Neutral Citation Number: [2013] EWCA Civ 1562

Case No: A2/2013/0201

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
EMPLOYMENT APPEAL TRIBUNAL (3 JUDGES)
UKEAT/332/12SM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2013

Before :

Lord Justice Maurice Kay, Vice President of the Court of Appeal, Civil Division
Lord Justice Elias
and
Lord Justice Vos

- -

Between :

Mba	**Appellant**
- and -	
Mayor and Burgesses of the London Borough of Merton	**Respondent**

- -
- -

Mr Paul Diamond (instructed by **Andrews Law Solicitors**) for the **Appellant**
Mr Jake Davies (instructed by **South London Legal Partnership**) for the **Respondent**

Hearing date : 23 October 2013

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Lord Justice Maurice Kay :

1. Some Christians attach great significance to the Fourth Commandment:

> "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 …"

Mrs Celestina Mba is a practising Christian. She attends a church in South London. She has a deep and sincere belief that Sunday is a day for worship and not for work. In July 2007 she became employed as a care assistant at Brightwell, a children's home run by the London Borough of Merton (the Council). The job description included the following provision:

> "… to undertake duties outside normal working hours as required by the shift rota including weekends, Bank holidays and sleeping duties."

Such a provision is not uncommon in a working environment which necessitates 24/7 coverage. The children in question have serious disabilities and complex care needs arising from challenging behaviour, medical needs, feeding difficulties and similar problems.

2. Although Mrs Mba took the view that, as a result of what passed between her and the Council's management at the time of her appointment, she was not contractually obliged to work on Sundays, it is now common ground that, whilst management would endeavour to arrange the rosters so as to permit her not to work on Sundays (and this was achieved in the early months), her legal obligation was to work on Sundays as and when required. When the Council began to roster her for Sunday working, a dispute arose. To cut a long story short, she raised a grievance. It was rejected. She was scheduled to work certain weekends, including Sundays. She declined to do so. Disciplinary proceedings ensued, leading to a final warning in early 2010. An appeal against that was rejected on 25 May 2010. Five days later Mrs Mba resigned "with regret". In due course she commenced proceedings in the Employment Tribunal (ET) alleging constructive unfair dismissal and indirect religious discrimination. Once the ET had rejected her case on the contractual terms, the central issue was that of religious discrimination.

The statutory framework

3. Religious discrimination was a late arrival in the panoply of protected characteristics. Regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003 provided:

> "(1) For the purposes of these Regulations, a person (A) discriminates against another person (B) if –
>
> (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or
>
> (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."

Thus, regulation 3(1)(a) was concerned with direct discrimination (which has never been an issue in the present case) and regulation 3(1)(b) was concerned with indirect discrimination. The regulation was a faithful implementation of the requirements of Council Directive 2000/78/EC. The Regulations have now been replaced by the Equality Act 2010 but the Act does not apply to the present case.

4. At all stages of this litigation, reference has also been made to Article 9 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which enshrines the qualified right to freedom of religion, including the right to manifest one's religion, either alone or in community with others and in public or private, in worship, teaching, practice and observance. However, the present case is confined within the four corners of the statutory jurisdiction of the ET, which does not extend to determining alleged breaches of human rights pursuant to section 6 of the Human Rights Act 1998. If Article 9 has relevance in the present case, it can only be in the context of construing regulation 3 of the domestic Regulations, pursuant to section 3 of the Human Rights Act.

The decision of the ET

5. The ET identified the relevant "provision, criterion or practice" (PCP) as the requirement that staff worked Sunday shifts as rostered. It addressed the issue of legitimate aim in this passage:

> "73. … we accept that [the Council] genuinely held the concerns that were identified at the time as to the impact upon the business of [Mrs Mba] not working

> Sundays … we conclude that … [the Council] made substantial attempts to try and accommodate [her] belief, in particular in arranging matters so that she was not required to work any Sundays at all until 26 July 2009, almost two years after her employment commenced, when a member of staff in her position would usually work two Sundays out of every three …
>
> 74. … We consider that [these considerations] were plainly [legitimate], given their relationship to the [Council's] effective running of its business, both in terms of service delivery at the Brightwell and the wider considerations of costs and staffing …"

There is no suggestion of legal error in this finding. The real issue is proportionality.

