Unsupervised reproducing equipment. The former aspect emerged dramatically in the well-known case of *Moorhouse* in which the court held the library liable for damages that provided unsupervised and unlimited photocopying facilities to users on the theory that, in effect, the library had authorised infringement by its users.[85]

User requests: copying articles and excerpts. The latter aspect relating to libraries providing photocopying of articles contained in copyrighted journals to their readers and other libraries has not been litigated in Australia (or New Zealand) so far but in a controversial case which arose in the United States, the decision was that this practice constituted fair dealing.[86]

Effect on library activities. Under the new Australian provisions, certain declarations are required to be made by the user requesting a copy of the officer of the library (or archives) supplying it.[87] The provisions also put certain limitations on the mode of permissible copying, e.g. in relation to making of charges and the quantities which are allowed to be copied.[88]

F. Quantities Deemed to be Fair

"Reasonable portion". As seen above, appropriation of even protectable material must always be substantial to constitute infringement; thus a minimal amount of copying should perhaps always be considered "fair". Section 40(3) now provides for certain minimum quantities which are deemed to be fair. This provision should be read along with the definition of "reasonable portion" in section 10. Section 53A, which deals with multiple copying of insubstantial portions of works without record-keeping or payments to the copyright owner, should also be mentioned here to complete the discussion of categories of permitted uses of copyright material without remuneration.

VII. PERMITTED USE OF COPYRIGHT MATERIAL WITH REMUNERATION

Photocopying. Publishers consider photocopying machines as their greatest enemy. These machines have made it easy to copy extensively and in multiple copies. Instead of being merely a labour-saving substitute for hand copying, these machines are now capable of substituting for the printing press. For the last ten years or so, copyright owners in Australia have expressed the fear that photocopying may get out of hand to such an extent as to compete with the potential market for regularly published copies.

Educational contexts: multiple copying. As a result, an amendment to the law has been made which permits copying by educational institutions under the

85 *University of New South Wales* v *Moorhouse* (1975) 6 A.L.R. 193.

86 *Williams and Wilkins* v. *United States* 487 F. 2d 1345 (1973), affirmed by an equally divided U.S. Supreme Court, 420 U.S. 376 (1975). In this case a publisher of medical journals had sought copyright infringement damages with respect to the article photocopying practices of the National Library of Medicine and the National Institute of Health.

87 Section 49, Copyright Act 1968 (Aust).

88 Section 50, Copyright Act 1968 (Aust).

statutory licence. The new section 53B permits the copying of the whole or part of articles and other works by educational institutions for teaching purposes, subject to certain limitations, provided that an equitable remuneration is paid to the copyright owner. A new section 53D is also added by the amendments. This section permits the making of records of works or of Braille, large-print or photographic versions "for use by a handicapped reader for the purpose of research or study". The copying under this provision is also required to be recorded and be paid for in a similar way to section 53B.

VIII. THE OVERALL PICTURE: BALANCING OF INTERESTS

From what precedes, certain conclusions are inescapable. It is apparent that the provisions of the recent Australian Act are intended to expand the scope of fair dealing. The amendments represent an elaborate attempt to deal with the problem of fair dealing by statute, while permitting a substantial measure of judicial flexibility. The new provisions relating to fair dealing attempt in some respects to codify established judicial thinking; while in other respects they seek to clarify situations involving technical infringements which were ignored by copyright owners.

The new legislation has tried to compromise the differences between competing interests. The real problem was not which competing interest should prevail — authors and publishers on the one hand as opposed to educators and libraries on the other. It was obvious to all concerned that the interests of both groups must be safeguarded — a balance must be struck. The real problem which the legislature has tried to solve is to provide a means of balancing those interests. Neither side was going to come out unscathed; both have paid some price for a just solution. On the whole, the law of fair dealing as legislated by the Australian Parliament is a wise synthesis of conflicting rights which, while safeguarding the author and the publisher, avoids injury to the progress of knowledge which would flow from an undue "manacling" of others in the reasonable use of copyrighted materials. It remains to be seen now whether, and if so, when, the New Zealand law-makers would update the copyright statute in regard to this important area of copyright law.

