

Appeal No. UKEAT/0332/12/SM

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal  
On 13 December 2012

**Before**

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

**MR B R GIBBS**

**MRS D M PALMER**

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MS C MBA

APPELLANT

THE MAYOR AND BURGESSES  
OF THE LONDON BOROUGH OF MERTON

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

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For the Respondent

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## **SUMMARY**

### **RELIGION OR BELIEF DISCRIMINATION**

A care worker in a Children's home was employed under a contract under which she could be required to work on Sundays. After accommodating her wish as a Christian not to do so for some two years, her employer required her to work as contractually obliged. She argued that this provision or practice discriminated against Christians, and hence her, on grounds of religion or belief. An Employment Tribunal decided that the employer's aim in seeking to ensure that all full-time staff worked on Sundays in rotation was legitimate, and was objectively justified, so that she could lawfully be required to do so.

Three grounds of appeal were raised – that the Tribunal adopted the wrong approach, though espousing the correct one; that the employer should have been proactive, not reactive, in considering possible alternatives which would have avoided the Claimant having to work on Sundays; and that the Tribunal had impermissibly taken into account a view of what was “core” to Christian belief, which was not part of its proper function. **Held:** the decision could not be said to be perverse; the Tribunal had applied the necessary anxious scrutiny, and judgment of whether the existence of alternatives rendered a policy or practice disproportionately discriminatory in its effect was one for the Tribunal and not the employer; and by using the expression “core” the Tribunal intended to reflect the evidence put before it from an Anglican bishop that only some Christians felt obliged to abstain from Sunday work – it was thus permissibly commenting on the degree to which Christians numerically would be affected, and not attempting to tell them what was important in their faith. Appeal dismissed.

## **THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

### **Introduction**

1. “Remember the Sabbath day to keep it holy” is the fourth Commandment. It appears on the walls of many churches in its King James form<sup>1</sup>. Many Christians, such as members of the Lord’s Day Observance Society, take a particular view as to how they should give effect to it. The Claimant in this case considered that she must not work on a Sunday. Under her contract of employment, as a residential care officer for Merton, she could be required to work on a Sunday. She refused to do so.

2. In days gone past the employer would have been free to have dismissed the Claimant for failing to observe her contract. It would not matter that it offended her religious scruples. She would have had no recourse. The **Employment Equality (Religion or Belief) Regulations 2003** have changed the landscape. It is no longer open to an employer to require staff to work on Sunday and thereby cause disadvantage to those who are Christian unless the employer can show that the requirement is objectively justified: a standard which has to be satisfied in accordance with the exacting test of proportionality as it was called by Mummery LJ in

**R (Elias) v Secretary of State for Defence** [2006] 1 WLR 3213 CA at paragraph 151:

“As held by the Court of Justice in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ICR 110 ECJ Case 170/84 at paragraphs 36 to 37 the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.”

Mummery LJ commented:

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<sup>1</sup> In the Old Testament, in the Book of Exodus 20:8-11, it is stated thus:

“Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work:

But the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor the stranger that is within thy gates:

For in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the Sabbath day, and hallowed it.”

**“So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.”**

3. The question on this appeal is whether the Employment Tribunal, which heard the Claimant’s complaint that she had been entitled to resign in circumstances in which her employer wrongfully insisted that she should work on Sundays, correctly approached the question whether it had objectively justified the requirement upon her to do so. We should make it clear at the outset of this Judgment to anyone who expects the conclusion to amount either to a ringing endorsement of an individual’s right not to be required to work on a Sunday on the one hand, or an employer’s freedom to require it on the other, that they will both be disappointed. No such broad general issue arises. The questions raised must be determined in the specific circumstances of this particular case alone. What are the circumstances?

### **The Facts**

4. The Tribunal found that in 2007 the Claimant was recruited to work from 30 July 2007 at a registered children’s home, the Brightwell. The home provided short residential breaks for children with serious disabilities and complex care needs, including such as challenging behaviour, medical needs, feeding difficulties and the like. A minimum standard set nationally requires that the staff in day-to-day contact with such children at such a home should include both genders, and that the staff left in charge of the home should have substantial relevant experience.