6. The ET then directed itself appropriately as to proportionality:

> "75. … we then have to consider whether the PCP that staff worked Sunday shifts as rostered was a proportionate means of achieving the legitimate aim … we have to balance the discriminatory impact on [Mrs Mba] as against the reasonable needs of [the Council's] business."

It also observed that Mrs Mba's contract required her to work Sundays and that she had not been promised any permanent arrangements to the contrary.

7. In a later passage (paragraphs 81-86), the ET considered whether a number of alternative proposals advanced in submissions on behalf of Mrs Mba were in reality viable and practicable alternatives. It concluded (at paragraph 87) that "none of the courses that she has suggested could have been undertaken without significant disadvantage to [the Council] in terms of costs, quality and efficiency of service delivery". Again, there can be no criticism of these findings.

8. It is the next part of the decision which is targeted by this appeal:

> "88. … we also need to weigh in the balance the discriminatory impact of the PCP upon [Mrs Mba]. We accept that the PCP impacted on her genuinely and deeply held religious belief and observance … However, in terms of the degree of disadvantage to her, we bear in mind the following particulars:
>
> (i) [the Council] did make efforts to accommodate her in this respect for two years;

> (ii) [the Council] 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 … As much is as accepted in terms as … Bishop Nazir-Ali's witness statement …, 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 opposed to simply proceeding on the basis of evidence before it as to the components of the Christian faith."

9. Having weighed all these matters in the balance, the ET concluded that the imposition of the PCP was proportionate and that the claim of indirect discrimination failed.

The decision of the EAT

10. In dismissing Mrs Mba's appeal, the EAT found paragraph 88 of the ET's decision to be "inelegant in its phraseology" but

> "read in context and bearing in mind that the [ET] was here dealing with the weight to be attached on the one hand to the employer's objective and on the other the discriminatory impact on Christians generally, this is, in our view, what the Tribunal meant." (Paragraph 48).

This appeal

11. When Lord Justice Elias granted permission to appeal to this Court he made it clear that he was doing so because of concern about the approach of the ET in paragraph 88 of its decision. This was to be and should have remained the focus of the appeal. However, in his written and oral submissions, Mr Paul Diamond has sought to paint with a broader brush on a canvas extending far beyond the narrow point in respect of which permission was granted. I do not intend to deal with the broader points which Mr Diamond tried but was not always permitted to make.

Discussion

12. In a nutshell, the case for Mrs Mba is that the ET fell into legal error in paragraph 88, particularly in sub-paragraphs (i), (ii) and (iii). The complaint is that (i) and (ii) are not relevant to the issue of proportionality and, more fundamentally, (iii) misstates the law.

13. To understand all this, it is first necessary to refer to the established approach of our Courts to the issue of religious doctrine. In *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, a case concerned with Article 9 of the ECHR, Lord Nicholls said (at paragraph 22):

> "When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure 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 the Jacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Anselem* (2004) 241 DLR (4^{th}) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief on the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Jacobucci J also noted, at p.28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."

The first part of that passage, the individual fact-finding stage, presents no problem in the present case. Everyone accepts that Mrs Mba is a devout Christian with sincere Sabbatarian beliefs. Nor is the evidence of Bishop Nasir-Ali disputed: "Some Christians will not work on the Sabbath (except for mercies), others may work only in an emergency …". It is obvious that some Christians have no such inhibition.

14. The primary issue for us is whether, in carrying out the proportionality exercise, the ET was entitled to give weight to its finding that Mrs Mba's belief that Sunday should be a day of rest and worship "is not a core component of the Christian faith". This raises the complex difficulty identified by Lord Justice Rix in the Court of Appeal in *Williamson* [2003] QB 1300, at paragraph 123:

> "The question, of course, is not what the status of a belief in angels is: but the argument proceeds by distinguishing between

> the belief in issue, which is accorded a distinct and subsidiary status, and on the other hand an 'article of faith' or belief which embodies or defines religious faith …, which is accorded a higher status. I am concerned that a secular court is 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."

This sensitivity to the diversity of beliefs between and within religions is something which flows from the respect that is accorded to the range of sincerely held religious beliefs.

