

# LSE-Featherstone Sexual Orientation and Gender Identity Moot Competition 2015-16

## Problem

### Factual background

1. Mike Harkness is the editor of the magazine *Out and About*. The magazine is based in Manchester. It is oriented primarily towards the LGBT+ community, although it enjoys a broader readership. It is circulated free of charge in hard copy through cafés, restaurants, bars, clubs and cultural venues throughout Manchester and some other Northern cities. It offers news content and campaigning journalism alongside 'softer' lifestyle reporting, cultural commentary and artistic and other reviews. It also carries a range of commercial and classified advertising. It has a circulation of approximately 20,000 copies each week. The magazine also has a website that receives upwards of ten thousand visits each week. A small staff of three full-time journalists - including Harkness - and several part-time, freelance and voluntary contributors is supported through advertising revenues. Approximately 75% of the magazine's staff and contributors identify as LGBT+. The magazine has won awards for both its journalism and its role in campaigning on LGBT+ and wider issues.
2. Covenant Printing Services ("Covenant") is a small, family run printing firm based in Manchester close to the offices of *Out and About*. Four members of the same family – Daniel, Mary, Mark and John Gilroy, a husband and wife and their two sons - staff the business. Each family member is a committed Christian, and attends an evangelical church in the neighbourhood where they live. All Covenant promotional literature includes the notice: "We are a Christian-run, family business. While we will endeavour to meet all your printing needs, we reserve the right to refuse to print material that we consider to be unlawful, obscene, offensive or political". The same notice is displayed prominently in the front-of house print shop at the business premises.
3. The dispute between the parties concerned the printing of an issue of the magazine in spring 2015. The magazine's regular printer had gone into liquidation, and Harkness was forced to seek alternative printing services at short notice. He had first contacted Covenant by telephone, having often noted the premises while *en route* to the magazine's offices. In a very brief

conversation, he had provided Daniel Gilroy with a brief outline of his immediate requirements. He had also suggested that a longer term relationship might develop given the loss of his previous printer. At no point in the short conversation did Harkness indicate the precise nature of the publication in question. Mr Gilroy had indicated that Covenant had the capacity, and in principle would be very happy to take on the work. He made a passing reference to the fact that the printing firm upheld certain 'moral standards', including "not printing anything obscene or unlawful". Harkness had affirmed cursorily that the magazine included no such material, promised to send on the made-up copy that afternoon by email, and to call into the print shop before the close of that working day to meet Mr Gilroy and to discuss the detail of the printing contract.

4. The contentious issue of the magazine comprised a 'special edition' focused on celebrating "new family norms". As was standard for *Out and About*, the intended front-page consisted of a large font header coupled with a small font date and issue number superimposed over a portrait style photograph. The front-page gave some indications of the content of the magazine by way of short-form headlines set out surrounding the photograph. Aside from aspects of the special edition focus, the themes trailed on the front page included racism in the LGBT+ community, LGBT poverty and mental health, the criminalisation of homosexuality in Commonwealth states, an interview with a celebrated lesbian interior designer, and the pending launch of a new LGBT+ film festival in Liverpool.
5. The front-page photograph comprised a stylised family portrait, depicting a man, a woman and three children. One of the children – a boy in his early teens, stood between the parents with his hand on the shoulder of the woman who was seated on a tall stool. The adult male figure stood some way to the side of this pair, with his body angled towards them. The other two children – a toddler and a pre-school child - sat on the floor playing to the foreground between the other three subjects. The portrait was set in what appeared to be a large family kitchen in a loft-style apartment. In short, the photograph depicted a typical domestic scene in which each subject appeared to be thoroughly content.
6. The parents depicted in the photograph are both well-known in the LGBT+ community and to some extent beyond. The adult woman is the transgender actor Nina Dublin. The adult man is the acclaimed author and activist Jack Pretty. The couple have been together for a number of years, and were married in early April 2014. Nina Dublin has played a number of roles in prime-

time television dramas, depicting male characters and latterly a transgender woman. She is a pre-operative transsexual and legally a man. As is evident in the front-page photograph, she still presents with some stereotypically “male” characteristics. The eldest child is the son of Jack Pretty from a previous marriage. The middle child is the daughter of Nina Dublin with a former partner, while the toddler was adopted by Dublin and Pretty in January 2015. While Jack Pretty presents as a cisgendered man, in fact he is also transgender. All of these facts are relatively widely known, albeit that they were not known to any member of the Gilroy family at the time of the dispute.

