

***Lee v Ashers Baking* [2018] UKSC 49 and the ramifications for Employment Law**

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1. INTRODUCTION

It is well established that as well as less favourable treatment because of the victim's protected characteristic, direct discrimination can occur because of something "indissociable" from a protected characteristic, or a third party's protected characteristic (often manifesting as "associative" discrimination), or even where the defendant mistakenly *perceives* the victim to have a protected characteristic. It has also been held that there can be liability for *harassment* where the conduct relates to *nobody's* (real or perceived) protected characteristic (*English v Sanderson*¹). Whether this notion applies to direct discrimination has yet to be tested. *Lee v Ashers* gave the Supreme Court the ideal opportunity.

This highly publicised case on a bakery's refusal to supply a cake iced with the words, "Support Gay Marriage" concerned discrimination on the grounds of political opinion and sexual orientation, and with it the bakery's rights to free expression and religion. The case arose in the provision of goods, facilities and services ("services"), but its ramifications could apply to all fields, including employment, the focus of this Note. The claim raised issues relevant to "indissociable" and associative discrimination, indirect discrimination, as well as *English v Sanderson*. The judgment provided an incisive analysis of the claim of associative discrimination, but declined to provide any enhanced guidance much beyond the immediate and novel facts. It failed to address indirect discrimination and the relatively embryonic principle from *Sanderson*, which is most in need of clarification in the context of direct discrimination. The judgment also omitted to provide a detailed analysis of the relationship between domestic discrimination law and the freedoms of religion and expression guaranteed by the European Convention on Human Rights (the "Convention"). In commenting on these omissions, as well as the reasoning given, this Note considers the ramifications for employment discrimination.

A. Facts and Decision

Mr Lee is a gay man and associated with an organisation called QueerSpace, which supports the LGBT (lesbian, gay, bisexual and transgender) community in Northern Ireland. He ordered from Ashers Bakery a cake iced with the phrase "Support Gay Marriage", for a QueerSpace event marking the end of anti-homophobia week. Ashers refused, because its owners objected to same-sex marriage. The objection was based on their (Christian) religious belief. Lee sued Ashers for direct discrimination.

¹*English v Sanderson Blinds* [2009] ICR 543 (CA).

because of political opinion (specific to Northern Ireland) and sexual orientation. These claims were brought, respectively, under the Fair Employment and Treatment (Northern Ireland) Order 1998, (FETO),² and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SORs).³ Each provides a definition of direct discrimination substantially the same as that provided by the Equality Act 2010 (EA 2010), section 13.⁴

The county court and Court of Appeal (Northern Ireland) found in Lee's favour on both counts.⁵ However, in a unanimous judgment, given by Lady Hale, the Supreme Court reversed. First, the Supreme Court "acknowledged" that the refusal *could* amount to direct discrimination on the ground of Mr Lee's political opinion, but in light of the bakery's freedoms of religion and expression under Articles 9 and 10 respectively of the Convention, FETO should not be read to find liability.⁶

On the sexual orientation claim, the Court held that the refusal was not direct discrimination because of Mr Lee's orientation, nor that of anyone with whom he was associated. In this case, all customers would have been refused the cake irrespective of their (or anyone else's) sexual orientation.

B. The Legislation

Direct discrimination is defined in the SORs thus,

"3.— Discrimination and harassment on grounds of sexual orientation

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

The FETO definition is substantially the same. The Equality Act 2010 provides,

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

² SR 1998/3162, art 3.

³ SR 2006/439, reg 3.

⁴ No claim of harassment was made. Neither FETO nor the SOR's provide for harassment in provision of goods, facilities or services. See further below, p 0000.

⁵ [2015] NI Cty 2, affirmed, [2016] NICA 39.

⁶ [2018] UKSC 49, [48] and [56] respectively.

The obvious difference here is that the phrase “on grounds of” in the SORs appears as “because of” in the Equality Act 2010. But they are substantially the same. In the British legislation, “because of” replaced “on grounds of”, but this did not change the legal meaning of the definition.⁷

2. COMMENTARY

Bearing in mind that the Supreme Court “hears cases of the greatest public or constitutional importance affecting the whole population”,⁸ the judgment offered little guidance, save some limited thoughts on “indissociable” direct discrimination and associative discrimination. This brings us to questions the Supreme Court did not address. First, the judgment did not explain its omission to analyse the case as indirect discrimination. Second, despite citing *English v Sanderson*, the judgment said nothing of its application to direct discrimination, nor indeed, the merits and standing of the decision itself. And third, there was no detailed consideration of how and when an interference by domestic discrimination law with Convention rights could be justified, and if not (as in this case), how the domestic definitions should be interpreted to comply.

A. “Indissociable” Direct Discrimination

On the claim of direct discrimination because of Mr Lee’s sexual orientation, Lady Hale rejected any notion that ordering the “message” was indissociable from sexual orientation. “People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.”⁹ This may be a correct observation of the facts in question, but in support, Lady Hale endorsed some “indissociable” cases, one of which being *James v Eastleigh BC*.¹⁰ Here the factor of “pensionable age” was a proxy for direct sex discrimination, where the differing pension ages were imposed by legislation.