Questions of ethical and religious belief: Human Rights Commission v. Eric Sides Motor Company Ltd & Others

Mark Jones*

The case Human Rights Commission *v.* Eric Sides Motor Company Ltd, New Zealand Newspapers Ltd and the Christchurch Press Ltd[1] *was the fourth decision of the Equal Opportunities Tribunal and it resulted directly in an amendment to the Human Rights Commission Act 1977. Here Mark Jones analyses the decision, the pressures which lead to reform, and the legal and political consequences of the amending legislation.*

On 2 March 1979 the owner of a Christchurch garage, an Evangelical Christian, Mr Eris Sides, submitted advertisements to the Christchurch *Press* and Christchurch *Star* newspapers seeking to employ a "keen Christian girl" for a forecourt attendant. Both newspapers substituted the word "person" for "girl" and although the Christchurch *Star* omitted the word "Christian", upon complaint from Mr Sides, it too, like the Christchurch *Press,* ran an advertisement for a "keen Christian person" to be employed. Ian Robinson an unemployed youth with temporary, but relevant experience, telephoned Mr Sides for an interview. In conversation Sides enquired initially about Robinson's work record. He then questioned Robinson about his religious convictions. Robinson replied that he considered himself a Christian but did not regularly attend church, upon which Sides indicated that Robinson was not a suitable applicant.

I. THE COMMISSION'S INVESTIGATION AND ATTEMPTS AT CONCILIATION

Upon the advice of the Citizens Advice Bureau, the complainant's mother wrote to the Human Rights Commission on 6 March 1979. The commission's officers began investigations, but Mr Sides (who, for the purposes of the case, was treated as the first defendant) was overseas until July 1979.

In September of that year the commission issued a public statement to the effect that hallal killing of sheep by Muslim slaughterers did not breach the Human Rights Commission Act. Essentially this was because section 15(1) of the

* This paper was submitted as part of the LLB(Hons) programme.

1 2 N.Z.A.R. 447.

Act stipulates that an employee must be qualified for available work. The commission recognised that religious belief could be a legitimate requirement if the holding of such a belief was an essential element in the work to be performed. As the Muslim faith, among others, requires the preparation of food only by adherents of that particular faith such a belief in Islam was considered by the commission to be an essential qualification for a hallal slaughterer[1a]. While steadfastly maintaining that in fact he did not refuse the complainant an interview because of his religious views, Mr Sides publicly maintained his right to do so. Notwithstanding that the teachings of Christ do not make it imperative to pray before pouring petrol, the commission's public statement on hallal killing seemed morally indefensible to Mr Sides. Consequently he went to the media to explain what appeared to him to be a glaring inconsistency in the application of the Act.[2]

The *Star* and *Press* newspapers took a similar resolute position. The Act had been in force for more than a year at the time, and the newspaper industry was irritated by what appeared to them to be the commission's persistence in requiring the use of precise terminology in advertisements. Both newspapers regarded this as a test case.

The commission is specifically charged with trying to effect some settlement between the parties; indeed this is the usual situation.[3] Yet despite the public furore surrounding the complaint, the Commission's report was not issued until March 1980 — one year after the complaint had been laid.[4] Commission officers have proffered as a reason for this delay the fact that conciliation may have been possible. This seems somewhat unconvincing because throughout the investigation Mr Sides publicly demonstrated his opposition both to the commission and to its empowering Act. Relying upon the Bible he felt that negotiation was not possible as it entailed compromise of his position.[5] He described the commission's suggestions of compensation as 'blackmail'.[6] Mr Sides asserted his right to employ whomsoever he wished, telling Human Rights Commissioner Downey that he

1a *Annual Report of the Human Rights Commission* (31 March 1980), (Government Printer, Wellington) 24. As the killing involves a cultural ritual there can be no subterfuge in terms of s.27 of the Act. The Tribunal would not be drawn on whether hallal killing was authorised by the Act.

2 *The Press* — Christchurch, 28 March 1980, p.2. *Challenge Weekly*, Auckland, 24 April 1981, p.1: "The exemptions in the Act which were applied to the advertisements for Moslems were purely for political expediency — nothing more, nothing less".

3 Section 37. As at February 1983 the Commission had taken only the *Sides* case and one other (*Human Rights Commission* v. *Ocean Beach Freezing Works* 2 N.Z.A.R. 415) to the tribunal. There have been two private civil claims: *Freedom from Discrimination Groups* v. *N.Z. Lodge of Freemasons* 2 N.Z.A.R. 401. and *John* v. *Rotorua City Council* Unreported 4/80, Tribunals Division of the Justice Department. Other cases are currently pending.

4 *Commissioner's Report: Relating to a Complaint against Eric Sides Motors Company Ltd,* 4 March 1980, available from the Commission.

