

OPINION (2) OF SENIOR COUNSEL

for

CALMAC FERRIES LIMITED

Re: Sunday sailings to Harris and Lewis

1. I am asked, by way of supplementary question to my original Opinion, to consider whether it the current position of CalMac Ferries towards Sunday sailings to the mainland from Harris/Lewis could be explained on the basis of the company's concerns for the culture of the Western Isles, and thus not within the scope of ss.45 and 46 of the Equality Act 2006, which is concerned only with discrimination in relation to goods and services on the grounds of religion or belief.
2. I have two problems of a preliminary nature in responding to this supplementary question. I am told that the suggestion is that the proposal would be contrary to the culture of the Western Isles "as a whole". That I find difficult to accept, given my understanding that attitudes towards Sunday observance within the administrative area of the Western Isles Council are not uniform. The values of the Catholic south are different to those of the Presbyterian north, and it would be more accurate, in posing the question, to speak of concerns for a particular culture which predominates within Harris and Lewis.
3. Secondly, I have difficulty in making a distinction between "culture" and "religion" in this context. If culture for this purpose is defined in terms of the shared set of values and beliefs which differentiates one community from another, then it becomes almost impossible to distinguish that from religious belief, in circumstances where the content of that belief has shaped public attitudes and behaviour for generations. In a society which is itself firmly based on religious beliefs (such as most obviously is found in a Muslim state) it makes little sense to

try to distinguish its culture (in the sense given) from its religion. The same may be said to apply, though rather less dramatically, to the interaction between the religious belief and the culture of Harris and Lewis. The most that can be said, by way of qualification to that proposition, is that if action is taken not on the ground of the belief itself, but because of how it is manifested then that is not likely to be seen as unlawful discrimination: cf. Chondol v Liverpool City Council [2009] UKEAT 0298_08_1102 (11 February 2009) and London Borough of Islington v Ladele and Liberty [2009] IRLR 154, EAT. I have already dealt with that argument in my first Opinion.

4. It is worth noting, too, that the definition of religion or belief under s.44 of the Equality Act 2006 is wider than the original definition provided in the Employment Equality Regulations (Religion or Belief) 2003. The definition as set out in the Act has four strands:

- 'religion' means any religion
- 'belief' means any religious or philosophical belief
- a reference to religion includes a reference to a lack of religion
- a reference to belief includes a reference to lack of belief

5. Since 'belief' means any religious or philosophical belief it is difficult to see how there could be a belief in a particular set of cultural constructs (such as Sunday observance) which does not fall within the definition or prohibited discrimination found in the Equality Act. It is not necessary that the belief system is based on the existence of a deity, although it does have to be of a "philosophical" character. Further, by 45(2) of the Act it is made clear that a reference to a person's religion or belief includes a reference to a religion or belief to which he is thought to belong or subscribe.¹ So it would be enough to constitute unlawful discrimination, to take an example based on the present facts, if Sunday ferry services were withheld by CalMac because of the company's *perceptions* of the

¹ In the Final Regulatory Impact Assessment published by the Home Office on the Proposal for Extending Protection from Discrimination in Goods, Facilities, Services, Premises and Public Functions to Religion or Belief (2005) it is put this way "The provision protects not just those who have an avowed religion or belief but also those who may potentially be discriminated against because of their perceived religion."

religion or belief to which it thought those opposed to such sailings subscribed – even if those perceptions were mistaken because the opposition was, as a matter of fact, determined by cultural standards rather than religion or belief.

6. What is central to the provisions of the Equality Act provisions is that the treatment of which complaint is made must be “on grounds of” religion or belief. (s.45(1)). Even if the objection to Sunday sailings is correctly identified as the product of a culturally-determined attitude which does not fall within the definition of what is prohibited under the Act, it does not follow that the action taken by CalMac in not timetabling Sunday sailings was on those grounds. To take an analogy from the law of unfair dismissal; it has been held that it does not follow from the fact that an employee has committed an act of misconduct and is then dismissed that the dismissal is the reason for the dismissal: ASLEF v Brady [2006] IRLR 576, EAT. Thus, even if, contrary to what has been suggested above, the correct factual explanation for opposition to Sunday sailings is a culturally-determined attitude not amounting to a qualifying religion or belief as defined by the Equality Act, it does not follow that this was the reason for the company’s actions. As pointed out in the earlier opinion (paras. 21-22) I can see no basis in the documents I have seen to indicate that the company’s decision not to provide Sunday sailings was taken on any ground other than respect for religious sensitivities.
7. For all these reasons, having considered the argument which I am told has been advanced by the Council of the Western Isles that there is a non-religious explanation for opposition to Sunday sailings, I see no reason to depart from the conclusions contained in my original Opinion.

Brian Napier QC

29th May 2009