There is a slight difficulty here, because as Lady Hale herself once acknowledged, that aspect of *James* is no longer aligned with the view of the Court of Justice of the European Union (CJEU). Most notable here, in the context of *James*, is *Schnorbus v Land Hessen*, where the CJEU held that in circumstances where legislation dictated that only men were eligible for military service, priority in

⁷ Explanatory Notes to the Equality Act 2010, para 61.

⁸ < www.supremecourt.uk > accessed 18 January 2019.

⁹ [2018] UKSC 49, [25].

¹⁰ [1990] 2 AC 751.

legal training given to those who had undertaken military service was *not* indissociable from sex.¹¹ This left the priority to be analysed only as indirect discrimination (thus providing the state with an objective justification defence). Bearing in mind the statutory commitment to retain EU-derived law that exists before EU Exit Day,¹² *Schnorbus* could be used to challenge the authority of this aspect of *James*, effectively reducing similar (“legislation-proxy”) cases to indirect discrimination.¹³ Given the potential complexities of post-Brexit interpretation of retained EU law, Lady Hale’s unnecessary endorsement of *James* as an indissociable case, having previously acknowledged it was incompatible with EU law, is perhaps, an unwelcome contribution to the matter.¹⁴

B. Associative Discrimination

On the central claim of associative discrimination, the Court of Appeal found that “The benefit from the message or slogan on the cake could only accrue to gay or bisexual people.... This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community.”¹⁵ Reversing this, Lady Hale cited established notions of perceived and associative direct discrimination: treating another less favourably on “what is believed to be his/her sexual orientation, or the sexual orientation/perceived sexual orientation of another person with whom they associate”.¹⁶ For Lady Hale,

“That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is ‘on grounds of’ sexual orientation.”¹⁷

¹¹ C-79/99 *Schnorbus v Land Hessen* [2000] ECR I-10997. For Lady Hale, this was a “surprise”, to readers of *James*: see *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [90].

¹² This would include CJEU case law such as *Schnorbus*. European Union (Withdrawal) Act 2018, s 2, and notably here, s 6(3). Note also, s 6(5): “In deciding whether to depart from any retained EU case law, the Supreme Court ... must apply the same test as it would apply in deciding whether to depart from its own case law.”

¹³ In a case of nationality discrimination under EU law, the Supreme Court followed *Schnorbus* in priority to *James v Eastleigh BC: Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

¹⁴ On free movement and nationally discrimination, the CJEU is similarly reluctant to hold that multi-layered provisions effectively putting other EU nationals at a disadvantage, were not indissociable from nationality. See e.g. Case C-73/08 *Bressol v Gouvernement De La Communauté Française* [2010] 3 CMLR 20 (access to medical education).

¹⁵ [2016] NICA 39, [58].

¹⁶ Citing Explanatory Notes to the (now repealed) Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), para 7.3. This applied in Great Britain to Services and Public Functions; Premises; and Education. See now, EA 2010, Parts 3, 4 and 6, respectively.

¹⁷ [2018] UKSC 49, [33].

The connection must be “closer” than that, although Lady Hale considered it “unwise” to define the closeness of the association required.¹⁸

The first thing to note here is that the Court of Appeal suggested there was an association between the *conduct* and the third party. Lady Hale’s cited definition suggests the notion is confined to an association between the *claimant* and a third party. But there is nothing more to suggest that. In any case, there is well-established authority of a more fluid approach, perhaps better labelled under a more generic term of “third-party discrimination”. In *Showboat Entertainment Centre v Owens*,¹⁹ it may be recalled, a white manager was dismissed for refusing to follow an order to bar black youths. This was direct discrimination against the manager on grounds of the race of the third party youths. In other words, there was a connection between the (employer’s) *conduct* and the third party. The claimant had no connection with the black youths other than managing the premises they wished to enter. Thus, the better view is that associative discrimination is a mere sub-species of third-party discrimination, and as *Showboat* demonstrates, courts need not be confined by such rigid sub-categories.

A second consideration is how this decision might play out in a similar employment scenario, notably one envisaged by the Employment Code of Practice. It states that discrimination by association can occur where “a worker is treated less favourably because they campaigned to help someone with a particular protected characteristic”.²⁰ Suppose, for instance, a white heterosexual worker is disciplined because she campaigned for the “Windrush Generation”, or same-sex marriage. Just as Lady Hale reasoned in *Lee v Ashers*, the employer’s treatment here merely “has something to do with” the race or sexual orientation of some people. Lady Hale addressed this matter (perhaps inadvertently) later in her judgment, when she further distinguished *Lee v Ashers* from such examples, isolating *Lee v Ashers* as a “message” case. She reasoned,

“It was not as if he were being refused a job, or accommodation, or baked goods in general, because of his political opinion...[the bakery was] quite prepared to serve him in other ways. ... It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.”²¹

This may be a valid distinction to make, but the reference to “his” political opinion, does not encompass the example supposed above, nor the Code, which is not restricted to the victim having a relevant protected characteristic. Further, although factually distinctive, “message” cases are not necessarily different in principle in the context of establishing associative discrimination. First, for the purposes of

¹⁸ *ibid* [34].