5 Mr Sides called in aid Psalm 16, verse 8; "I have set the Lord always before me, because he is at my right hand: I shall not be moved" *The Christchurch Star,* 23 March 1980, p.1.

6 *The Press,* Christchurch, 28 March 1980, p.8.

thought the Act ought to be restricted to the civil service and not extended to private enterprise.[7] He would hold prayer meetings in the morning at work. But he refused to accept that since the passage of the Act his activities were no longer legitimate, and claimed that he was prepared to go to the Privy Council if necessary.[8]

It is the writer's opinion that the complaint procedure in this case was too protracted. A complaint was laid in March 1979, and the Commission's Report was not finalised until March 1980. It took a further four months for the Justice Department to bring procedural regulations for the Equal Opportunities Tribunal into effect.[9] The case against Mr Sides and the two newspapers was finally heard over five days in December 1980 with judgment given in April 1981 — more than two years after the original incident. Surely one of the likely disincentives for complaints is the time taken to effect a resolution? Indeed one of the supposed justifications for the establishment of a commission and a tribunal process, is its comparative speed. It is submitted that the delay in bringing proceedings before the Equal Opportunities Tribunal was both unnecessary and indefensible.

II. THE DECISION OF THE EQUAL OPPORTUNITIES TRIBUNAL

All conceivable defences were raised by Mr Sides and the two newspapers, but it is proposed to discuss only the most important of them.

A. The Refusal to Employ the Complainant

Briefly, the accepted version of the facts was the following. Robinson telephoned Sides and informed him of his name and his interest in the position of forecourt attendant. When asked of his work record the unemployed sixteen year old replied that he had left school less than six months earlier. Sides made the comment that perhaps Robinson was a 'fly-by-night'. Robinson explained that he had been employed on jobs of a temporary nature. It was not in dispute that Sides then asked questions concerning the strength of Robinson's Christian beliefs. Apparently upon learning that Robinson was not a Christian (in Mr Sides' definition on that concept) Sides gave the distinct impression that it would be worthless for Robinson to seek the position. The conversation then abruptly terminated.

Section 15 (1) of the Act provides:

> It shall be unlawful for any person who is an employer . . .
>
> (a) To refuse or omit to employ any person on work of any description which is . . . . available and for which that person is qualified;
>
> by reason of sex, marital status, or religious or ethical belief of that person.

7 Taken from the evidence in chief of the Human Rights Commissioner, Mr Downey (available from Tribunals Division, Justice Department, Wellington).

8 *The Christchurch Star,* Christchurch 1 April 1980, p.3. Note however that the decision of the Administrative Division of the High Court is final (s.64).

9 Equal Opportunities Tribunal Regulations 1980 which took effect 6 March 1980. Before the proceedings began the first defendant tried to obtain an order for discovery against the commission. Not surprisingly, it was held that in the absence of specific statutory authority the tribunal had no inherent power to award such an order: 2 N.Z.A.R. 407.

While vigorously asserting his right to employ Christians, Sides maintained that he refused the complainant an interview for 'sound business reasons' — namely his 'unsatisfactory work record'. Yet while the tribunal preferred Robinson's version of the events to that of Sides, the tribunal was not convinced that the refusal was "by reason of" the religious belief of the complainant. In reaching its conclusion, the tribunal adopted a test from two decisions of the High Court of Australia which held that "for the reason that" or "by reason of" meant that the factor prohibited by the legislation must be a "substantial and operative" one in the decision.

In *Mikasa (N.S.W.) Pty. Ltd.* v. *Festival Stores*[10] a wholesaler had withheld goods from a retailer. It was claimed that this was either because they were to be sold below the maintained price (which was prohibited) or because the wholesaler did not like the retailer's merchandising style. The Puisne Court had found as a fact that supply was withheld for the sole reason that there was likely to be price cutting. In the High Court's opinion such a conclusive finding was unnecessary in order to establish liability. Barwick CJ said:[11]

> The likelihood of price cutting is not required, in my opinion, to be the predominant reason; it is enough if it is an operative reason . . . a substantial reason in the totality of reasons . . .

Menzies J commented:[12]

> Had I been in the position of the Court, I doubt whether I would have reached a conclusion so exclusive and so exhaustive, for in business affairs it is usual to find that a course of action has been adopted for a number of reasons . . .