7. At trial, Mike Harkness gave evidence regarding the photograph. He explained that: “the family had been chosen to front the issue of the magazine because their life histories were well-known. This allowed us to introduce a series of fairly subtle and complex themes – some of which we hoped to cover in the body of the magazine - very efficiently”. He added that “the difficulties this particular family has faced are also very well-known, and the fact that they have come through it all offers precisely the sort of positive context that we hoped to convey... in particular, we thought the relation of the oldest child to Nina Dublin in the photograph conveyed an enormously powerful message”.
  
8. The magazine copy was sent to Covenant by email some time before Harkness visited the print shop. Daniel Gilroy was not present at this time, and Harkness was met by Mary Gilroy. John and Mark Gilroy were also both present, although Harkness spoke primarily with Mrs Gilroy. In evidence, Mary Gilroy explained that the family members had considered the front-page and - to some extent - the content of the magazine after receiving it by email. They had all agreed that this was not something that they could print. She stated that Daniel Gilroy had chosen not to be present when Harkness arrived. He had been angry that he had been “misled” as to what the print job comprised. Mrs Gilroy told the court that she pointed out Covenant’s stated policy to Harkness, and explained that their religious commitments informed everything they did in work as in their lives. She attested that the family’s religious commitments were such that they could not condone the representations of marriage and of the family contained in various parts of the magazine and in particular in the front-page photograph. In their view, marriage involved a sacred compact that could involve only one man and one woman; anything else was an abomination in the eyes of God.

9. Mrs Gilroy told the court at first instance that neither she nor any member of her family have any problem in dealing with homosexuals. She explained that in her view “homosexuality per se is not sinful”. Rather, she explained, it is homosexual acts - especially when conducted under the auspices of a “sham marriage” – that are an “affront to God”; “Marriage is a sacred compact within which a man and woman dedicate themselves to the service of God, most especially in their conceiving and parenting of children”. Mrs Gilroy attested that she and her family members had agreed that by printing the magazine, they would be implicitly endorsing the false representations of marriage and the family that the publication contained and that this would be a wrongful act in the eyes of God. Mrs Gilroy explained that her family members had each agreed that the message contained in the magazine, and especially the front-page photograph, was “intensely political” and “offensive”. She agreed during cross-examination that the magazine could not be described as “obscene”, although one of her sons did ascribe it that epithet.
  
10. Under cross-examination, none of the Gilroys was able to give any example of their having provided printing services to a homosexual man in the past, although John Gilroy suggested that “by the law of averages they must have done”. Mrs Gilroy explained that it was “not the sort of thing one asks”; she also insisted that “it wouldn’t have made a blind bit of difference to her, nor to her husband or sons”. Their concern in this case, she stated, was with “the message not the messenger”. Covenant would have likewise refused to print the magazine if they had been dealing with a heterosexual person.
  
11. In evidence, Harkness explained that this meeting had been tense from the outset. He agreed that none of the Gilroys had inquired as to his sexuality, although he indicated that he did not attempt to hide or deny his sexuality in his public dealings and he thought that other people tended to assume that he was homosexual. He imagined that the same would have been true of the Gilroys, not least on account of his editorship of *Out and About*. He accepted under cross-examination that homosexuality was not a requirement of his role, and acknowledged counsel’s reference to the make-up of own staff. He also agreed that none of the Gilroys had explicitly referenced his sexuality when his order was refused. Rather, they had emphasised the “political” and “offensive” character of the content of the issue. He explained that he had found the interplay with the Gilroys uncomfortable and shocking, and that he considered their attitudes to be “pathetic” and “backward”.