¹⁹ [1984] 1 All ER 836 (EAT). “Instructions to discriminate” are now specifically unlawful by EA 2010, s 111. See also further below, p 0000.

²⁰ Employment Statutory Code of Practice (2011, EHRC), para 3.20.

²¹ [2018] UKSC 49, [47]. Although discussing the political opinion claim, at this stage, she likened it to the sexual orientation claim.

the legislation, an omission to act is equated with an act.²² Second, withholding one service while providing other services is no defence to a discrimination claim.²³ Similarly, it is no defence to provide a disciplined worker with all the other benefits of employment.

There is a third and connected feature of the judgment. While Lady Hale confined herself to a rigid sub-category (associative discrimination), she considered it unwise to define its major feature: the “closeness” required. This may disappoint those seeking certainty, but by leaving any “closeness” rubric undefined, the judgment has provided tribunals with the necessary discretion to come to a satisfactory decision, where the circumstances (including the Code of Practice) dictate. For instance, in the scenarios suggested above, a tribunal might well be influenced by, on the one hand, the difference between the difficulty of suffering the consequent work environment and/or securing another job, and on the other, the ease of finding another bakery to provide a cake with the message. Thus, Lady Hale’s distinctions may not be watertight in principle, but they may prove *practically* useful to an employment tribunal sympathetic to the Code and the claimant’s case, although a sounder distinction would be confining *Lee v Ashers* “message” cases more specifically to the field of services.

That deals with what was said. Now for the matters that were not, or not fully, addressed in the judgment. These comprise Indirect Discrimination, the *Sanderson* principle, and the relationship between domestic discrimination law and Convention rights.

C. Equal Treatment and Indirect Discrimination

In rejecting associative discrimination, Lady Hale’s characterisation of the refusal, as affecting “People of all sexual orientations”,²⁴ leads to a more complete rejection of direct discrimination. Lady Hale cited a well known rubric, “It cannot constitute direct discrimination to treat all employees in precisely the same way.”²⁵ To this end, Lady Hale approved counsel’s observation that, “Anyone who wanted that message would have been treated in the same way.”²⁶ That may be so, and a good reason to hold that this was not direct discrimination. But given that the refusal to supply the cake was lauded as “applying to all”, the next step for any discrimination lawyer would be a consideration of *indirect* discrimination.

Indeed, the context of the rubric makes this point. The citation is from the Court of Appeal judgment in *Islington LBC v Ladele*, which was itself lifted from the EAT below.²⁷ Here, a registrar was subjected to disciplinary proceedings for refusing to conduct (same sex) civil partnerships, for

²² EA 2010, s 212(2).

²³ In *Gill v El Vino* [1983] QB 425 (CA) a wine bar’s practice of providing women with table service while excluding them from the bar area amounted to sex discrimination.

²⁴ [2018] UKSC 49 [25].

²⁵ *Islington LBC v Ladele* [2007] ICR 387 (EAT) [53] (Elias J), adopted by [2010] 1 WLR 955 (CA) [29] (Lord Neuberger), cited by Lady Hale, and in *Lee Ashers* [2018] UKSC 49 [23].

²⁶ [2018] UKSC 49, [23].

²⁷ [2007] ICR 387 (EAT) [53] (Elias J).

reasons of her religion. After rejecting the registrar's direct discrimination claim because all disobedient registrars would be treated in the same way, the Court of Appeal went on to analyse the case as *indirect* discrimination. Why Lady Hale did not follow this logical course is not explained beyond discarding the county court judge's finding of indirect discrimination in one pithy phrase, "is not easy to see how she could have done so".²⁸

The elements of indirect discrimination require an unjustified practice applied to all that puts a protected group, as well as the claimant, at a particular disadvantage.²⁹ Thus, the refusal to supply the message, which applied to all, was intrinsically liable³⁰ to have particularly disadvantaged those of Northern Ireland's LGBT community (or indeed, the members of QueerSpace, a smaller cohort of those for whom the cake was intended), as well as Mr Lee (who, being gay, suffered the same disadvantage). Note here, that it is irrelevant that the bakery might not have known, or perceived, Mr Lee was gay.

It should also be noted that even if the customer were not gay, CJEU authority suggests that he may still claim for indirect discrimination. In *CHEZ*, the placement of meters in a predominantly Roma district out of reach to avoid tampering was sufficient to permit a non-Roma person similarly disadvantaged to bring an action of discrimination.³¹ As retained EU law, *CHEZ* should remain good law in the UK post-Brexit.³²

In conclusion, a central reason given in *Lee v Ashers* for rejecting a direct discrimination claim *should* have led to an indirect discrimination analysis. None of this need have disturbed the outcome, given the availability of an objective justification defence. Otherwise, the Supreme Court ought to have provided a fuller explanation, if only to confirm that the established notion of indirect discrimination remains undisturbed by its decision, save we see any decisions eschewing indirect discrimination based on doubts raised by this judgment.