5. It was an aim of Merton, and required nationally, that continuity of care should be ensured insofar as possible. A lack of such continuity increases the risk of significant behavioural change in those children who have difficulty in communicating going unnoticed.

6. The home was open 7 days a week, 24 hours a day in general. There was a maximum of eight and sometimes no more than four or five children staying there. Staff worked in 3 shifts: morning, afternoon and night, covering the 24 hours. Three members of staff would be on duty at any one time: a team leader and two residential care officers. Sometimes it was necessary to add another member of staff.

7. Rotas for their work were organised over a three-week period. Staff worked one long week (seven days and no days off), then one regular week (five days on two days off); then one short week (three days on, four days off). They worked two of the three weekends in each rota: that is, each person worked four weekend days every three weeks. Once the Claimant had been recruited there were five fulltime members of staff. But there were nine staffing posts. Bank and agency staff filled the four vacant positions. The cost to Merton for those staff to work weekends, rather than fulltime staff, was higher than it was for weekdays.

8. When the Claimant was offered the job she understood that a promise had been made to her that she need not work Sunday shifts. Management thought that it had said it was not possible to alter the rota arrangements we have described, but recognised that it was likely to be possible that the rota could be worked so that the Claimant could work every Saturday and have every Sunday as a day off. This fell short of a promise never to require the Claimant to work on Sunday - but it was an offer to take reasonable steps to accommodate her wishes at least in the short term. The Tribunal accepted that the employer's version was correct.

9. After the Claimant began work matters came to a head. Internal discussion occurred. The Claimant raised a grievance about the approach of Merton. Ultimately, by 22 June 2009, Management rejected the grievance and said that the Claimant would be scheduled to work two weekends in three in accordance with the normal rota with effect from 13 July 2009. That

would involve her actually having to work on a Sunday as she had not hitherto actually been required to do. She did not work on the Sundays she was rostered. Disciplinary action followed, which included a final written warning in early 2010. An appeal against that was rejected on 25 May 2010. Five days later the Claimant resigned. She did so with express regret. We should mention that there was never any question of the quality of the Claimant's work nor her personal integrity.

### **The Law**

10. The **Equality Act 2010** had not yet come into force. The 2003 Regulations applied. Regulation 3(1) provides materially as follows:

**“For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if—**

**[...]**

**(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but—**

**(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,**

**(ii) which puts B at that disadvantage, and**

**(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.”**

### **The Tribunal Decision**

11. The Tribunal directed itself that it should weigh the discriminatory impact upon the Claimant as against the reasonable needs of the Respondent applying it, purportedly applying **Hampson v The Department of Education and Science** [1989] IRLR 69 C.A. In doing so we observe it misstated what we understand to be the law. As might appear if Regulation 3 is read carefully, what has to be considered is not the discriminatory impact of a provision, criterion or practice in respect of a given Claimant but the discriminatory impact of that provision, criterion or practice in respect of a group taken as a whole. Indirect discrimination has, on occasions, been termed group discrimination, by contrast with direct discrimination in which the UKEAT/0332/12/SM

individual is the direct victim of the discriminatory act. The citations from Hampson do not justify a conclusion that it is the discriminatory impact upon an individual that must be considered, though, of course, the individual must herself or himself be disadvantaged as one of the group.

12. The case of Cherfi v G4S Security Services Limited [2011] UKEAT/0379/11, a decision of the Employment Appeal Tribunal on 24 May 2011, HHJ Reid QC presiding, was cited to the Tribunal. At paragraph 27 the Tribunal recited the submissions that had been made to it in which the Judgment of Balcombe LJ in Hampson at page 72 was cited for this passage:

**“In my judgment ‘justifiable’ requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party whom applies the condition.”**

13. That suggests that the consideration is as to the discriminatory impact in respect of the group who may be subject to it. The problem may arise because at paragraph 38 in the discussion in this Tribunal, it observed that the Tribunal in that case had considered the impact on the Claimant of a particular refusal. It had to do that, of course, in order to determine whether the Claimant could properly make any claim at all, but the requirement of justification must be understood as being in respect of the group as a whole.

