

# That gay cake – a quick digest

An explanation of what the Supreme Court's decision in the Ashers bakery case means for LGBT+ rights

## **So, did the Belfast-based bakery discriminate against its gay customer?**

The Supreme Court said no. They said Ashers bakery had the right to refuse to decorate the cake with the message supporting gay marriage, as it was the message they objected to, not the person who ordered the cake.

## **How could Ashers bakery argue that as a service provider it could object to meeting certain requests?**

The bakery argued that under Articles 9 and 10 of the European Convention of Human Rights (ECHR) it had the right not to manifest beliefs they did not actually hold. Producing the cake would have been in breach of the baker's rights permitting it not to express a particular opinion.

## **Doesn't the Equality Act 2010 and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and their provisions on sexual orientation have any force then?**

The Equality Act 2010 and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 do indeed protect against discrimination on the grounds of sexual orientation.

In this case there were two potential claims. One for discrimination on the grounds of sexual orientation and another for discrimination on the grounds of political belief.

The sexual orientation claim failed because the Supreme Court found the decision not to make the cake was taken due to the message on the cake, not to the customer being gay.

The political belief claim failed because the Supreme Court found the provisions of Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 could not interfere with the rights to freedom of thought, conscience and religion, and freedom of expression under Articles 9 and 10 of the ECHR.

The court confirmed that Articles 9 and 10 included the right not to be obliged to manifest beliefs one does not actually hold. Therefore, forcing Ashers bakery to bake a cake with a pro-gay marriage message would breach its rights.

## **What can we take from this? Does this ruling now give service providers the right to discriminate against gay people?**

No. The Equality Act 2010 (and the relevant NI regulations) has not been changed by the Supreme Court's judgement. This case should not be interpreted as giving providers of goods and services the right to discriminate against gay people.

In this case the Supreme Court drew a distinction between the protection of people and the protection of messages, but the protection available to people remains as set out in the Equality Act 2010 and the relevant NI regulations.

If you or your members are subject to similar treatment, you must continue to assume you have a potential claim and seek legal advice immediately from your union.

## **But won't this ruling still have implications for other similar cases in the UK?**

Yes, possibly. It could for example, result in service providers arguing that they are entitled to refuse goods or services for other reasons to do with freedom of thought, conscience and religion.

But the Supreme Court made clear that it made its judgement based on the particular circumstances of the case. This means a slight change in the facts may have led to a different decision.

A difference in facts may also have led to a difference in the balancing act between the right not to be subject to discrimination and the rights under the ECHR.

Also, it didn't set out in its judgement a particular test to be used when assessing the message, rather than the person.

## **The technical detail**

*Lee v Ashers Bakery Company Ltd and others* (2018 UK SC49)

### **Applicability of the Supreme Court's decision**

#### **The Supreme Court**

The Supreme Court is the final court of appeal in the UK and hears appeals from the Court of Appeal in Northern Ireland (NI).

In accordance with the system of legal precedent, lower courts are bound by the decisions of higher courts. This means that as the Supreme Court is the highest court in the UK, the principles established in its decisions are applicable to all courts and tribunals in the UK.

#### **The Equality Act 2010**

The Equality Act 2010 does not apply in NI. However, there are several different regulations in NI which provide for protection against discrimination on various grounds. Two of these are Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (EASOR) and Fair Employment and Treatment Order (NI) 1998 (FETO).

The provisions from EASOR and FETO outlined below are extremely similar to S.29 of the Equality Act 2010 which addresses discrimination in goods and services. Therefore, the reasoning used by the Supreme Court in the Ashers case will apply when claims are brought under the equivalent Equality Act provisions in similar cases elsewhere in the UK.

#### **Case facts**

Mr Gareth Lee placed an order with Ashers bakery ("Ashers") for a cake to be iced with the message "Support Gay Marriage" alongside a picture of the cartoon characters "Bert and Ernie". Lee is a gay man. He wanted to take the cake to a party held by an organisation for the LGBT community in Belfast.