D. The Sanderson Principle

Given the findings that all-comers would have been treated in the same way, and that this was not a case of associative discrimination, we could infer from the *Lee v Ashers* judgment that where the conduct is inherently related to a protected characteristic, but nobody's protected characteristic is

²⁸ *ibid* [21]. Contrast *Onu v Akwivu, Taiwo v Olaigbe* [2016] UKSC 31, [31]-[33], where, despite the claimant's concession that there was no indirect discrimination, Lady Hale discussed the matter.

²⁹ SORs, reg 3; EA 2010, s 19.

³⁰ See Case - C237/94 *O'Flynn v Chief Adjudication Officer*, [1996] ECR I-2617; and on the EA 2010, *Homer v Chief Constable of West Yorkshire* [2012] ICR 704 (SC) [14] (Lady Hale).

³¹ C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] CMLR 14, paras 50 and 56.

³² European Union (Withdrawal) Act 2018, s 2, and notably here, s 6(3)(a). Note also, s 6(5): "In deciding whether to depart from any retained EU case law, the Supreme Court ... must apply the same test as it would apply in deciding whether to depart from its own case law." This suggests that the Court would have to cite more than the event of Brexit to depart from *CHEZ*.

involved, the conduct cannot be directly discriminatory. It is akin to a person making homophobic remarks in an empty room. (This accords with isolating *Lee v Ashers* as a “message” case.) For Lady Hale, this was a case of associative discrimination “or it was nothing.”³³ As well as indirect discrimination, this adherence to associative discrimination closed down a consideration of the principle established in *English v Sanderson*,³⁴ which seems more aligned to the case in question. What was more curious is that Lady Hale actually cited *Sanderson’s* majority and dissenting judgments, but without expressing a clear opinion on either.³⁵

In *English v Thomas Sanderson Blinds*, it may be recalled, Mr English was harassed by colleagues using homophobic sexual innuendo. This conduct was rooted, apparently, in two things: he lived in Brighton (a well-known centre of the LGBT scene) and had attended boarding school. What made this case unusual is that Mr English was heterosexual, *and* his tormentors knew this; they neither assumed nor perceived Mr English to be gay. Further, Mr English was aware of this throughout. If you like, *he knew that they knew* he was heterosexual. *Lee v Ashers* resembled this case in that the conduct was inherently discriminatory, and (according to the Supreme Court) nobody’s sexual orientation was in question. (A difference between the two cases is that the conduct in *Sanderson* was aimed at just one person, rather than all-comers; but the widespread effect of inherently discriminatory conduct is no reason to dismiss it; quite the opposite.)

Mr English sued Sanderson Blinds for harassment under the since-repealed Sexual Orientation Regulations 2003, which defined harassment as unwanted conduct “on the grounds of sexual orientation”, that had the “purpose or effect” of violating his dignity, or creating an “intimidating, hostile, degrading, humiliating or offensive environment” (“hostile environment”). The conduct would have the required effect if, with regard to the circumstances and the victim’s perception, “it should reasonably be considered as having that effect”.³⁶ (The current definition is slightly broader.)³⁷ Reversing the EAT and the employment tribunal below, a majority of the Court of Appeal found that such abuse could amount to unlawful harassment.³⁸ Quite clearly, the absence of a possessive adjective (“his” or “her”) renders the phrase “on the grounds of sexual orientation” broad enough to cover the “inherent” harassing conduct even though it was unrelated to any *person’s* sexual orientation (actual or perceived). The majority provided both technical and policy reasons for their decision.³⁹ Sedley LJ

³³ [2018] UKSC 49 [34].

³⁴ [2009] ICR 543 (CA). Applied, *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34, [97], where the victim was in the past homosexual.

³⁵ [2018] UKSC 49, [30]-[31].

³⁶ Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1660, reg 5.

³⁷ EA 2010, s 26. This replaced the term “grounds of” with “related to”. See n 51 and accompanying text.

³⁸ On facts, the case failed. *English v Sanderson Blinds (No 2)* [2011] Eq LR 688 (EAT), [41], upheld a finding that as he joined in the banter and remained genuine friends with his tormentors, the claimant did not perceive a violation of dignity nor a hostile environment.

³⁹ In this Note, “technical” means that the interpretation accords with the statutory language. “Policy” involves broader concerns, such as statutory purpose; for example, where a provision is ambiguous, a judge may prioritise a claimant’s privacy or dignity.

found that the distance between this and perceived discrimination was “barely perceptible”. In both instances, the “imaginary” sexual orientation was the ground of the harassment.⁴⁰

Sedley’s LJ technical reasoning was cited by Lady Hale.⁴¹ But his policy considerations were not. He first noted the “calculated insult to [Mr English’s] dignity... and the consequently intolerable working environment”.⁴² Moreover, perhaps, Sedley’s LJ precedential concern was for some future scenario where the victim preferred to keep his sexuality a private matter. A decision against Mr English here would mean that in such cases, before he could complain, the victim would have to disclose his sexual orientation (whatever it was).⁴³ Thus, Sedley’s LJ principal concern was to preserve the dignity of workers that equality law is supposed to enshrine.