14. This properly recognises that which Mummery LJ had to say in the Elias case (see paragraph 119) in which he described the difference between a case of direct and a case of indirect discrimination as being between a form of discrimination which focuses on treatment of another person on prohibited grounds and aims at achieving ‘formal equality’ of treatment, on the one hand, and a different form of discrimination which aims at achieving ‘substantial equality of results’ where the application of apparently racially-neutral criteria produces a disproportionate, adverse racial impact on the other.



15. The Tribunal next directed itself that it should reach its own objective assessment whilst critically analysing any business need put forward by the Respondent in support of the provision, criterion or practice. It had in mind Article 9 of the **European Convention on Fundamental Human Rights and Freedoms**, which under the heading “Freedom of thought, conscience and religion”, provides:

**“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.**

**2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”**

We observe for our part, that Section 6(1) of the **Human Rights Act 1998** makes it unlawful for a public authority, of which Merton is one, to act in a way which is incompatible with a Convention Right.

16. The Tribunal at paragraph 63 directed itself that there was no essential difference in the approach to be adopted when considering Article 9 from that to be adopted when considering the 2003 Regulations. It is not in dispute before us that, for reasons expressed in the **Elias** case, the approach under the 2003 Regulations, deriving as it does from a European directive 2000/78, is more stringent than that which is currently applied in considering Article 9 of the European Convention, whose origin is in a different instrument. For present purposes, therefore, Article 9 adds nothing, though Mr Diamond showed us recent indications that the judicial approach at and derived from Strasbourg is tightening toward that which might be adopted in considering such as the 2003 Regulations.

17. Next, the Tribunal at paragraph 64 said this:

**“Mr Diamond also submitted that the onus lay on the Respondent to identify alternative solutions to requiring the Claimant to work Sundays, rather than there being any onus on her to put forward such proposals at the time. We accept that an Employment Tribunal is not confined to considering alternatives that were specifically proposed by/on behalf of a claimant at the time of the material events. However in terms of assessing whether viable solutions existed, an employer cannot be expected to explore that which he is neither aware of nor could reasonably be expected to be aware of at the time.”**

18. In turning to indirect discrimination, the Tribunal did not set out the test derived from **Bilka**, to which we referred above. No point arises directly on that, for the Tribunal looked for a legitimate aim and considered proportionality. It accepted that it was legitimate for Merton to have the aim of ensuring (a) an appropriate gender balance on each shift, (b) an appropriate seniority mix on each shift, (c) a cost-effective service in the face of budgetary constraints, (d) fair treatment of all its staff, and (e) continuity of care in staff looking after the children at the Brightwell.

19. Merton’s Ms Songui, who considered a grievance at appeal level, was concerned about the impact of continuing on a permanent basis to accommodate the Claimant’s request not to work Sundays. It limited flexibility. It affected other staff. They would have to cover Sunday shifts disproportionately, and it would reduce their opportunity to have a full week’s leave. It was more costly to the council. It provided less well-trained staff, since agency staff would have to cover and they were less well trained. Thus the quality and continuity of service to children with disabilities would not always be so high. Her view was that, where possible, requests in respect of faith days would be accommodated but specific days off as a matter of routine could not, in the light of those considerations, be accommodated. She sought also to limit the use of agency and bank workers.