15. Paragraph 88(iii) of the ET's decision was expressed to be informed by *Islington London Borough Council v Ladele* [2010] 1 WLR 955 which was concerned with regulation 3(1)(b)(iii) of the 2003 Regulations. The claimant was employed as a registrar by Islington and was required to conduct civil partnerships between persons of the same sex. She objected on the ground that such unions were contrary to her religious beliefs. She was then subjected to disciplinary proceedings on the ground that her refusal was contrary to Islington's equality and diversity policy. Her discrimination claim succeeded in the ET but failed in the EAT and in the Court of Appeal. (She also failed to establish a claim pursuant to Article 9 of the ECHR in later proceedings in Strasbourg: see *Eweida and others v United Kingdom* [2013] 1 IRLR 231, to which I shall refer later). The paragraph in the judgment of Lord Neuberger MR which has prompted some debate in the present appeal reads as follows:

> "52. it appears to me that the fact that Ms Ladele's refusal to perform civil partnerships was 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. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job … Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished."

The passages I have emphasised perhaps illustrate the difficulty identified by Lord Justice Rix. They are seemingly ambivalent. On the one hand, they refer to her

religious view of marriage. On the other hand, they contrast her view of marriage with the core part of her religion, without making it clear whether the reference is to the core part of her religion as perceived by her or the core part of her religion as objectively assessed.

16. When the EAT considered Mrs Mba's appeal, it addressed paragraph 52 of Lord Neuberger's judgment. It said (at paragraph 46):

> "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 on the numbers of believers who will be affected by the particular PCP concerned."

Applying this analysis to the reasoning of the ET at paragraph 88(iii), the EAT said (at paragraph 48):

> "… 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."

Thus, it dismissed the appeal because there was no error of law in the ET's reasoning, just a degree of "inelegant phraseology".

17. I do not agree that there was no error of law in the ET's reasoning. Regulation 3(1)(b)(i) envisages a PCP which applies or would apply equally "to persons not of the same religion or belief" as the claimant and which puts or would put "persons of the same religion or belief" as the claimant at a particular disadvantage when compared with other persons. The fact that those at the requisite particular disadvantage are described in the plural – "persons" – is the reason why the test is sometimes described as one of "group disadvantage". However, the use of the disjunctive – "religion or belief" – demonstrates that it is not necessary to pitch the comparison at a macro level. Thus it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage. It is permissible to define a claimant's religion or belief more narrowly than that. In my judgment, this is where the ET went wrong. It described Mrs Mba's Sabbatarian belief as "not a core component of the Christian faith". By so doing it opened the door to a quantitative test on far too wide a basis.

18. It is clear (and, if it is necessary for it to have an evidential foundation, it was provided by the evidence of Bishop Nazir-Ali) that, for some Christians, working on Sundays is unacceptable. It is also clear that Mrs Mba's religious belief genuinely embraces that injunction. On this basis, it seems to me that the ET should have found that the application of the Sunday working PCP satisfied Regulation 3(1)(b)(i), with the consequence that the real issue in this case was whether the Council could show "a proportionate means of achieving a legitimate aim", pursuant to Regulation 3(1)(b)(iii).

19. This analysis goes as far as it can to accommodate the pluralistic tolerance required by *Williamson*. In this context, I refer again to the passage from the judgment of Lord Justice Rix, set out in paragraph 14 , above. However, this still leaves the question whether there is a quantitative element to be considered alongside the qualitative factor of genuine belief to be considered as part of the proportionality exercise. I am not convinced that there necessarily is, over and above the requirement of group disadvantage in the limited sense to which I have referred. Moreover, even if there is (for example, by resort to Article 9 of the ECHR for interpretative purposes as suggested by Lord Justice Elias in his judgment which I have read in draft), it is not clear to me whether it would favour the employer or the employee in a case such as this. If there are only one or two employees in the particular workplace who subscribe to the particular belief, it may make the application of the PCP either easier or more difficult to justify, depending on the circumstances.

20. Be that as it may, for the reasons I have given I am satisfied that there was an error of law in the decision of the ET and that it was repeated in the judgment of the EAT. I reach this conclusion without the need to venture into the Strasbourg jurisprudence on Article 9 or recent decisions of the Luxembourg Court which, Mr Diamond submits, demonstrate a growing emphasis on protecting the dignity of religious belief. The proportionality test set out in regulation 3(1)(b)(iii) is derived from Council Directive 2000/78/EC. As the EAT said (at paragraph 16), the test is more stringent (in the sense of more favourable to an employee) than that which has been applied in relation to Article 9 of the ECHR. I do not think that Mrs Mba's case under regulation 3(1)(b)(iii) is strengthened, as Mr Diamond submits it is, by the Strasbourg decision on *Eweida*, which postdated the hearing in the EAT in the present case. Ms Eweida's success was based on her Article 9 right to manifest her religion by wearing a cross while at work. She won the proportionality argument because, in the view of the Court, there was "no evidence of very real encroachment on the rights of others". That outcome was entirely fact-sensitive.