The logical extension of this concern is the scenario where employees regularly make homophobic comments in the workplace for all to hear, but aimed at no one in particular. A colleague who, unknown to these employees, happens to be gay and is offended, must declare his sexual orientation in order to complain. Otherwise he either suffers in silence or even resigns.

Concurring, Collins LJ provided roughly parallel reasoning,

“If the conduct is ‘on grounds of sexual orientation’ it is plainly irrelevant whether the claimant is actually of a particular sexual orientation. In a case of this kind, even if the claimant is homosexual, it is obviously not for the claimant to show that he is homosexual, any more than a claimant in a racial discrimination case must prove that he is Asian or a Jew.”⁴⁴

Here, Collins LJ aligns the legislative language with the *conduct*, rather than the victim’s protected characteristic. Notably, he believes the same logic applies to discrimination. As a matter of policy, he considered that if there were no liability in this case, then there would be none on the same facts save that the claimant *is* homosexual. According to Collins LJ, this could not have been the legislative intention.⁴⁵ This parallels Sedley’s LJ reasoning, although with an alternative scenario. Here, instead of a “blank canvas” victim, entitled to keep his sexual orientation private, we have one who is homosexual, but similarly entitled to a dignified and abuse-free working environment.

It would seem from this that the Supreme Court in *Lee v Ashers* ought to have felt challenged by these two judgments. If it did, it did not show. After quoting the technical reasoning of Sedley LJ, Lady Hale cited an extract (of roughly equal length) from Laws’s LJ dissent,⁴⁶

⁴⁰ [2009] ICR 543 (CA) [38].

⁴¹ [2018] UKSC 49 [30].

⁴² [2009] ICR 543 (CA) [37].

⁴³ *ibid* [39].

⁴⁴ *ibid* [46].

⁴⁵ *ibid* [47].

⁴⁶ [2018] UKSC 49 [31].

“In my judgment, harassment is perpetrated on grounds of sexual orientation only where some person or person’s actual, perceived, or assumed sexual orientation gives rise to it, that is, is a substantial cause of it. [The Claimant’s] case confuses the reason for the conduct complained of with the nature of that conduct.”⁴⁷

This is more in tune with the decision in *Lee v Ashers*. Law’s LJ speech holds that it is not enough that the nature of the conduct is discriminatory (or “inherently discriminatory”); the reason for the conduct must be somebody’s real or perceived protected characteristic.

Given the openness of the statutory definition, it seems that the Court of Appeal in *Sanderson* divided on policy. In terms of principle, the majority decision meant that there can be harassment where the conduct is related to a protected characteristic, but nobody’s protected characteristic is in question. This is distinctive from third party, associative, or perceived, harassment. It is the “*Sanderson* principle”.

Lady Hale expressed nothing on the merits or status of *Sanderson*. The only hints were her description of Laws’s LJ dissent as “powerful”,⁴⁸ and the Supreme Court’s decision itself,⁴⁹ which effectively rejected the *Sanderson* principle in the context of “associative” direct discrimination, but no more. This leaves the status of *Sanderson* uncertain. If we were to take *Lee v Ashers* as a disapproval of *Sanderson*, it would appear a rather high-handed dismissal of a Court of Appeal decision, and a principle rooted in policy, particularly a respect for those wishing to keep their sexuality private. This principle could extend, albeit less obviously perhaps, to other protected characteristics. Some may prefer to keep private their religion, racial background, or disability. But all people would prefer to work in a dignified and abuse-free environment, whatever the protected characteristic in question. Moreover, the judgment, with respect, ought to have expressed a view on whether or not the *Sanderson* principle applied to direct discrimination.

As it happens, the relationship between discrimination and harassment, and the legislative history, provides an argument for excluding *Sanderson* from direct discrimination.

E. The Relationship between Harassment and Direct Discrimination

An argument in support of the exclusion of the *Sanderson* principle from discrimination, or at least from Mr Lee’s claim, has its roots in the exclusion of *some* forms of harassment from *some* fields of

⁴⁷ [2009] ICR 543 (CA) [21].

⁴⁸ [2018] UKSC 49, [31].

⁴⁹ See further below, p 0000.

activity. Neither FETO nor the SORs provide for harassment in the provision of services.⁵⁰ Had it been available, the courts may have been compelled to entertain the *Sanderson* principle. The starting point for this reasoning is considering how harassment *could* have applied in *Lee v Ashers*.

