

OPINION OF SENIOR COUNSEL

for

CALMAC FERRIES LIMITED

Re: Sunday sailings to Harris and Lewis

1. I am asked to advise on the question whether the Memorialist's current position with regard to Sunday sailings between mainland Scotland and Skye and Harris/Lewis may give rise to unlawful discrimination in the supply of services on grounds of religion or belief, contrary to ss.45 and 46 of the Equality Act 2006.

General background

2. There are at present no such Sunday sailings to the mainland although I am told that on purely economic grounds the projected volume of traffic would be likely to support such a service. The sample timetable which accompanied my instructions (comprising Annex 1 to the Public Service Contract between the Scottish Ministers and CalMac Ferries Limited) shows that, with the exception of the Harris/Lewis-mainland and Skye routes, Sunday ferry services are routinely provided on the Memorialist's other routes. An inter-island service between North Uist and Harris has been operated by the Memorialist on Sundays since 2006. I am told that the Memorialist is capable of undertaking Harris/Lewis Sunday sailing to the mainland, and there is evidence of substantial public and business demand for this. In the last few years there have been petitions and counter-petitions presented to the Memorialist by those who either wish to see the Company change its position on Sunday sailings, or wish the status quo to continue.

3. The absence of a Sunday service has its roots in the religious beliefs held by a section of the community living in the Western Isles. The Memorialist has for long been aware of and has respected the deeply-held religious feelings of islanders (and others) who object to Sunday sailings because it offends their particular beliefs. Opposition is focused mainly through the Free Church of Scotland and the body known as the Lords Day Observance Society (the latter now having the new name of “Day One”). On the other hand, business interests, and a sizeable proportion of the local population are in favour of introducing a Sunday ferry service to the mainland and are pressing strongly for change. I do not have any figures to tell me the relative strength of the different interest groups, but I have been told that in recent years support for the introduction of a Sunday service has been growing, while those opposing change have seen a reduction in the level of popular support they command.
4. Public bodies express a variety of views. The Western Isles Council has said that it is against the introduction of Sunday sailings, but it also recognises that it is a matter for the Company. The Highlands and Islands Enterprise Board favour the introduction of such a service. According to extracts from Board Minutes which I have seen, the Scottish Government’s then Transport Minister in 2006 (Mr. Tavish Scott) was of the view that the issue of Sunday sailings was an operational matter for the Company. As far as I know that is still the position of Scottish Ministers on the matter. Politicians, in other words, are unwilling to be seen as backing any particular outcome and are content to leave the burden of deciding if and when there should be change to the Memorialist.
5. A recent change in the law has however moved matters on.
6. Since October 2006 legislation has been in force (Equality Act 2006, ss.45-46) which has added a specific legal dimension to the difference of views noted above. For the first time, it is open to argument that the non-provision of service by the Memorialist may be open to challenge on legal grounds. This arises because under the Equality Act it is unlawful to discriminate (on grounds of religion or belief) in the provision of goods, facilities or services.

7. Section 45 defines the meaning of discrimination on grounds of religion or belief, and states, in s.45(1) that

A person (“A”) discriminates against another (“B”) for the purposes of this Part if on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A’s religion or belief) A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).

8. Section 46 applies this definition of discrimination to the provision of goods, facilities and services, and provides (s.46(1)):

It is unlawful for a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person (“B”) who seeks to obtain or use those goods, facilities or services-

(a) by refusing to provide B with goods facilities or services,

(b) by refusing to provide B with goods, facilities or services of a quality which is the same as or similar to the quality of goods, facilities or services that A normally provides to—

(i) the public, or

(ii) a section of the public to which B belongs,

(c) by refusing to provide B with goods, facilities or services in a manner which is the same as or similar to that in which A normally provides goods, facilities or services to—

(i) the public, or

(ii) a section of the public to which B belongs, or

(d) by refusing to provide B with goods, facilities or services on terms which are the same as or similar to the terms on which A normally provides goods, facilities or services to—

(i) the public, or

(ii) a section of the public to which B belongs

9. By s.46(2)(e) it is provided, in particular, that the prohibition of discrimination in s.46(1) applies to facilities for transport or travel.