21. Lord Justice Elias and Lord Justice Vos take a different view about the relevance of Article 9. Theirs is a more sophisticated analysis. For my part, whilst I agree that Article 9 does not carry a requirement of group disadvantage, I prefer not to resort to reading down, for ECHR reasons, a domestic provision which is compliant with the EU Directive from which it is derived. I am not convinced that giving regulation 3 its natural meaning would involve a breach of Article 9. However, I prefer not to go further into this complication in this case in which, as will become apparent, we are all agreed on the appropriate disposal of the appeal and when we have not had the

benefit of full submissions on this aspect of Article 9. It only arose at the hearing of the appeal when suggested from the Bench.

22. I should refer briefly to paragraph 88(i) and (ii) of the decision of the ET in the present case. Mr Diamond submits that, to the extent that the ET, in carrying out the proportionality exercise, accorded weight to the facts that the Council had made efforts to accommodate Mrs Mba for two years and was still prepared to arrange her shifts in a way that enabled her to attend her Church to worship on Sundays, it took into account factors which were irrelevant to the issue of proportionality. There is force in this submission. Although it was necessary for the ET to address these points for other purposes (in particular when considering Mrs Mba's primary but rejected case that management had deliberately put obstacles in the way of her complying with her belief that she should not work on Sundays), their materiality in relation to proportionality, once the *prima facie* elements of indirect discrimination were made out, were somewhat exiguous. Also, the reference to enabling her to attend Church on Sunday ignored the other aspect of her belief, namely that she should not work on Sunday.

23. As I have accepted that there were legal errors in the reasoning of the ET, the final question is whether this should lead to the quashing of its decision and of the order of the EAT upholding it. Mr Jake Davies submits that, at this stage, we are in the territory identified in *Dobie v Burns International Security (UK) Limited* [1984] ICR 812. Where the ultimate conclusion is "plainly and unarguably right", notwithstanding any misdirection of law, it would be otiose for the EAT or this Court to allow an appeal and to quash a manifestly correct decision, with the consequent need to remit the case to the ET. Is this such a case?

24. Mr Davies submits that when one considers the detailed and unappealed findings of the ET that the Council had no viable and practicable alternative but to require Mrs Mba to work on Sundays <u>in accordance with her contract</u>, this would inexorably lead any reasonable ET, properly directing itself on the law, to the conclusion that the requirements made of Mrs Mba to work on certain Sundays were a proportionate means of achieving an indisputably legitimate aim. After the most anxious consideration, I have come to the conclusion that, in all the circumstances of this case, and notwithstanding the legal errors to which I have referred, the decision of the ET that the imposition of the PCP was proportionate was "plainly and unarguably right". In truth, once Mrs Mba failed to establish the more favourable terms of the contract for which she had contended and the Council had established that there was really no viable or practicable alternative way of running Brightwell effectively, there was only ever going to be one outcome to this case. The legal error can have made no difference.

Conclusion

25. It follows from what I have said that, in my judgment, this appeal falls at the final hurdle and must be dismissed.

Lord Justice Elias:

26. I agree with Maurice Kay LJ that the appeal should be dismissed notwithstanding that the Employment Tribunal erred in law in having regard to the three matters identified in paragraph 88 of its decision. These were, however, essentially makeweight considerations in the justification analysis of the Employment Tribunal and if the case were to be remitted to it, I am satisfied, essentially for the reasons given by my Lord, that it would inevitably reach the same result. So the well known principle in *Dobie v Burns International* dictates that the appeal should be dismissed. However, although I arrive at the same destination as Maurice Kay LJ, I do so by a longer and more circuitous route. I will briefly explain my reasoning.

27. The case before the Tribunal was one of indirect discrimination. That arises in the following circumstances (see reg.3):

> 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."