He then went on to find that such a reason was a 'substantial and operative factor' in the decision. Stephens J described the words "for the reason that" as meaning a "substantial and proximate reason, albeit one of several reasons".[13]

A later High Court decision, *General Motors-Holden Pty. Ltd.* v. *Bowling*[14] involved the dismissal of a shop steward allegedly by reason of his union position. Despite the fact that the shop steward was continually late for work, and deliberately made incorrect fittings to cars (and had been warned several times about that) the court held that his employers had dismissed him by reason of his union position. The test of liability is wide and does not focus upon the predominant reasons, nor upon what may be good cumulative reasons. Mason J, delivering the judgment of the majority stated:[15]

> If this was no more than a slender possibility, the circumstance may be discarded as one which was not a substantial and operative factor in the dismissal . . . it does not cease to be such a factor because it is coupled with other circumstances.

Purporting to apply this test to the evidence before it, the Equal Opportunities Tribunal held that Sides had not refused Robinson an interview "by reason of" his religious belief because:[16]

10 (1972) 127 C.L.R. 617, 635.
11 Ibid. 634.
12 Ibid. 641.
13 Ibid. 656.
14 (1976) 51 A.L.J.R. 235.
15 Ibid. 242: Note however there was a reverse onus of proof upon the defendant.
16 *Sides* supra n.1, 457.

> . . . a person's working ability is of *overriding* importance to him. We consider that in all probability Mr Sides formed an unfavourable view of Mr Robinson's application during the conversation that preceded the questions concerning religion and that Mr Robinson's answers to those questions only served to confirm the unfavourable view that Mr Sides had already formed. Whilst therefore we consider the religious issue was a factor in Mr Sides' decision, we are, after giving the matter most careful thought, left in doubt whether it was a substantial and operative factor, or expressed alternatively, whether it was a substantive reason in the totality of reasons.

As the tribunal noted, section 38(6) quite clearly places the onus of proof — the civil standard of the balance of probabilities — upon the plaintiff, and the defendant was entitled to any benefit of the doubt. It is recognised that the tribunal had the benefit of seeing and hearing the various witnesses. However for reasons which are discussed it is submitted that the tribunal's conclusion that the religious element was not shown to be a substantial factor in Sides refusal to hire Robinson is, in the light of all available evidence, difficult to sustain. It is respectfully submitted that the tribunal imposed a heavier burden of proof than the civil standard. Whilst purporting to apply the test their application of it indicates a rather conservative approach. It is submitted, that this is so because:

(i) In accepting Robinson's version of the events, the tribunal refused to accept Sides claim that the question on religion were totally unconnected with his decision to refuse an interview. It could therefore quite logically be inferred that there was more than a slender possibility (as required by the test of Mason J)[17] that religion was involved. On this basis religion seemed to be accepted as an operative factor in the decision to refuse an interview. In fact the tribunal commented, obiter, that Sides' enquiry to the complainant could reasonably be understood as indicating an intention to commit a breach of section 15(1) of the Act.[18]

(ii) In response to questions put to him at the hearing Sides said:[19] " . . . but I would make it very clear and definite during my interviews that I would be giving preference to a person of equal qualifications if he or she was a Christian."

The tribunal explicitly states,[20] that any preference given is a substantial reason in terms of section 15(1) of the Act. Presumably therefore Sides could not have considered that Robinson had suitable qualifications. Yet in determining the actual version of the events during the telephone conversation the tribunal was clearly satisfied that "Mr Sides did link the two matters" (employment and religious belief) and one of the reasons the Tribunal is prepared to infer this was because:[21]

> the fact that there was no point in Mr Sides asking questions about Mr Robinson's religion if he had already completely made his mind up that he was not a suitable person.

17 Supra, n.15.
18 Supra n.1, 457-458.
19 Ibid. 452.
20 Ibid. 465.
21 Ibid. 456.

So if there was "no point" in Sides pursuing the religious questions, why did he? No credible explanation of his reasons for pursuing the religious question was given by Sides.

(iii) In both his evidence and his advertisements Sides stated that he required a hardworking person. But he also stated that he required a Christian person to operate his petrol bowsers. Neither a person's work record nor his Christian belief, were in themselves, exclusive criteria used by Sides in selecting an attendant. It is relevant to recall the words of Menzies J, "that it is usual in business affairs to find a course of action that has been adopted for a number of reasons." Such public statements may not in isolation prove that Robinson was refused an interview by reason of his alleged religious deficiency nevertheless it appears to be reasonable to infer from all the circumstances that for Sides both an applicant's working ability and his religious persuasion were substantial and operative factors: a person's working ability it appears was simply not of overriding importance to him.