20. The Tribunal identified those factors as, together, amounting to a legitimate aim, to which it considered the contractual provisions governing the Claimant's work were directed. It then asked whether the PCP, derived from the contract, that staff should work Sunday shifts when they were rostered to do so, was a proportionate means of achieving it. In considering that it struck a balance between the discriminatory impact upon the Claimant on the one hand, as against the reasonable needs of the Respondent's business on the other. In doing so, as we have noted, it applied its view of the test derived from Hampson. In doing so, it was in fact adopting a test which was likely to work more favourably for the Claimant than for the Respondent. Thus, in the event, nothing turns upon the Tribunal's self-misdirection in law as to the nature of the test.

21. The Tribunal considered six suggestions that had been made to it by the Claimant as to means of ensuring that the Claimant could have Sundays off such that it was not necessary for there to be the PCP. They were: using bank or agency workers; recruiting an additional female permanent employee; scheduling a Ms Ahmed or, separately, a Ms Alviz to work the Claimant's Sunday shifts; using a Ms Foreman, who was an experienced member of bank staff, to do so; or, finally, using members of the Outreach Team to fulfil that function.

22. In evaluating the disadvantage to the Claimant it said at paragraph 88:

**“As stated earlier, we also need to weigh in the balance the discriminatory impact of the PCP upon the Claimant. We accept that the PCP impacted upon her genuinely and deeply held religious belief and observance, as we have described above. However in terms of the degree of disadvantage to her, we bear in mind the following in particular:**

**(i) The Respondent did make efforts to accommodate her in this respect for two years;**

**(ii) The Respondent was in any event prepared to arrange the shifts in a way that enabled her to attend church to worship each Sunday, and**

**(iii) Her belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith (in the sense that this phrase is used in *Ladele*, see our summary of the relevant legal principles above). As much is accepted in terms at paragraph 9 of Bishop Nazir Ali's witness statement (served by the Claimant), where he states that some Christians will not work on the Sabbath. To approach the matter in this way does not involve a secular court impermissibly**

adjudicating in evaluative terms upon religious beliefs as Mr Diamond submitted, as opposed to simply proceeding on the basis of evidence before it as to the components of Christian faith.” (The underlining is that of the Tribunal).

“**Ladele**” is a reference to **Ladele v The London Borough of Islington and Liberty (as intervener)** [2009] EWCA Civ 1357, reported at [2010] IRLR 211. It concerned a registrar of births, deaths and marriages at Islington who, being a strongly committed Christian believing that marriage concerned men and women to the exclusion of all others, refused to participate in ceremonies which involved the partnership of gays.

23. On that basis, the Tribunal said that having weighed all relevant factors in the balance, it concluded that the imposition of the PCP upon the Claimant was proportionate and, therefore, her claim of indirect discrimination should fail.

### **The Grounds of Appeal**

24. Three Grounds of Appeal remain out of those originally submitted. Firstly, it is said that the Tribunal was wrong to hold that, in accordance with observations in **Ladele**, not working on Sundays was not a core component of the Christian faith. Secondly, that the Tribunal failed to apply the proper test, which it is contended is one of ‘anxious scrutiny or intensive review’. Thirdly, that it did not place the onus upon the employer to justify the proportionality test, which is where it should have rested, rather than upon the employee, which is where it did. We, therefore, turn to each of these grounds.

### **Submissions**

25. As to the first ground, Mr Diamond took us to what was said at paragraph 52 in the case of **R (Williamson & Ors) v Secretary of State for Education and Employment** [2005] UKHL 15, reported [2005] 2 AC 246. At paragraph 22 he noted:

**“The court is concerned to ensure that an assertion of religious belief is made in good faith: ‘neither fictitious, nor capricious, and that it is not an artifice’ to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* [2004] 241 DLR (4th) 1, 27, paragraph 52.”**

There was no issue here that the Claimant did not have a genuine belief. That was accepted.