12. Harkness also narrated to the court his recollection of the final moments of the exchange with the Gilroys. While he agreed that for the most part the discussion had been polite, if frustrating, he stated that at the close of the discussion one of Mrs Gilroy's sons had interjected in what he considered to be a more menacing fashion. He indicated that the unidentified son had taken issue with something he had said to Mrs Gilroy, and had stated forcefully that "enough was enough... the bottom line is that we don't want your business! And what's more, if one of their kind came in here [pointing aggressively at a print out of Nina Dublin] ... well that sort should think twice about coming in here... Blokes should be blokes... and live the way God made them... we're a family business with traditional values! This sort are a menace to society!" Harkness gave evidence to the effect that when this was said, and while he is "just" a homosexual man, he became acutely aware that he had been wearing "somewhat androgynous" clothing and a little eye make-up. More generally, he had felt strongly that this was a comment directed at himself, and had left the premises feeling angry and upset.
  
13. In evidence at trial, John Gilroy confirmed that he had "raised his voice" at the end of conversation with Harkness, although he could not recall specifically what he had said. He agreed that he had become increasingly irritated while listening to Harkness' insistence that the magazine be printed, that he felt his mother was becoming upset, and that in consequence he wanted Harkness to leave the premises.
  
14. Harkness had been able to arrange for the printing of the contentious issue to be undertaken by an alternative printer, albeit on relatively disadvantageous terms.

### **First Instance Decision**

15. The judge at first instance determined that there had been no unlawful discrimination perpetrated by Covenant Printing Services against Harkness contrary to section 29(1) of the Equality Act 2010.
  
16. The judge found, first, that the correct comparator to Harkness was that of a heterosexual man who had sought the printing of content such as that presented by Harkness. As the Gilroys would have rejected such business equally in accordance with their refusal policy, there was no direct discrimination on grounds of sexual orientation as defined under section 13 of the Equality Act 2010.

17. The judge found, secondly, that there may have been indirect discrimination against Harkness on the basis that the Gilroy's conception of "offensive" and "political" speech might be said to apply only to content that would be proposed by homosexual persons. He considered, however, that it was not necessary for him to decide the point as in any event Covenant / the Gilroys (whom the judge treated interchangeably) had shown that the refusal to contract with Harkness was "a proportionate means of achieving a legitimate aim" under section 19(2)(d). He considered that the Gilroys held a bona fide religious conviction; that this religious conviction was protected under Article 9 ECHR; that their conviction did compel them to refuse to print the content in question, and that this was something that the court was bound to acknowledge and defend. He added that the Gilroys should not be compelled "to speak" in a manner that ran contrary to their basic religious commitment. Were the law to require otherwise, this would be in breach of their Article 10 ECHR right to freedom of expression.

18. The judge also considered, but dismissed peremptorily, a claim for harassment made by Harkness under section 29(3) of the Equality Act 2010. In what was little more than a passing comment, he noted that although the conduct was unwanted and unpleasant, it did not relate to any protected characteristic. He had added: "for instance, Harkness was not proposing to undergo, and had not undergone, a process for the purpose of reassigning his sex, and so there could be no harassment related to gender reassignment irrespective of what one of the Gilroy sons had or had not said and done". In any event, the judge observed, what had occurred did not reach the threshold for harassment as it was only a short outburst in an otherwise polite meeting.

### **Points of Appeal**

The points of appeal to be brought before the Court of Appeal are:

- that the judge at first instance was mistaken in his understanding and application of section 29(1) of the 2010 Act when determining that there had been no direct discrimination on grounds of sexual orientation, no indirect discrimination on grounds of sexual orientation, and that there had been – in any event – justification for the conduct in pursuit of a legitimate aim.

- that the judge at first instance was incorrect to reject the need to consider *any* claim for harassment, and to conclude that in any event the conduct in question did not reach the threshold for harassment under section 26(1)(b) of the 2010 Act.