

THE
NATIONAL LAW REVIEW

Lee v. McArthur and Ashers Baking: Why “Gay Cake” Case Matters to Employers

Friday, November 25, 2016

Last month, the **Northern Ireland Court of Appeal** gave its judgment in the so-called “Gay Cakes” case (otherwise known as **Lee v. McArthur and Ashers Baking Company Limited**). The facts are simple and have made the headlines: the law is not, and the press coverage has not really explained it.

Mr Lee wanted a bakery to bake him a cake with the slogan “Support Gay Marriage” iced upon it. His first port of call was Ashers Bakery which advertised a bespoke cake decoration service, offering to turn logos and messages into icing. However, upon learning of the desired slogan, Ashers refused the order. It was freely admitted that the order was refused because the directors of Ashers are devout Christians who oppose the introduction of gay marriage in NI, considering it sinful and contrary to God’s law. Superficially (reflecting the way it was reported), that looks pretty clearly discriminatory. But on what grounds, bearing in mind that it was agreed all round that Ashers would happily have baked Mr Lee some other cake and also that if Mr Lee had been straight, not gay, they would still have refused to put the gay marriage slogan on it. So the discrimination arose not from Mr Lee’s own sexuality but from the “association” of the slogan with homosexuality.

The Court of Appeal has now agreed that the refusal to fill the cake order amounted to direct discrimination on the grounds of sexual orientation and that Mr Lee is entitled to damages.

This case involved discrimination in the provision of services and is not directly an employment law case but it does contain some food for thought for employers and an example of the issues that can arise when employees’ political or religious views are offended by something they are required to do as part of their duties. Bear in mind that the employer will be liable for the discriminatory actions of those employees unless the very clearest steps are taken in advance to prevent them.

The key point is that Ashers owners Mr and Mrs McArthur are entirely free to hold these views in their personal capacity and for example, to refuse to donate money to a charity promoting LGBT rights. They said after the decision that “*if equality law means people can be punished for politely refusing to support other people’s causes then equality law needs to change*”. However, as soon as they engage in the provision of “*goods, facilities or services to the public*” the law prevents them from distinguishing between potential customers on the basis of a protected characteristic, in this case sexual orientation. If Ashers had had a blanket ban on providing any cakes with political slogans (political in NI because gay marriage remains unlawful), the situation would have been different. It was the attempt to determine the service it would offer on discriminatory grounds that got them into hot water.

The bakers also argued that it would be an infringement of their right to manifest their religious beliefs if they were forced to produce a cake with a slogan supporting a cause they believed to be sinful. The judgment itself is clear on this point at paragraph 100 (our emphasis):

“...Anyone who applies a religious aspect or a political aspect to the provision of services may be caught by equality legislation, not because the legislation treats their religious belief or political



SQUIRE PATTON BOGGS

Article By

[Marianne Parkinson](#)

[Squire Patton Boggs \(US\) LLP](#)

[Employment Law Worldview](#)

[Labor & Employment](#)

[Litigation / Trial Practice](#)

[Global](#)

[Ireland](#)

opinion less favourably but because that person seeks to distinguish, on a basis that is prohibited, between those who will receive their service and those who will not” ... and then, in pre-emptive response to the MacArthurs’ later comments, “the answer is not to have the legislation changed ... the answer is for the supplier of services to cease distinguishing, on prohibited grounds, between those who may or may not receive the service. Thus ...the supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds...”

What they may not do, in other words, is provide a service that only reflects their own political or religious belief. You can believe what you want but you can’t let it interfere with how you treat your customers. In any event, the Court was clearly sceptical as to the significance of the icing slogan. Doing a decorated Halloween cake would not indicate a belief in witchcraft, nor would anyone sensibly conclude that a cake decoration reasonably represented the views of the baker, is said.

So, if employees refuse to bake a customer a particular cake because to do so would offend their religious or political sensibilities, the employer must direct them that they cannot bring their own personal views to bear on the provision of services. Ideally there should be written instructions to public facing staff that no one must be refused any or a full service on the grounds of the employee’s own beliefs.

© Copyright 2019 Squire Patton Boggs (US) LLP

Source URL: <https://www.natlawreview.com/article/lee-v-mcarthur-and-ashers-baking-why-gay-cake-case-matters-to-employers>