Ashers bakery is comprised of six shops employing around 65 members of staff.

The owners of Ashers, Mr and Mrs McArthur, are Christian. They hold a religious belief that gay marriage is inconsistent with the teachings of the Bible. Although Mr and Mrs McArthur have sought to run Ashers in accordance with their beliefs, this has not been made known to the public.

When Lee placed the order, he did not know anything about the McArthurs' beliefs on marriage and neither they nor their staff knew Lee's sexual orientation.

Mrs McArthur initially accepted Lee's cake order, but then cancelled it, explaining they could not fulfil the order as they were a Christian business. She refunded him.

Lee went on to contact the Equality Commission of Northern Ireland and with their assistance pursued discrimination claims against Ashers and Mr and Mrs McArthur.

## Legal claims

Lee brought claims of discrimination on the grounds of sexual orientation and/or on the grounds of religious or political opinion.

The claims were pursued under two regulations in Northern Irish law which protect against discrimination in the provision of goods, facilities and services to the public:

- The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (EASOR) which protect against discrimination on the grounds of sexual orientation.
- The Fair Employment and Treatment Order (Northern Ireland) 1998 (FETO) which protects against discrimination on the grounds of religion and belief.

EASOR and FETO stipulate that it is unlawful for any person concerned with the provision of goods, facilities or services to the public to discriminate against a person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them.

## Northern Irish courts' decision

The NI County Court upheld the claims of direct discrimination on all three grounds. The sexual orientation claim was upheld on the basis that although Ashers had not refused the order because of Lee's sexual orientation (they would have refused the order if he had been heterosexual), the County Court considered support for same sex marriage was unable to be dissociated or "indissociable" from sexual orientation.

Ashers then appealed to the NI Court of Appeal (CoA) which rejected the appeal and upheld the County Court judgement. The CoA found that there had been discrimination by association on the basis that the reason for refusing to supply the cake was founded on Lee's association with gay people. The CoA therefore found that there has been direct discrimination on the grounds of sexual orientation. The CoA did not resolve the question of whether there was discrimination on the grounds of political opinion.

Ashers appealed again, this time to the Supreme Court.

## Supreme Court ruling

Ashers appeal was upheld.

The Supreme Court found that Ashers had not discriminated against Lee on the grounds of sexual orientation, because the decision not to make the cake was taken due to the message on the cake, not due to Lee being gay. It concluded that "the objection was to the message and not to any particular person or persons" and that Ashers would not have supplied the cake to a heterosexual customer.

The Supreme Court rejected the CoA's "discrimination by association" argument on the basis that the evidence presented did not suggest Lee's association with gay people was the actual reason for the refusal to bake the cake.

It also rejected the argument that the message was “indissociable” from Lee’s sexual orientation as one does not have to be gay to support gay marriage.

The Supreme Court rejected the argument that Asher’s refusal to make the cake was discrimination on the grounds of political beliefs. It accepted that support for gay marriage was a political opinion and that there was potential to make a link between the message on the cake and the political opinion of Lee, the message being “indissociable” from the customer’s political opinion. However, the Supreme Court found that the provisions of FETO could not interfere with the rights to freedom of thought, conscience and religion, and freedom of expression under Articles 9 and 10 of the European Convention of Human Rights.

The Supreme Court confirmed that the provisions of Articles 9 and 10 included the right not to be obliged to manifest beliefs one does not actually hold. It concluded that forcing Ashers to bake a cake with the gay marriage message would be in breach of Asher’s rights not to express a particular opinion under Arts 9 and 10.

Rights under Articles 9 and 10 can be limited where there is justification in accordance with the law and where in pursuit of a legitimate aim, but the Supreme Court found none in this case.

### **Further information**

For a copy of the full judgement, please see:

[www.supremecourt.uk/cases/uksc-2017-0020.html](http://www.supremecourt.uk/cases/uksc-2017-0020.html)

For a recently decided similar case please see *Masterpiece Cakeshop v Colorado Civil Rights Commission* (US Supreme Court, 138 S Ct 1719).