(iv) The tribunal stated that in all probability an applicant's working ability was of 'overriding' importance to Sides. Admittedly Sides made a comment to the effect that Robinson was a 'fly-by-night'. But perhaps the tribunal put undue emphasis on the fact that Robinson had been dismissed from a previous forecourt attendant's position at another service station; Sides specifically denied any recollection of Robinson's reference to his earlier dismissal.[23] Indeed Sides was evidently sufficiently satisfied with Robinson's explanation of the temporary nature of his previous employment to continue the telephone conversation and explore his religious preferences.

(v) One of the 'sound business reasons' proffered by Sides for his refusal was Robinson's age. The Tribunal decisively rejected this submission simply because it was not credible.[24] Sides' advertisements had asked for a 16-18 year old.

(vi) In the alternative, Sides' counsel submitted that this dispute consisted of two people arguing about the practice of a belief, rather than about the concept of the belief itself. Indeed this version of the events seems the most likely from all the other evidence available. But as the tribunal stated[25] whether the situation is analysed on the basis of an inadequate religious belief or of an ethical belief, any decision based on either of those factors would be a breach of the Act.

Thus it is submitted that there were, on the balance of probabilities, two substantial and operative factors — one was the complainant's work history and the other his alleged religious deficiency. If this is so it follows that Robinson was refused an interview by reason inter alia of his religious or ethical belief.

B. Advertisements

Section 32(1) of the Act provides:

22 Supra, n.12.
23 *Sides* supra n.1, 456.
24 Idem.
25 Ibid. 464.

> It shall be unlawful for any person to publish or display, or to cause to allow to be published or displayed, any advertisement or notice which indicates, or could reasonably be understood as indicating, an intention to commit a breach of any of the provisions of [Part II] of this Act.

This section contains an objective criterion for ascertaining whether any particular advertisement is discriminatory. So while, apparently, no offence had been committed against section 15, an offence could, nevertheless, be committed against section 32. The fact that Sides himself did want a church-going Christian was therefore irrelevant since the legality of the advertisement falls to be determined not by Sides' actual wishes but by the words of the advertisement. By way of defence, all defendants submitted that the 'golden rule' ought to be applied in interpreting the advertisements and that 'Christian' should be read as meaning 'kind, decent and civilised'. The *Press* advertisement read:

> SERVICE STATION ATTENDANT
>
> We have a vacancy for a keen Christian person 16-18, who is not afraid of work, to assist on our forecourt, only permanents need apply. (Particulars given).

And the *Star* which had originally excised references of Sides concerning his desire to employ a 'Christian' later printed this classified advertisement:

> We are looking for a keen Christian person 16-18 years with good education. Must have a driver's licence and like people and work. Must have an outgoing personality. Duties include petrol pumps, car grooming, etc. on our forecourt. Must be honest, and accurate with figures. This is a key appointment and we will select the person we feel best suited to the position. (Particulars given).

As an aid to interpreting section 32 (1) of the Act the tribunal relied upon the somewhat confused English Court of Appeal decision *Commission for Racial Equality* v. *Associated Newspapers Group Ltd.*[26] decided upon a materially similar legislative provision. In that case Shaw LJ observed that it must be reasonable to understand the text of the advertisement complained of as indicating an intention to do an act of discrimination, rather than the broader question, whether a possible meaning which can reasonably be attributed to the text of the advertisement is that it indicates an intention to do an act of discrimination. A rather fine point. However, Lord Denning MR, preferred to place greater reliance upon the language of the statute. The meaning given the words in the advertisement he said, should be the same as that in a libel action, namely the meaning given by an ordinary reasonable person. Waller LJ concurred with both. It seems however, he favoured the view taken by the Master of the Rolls which emphasises that the court is loathe to interfere with the impression of a tribunal of fact.

It is a cardinal rule of statutory interpretation that, if possible, a separate meaning is to be given to each word in a section. The legislation provides that the intention of an advertisement must be reasonably understood from the text of the advertisement or, alternatively, that an intention to discriminate need

26 [1978] 1 W.L.R 905; s.6(1) Race Relations Act 1968 (UK) is noted in the case (907 C).

merely be indicated by the advertisement. Yet the Court of Appeal in the *Associated Newspapers Group* case held that such an indication must be one as is so understood by an ordinary reasonable person. In the result both parts of section 32 (1) now apparently have the same meaning. That is, an indication understood as such by a reasonable person or an indication reasonably understood.[27]

In the course of his judgment Lord Denning refers to the fact that the puisne judge in the *Associated Newspapers Group* case was assisted by two specialist assessors whose role it was to determine whether discrimination in fact existed. The Equal Opportunities Tribunal is similarly constituted. The Master of the Rolls further commented that:[28]

> It seems to me that we can and should pay close regard to the decision of the judge sitting with the assessors. We should not reverse it unless we are satisfied that it was wrong.