28. In this case it was conceded that the provision requiring Sunday working constituted the group disadvantage identified in reg.3(b)(i) in addition to placing Mrs Mba at a personal disadvantage within the meaning of sub-paragraph (ii). So the only issue was whether the employer could justify the provision under sub-paragraph (iii).

29. The argument of Mr Diamond is that in paragraph 88 of its decision the Employment Tribunal wrongly took into account the three factors there identified when applying the justification test. Paragraph 88 is set out at paragraph 8 above and I will not repeat it. I agree that sub-paragraphs (i) and (ii) were irrelevant factors to consider in the proportionality exercise. The fact that the Council made efforts to accommodate the appellant for two years is no answer to her contention that they should have done so permanently. Equally, the fact that the Council would accommodate church worship was no answer to her claim that they should accommodate her genuinely held belief that she should not work on Sunday. I accept that these factors show that the Council

was acting in good faith and had travelled some way towards meeting her concerns; but the issue is whether the Council had gone far enough, and these factors do not help at all in answering that question.

30. The more difficult question is whether the Tribunal was entitled to take into account the fact that the refusal to work on Sunday, although a deeply held belief of the appellant, "is not a core component of the Christian faith". I agree with Maurice Kay LJ that the Employment Tribunal ought not to have weighed this in the balance in support of the justification defence, but for a different reason than he has given.

31. If one considers this case purely as a domestic law indirect discrimination case, independently of Article 9 considerations, then in my view it would at least indirectly be a legitimate factor for the Employment Tribunal to consider. This is because if the belief which results in the disadvantage is a core principle or belief of a particular religion, a policy, criterion or practice which interferes with the manifestation of that belief will impinge upon a greater number of potential adherents than would otherwise be the case; and in general the greater the impact, the harder it is to justify the provision. As Baroness Hale pointed out in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704 para.24, what has to be justified is the particular policy, criterion or practice, but

> "Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer".

32. In my judgment, an evaluation of the impact must include its extent. That was the view of the President of the Employment Appeal Tribunal, Langstaff P, giving the judgment below (para 46):

> ".. if a PCP affected virtually every Christian to a given extent, it would have a much greater discriminatory impact than if the measure affected only a small 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."

33. The President went on to say that this is what the Tribunal was driving at in paragraph 88(iii), notwithstanding its inelegant phraseology; it was suggesting that the justification hurdle was less onerous because the group affected was relatively small. I respectfully agree with his analysis both of the law and of what the Employment Tribunal was intending to say. In my view, the potential extent of the impact is a factor which a tribunal was entitled to consider, giving it such weight as it deemed appropriate. In practice, I find it difficult to imagine that once a *prima facie* group disadvantage has been established - as it was in this case and must be in order for

justification to be required - a court will give much weight to the fact that the size of the pool adversely affected is in principle potentially large if that is not in fact the case in relation to the particular employer. So I would not have expected that factor to be of any real weight in the context of this case, although in other circumstances it is a consideration which may gain greater currency. But in my view, looking at the matter purely in terms of establishing indirect discrimination, the Tribunal was certainly not wrong to have regard to the overall impact of the criterion when assessing proportionality.

34. However, in my judgment the same analysis does not hold sway where the right to religious freedom under Article 9 is engaged, as it directly is in this case given that the Council is a public body. The protection of freedom of religion conferred by that Article does not require a claimant to establish any group disadvantage; the question is whether the interference of that individual right by the employer is proportionate given the legitimate aims of the employer: see the analysis of the Strasbourg court in *Eweida v United Kingdom* [2013] IRLR 231 paras 79-84. In substance the justification is likely to relate to the difficulty or otherwise of accommodating the religious practices of the particular individual claimant.

35. Article 9 cannot be enforced directly in employment tribunals because claims for breaches of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg Court in *Eweida* does not seem to have appreciated that fact): see *X v Y* [2003] ICR 1138 . The *Eweida* decision in Strasbourg has not, and could not, affect the reach of the statutory jurisdiction and therefore the claimant's Article 9 right is incapable of direct enforcement in the Employment Tribunal. However, domestic law must be read so as to be consistent with Convention rights where possible, in accordance with section 3 of the Human Rights Act. In my judgment, it is simply not possible to read down the concept of indirect discrimination to ignore the need to establish group disadvantage. But I see no reason why the concept of justification should not be read compatibly with Article 9 where that provision is in play. In that context it does not matter whether the claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion. It is for this reason that in my view the Employment Tribunal was wrong to make reference to this factor as one assisting the employer.