10. The Memorialist provides services¹ to the public in the form of the ferry services it offers between the Scottish islands inter se, and between the islands and the mainland. It is thus a “person...concerned with the provision to the public...of services” within the meaning of s.46(1). As noted above, it does so pursuant to a contract (“the Public Service Contract”) it has with The Scottish Ministers. This contract (which in its current version dates from 2007) makes provision for specified services which the Memorialist must provide, but the obligations so imposed do not require Sunday sailings between the mainland

¹ It could also be said that it offers “facilities for transport” in terms of s.46(2)(e), but this is deemed to be covered by s.46(1), and so adds nothing of importance for present purposes.

and Skye and Harris/Lewis. In turn the Memorialist's Published Timetable makes no provision for such sailings

11. My understanding, however, is that were the Memorialist to make a decision to introduce Sunday ferry sailings, it would have the power to do so under the present contract. By clause 3.5.4 provision is made for the Operator (i.e. the Memorialist) making changes (with the consent of the Scottish Ministers) to the departure and arrival times set out in the Published Timetable.

12. I conclude that the general position is as follows: while the Memorialist is not presently required under the contract it has with Scottish Ministers to provide for Sunday sailings, it could under the terms of that contract seek to make provision for such sailings relying on clause 3.5.4 of the contract. It would by the terms of that contract have to seek the approval of Scottish Ministers to any change which would introduce Sunday sailings, but it is provided in clause 3.5.4 that the consent of Scottish Ministers to a proposed change in departure times "if the proposals are as a result of and are required to comply with Applicable Law." The meaning of "Applicable Law" is set out in clause 1.1, and extends to the requirements of legislation. Thus, if sections 45 and 46 of the Equality Act 2006 were to be seen as making unlawful the present situation, Scottish Ministers would be obliged under the terms of the contract to give their consent to changes in the timetable designed to end such unlawfulness. I, of course, cannot say what views Scottish Ministers might have in such an eventuality, but I very much doubt Scottish Ministers would seek to withhold their consent in circumstances where they were of the informed view that to do so would be to give their support to an act that was itself (because of breach of the Equality Act) unlawful. The fact that a contractual obligation to act in accordance with the requirements of the law only makes it all the more likely that consent would be forthcoming in such a situation. Whether Scottish Ministers would give consent to change where they were not convinced it was required to bring compliance with the Equality Act is another matter, but not one on which I can offer any advice.

13. The obligation in question under the Equality Act is defined in terms of a refusal to provide services to a person (“B”) who seeks to obtain or use these services. The refusal may either be absolute (in the sense that no services are provided) or qualified, in the sense that the refusal may be to provide services that are as good quality, or provided in the same manner, or on the same terms as they would normally be provided to a section of the public to which B belongs.

14. From the papers I have seen it is not clear to me that a formal “refusal”, as the legislation requires, has as yet taken place. What has happened, however, is that a number individuals (unidentified, save that they are said to be “residents of Harris and Lewis”) have made an approach to the Equalities and Human Rights Commission about the possibility that the non-provision of Sunday services might constitute unlawful discrimination, and the EHRC has in turn made a general inquiry (by letter dated 20 February 2009) to the Memorialist. By that letter, the Memorialist is asked to explain why there are no Sunday sailings.

15. It would thus appear that, so far as the matter has been taken up by way of preliminary inquiry by the Equalities and Human Rights Commission, there has as yet been no “refusal” in terms of s.46 by the Memorialist to provide a Sunday service, since it has not been formally asked to provide such a service by the individuals who have made contact with EHRC. It is only likely to be a matter of time, however, before such a specific request is made, either through the EHRC or otherwise. When such a request is made it will be met with a refusal, unless and until the policy currently adopted by the Memorialist changes. My instructions state that “CalMac does not provide a mainland service to Harris and Lewis due to the Lord’s Day Observance Society’s insistence on Sunday Observance.”