26. At the Court of Appeal stage ([2003] QB 1300, [2002] EWCA Civ 1926), in that case, Mr Diamond reminded us, Rix LJ had, at paragraphs 123 and following, questioned the ability of any Court to define religious faith. He said that he was concerned that a secular Court was ill equipped for such distinctions:

**“I am concerned that it is not only ill equipped, but that it lacks in this case the conventional means by which it would normally proceed to make such distinctions, which is evidence. I am in any event uneasy about the efficacy of such evidence: one of the problems of religion is the diversity of belief even within the umbrella of a single faith. I am also sceptical that such distinctions would give correct answers about beliefs arising out of religions other than Christianity. The practice of Judaism, for instance may be said to depend in large part not merely on faith but on a law based or developed obligation to obey God’s commands. Thus I do not think that circumcision, or the dietary laws, could be correctly (or other than metaphorically) referred to as an “article of faith” of Judaism or Islam, although they are regarded as divine commandments. It is hard to conceive, however, that Jews or Muslims could be prevented from manifesting their religion or belief in such respects without an engagement of Convention rights.”**

27. He considered at paragraph 127 it was difficult for any Court to evaluate a claim to a religious basis or someone’s belief. Basing himself on that Judgment and the decision in **Williamson** more generally, Mr Diamond submitted, and we accept, that it is not for a Court to adjudicate in evaluative terms upon the content of religious belief. The question is not whether the Court itself would accept a matter as part of that belief, but whether (see paragraph 22 again) the Claimant in the particular case actually did. It therefore followed, submitted Mr Diamond, that the opening sentence in paragraph 88(iii) of the Tribunal decision showed an error of law. The Court purported to identify what was a core component of the Christian faith. It had no right to do so. If, therefore, that is what it did, he submits that the Tribunal was taking into account in striking the balance something which should not have weighed in the balance at UKEAT/0332/12/SM

all. It was as a result of that balance that it concluded that the PCP was proportionate. Take that out of the balance, the matters to be said in favour of the Claimant would have greater weight. The balance would have been more likely to be struck in her favour.

28. He supported those submissions by reference to the case of **Y & Z v Germany**, a decision of the Grand Chamber of the Court of Justice of the European Union [2012] in case C-99/11. In that case the position of Ahmadis, whom it was proposed might be returned to Pakistan, was considered. The German approach had been that they would only face persecution relevant for the purposes of the right to asylum where there had been interference with the “core areas” of religious freedom (see paragraph 42 of the Judgment).

29. The Court concluded at paragraphs 62 and 63 that it was unnecessary to distinguish acts which interfered with the core areas of the basic right to freedom of religion, which did not include religious activities in public, from acts which did not affect those purported core areas, observing:

**“Such a distinction is incompatible with the broad definition of ‘religion’ given by Article 10(1)(b) of the Directive, which encompasses all its constituent components, be they public or private, collective or individual.”**

30. The response to this by Mr Davies for Merton was that he accepted that a Court could not and should not identify for itself what was or was not a core component of faith. However, he made these points. First, he submitted that at this stage of its analysis the Tribunal was not concerned, as had been the authorities on which Mr Diamond relied, to identify whether the 2003 Regulations or Article 9 had been engaged at all. The issue was not whether there was something which might be or might not be a religious belief which was being interfered with, but rather whether - accepting both that there was such a belief, and it had been interfered with - the extent of that interference was justified.

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31. Secondly, he argued that Mr Diamond's approach misunderstood what the Tribunal had intended to say. He confessed that the Tribunal had adopted from his own submissions the expression 'core component' and was inclined, we think, to accept that the Tribunal's language in using that phrase was less than elegant, but submitted that it was engaged in asking how great an interference was made by the PCP in the rights of Christians generally, as a group. That was the legitimate scope of its inquiry: it had earlier (see paragraph 5, fourth line) identified persons of the same religion as the Claimant, i.e. Christians, as being the group in respect of whom disproportionate disadvantage was to be considered. The evidence was that only some (i.e. a minority) of Christians felt obliged by faith to avoid work on Sundays.

32. The second and third grounds taken by Mr Diamond run together. Here he had appeared to argue in his skeleton argument that the approach, which the Tribunal had adopted, was expressly the wrong approach. Before us he made it clear that was not his contention. He expressly disavowed the Tribunal having addressed itself to the wrong test. He argued that the Tribunal had purported to apply the right test. It had, in the result, simply failed to do so. The reason it had failed to do so was that both the result and various aspects of the decision showed it could not have been applying that approach.