It is submitted that in essence what Lord Denning is saying, is that, despite the reference to the view of the reasonable person, the real test is whether the view of the tribunal members is a tenable one. Which is of course not what the section says. The view of the tribunal appears to have been substituted for the view of the reasonable person unless it can be shown the tribunal's view is demonstrably wrong. This broader interpretation permits great latitude to the tribunal in coming to a conclusion under section 32 (1) of the Act.

At three stages during its discussion the Equal Opportunities Tribunal indicated some tendency to depart from the 'ordinary and reasonable person' test which it held should be applied. First, it remarked that the ordinary reasonable person, would more likely than not, be a member of the majority group and this could lead to the absurd contention that if the majority sees no discrimination then it simply does not exist.[30] To avoid this outcome the ordinary reasonable person should be neither a member of a majority nor a minority group: a somewhat unique person! Secondly, submissions on the meaning of the word 'Christian' made by counsel for the newspapers were rejected because they constituted colloquial, slang, or informal usage of the word.[32] Arguably, however, an ordinary reasonable person could properly draw inference from the colloquial meaning of a word. Thirdly, and perhaps most decisively, the tribunal indicates some prima facie bias towards the interpretation of the language by use of its so called specialist knowledge. At an earlier stage in its decision it refers to the device used in Nazi Germany

27 In respect of which the tribunal in *Sides* (460) definitively states "We are of the clear view that the advertisements indicated could reasonably be understood as indicating an intention to commit a breach of the Act".

28 *Associated Newspapers Group* Case, supra n.26, 909D.

29 Any New Zealand appeal is made to the Administration Division of the High Court with two specialist assessors appointed from the panel maintained by the Minister — s.66. Appeal is by way of rehearing the evidence (s.66) and the decision is final (s.64).

30 *Sides* 460. At p.459 also the tribunal noted that it is debatable whether Mr Sides' views are relevant to an objective test. Surely there is no debate however; they must be totally irrelevant to an objective test (what a reasonable person would understand).

31 Idem.

32 Ibid. 449.

of excluding Jews by advertising for 'Christians only'.[32] In the light of this example it would appear that the defendant's contention for a non-religious interpretation of "Christian" was destined to fail.

At least ostensibly the tribunal relied upon the 'ordinary reasonable person' test. Christians called by the defendants uniformly stated their belief that 'Christian' did not mean 'Christian' in the religious sense of the word but meant kindly and good. Members of minority religious groups called by the plaintiff believed 'Christian' did mean 'Christian'. While admitting such evidence the tribunal in effect rejected it because of its very partisan nature. It was totally irrelevant in determining what an ordinary reasonable reader would understand. The tribunal instead reasoned that, given the particular context of the advertisements, the word 'Christian' was sufficiently distinct from other words which conveyed the impression that Sides also required an honest hardworking person. Clearly on any objective reading of the advertisements an honest and hardworking but also a religious Christian was required to groom cars and pour petrol. While one may be sceptical about some aspects of the tribunal's reasoning, there can be no doubt that its conclusion was correct.

All defendants were found to have breached section 32 of the Act. The newspapers had taken insufficient care, for they had failed to advise their respective staff fully of the implications of the Act in respect of religious advertising and so were unable to rely on any defence which might otherwise have been open to them under section 33(1) of the Act.