The law

16. In my view there is a prima facie case that such a refusal will be unlawful under ss.45-6 of the Equality Act, although the matter is not wholly free from doubt. There are, however, two sets of argument to be considered which point in the opposite direction, i.e. against the view that there is prima facie unlawful discrimination. The argument in favour of there being discrimination may be said to arise from a “common-sense” reading of the words of s.46 against the historical background of events outlined above, but, as often is the case, that approach, based on ordinary language and the natural meaning of words, has to be refined to take account of legal subtleties.
17. The first point to note, however, is by way of preliminary comment on the notion of discrimination which underpins the legislation. The religion or belief which provides the reason for the unlawful act need not be that of the person who makes the complaint. Thus it is sufficient if A refuses a public service to B on the grounds of the religion or belief of C. The Explanatory Notes to the Equality Act give the example of a shopkeeper who refuses to serve a customer, not because of the customer’s religion, but because of the religion of his friend who is in the shop with him. So to take the facts presently relevant, the refusal of a Sunday sailings requested by individual residents of Harris/Lewis on the ground of the religious beliefs of other individuals (whether they belong to the Lords Day Observance Society or other organisation, or are members of no organisation at all) would, other requirements being met, suffice to show discrimination as that concept is defined under the Act.

What are the reasons for the non-provision of service?

18. Before any conclusion can be reached as to whether a refusal on the part of the Memorialist actually does give rise to unlawful discrimination on grounds of religion, identification of the reasons for the refusal is of vital importance. In particular, a distinction has to be made between a decision which is taken because of the beliefs of an individual, and one taken because of the way in which the individual manifests these beliefs. Only in the former case is there the basis for a finding of unlawful discrimination.

19. The point is neatly made in a recent decision of the Employment Appeal Tribunal (London Borough of Islington v Ladele and Liberty [2009] IRLR 154, EAT.) The case concerned the disciplining of a registrar of births marriages and deaths, who had refused to carry out ceremonies of civil partnership, involving couples of the same sex. She was a committed Christian and saw same-sex marriages as sinful. Nevertheless, in disciplining her for her refusal, her employer was found not to be committing an act of unlawful discrimination. As the court saw it, she was disciplined not for her beliefs, but for how she put her beliefs into practice – and that was not caught by the legislation protecting her against discrimination on grounds of her religion.
20. In the words of Elias J. (at para. 55) “If I burn down my employer’s factory because of my philosophical anarchists beliefs, an employer who dismisses me thereafter for burning down the factory is not doing so because of my philosophical beliefs. Those beliefs may be the reason for my action but they are not the reason for the employer’s response.”
21. What that decision emphasises is the importance (as in all discrimination cases) of looking closely at the reasons why the alleged discriminator acted as he did. To borrow an approach that has recently been endorsed by the Court of Appeal in England with regard to discrimination in pay on grounds of sex (Redcar & Cleveland Borough Council v Bainbridge and Surtees v Middlesbrough Borough Council [2008] IRLR 776, CA per Mummery LJ at para. 103) what is likely to be important is the *underlying* as opposed to the *immediate* reason for the behaviour in question. That, as far as I am aware, is a stage which has not yet been reached on the present facts. Since there has not yet been a “refusal” as is required by s.46 of the Equality Act, it is premature to judge the reasons for such a decision. What can be said, however, is that if the underlying reason for such a refusal is found to be not the religion or belief of those who object to Sunday sailings, but rather (say) the Memorialist’s concerns about bad publicity, or its concern to project a particular image of the Company, for public relations or other purposes, then

that would not give rise to a refusal on grounds of religion and belief. The identification of reasons would, of course, be a matter of fact for a court to decide, after hearing evidence. In general commercial organisations may be expected to act for commercial (as opposed to moral or theological) reasons, but this is not always so. In the case of the Memorialist, there is evidence that its responsible officers have taken decisions to maintain the ban on Sunday sailings because of respect for the strongly-held religious beliefs of objectors to change. Thus the Board Minutes of the Memorialist for a meeting held on 29 March 2006 contain the following:

“In considering the proposals [for the introduction of a Sound of Harris Sunday sailing] the Board fully acknowledged the sensitivities associated with the proposals arising from the respect for the sanctity of the Sabbath held by many of the residents of Lewis, Harris and North Uist and recognised that *accordingly* [emphasis added], this was a difficult decision to take.”

22. On that occasion, of course, the ultimate decision was in favour of the introduction of the disputed service. In relation to Sunday sailings to and from the mainland, however, the religious sensitivities of local residents has, until now, apparently taken precedence. I have seen no evidence to suggest that the decision to keep the ban in place has been taken on any ground other than respect for religious sensitivities.
23. Where allegations of discrimination on grounds of religion or belief (or, for that matter, other prohibited grounds such as sexual orientation) are made, it is obvious that an alleged discriminator will seek to defend his position as best he can. One way of so doing is by claiming that the action taken was not because of the beliefs or attributes of the individual or individuals concerned, but rather because of how these were manifested, or for some other reason that points not to the belief itself, but to some consequence or event associated with the holding of belief. For that very reason, the courts and tribunals are understandably cautious in allowing such a defence to succeed.² Were it to be

² See, e.g., *O'Neill v Governors of St Thomas More RCVA Upper School* [1996] IRLR 372, EAT where the same judge who referred to the need of going to the “underlying reason” for conduct in

too easily accepted that action taken apparently on religious grounds was in fact taken because of a consideration causally related to but distinct from these grounds themselves, there would be a risk of undercutting much of the impact of the law.

Is there a need for the service to be provided before a refusal can be challenged?

24. It is certainly arguable that the aim of the new law was to go no further than preventing someone (on grounds of religion or belief) from providing a service *that otherwise would be provided* to members of the public, or a section of the public. The point is made in the Home Office's document: Proposal for Extending Protection from Discrimination in Goods, Final Regulatory Impact Assessment. (January 2005) in two practical examples (para. 12)

12. The protection being extended is intended to capture direct discrimination, indirect discrimination and victimisation. In essence, the new legislation will make it unlawful for businesses or public functions to discriminate in the provision of the goods, facilities or services that they would normally offer to someone on the grounds of his or her religion or belief. For instance:

- A butcher who sold only traditional forms of meat would be unable to refuse to sell these meats to someone on the grounds of their religion or belief. However, the butcher would not normally be regarded as being discriminatory if he refused requests to stock either halal or kosher meat.
- A kosher butcher would be unable to refuse to sell these meats to someone on the grounds of their religion or belief. However, the butcher would not normally be regarded as being discriminatory if he refused requests to stock halal meats.

25. In the course of the Equality Act's passage through Parliament, there was discussion of the same point in Committee, in a format which foreshadowed the butcher example subsequently used in the Impact document. The following extract occurs:

Bainbridge (Mummery J., as she then was) rejected an argument that the dismissal of a woman was not discriminatory because it was not for pregnancy, but rather a consequence of pregnancy.