33. The proper approach is one that calls for intense scrutiny. Objective justification places the onus upon the employer to justify any provision, criterion or practice. (He is right in our view in both those last two submissions).

34. He argued that if the Tribunal had properly applied the approach of intense scrutiny then it would not have concluded, as it did at paragraph 30, that the Respondent was unable to recruit any more female permanent staff during the Claimant's employment. He argued it was

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inconceivable factually that this could be the case. Next, he argued that there was a Lorraine Alviz who could have covered the Sunday shifts and that it would have been proportionate to have asked her to do so. Paragraph 84, which dealt with her position, showed that the employer had not properly addressed its obligations with appropriate scrutiny and care. He said the same of the contention in respect of Saturday work, that it was, he suggested, a submission of fact made purely for the purposes of the appeal. In argument orally he dealt with further matters which, in essence, looked at the various items, 1 to 6, identified paragraphs 81 to 86, upon which the Tribunal had spent some time in its Judgment.

35. The Tribunal had concluded (see the last words of 86) that the use of the Outreach Team had never been suggested to Mr Deegan of Merton at the time of the Claimant's employment. It commented:

**“In our judgment he cannot reasonably have been expected to anticipate that she was prepared to transfer to an entirely different job, if she did not inform him of this.”**

This reveals two things: first, that Mr Deegan had not, though he might have done, thought of the matter for himself and, secondly, the Tribunal was here putting the onus, in effect, upon the Claimant to justify any alteration to the PCP, rather than on the employer at the time of the alleged discriminatory effect showing that it had considered the matter and was making a proportionate response.

### **Discussion**

36. As to the second ground, that is the application of the test, we simply say this. The Tribunal directed itself properly, in terms, as to the law it had to apply. That is not in dispute. To argue that its findings of fact demonstrated that it had not applied its self-direction is, in effect, to argue a case of perversity. There was evidence here from which the Tribunal could



come to the conclusion it did in respect of each of the grounds it considered. There is nothing about the way in which the Tribunal considered the matters under the heading ‘proportionality’ which suggests to us that the Tribunal was any less than properly scrupulous about those conclusions. It examined each of the possibilities that had occurred during the course of the Tribunal hearing as allowing a response to the legitimate aim and needs of the employer which would fall short of a rule requiring the Claimant to work at a time when she was known not to be prepared to do it. We cannot see here that the case could meet the high standard that any case of perversity would have to surmount, that is that the findings are wholly impermissible or fly in the face of reality, or are such that no reasonable Tribunal could possibly reach them.

37. Part of the submission shaded into the suggestion that the employer should, in the first place, have considered for itself issues which the Tribunal considered for the first time at the Tribunal hearing. There is much to be said in general terms for an employer being careful that its policies and practices do not disadvantage people who are protected in the characteristics they have: it may be called upon to justify its approach to a Tribunal. However, the difference between the approach to be adopted when applying **Elias** and **Bilka**, namely one of seeking objective justification, means that the decision whether a provision, criterion or practice is justifiable or not is not one for the employer. It is one for the Tribunal or Court.

38. That leaves it open to the employer to seek to justify a provision, criterion or practice to the Tribunal or Court at the time when it is called in question. If a lower standard of scrutiny had been applied, by adopting such as a **Wednesbury** test of review, what would have come into question would have been the employer’s decision at an earlier time – when the employer took it. This might involve asking what the employer actually thought at the time about some of the consequences of its proposals. That would be directly relevant if the Court were reviewing the employer’s decision: but is not directly relevant when the question is one for the

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decision of the Court itself as to whether a particular PCP is justified. Indirectly it may still have an impact, since it may demonstrate evidentially that the justification advanced by an employer in any given case is not a real one. Any reason advanced to justify a PCP before a Tribunal which was not in the mind of the employer when it was first introduced should be subject to the most cautious and sceptical scrutiny, and so the lateness of relying upon it is not without significance, but it must be kept in its proper place.