C. Summary of the Decision

In evidence Sides also claimed that his forecourt attendant, as well as pumping petrol was to counsel customers on their religious life and provide spiritual material for them. It was further contended that Eric Sides Motors Company Ltd. was not really a garage, but a platform devoted principally to the promulgation of the Lord's work and as a place of fellowship for Christian people. Without commenting upon the credibility of the first claim — presumably that a sixteen year old was to initiate religious conversation with customers while filling their petrol tanks — the tribunal held that Sides could not advertise for a Christian worker. Section 15(1) prohibits an employer refusing employment to any person who is qualified to work, on the basis, inter alia, of their religious belief. It was the tribunal's opinion that any requirement of a religious persuasion must be an essential qualification for that particular job. Counsel's contention that Sides business was of a Christian character and thus all jobs in that business required a Christian employee was held irrelevant. The words in section 15(1) involving qualification for work relate to activities intrinsic to the job and are not altered by an employee's method of conducting his business affairs. This is of fundamental importance to an understanding of the Act. After examining the business accounts of the firm,

33 While leaving the legal question open the tribunal was of the opinion, that the words of s.33 probably exclude the effect of the rule in *Tesco Supermarkets* v. *Nattrass* [1972] A.C. 153. Full costs were awarded because of the adversarial attitude of each defendant.

the tribunal was disposed to say that while donations were made to charitable groups:[34]

> We do not consider it can be said that the business or its assets are devoted solely or principally to the service of the Lord for the propagation of the Christian belief. Nor do we consider that the business of Eric Sides Motors Company Ltd. is a charitable or religious organisation. It is in fact a commercial garage and service station.

Interestingly enough Eric Sides Motors Ltd. was not thought to be, upon analysis, a quasi-religious business organisation at all. Furthermore, the Act does not prevent a Christian employer, like Mr. Sides, from holding prayer meetings each morning at his garage. The Act would allow him to advertise for people 'who are happy to work in a Christian atmosphere', but not to indicate his preference to employ Christians.

It is however difficult to escape the conclusion, on reading the carefully expressed decision of the tribunal, that it was perhaps unduly influenced by an awareness of treading over a legal and political minefield. One detects a distinctly less forthright approach to the problem before it than the more publicly acceptable *Ocean Beach* decision.[35] Indeed the tribunal went out of its way to suggest the actual form an amendment to the Act might take, if Sides were to petition Parliament to remedy the quandary in which he found himself.[36] It is suggested that given the particular sensitivity of the question before it, the marked reluctance of the tribunal to find liability for a breach of section 15(1) is more readily explicable even if not defensible.

Declarations and costs were awarded against all defendants in respect of the infringement of section 32, with the tribunal making a restraining order against Sides prohibiting him from indicating in advertisements his preference for Christian employees.

III. THE EPILOGUE

A. Press and Public Reactions

Chief Human Rights Commissioner Downey had often complained that media attention sought to denigrate and ridicule the commission's efforts. Perhaps the Act had not been fully explained to the general public or, while acceptable in principle, constraints against alleged discriminators on religious grounds were not in practice politically popular. Whatever the reason, it seems clear that the Government found the law as it stood unacceptable.

34 *Sides,* 462.

35 Supra n.3. Approval was voiced by the Prime Minister himself — *The Press,* Christchurch, 15 May 1981, p. 3. See also, Wilson "Human Rights in the Freezing Works" (1981) 9 N.Z.U.L.R. 273.
The tribunal's chairman, Mr J. H. Wallace Q.C, has since been appointed to the High Court. Noting his appointment the New Zealand Law Journal commented that " . . . the Tribunal emerged untainted from the crucible of publicity and political pressure. The validity of both sides [a pun?] of the issue could have justified a different conclusion. The choice was a hard one and it was to the Tribunal's credit that it sought no easy way out". [1982] N.Z.L.J. 221.

36 2 N.Z.A.R. 447, 463. The partnership exemption is s.19.

The *Sides* case had, long before the Tribunal decision of April 1981, attracted widespread public controversy.[37] November 1981 heralded an election critically important for a third term National Government. There had been much discussion of the value of the small business sector. Consequently the National Party expressed concern at the growth of administrative agencies within Government, and to those who wished to propagate this view, the Human Rights Commission was thought to provide a good example of bureaucracy hampering the operation of private enterprise.

The Prime Minister, the Rt. Hon. R. D. Muldoon, reacted immediately. "The law is an ass" he was widely quoted as saying.[38] "It's a farce".[39] "The whole purpose of the Act is to outlaw discrimination" he observed, but seemingly unaware of section 15 (7) (b) (i) went on to say " . . . but it makes no sense for an Ayatollah to run along to the Commission complaining of discrimination because the Presbyterian Church wanted a Presbyterian for a Minister. There is not much common sense in that is there?"[40] Later the Prime Minister indicated that legislative changes would not be limited to questions arising out of the *Sides* case:[41]

> The Sides case is just the latest in a series of things that we have seen to be not really as we expected them. One could not call it discrimination. At least I do not call it discrimination but apparently the law does.

