CHURCHES' LEGISLATION ADVISORY SERVICE

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Disclaimer

CLAS is not qualified to advise on the legal and technical problems of members and does not undertake to do so. Though we take every care to provide a service of high quality, neither CLAS, the Secretary nor the Governors undertakes any liability for any error or omission in the information supplied.

It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

CHARITIES AND CHARITY LAW

Charity Commission: statutory inquiry into Birmingham Diocesan Trust

For information

On 21 December, the Charity Commission opened a statutory inquiry into The Birmingham Diocesan Trust (234216) – the charity for the Roman Catholic Archdiocese of Birmingham – focused on the charity's safeguarding governance and the adequacy of its response to recent reviews. The Trust is a large charity, providing services accessed weekly by some 60,000 people, and it works across many different regions and has a wide range of beneficiaries.

In February 2018 the charity notified the Commission that the Independent Inquiry into Child Sexual Abuse (IICSA) had selected it as a case study and had listed a hearing into historic safeguarding issues at the charity for November 2018. During the summer of 2018, as part of its preparation for the hearing, it commissioned a number of reviews of its safeguarding policies, procedures and practices. In late October and November, it provided the Commission with copies of the results of these independent audit reviews which highlighted some serious failings and concerns over how the charity was handling safeguarding matters.

The Commission requested further information from the charity via its solicitors about its response to the results of the reviews, to assess its management of any live risks, if the charity had adequate procedures on safeguarding in place and its response about the areas in need of improvement. The responses supplied during November and December were not sufficiently timely or adequate to satisfy the Commission, given the gravity of the issues raised by the reports, nor did they give adequate reassurance that the key risks were being managed swiftly and effectively.

Part of the charity's response to the review findings was to recruit a new interim head of safeguarding. His first report, three weeks in, emphasised the need to address the governance failures and ensure that the charity was taking sufficiently timely action and applying sufficient resource to respond to the concerns.

The purpose of the statutory inquiry is to examine and provide assurance about the charity's governance, operational management and its policies and practices with regard to safeguarding and people protection issues, particularly in relation to:

- its risk management procedures, and handling of incidents reported since 2016;
- its responsibility to provide a safe environment for its beneficiaries, staff and other charity workers;

- vetting and following of DBS procedures in relation to its employees, volunteers and other charity workers;
- its response to, and actions in relation to, the audit report review; and
- whether sufficient steps are being taken to ensure public trust and confidence in the charity.

Safeguarding procedures in the schools that come under the oversight of the diocese are not, at this time, within the scope of the inquiry.

[Source: Charity Commission – 12 February]

EMPLOYMENT

National Minimum Wage and 'sleep-in' careworkers

For information

BWB reports that the Supreme Court is to hear an appeal from Mencap about the pay of social care workers on 'sleep-in shifts'.

In *Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641, the Court of Appeal held that 'sleepers-in' are to be characterised as 'available for work' within the meaning of Regulation 15 (1)/32 of the National Minimum Wage Regulations rather than actually 'working' within the meaning of the Regulations and that the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working.

The appeal is not currently listed on the UKSC website.

[Source: Bates Wells Braithwaite – 26 February]

Powers of employment tribunals: Government guidance

For information

The Government has published helpful guidance for users on the powers of Employment Tribunals. It covers the general principles; actions before a hearing (including deposit orders); costs/expenses and preparation time orders; wasted costs orders; and powers relating to breaches of employment law.

The guidance is applicable in England, Wales and Scotland and relates to the employment tribunal rules as at the time of publication. Further advice on employment law is available from Acas. General information on employment tribunals can be found on GOV.UK and detailed information on the tribunal process is available from HM Courts & Tribunals Service and in Presidential Guidance.

[Source: HM Government – 21 February]

Religious discrimination in employment: *Gan Menachem v De Groen*

For information

The balance between the rights of employers and the rights of employees in matters of religious observance seems to have shifted slightly in favour of employers as a result of the Supreme Court in *Ashers Baking* – as the following demonstrates.

Ms De Groen, a teacher at a private Orthodox Jewish nursery school that followed the teachings of the Lubavitcher Rebbe, was sacked because she was cohabiting with the man whom she later married. Before the Employment Tribunal, instead of claiming unfair dismissal she had brought claims in relation to various acts of discrimination said to have arisen in the context of the events which led up to her sacking. She explained that while she understood that some ultra-Orthodox Jews would see cohabitation outside marriage as contrary to a fundamental tenet of Jewish law (as they understood it), she did not herself believe that to be so. The ET found that she had been unlawfully discriminated against on grounds of her sex and her religious beliefs. The nursery appealed.