Dr. Harris: I am grateful to the Minister for agreeing to consider my point. The question I am raising does not relate to the issue of the skill but is a general question: will high street butchers or supermarkets be expected to provide to people who want them certain services that would, potentially and practicably, be available if commercial businesses chose to go into the market? If they do not do so, will they run a risk of being held to have discriminated under the clause? It would be helpful if the Minister could clarify that at some point. I suspect that the clause does not force commercial decisions on commercial organisations, but it is not all that easy to tell. (Hansard, 6 December 2005, col. 164)

26. In the present context, the question might arise in this way. It could be argued that since there is no Sunday service presently provided by the Memorialist, there is no basis on which a refusal to provide such a service is open to challenge under s.46. That prompts the question whether the situation is akin to that where a traditional butcher is asked to provide Halal meat to satisfy the religious needs of individuals, and is then challenged when he refuses to change his existing commercial practice by stocking such meats.
27. The examples given in the Home Office document allow for room for manoeuvre by providing that “normally” the butcher example would not be seen as giving rise to unlawful discrimination. But that, of course, is no more than government guidance, and has no binding (or even persuasive) force when it comes to interpretation of the statute by the courts.
28. A better approach is to analyse the facts against the wording of the statute. The starting point is recognition that it is logically possible to see the present situation in one of two ways. It can be seen as a situation where there is simply “no service” on Sundays or, alternatively, one in which the ferry service that is offered by the Memorialist is provided (to those seeking to travel to or from the Western Isles on Sundays) on terms which are different to (and less favourable than) the service offered to other islands. If the situation is analysed in terms of “no service” then it certainly becomes much more difficult to argue for the application of s.46. That is because if what might be termed the “slippery slope” argument. If the new law were to be read as

obliging commercial bodies to venture into wholly new areas of economic activity, on the basis that to refuse to do so offends some person's religious sensitivities, or lack of them, then the scope of the prohibitions contained in s.46 go very wide indeed. Apart from the butcher example, used above, another illustration might be based on a bookshop which exists to sell the books and material supportive or associated with a particular faith. On the widest interpretation of s.46, the Christian faith bookshop (for example) might face challenge because it does not stock literature extolling the virtues of Judaism, Islam or any other particular set of religious beliefs. Were the law to be interpreted to have the effect of compelling the bookshop to provide such literature, however, it would have to be by way of judicial decision. In my view it would be extremely difficult to persuade a judge that the intention of Parliament was for the legislation to be read in this expansive way.

29. There is, however, an alternative way of analysing the situation which is more likely to prevail were the matter to come before the courts. It can be said that the Memorialist is already concerned with providing facilities for transport or travel (in the form of ferry services) to the public, or (alternatively) to that section of the public comprising those with an interest in sailing to and from the Scottish islands. Normally the service offered is a full seven-day service, as the timetable shows. But with regard to those who seek to make use of the Western Isles service on a Sunday, there is a restriction imposed on the services offered because of the religious objections of the Lords Day Observance Society. That restriction may thus be characterised as a refusal to provide facilities for transport on terms which are the same as the Memorialist normally provides to persons seeking to travel by its ferry services on Sundays. If it is seen in that way, the outcome is that the Memorialist in not providing a Sunday service is vulnerable to challenge by reference to s.46(1)(d)(ii).

30. I recognise that deciding the situation is to be seen as the offering of facilities for travel on different terms rather than as a simple refusal to provide any facilities at all is a matter of choice, in the sense that it is impossible to argue definitively that one analysis is more correct than the other. That said, there

are indications that the matter should be seen as a refusal to offer a service on terms elsewhere available. The contract under which the Memorialist operates is described in its preamble as providing “lifeline ferry services for the Clyde & Hebrides, together with associated harbour services.” It is a matter of fact that a service is provided to Lewis and Harris which, but for the prohibition on Sunday sailings, is the same as the service provided to other destinations. In short, in my opinion, it is a fair reading of the situation to describe the position as being where, because of considerations for the religious feelings of a section of the community, the Memorialist is prepared to offer only a modified (and, from the point of view of those seeking to travel on Sundays) less favourable version of its general ferry service.

Conclusion

31. For the above reasons, my overall view is that it is more than likely that the continuation of the Memorialist’s refusal to provide Sunday sailings on the routes between Lewis/Harris and the mainland and Skye is in breach of s.46(1)(d)(ii) of the Equality Act 2006.

Brian Napier QC
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