36. This is not to say that the number of employees sharing a particular belief will necessarily be irrelevant to a justification challenge where Article 9 is engaged. Assuming that the employer's criterion is designed to achieve a legitimate end, the greater the number of employees affected, the more difficult it is likely to be for an employer to accommodate those beliefs in a way which is compatible with his business objectives. So paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against.

37. It follows that, in my view, it is the Article 9 dimension of this case which made it inappropriate for the Employment Tribunal, when assessing justification, to weigh in

the employer's favour the fact that the appellant's religious belief was not a core belief of her religion so that any group impact was limited. However, I am wholly satisfied that this was a peripheral part of the proportionality analysis of the Employment Tribunal and did not materially affect its conclusion. Accordingly, notwithstanding the errors in paragraph 88, I would dismiss the appeal.

Lord Justice Vos:

38. I agree with both Maurice Kay LJ and Elias LJ that the appeal should be dismissed. I also agree with them both that that should be the result notwithstanding that the Employment Tribunal was wrong to take into account the three enumerated factors identified in paragraph 88 of its decision in relation to the question of proportionality under Regulation 3(1)(b)(iii).

39. I do, however, prefer the reasons given by Elias LJ on the two central questions on which he disagrees with Maurice Kay LJ. In my judgment, for the reasons Elias LJ has given:-

i) In the absence of the application of Article 9, the question of whether the refusal to work on Sunday was or was not a core component of the Christian faith might be relevant to the question of proportionality under regulation 3(1)(b)(iii).

ii) Article 9 has the effect in this case of making it irrelevant, for the purposes of determining proportionality, to examine whether the refusal to work on Sunday was a core component of the Christian faith.

I regard the question of whether Sabbatarianism is a core component of the Christian faith to be equivalent to the more easily understood question of whether the belief is widely held amongst the Christian population. Whichever way it is put, it is the quantitative question to which the EAT referred.

40. In relation to the first point, it seems to me that when the Council seeks to show that the PCP is "*a proportionate means of achieving a legitimate aim*" within Regulation 3(1)(b)(iii), it may be relevant to consider whether the belief in question is widespread. If, to take an extreme example, the belief were to be so widely held that a large proportion of the employees at Brightwell were or were likely to be committed Sabbatarians, it would be more likely to be proportionate to insist on Sunday working in order to enable care to be provided for the resident children. Conversely, the fact that the belief was not widely held might work the other way if a large employer with many staff were seeking to justify a legitimate aim, but could not show any difficulty in accommodating the single individual concerned, because others were unlikely to be similarly affected. There would, I think, be many cases like this one where the question of whether the belief was or was not widely held would in practice be of either marginal or only theoretical relevance in relation to the question of

proportionality. It does not, however, seem to me to make the question automatically irrelevant simply because it may work one way in some cases and another way in others.

41. I am somewhat diffident about expressing a positive opinion on the second point, bearing in mind that we did not hear full argument in relation to it. But since it has provoked disagreement between Maurice Kay LJ and Elias LJ, I should do so. Section 3(1) of the Human Rights Act 1998 provides that "*[s]o far as it is possible to do so, … subordinate legislation must be read and given effect in a way which is compatible with Convention rights*". Thus, even though Article 9 rights are not directly enforceable in the Employment Tribunal, they are still relevant to the proper meaning of Regulation 3(1). The question that arises is whether the requirement for the Council (in this case) to show that the PCP in question is "*a proportionate means of achieving a legitimate aim*" can be "*read and given effect in a way which is compatible with*" Mrs Mba's Article 9 rights. It seems to me that it can. The question of whether Mrs Mba's belief was widely held might, in theory and absent Article 9, be relevant to the proportionality question for the reasons I have given. But there is no reason why regulation 3(1)(b)(iii) cannot be equally well read to exclude such a consideration on the ground that Article 9 does not require any test of group disadvantage, and concentrates only on the religious freedom of the individual concerned.

42. It is perhaps worth concluding by pointing out that the two points of contention that have arisen are inter-connected. If I were wrong in thinking that the quantitative question could be relevant to the issue of proportionality on the natural reading of Regulation 3(1)(b)(iii), it would not be necessary to engage Section 3 or Article 9 to ensure that it was not.