Under the Equality Act 2010, harassment is defined as unwanted conduct related to a relevant protected characteristic, with the purpose *or* effect of violating the dignity or creating a hostile environment for the complainant.⁵¹ The refusal to supply the message, although held to be unrelated to any particular person's sexual orientation, was "inherently" discriminatory and thus related to (or *on the ground of*) sexual orientation. And while the bakery had no purpose to violate anyone's dignity, that was the likely effect on Mr Lee, especially given the relatively low threshold required.⁵²

The unavailability of harassment suggests a reason to exclude the *Sanderson* principle from the case. Along with FETO and the SORs, the Equality Act 2010 (and its predecessors) excluded harassment related to religion or belief, or sexual orientation, from the provision of services.⁵³ The background to this was a concern that its inclusion would curtail service providers' Convention freedoms of religion and expression.⁵⁴ Bearing in mind that the *Sanderson* principle originated in a harassment case, it is thus arguable its recognition of "inherently" discriminatory conduct, encompassing expressions of religion and free speech generally (and thus "message" cases), should be excluded from *discrimination* in the provision of services. To hold otherwise would defeat the objective of the harassment exclusion. The difficulty with this reasoning is that its basis, the harassment exclusions, only apply to two of the protected characteristics (sexual orientation and religion or belief), indicating that the legislature saw no issue with free speech and race, sex, disability, and age, for example. And so, to use the exclusions as a reason to prevent the *Sanderson* principle migrating to discrimination would either oust the *Sanderson* principle only from discrimination on those two protected characteristics, creating an inconsistency in the definition of direct discrimination; or would oust it from discrimination for all protected characteristics, where the "exclusion" basis does not exist.

⁵⁰ The harassment provisions in the SORs were quashed under judicial review because of an "absence of proper consultation": *The Christian Institute v The Office of the First Minister and Deputy First Minister* [2007] NIQB 66; [2008] ELR 146, [34] and [43].

⁵¹ EA 2010, s 26(1). Save for the Disability Discrimination Act 1995, s 3B and Sex Discrimination (Northern Ireland) Order 1976 SR 1976/1042, art 6A (sex and gender reassignment), the NI legislation has retained the narrower phrase "on grounds of" in its harassment provisions: FETO 1998, art 3A (religious belief/political opinion); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 SR 2003/497, reg 5; Employment Equality (Age) Regulations (Northern Ireland) 2006 SR 2006/261, reg 6; Race Relations (Northern Ireland) Order 1997 SR 1997/869, art 4A.

⁵² See *Richmond Pharmacology v Dhaliwal* (2009) ICR 724 (EAT) *cf* United States, where courts expect workers to be more robust: *Harris v Forklift Systems* 510 US 17, at 21 (Sup Ct 1993). Also *cf Pemberton v Inwood* [2018] EWCA Civ 564, requiring "aggravated features" to transform a case of discrimination to one of harassment.

⁵³ EA 2010, s 29(8), or, premises (34(4)); exercise of public functions (28(8), 33(6), 34(4), 35(4)); associations (members or guests -103(2)); school education (85(1), which also excludes harassment related to gender reassignment).

⁵⁴ The original exclusion was brought about by a House of Lords amendment to the Equality Bill 2005: HL Deb 9 November 2005, Vol 675, cols 648-653. See also, Lord Lester, HL Deb 13 January 2010, Vol 716, cols 574-578; and generally, B Hepple, *Equality, The New Legal Framework* (2nd edn, Hart 2014), 97-102, who also suggests a technical solution to its inclusion.

The same difficulty arises when one considers that the exclusions do not apply to the field of Work.⁵⁵ Thus, in the context of *Lee v Ashers*, this may appear an attractive explanation for why the *Sanderson* principle was not considered. But in the context of the equality legislation as whole, the reasoning is flawed.

That said, if *Sanderson* did not apply to employment discrimination, any limitation could be circumvented in many (if not most) cases. In order to prevent two claims being made on the same facts, where the facts satisfy both the definitions of direct discrimination and harassment, the complaint *must* be treated as one of harassment,⁵⁶ ensuring that a tribunal could not side-step *Sanderson*.

F. Convention Rights, the Human Rights Act 1998, and “Reading Down” Direct Discrimination

Finally, the Supreme Court acknowledged that the refusal *could* amount to (“indissociable”) direct discrimination on the ground of Mr Lee’s political opinion⁵⁷ (a ground of discrimination specific to Northern Ireland). This brought into play the bakery’s freedoms of religion and expression under Articles 9 and 10 respectively, of the European Convention on Human Rights. These are qualified rights, and so any infringement may be justified if prescribed by law and necessary in a democratic society.⁵⁸ As is well known, the Human Rights Act 1998 introduced the Convention’s rights into domestic law. In anticipation of possible conflicts between domestic legislation and Convention rights, section 3(1) of the Act provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. If this is not possible, by section 4, a court (but not an employment tribunal or the EAT) may issue a declaration of incompatibility. Thus, there are two broad tasks here. First, assessing whether any infringements of the Convention rights were justified, and second, if not, whether and how the definition of direct discrimination in FETO could be “read” to comply with the Convention.

⁵⁵ EA 2010, s 40. EA 2010, s 40. For NI, see FETO 1998, art 19(1A) (religious belief/political opinion); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 SR 2003/497, reg 6(3); Disability Discrimination Act 1995, s 4(3); Sex Discrimination (Northern Ireland) Order 1976 SR 1976/1042, art 8(2A) (sex and gender reassignment); Employment Equality (Age) Regulations (Northern Ireland) 2006 SR 2006/261, reg 7(3); Race Relations (Northern Ireland) Order 1997 SR 1997/869, art 6(2A).