In *Gan Menachem Hendon Ltd v De Groen* (Sex Discrimination: Religion or Belief Discrimination: Harassment) [2019] UKEAT 0059 181202, there were two issues in the appeal: the conclusion on the claim of direct sex discrimination, contrary to s.10(1) Equality Act 2010 and the conclusion on the claim of harassment on grounds of sex [10].

Crucially for what follows, on the issue of religious discrimination Swift J concluded that the ET had misunderstood the law:

> 'The conclusion that section 10(1) of the 2010 Act prohibits less favourable treatment by an employer on the basis of its own religion or belief is wrong. It is a conclusion that cannot survive the reasoning of Baroness Hale in her judgment in *Lee v Ashers Baking Co Limited* [2018] 3 WLR 1294, at §§42–45 (handed down after the Tribunal's Judgment in this case)…[20] … The purpose of discrimination law, she said, was the protection of a person who had a protected characteristic from less favourable treatment because of that characteristic, not the protection of persons without that protected characteristic from less favourable treatment because of a protected characteristic of the discriminator' [21].

Further, Swift J concluded that 'this is not a case about whether or not a non-religious belief is a belief which is protected' [29]. Rather:

> '*This is a case about differing religious belief within a religion*. Ms De Groen is Jewish; she considers herself a practising Jew. It is not her case that her belief is either novel or outside the scope of Judaism. For the purposes of this part of my judgment, I must assume … that the root cause of the events that resulted in her dismissal was the disagreement about whether adherence to Judaism excluded cohabitation outside marriage. The Tribunal recorded that some Jews consider

> cohabitation outside marriage to be impermissible, but others do not. In the course of this appeal, neither party sought to persuade me otherwise. Disagreements on such matters are not exclusive to Judaism. It is entirely possible in any organised religion that disagreements exist as to whether some or other practice or value is an important part of the religion, or to the extent of its importance. It is in the nature of many organised religions that there will be differences of opinion. *Members of the religion may disagree but, absent schism, they remain members of the same religion*.' [30: emphasis added].

The Nursery's appeal against the conclusion that it directly discriminated against Ms De Groen because of the religion or belief protected characteristic therefore succeeded [38]. The appeal against the finding of direct discrimination and harassment on grounds of sex, however, was dismissed.

The claim was remitted to the Employment Tribunal for consideration of remedy on the claims of direct sex discrimination and harassment on grounds of sex [68].

Comment: *De Groen* is one of the first reported decisions of the EAT following the Supreme Court's decision in *Ashers Baking*. In that case it was established that discrimination on the grounds of the alleged discriminator's own religious belief is not enough to establish a claim of direct discrimination. The EAT's decision suggests that the decision in *Ashers Baking* might possibly restrict future claims for direct discrimination in the workplace on grounds of religion or belief.

[Source: BAILII – 12 February]

FAITH AND SOCIETY

Civil Partnerships, Marriages and Deaths (Registration etc.) Bill

For information

The Civil Partnerships, Marriages and Death (Registration etc.) Bill has finished its committee stage in the Lords and is awaiting report and third reading, which are scheduled for **1 March**. The current text of the Bill is here.

[Source: CLAS – 27 February]

FUNDING

Fundraising Preference Service: changes from 1 March 2019

For information

The Fundraising Regulator has issued a reminder about an important change to the Fundraising Preference Service from 1 March 2019. From this date, charities will have 21 days to action a suppression request instead of 28 days. The Fundraising Regulator says that the change brings the service in line with the Data Protection Act 2018 and the Code of Fundraising Practice. The change means that from 1 March:

- Any person that makes a request on the service will be told that charities have 21 days to action the request.
- Any person that makes a request will be able to make a 'follow-up' request after 21 days (previously 28 days) if that person still receives direct marketing from the charity
- The Regulator will consider complaints about direct marketing received by individuals 21 days after the first suppression request was made

Any member of CLAS that uses direct marketing communications as a method of fundraisng should prepare for this change now by considering how this will affect their internal processes. On 1 March, all users accessing the FPS charity portal will be required to accept updated terms and conditions that reflect the change from 28 to 21 days.

Separately, the Board of the Fundraising Regulator has agreed that it will name all organisations which it investigates, whether the complaint is upheld or not. Organisations will be named in all investigations into complaints received on or after **1 March 2019**.

[Source: Fundraising Regulator – 13 February]

Gift Aid Small Donations Scheme changes approved

For information

The Statutory Instrument increasing from £20 to £30 the maximum donation on which a charity can claim a top-up payment under the Gift Aid Small Donations Scheme (GASDS) was laid before Parliament on 14 January 2019. The Order specifies that it will take effect from **6 April 2019**.