39. During the course of the hearing we asked to see a letter of 17 May 2010 confirming the outcome of a grievance which the Claimant had made in respect of Sunday working and some other issues. In its penultimate paragraph the author, Denise Goodwin, says:

**“I have looked at the Council’s policies on equalities and diversity and although the policy comments on accommodating people’s religious beliefs, it also has to take into account meeting the service delivery for our services users.”**

It is plain from the letter that the employer did actually consider much of the case and the justification for the PCP at a stage before it was called upon to do so at the Tribunal. The Tribunal was therefore not obliged to regard the justification advanced to it as so recently configured that it lacked cogency. In summary, concluding that applying the PCP was proportionate did not indicate that the Tribunal must have taken a wrong approach.

40. Accordingly, the second ground failed. We turn then to the first and third grounds. The third ground was that the Tribunal placed the primary responsibility for showing proportionality on the employee not the employer. The suggestions as to ways of ameliorating the impact of the PCP all came from the Claimant initially. That, it was submitted, was an error of law. It was for the employer to justify the PCP. It should be proactive, not responsive.

41. As to the first and third grounds, we begin with the first. Here everything depends upon the way in which paragraph 88(iii) is to be understood. It is trite that a Tribunal's decision must be viewed as a whole. Regard has to be had to context. Its decision cannot be expected to be an elaborate piece of formal legal craftsmanship. Inelegancies and infelicities, though regrettable, are not necessarily errors of law, providing the meaning taken overall is sufficiently clear.

42. We do not think it was well expressed to say, as the Tribunal here said at 88(iii), that the belief that Sunday should be a day of rest was not a core component of the Christian religion. If that was all that was said, and if there had been no wider context in which to read it, to express matters in that way would have been capable of being offensive. It would have placed the Court where it should not be, in the position of judging the tenets of faith (see Williamson), and it would have been a misdirection of law.

43. However, we do not think it is what the Tribunal was saying. The Tribunal made that clear, if that sentence is taken with what else appears in subparagraph (iii) and with regard to the context in which paragraph 88 is written. Having said that the belief was not a "core" one it adds immediately "in the sense that the phrase is used in Ladele" and directs the reader to a summary of the relevant legal principles "above". That appears to be a cross-reference to paragraph 68. That reads:

**"We also note, because it relates to a submission concerning proportionality made by the Respondent, that in *Ladele* one of the features considered by the Court of Appeal to be relevant to the assessment of this question, was that the Claimant's objection to conducting civil partnerships, whilst based on her view of marriage, was not a core part of her religion: see paragraph 52. This was an approach taken after consideration of the House of Lords' decision in *R (Williamson & Ors) v Secretary of State for Education and Employment* cited in *Ladele* (an aspect we mention because that authority was relied upon by Mr Diamond at paragraph 17 of his written closing submissions)."**

44. Paragraph 52 of **Ladele** is a part of the Judgment of the Master of Rolls Lord Neuberger in which he set out a number of reasons why Ms Ladele's refusal to perform civil partnerships, though being based on her religious view of marriage, could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Lord Neuberger then identified a number of factors. Second from last in the list was:

**“Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion.”**

45. The use of the word 'her', the context and the fact that **Williamson** had been referred to suggest that this was a statement which was responding to the particular facts of the case rather than setting out any proposition of law or principle of policy. It was not purporting to be a process of reasoning which began with identifying what the religion was, then identifying what the Court considered its core components were, and then asking whether the person concerned had a belief which accorded with the Court's own list of components.