⁵⁶ EA 2010, s 212(1): “‘detriment’ does not... include conduct which amounts to harassment”. Thus, if the conduct amounts to harassment, s 212 dictates that there is no “detriment” for the provisions on employment discrimination (e.g. EA 2010, s 39). For a similar proviso in NI, see, FETO 1998, art Art 2(2); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 SR 2003/497, reg 2(4); Disability Discrimination Act 1995, s 18D(2); Sex Discrimination (Northern Ireland) Order 1976 SR 1976/1042, art 2(2); Employment Equality (Age) Regulations (Northern Ireland) 2006 SR 2006/261, reg 2(3). The Race Relations (Northern Ireland) Order 1997 SR 1997/869, has no such proviso. Where harassment is excluded EA 2010, s 212(5) (but not the SORs or FETO) lifts the proviso, allowing “harassment” claims where the facts satisfy the definition of direct discrimination.

⁵⁷ [2018] UKSC 49, [48].

⁵⁸ Articles 9(2) and 10(2) set out respective aims. See below, n 64.

When she came to these tasks, Lady Hale provided an opinion in a single sentence, “FETO should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.”⁵⁹

On the matter of justification, the first thing to note is that this opinion was given in the context of both Articles 9 and 10. As such, Lady Hale suggested that the judgment went beyond just freedom of the defendant’s religion and extended to a more general right of free expression:

“In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination.”⁶⁰

The reference to “whatever the message”, and the “political party” example, signal that “message” cases can enjoy immunity for discrimination claims even if the refusal is not on religious grounds, but merely those of free expression (free expression includes the right *not* to express a view⁶¹). Employers may be encouraged by this to express their views in the workplace, such as displaying anti-immigration posters, or ones favouring opposite-sex marriage. But such a move would be vulnerable to harassment claims.⁶² The conduct is likely to violate dignity of, or cause a hostile environment for, workers with a Black Caribbean heritage, or an LGBT identity, as the case may be. Others may well have a connected claim under *CHEZ*.⁶³

Otherwise, little was said on justification here. There was no identification of the particular qualifications provided by the Convention, and little expressed in support of the finding. The qualifications to Articles 9 and 10 provide somewhat distinct and exhaustive reasons for justifying an interference.⁶⁴ But both provide that an apparent infringement may be justified in deference to the “protection of the rights of others”. The obvious one here would be the “right” of Mr Lee not to be discriminated against because of his political opinion. But this was not evaluated.

⁵⁹ [2018] UKSC 49, [56].

⁶⁰ *ibid* [55].

⁶¹ *ibid* [52]-[54].

⁶² Bear in mind, one justification for the introduction of free-standing harassment provisions was *Stewart v Cleveland Guest (Engineering)* [1996] ICR 535, where the EAT upheld a finding that the display of nude female pin-ups in a factory treated both male and female workers equally, and so did not amount to direct sex discrimination.

⁶³ See above, p 0000.

⁶⁴ Art 9(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.” Art 10(2) exceptions are limited to “the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Little else was expressed in support of the finding that the interference was not justified, although two bases can be detected from the accompanying text. First, in the paragraph previous to her opinion cited above, Lady Hale said,

“The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed.”⁶⁵

In the context of Mr Lee’s FETO claim, it seems rather remiss to deploy his sexual orientation as part of the reasoning. Bearing in mind the premise that there *was* discrimination because of political opinion, we *could* nonetheless infer from this passage that “message” cases, even when discriminatory, can be distinguished from other forms of discrimination.

Second, again in the context of justification, Lady Hale noted that her earlier finding of political opinion discrimination was made with “doubts”.⁶⁶ The doubts were unspecified, but would appear to allude to her earlier alignment of this claim with the sexual orientation claim, as a “message” case, before conceding that “it could be argued” that Mr Lee’s political opinion and the message were “indissociable”.⁶⁷ With respect, it is hard to fathom the relevance of these doubts to the question of justification. There either was, or was not, discrimination. It may be that Lady Hale considered the discrimination here relatively minor in comparison to the infringement of the Bakery’s Convention rights, but such a line of reasoning was not expressed, so one can only speculate.

Overall, one would have hoped for a detailed explanation as to why Mr Lee’s “right” not to be discriminated against was subordinate to the bakery’s Convention rights, and of course, some broader guidance as to when an interference by domestic discrimination law *could* be justified. The best that can be inferred from this judgment is that the interference was not justified because this was a “message” case, and/or the discrimination was relatively minor.

On the second task under the Human Rights Act 1998, Lady Hale’s opinion was made with reference also to section 3. So this was not a case of incompatibility. As noted above, section 3 invites courts to engage with statutory language and interpret it in a way compatible with the Convention rights in question. There are in the reports many examples of this process. Most notably perhaps is the “*Ghaidan* approach”,⁶⁸ encapsulated by the Court of Appeal when providing a detailed eight-point

⁶⁵ [2018] UKSC 49, [55].

⁶⁶ *ibid* [56].

⁶⁷ *ibid* [47]-[48]. See also text to n 21, above.