Institute of Fundraising: guide to telephone fundraising

For information

The Institute of Fundraising has published a free guide about telephone fundraising, saying that the method is still 'a crucial way to develop relationships with supporters'.

A Good Call: Using the Telephone for Successful Fundraising urges fundraisers to develop best practice in its telephone fundraising as a way to help charities build stronger relationships with supporters.

[Source: Institute of Fundraising – 2 February]

PROPERTY & PLANNING

Social housing providers and religion: *R (Z & Ors) v Hackney LBC*

For information

In *R (Z & Ors) v Hackney London Borough Council & Anor* [2019] EWHC 139 (Admin), a non-Jewish woman Z had four children, including a son with autism. She was at the top of Hackney's list for a four-bedroom home. The co-defendant, the Agudas Israel Housing Association ('AIHA'), which provides social housing for Orthodox Jews in north London, does not accept applications from anyone outside the Orthodox community. Six four-bedroom properties owned by AIHA became available, but Ms Z was not allowed to apply for one of them and she alleged discrimination. It was common ground that AIHA's arrangements involved direct discrimination under s.13(1) Equality Act 2010 but AIHA contended that it was rendered lawful by s.158 and s.193 of the 2010 Act.

The Court took the view that it the reasons for AIHA's policy were self-evident: if AIHA were to allocate any of its properties to non-members, it would seriously dilute the number of properties available for Orthodox Jews and would fundamentally undermine its charitable objective of giving preference to Orthodox Jews' [74]. It also concluded that AIHA's arrangements were proportionate under s.158 because of the disadvantages and needs of the Orthodox Jewish community and the fact that they had large families [76]. AIHA was recognised by the Regulator of Social Housing as a 'small provider' and its 470 properties in Hackney were a tiny proportion of the general needs housing potentially available for letting in the area [78]. The Court concluded that AIHA had met the criteria under s.193 [85-104] and, so far as the claim against Hackney LBC was concerned, so long as AIHA was acting lawfully (which it was), Hackney LBC had no legal right or power to intervene [114]. Claim dismissed [135].

There is a much longer note on the *Law & Religion UK* blog, here.

[Source: BAILII – 5 February]

SCOTLAND

Scottish Government: consultation on law of succession

For information and possibly for action

The Scottish Government has opened a consultation on the law of succession, focusing on intestacy. The key area under consideration is how an estate should be split where there are both a surviving spouse/civil partner and surviving children. The paper seeks views on a fresh approach to reform of the law of intestacy with reference to regimes which operate elsewhere.

The paper also seeks views on extending an alternative approach to cohabitants to test whether views have shifted on what cohabitants' rights on intestacy should be.

The consultation closes on **10 May**.

[Source: Scottish Government – 17 February]

TAXATION

Finance Act 2019

For information

The Finance Bill 2018-19 received Royal Assent on 12 February 2019 as the Finance Act 2019.

Making Tax Digital (MTD) for charities: update

For information and possibly for action

In a statement to Parliament last week the Financial Secretary to the Treasury confirmed that the MTD timeline will proceed as planned (despite some speculation that there may be a delay). VAT registered churches will need to ensure that they are compliant with MTD reporting requirements by 1 April 2019, unless their start date has been deferred until 1 October 2019. HMRC officials have confirmed that all organisations receiving a deferred MTD start date should now have received a letter to this effect (see an example here). If you think your organisation should be deferred but have not received a letter, you are are encouraged to contact the Charities VAT helpline.

Members are reminded that HMRC has published VAT Notice 700/22: Making Tax Digital for VAT, which provides full guidance on how MTD will work in practice. HMRC has published a helpful stakeholder communications pack, including FAQs, as well as a new "mythbusters" information sheet about MTD. Things for churches to remember include:

- HMRC will be launching an MTD 'software choices viewer' at the beginning of March through which you can select potential MTD software based on criteria you input to it (e.g. the cost, user type and type of software needed)
- It is very important to consider the timing of when exactly to sign up for MTD - this is especially important in relation to the timing of direct debits.
- HMRC will take a 'fairly soft approach' to record-keeping penalties where businesses are clearly trying to get it right, but if a business is making no effort then HMRC will 'come down hard' on penalties.
- 1 April is not a 'sign up deadline' - you need to be signed up to MTD in time to submit your first mandated return (but you'll need to be keeping digital records from the start of that return period) - this will be the end of the first quarter starting on or after 1 April.