46. That this, or something like it, is the sense in which the Tribunal regarded “core” is demonstrated by what then follows. Two situations must be contrasted: first, evaluating how important the belief is, so that it may be described as “core”; the second asking how many people who are adherent to the faith believe in that particular aspect or requirement of it. The first is qualitative, the second is quantitative. The difference between them is significant for a Tribunal when assessing proportionality. Whereas it has no right to determine matters of faith qualitatively, the weight to be given to the degree of interference with religious belief of a certain kind will inevitably differ depending upon the numbers of believers who will be affected by the particular PCP concerned. If, for instance, on the evidence before a Tribunal, it is shown that a minority of those who ascribe to a particular belief have a specific view of that which it

requires them to do in particular circumstances, then a PCP which affects the whole group, but only that small part of the group of believers adversely, will be of lesser weight than a PCP which adversely affects every one. To illustrate, if a PCP affected virtually every Christian to a given extent, it would have a greater discriminatory impact than if the same measure affected only a much smaller number of Christians to that extent. The greater the discriminatory impact on the group as a whole, the more that has objectively to be shown by the employer to demonstrate that the PCP is necessary, and proportionate.

47. When the Tribunal goes on to say that as much was accepted in paragraph 9 of the Bishop's statement, it caused us to ask to see a copy of the Bishop's statement, which had been admitted into evidence and accepted by the Tribunal without requiring the Bishop to attend. He said:

**“Some Christians will not work on the Sabbath (except for mercies), others may work only in an emergency.”**

That is evidence that many Christians will work on the Sabbath. It was, therefore, appropriate for the Tribunal to have regard to that in weighing the impact of the PCP. That this is what the Tribunal had in mind is emphasised by its underlining of the word 'some'.

48. Making it doubly clear that this was its approach, the last sentence shows that the Tribunal did not think that it was adjudicating in evaluative terms upon religious beliefs. Though inelegant in its phraseology, and though rightly giving rise to concern on the part of the Appellant, we have concluded that, read in context and bearing in mind that the Tribunal was here dealing with the weight to be attached on the one hand to the employer's objectives and on the other the discriminatory impact on Christians generally, this is, in our view, what the Tribunal meant.

49. Therefore, we cannot accept that there is here an error of law as contended for by the Claimant.

50. We turn then to the third ground. The approach the Tribunal took was not, in our view, to say that the employee had to justify the PCP, or at least to show that it was unjustified. That burden, it had said, was on the employer. That, it seems to us, is how it approached the case. In dealing with that which the employer said to it, and using the expression such as ‘that cannot reasonably have been expected to anticipate’ it was making the obvious point that historically the employer could only be expected *to deal* with that which it knew or ought to have known.

51. By using the expression ‘cannot reasonably have been expected to anticipate’ it did not argue that the employer had to be *judged* on the knowledge it had. This was a statement accepting it had to be judged on that which it could have had if it had acted reasonably. The Tribunal evaluated the various suggestions that fell for its consideration. We have indicated already that we see no error in law in its conclusions, in the sense that they were ones open to it.

52. It has not been suggested to us that the decisions reached were wrong, except in general terms. In those general terms Mr Diamond emphasised throughout his submissions to us that the need to recognise religion and belief is central to many international instruments. It is of great importance to the proper functioning of a civilised society. It must not be taken lightly by employers or tribunals. He went so far at one stage to suggest that the employer here was at fault in not being blunt with the employee in saying that she should not work for Merton if she would not work on Sundays, but instead rostering her to do so knowing that she would not and could not do so with integrity. He argued that an employer must make serious efforts to accommodate an employee and went so far as to say that it must make “all possible” efforts.

That, we consider, is to put the standard too high: though we should make it clear that we accept the importance which he lays stress on of eliminating discrimination on the ground of religion and belief.

53. Our conclusion is not that he is wrong in those submissions, but that, in this particular case on its particular facts, the employer had established a legitimate aim; that the Tribunal was not in error in concluding that it had justified a PCP relevant to achieving that aim; and that, although the effect was that the Claimant had then to surrender her job, this gave rise to no proper claim by her that she had been discriminated against on the grounds of religion and belief, on the basis of the law as it stands. For those reasons this appeal must be dismissed.