⁶⁸ After *Godin-Mendoza v Ghaidan* [2004] 2 AC 557 (HL).

rubric on the do's and don'ts of this process.⁶⁹ Lady Hale's speech made no attempt to show how this could be achieved. The statutory definitions of discrimination, themselves having a human rights dimension, are important provisions, and one would hope for some clear and concrete guidance here.

Given the importance of the case, the complexity of reconciling domestic and Convention law, and that this decision upset the considerable reasoning below,⁷⁰ this is a rather meagre analysis of the issue.

3. CONCLUSION

Often billed as a conflict of rights, between sexual orientation and religion, Lady Hale's judgment rendered it no such thing, ruling that there was no sexual orientation discrimination in the first place. With respect, Lady Hale may be praised for a masterly factual analysis of a highly unusual case. But her acuity arguably disguised a lack of ambition for discrimination law more generally. That is a notable omission from a Supreme Court judgment, which is meant to be of "the greatest public or constitutional importance affecting the whole population".⁷¹

On the "proxy" or "indissociable" rubrics for identifying direct discrimination, ordering a message, "support gay marriage" was not indissociable from sexual orientation, but *could* have been for political opinion (although this latter finding was neutered by the bakery's Convention rights). In this context, Lady Hale, approved the "indissociable" aspect of *James v Eastleigh BC*,⁷² which, as she had once acknowledged, was now inconsistent with EU law. This, in turn, could provide an unwanted layer of complexity to any post-Brexit cases on the matter.

On associative discrimination, the ruling was that any association between the message and sexual orientation of anyone needed to be "closer". However, this finding was not accompanied by a definition of how close the association has to be. Given that the ruling upset all the reasoning below, its potential to conflict with the Employment Code of Practice, and the subtlety of Lady Hale's distinguishing this case as one of solely "inherent" discriminatory conduct (i.e. involving nobody's sexual orientation), a clearer explanation of the consequences for the law of discrimination and harassment would have been welcome. On the other hand, tribunals may appreciate the latitude perhaps afforded by this absence of definition, providing them some discretion when faced with pressing policy

⁶⁹ *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 (CA) [38]. Its authority was enhanced when permission to appeal was refused by the Supreme Court: UKSC 2009/0162 (16 Dec 2009) < <https://www.supremecourt.uk/docs/pta-0910-1002.pdf> > accessed 18 January 2019. The guidance applied to EU law as well as Convention rights.

⁷⁰ On the basis there was direct sexual orientation discrimination, the courts below dedicated 42 paragraphs to the Convention rights: [2015] NI Ct 2 [70]-[99]; [2016] NICA 39 [59]-[72].

⁷¹ < www.supremecourt.uk > accessed 18 January 2019.

⁷² [1990] 2 AC 751.

considerations in any forthcoming unusual and/or fact sensitive cases, notably the “campaign” example, suggested above.⁷³

There were two major omissions from the judgment, as well as one shortfall. First, the finding that there was no direct sexual orientation discrimination, because the refusal affected “People of all sexual orientations”,⁷⁴ should have led to a consideration of indirect discrimination, and in turn, a consideration of the defendant’s Convention rights under the domestic legislation’s objective justification defence. In contrast to trying to reconcile direct discrimination provisions with the Convention, this would at least have provided an appropriate vehicle for the task.

Second, there was no concrete consideration of the logic and status of the Court of Appeal’s decision in *English v Sanderson*, which holds that there can be harassment liability for conduct “inherently” related to a protected characteristic which is not associated with any particular person’s protected characteristic. Giving the slightest of nods towards Laws’s LJ dissent, with respect, does nothing but cast uncertainty over the status and reach of this significant Court of Appeal decision. It could apply to direct discrimination generally, or generally *except for* “message” cases, or perhaps generally *except for* in the provision of services. On the other hand, it could be confined to harassment, or completely disapproved in line with Laws’s LJ dissent. This Note suggests that there are policy (dignity and privacy) and technical bases for the *Sanderson* principle to apply to direct discrimination generally. What was required in *Lee v Ashers*, was a reasoned opinion on whether it *should*. As it happens, if the field of Work, most *Sanderson*-type cases are likely to satisfy the requirements of harassment, and so the major debate is whether *Sanderson* is good law at all.

The shortfall fell under the political opinion claim. Having found direct discrimination here, the opportunity arose to provide guidance on a defendant’s Convention rights in relation to the equality legislation. The judgment suggested that in “message” cases, freedom *expression* (not just religion) prevailed. Otherwise, the reasoning fell short of supplying a detailed consideration of when such an infringement could be justified, and ducked the challenging interpretive task of how to read the definition of direct discrimination to comply with the Convention in such cases.

As famous as it was in its day for upholding the freedom of expression for providers of services, in time, this case may become better known for what it did not say. As a result, should any of the unresolved, or unexplored, issues highlighted in this Note come before a tribunal, another journey all the way the Supreme Court could be required to settle squabbles over what *Lee v Ashers* did not say.

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⁷³ See p 0000.

⁷⁴ [2018] UKSC 49 [25].

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