The Minister of Justice regarded the Act as very effective in removing discrimination against women and on the grounds of race. "I have got to say however that I am disturbed when it gets into other areas. The Sides case was a classic example of that" he said.[42] The Minister did, however, emphasise that he did not want to see a situation in which people could be actively discriminated against because of their religion.

Sides claimed to have widespread public support and donations totalling $17,000 to fight the case, but said he would not appeal because of the cost factor involved.[43] When the commission sealed the tribunal's order (a mere formality to complete the proceedings) a somewhat confused Sides said[44]

> Because we dared to question their decision they're taking this vicious provocative action. It shows the extent they're prepared to go to keep me quiet. This Commission is too big for us — it is supported by taxpayers' money.

Somewhat in disgust he sold the garage and returned to a one man car lot. Sides annouced he would spearhead a nationwide movement to have the Act

37 A National Party regional remit calling for the abolition of the commission was narrowly defeated: Noted by Mr. O'Flynn, M P. N.Z. Parliamentary debates Vol. 442, 1981: 4265.
38 *The Press,* Christchurch, 13 May 1981, p.1.
39 *The Star,* Christchurch, 28 May 1981, p.2.
40 *The Press,* Christchurch, 15 May 1981, p.3. Section 15 7(b)(i) allows religion to be a qualification for those involved in the propogation of a belief, e.g. Catholics to be priests.
41 *The Star,* Christchurch, 15 May 1981, p.3. Changes were however restricted by caucus (infra. nn. 58,59 and related text).
42 *The Dominion,* Wellington, 14 May 1981, p.5.
43 *New Zealand Herald,* Auckland, 18 April, p.3. $60,000 was claimed by the *Star* (infra n.48); *Challenge Weekly,* Auckland, 1 May 1981 (Editorial) p.2, claimed $26,000.
44 *Bay of Plenty Times,* Tauranga, 28 November 1981, p.15.

amended, so that he and others like him could once more advertise for Christian staff. "In a public statement Mr. Muldoon who had received a substantial volume of mail on the issue, said Mr. Sides' decision to promote the petition was undesirable".[45]

N.Z. Truth, a weekly newspaper, believed the case confirmed its view that the commission was a waste of taxpayers' money and saw no need for redress of such grievances in New Zealand. Claiming that those who died in World War II did not fight for this type of legislation it continued, "We said this type of thing [the Act] would make great news in the world's dictatorships, but it was old hat in New Zealand."[46] Newspapers included in their articles comment to the effect that this was law gone mad; only two articles actually supported the commission and tribunal's stance from a moral viewpoint. Some journalists resorted to ridicule which incidentally revealed little understanding of human rights legislation:[47]

> Why doesn't Sides stick to tax evasion or adultery or child bashing or drink driving . . . but to employ a Christian! I recoil in horror at the nastiness of the man. What an evil mind (sic) he must have. I wish I didn't take this Human Rights Commission seriously. I'd like to say its one big farce but it's too sinister for that."

One of the litigants, the *Star,* stated under a headline "COMMON SENSE ABANDONED IN RIGHTS ACT" that Sides had to pay $60,000 in legal fees and went on to label the affair as "an inexcusable paper war declared by bureaucrats . . . ."[48] "Some of the restrictions imposed by the Act on advertising are farcical."[48a]

> The Human Rights Commission Act is to be amended. And that will please a great many New Zealanders. In sticking to the letter of the law the Human Rights Commission has found itself accused of nit picking and focusing upon trivial issues.[49]

The Managing Director of New Zealand Newspapers Ltd., Mr R. Sayers, claimed he would " . . . continue to fight the equity of the Human Rights Commission Act and advocate its reform".[50] And what in the view of the press is so iniquitous about the Act? Perhaps the Manager of Wilson and Horton Ltd., Mr M. Horton, provides the answer — "[it is a] real inconvenience following Human Rights legislation to the letter".[51] The media were able to present critically this case of religious discrimination 'successfully', presumably because unlike sexual or racial discrimination, there was considerably less vocal opposition. When the Bill was presented to the Select Committee neither Mr Sayers nor Mr Horton confined their submissions to the needs of religious employers or religious advertisers. Rather the Select Committee hearings provided them with an opportunity to petition for the removal of the advertising restrictions concerning a wide spectrum of discriminatory matters. The writer does not wish to suggest that the newspapers

45 *The Evening Post,* Wellington, 12 May 1981, p.1.
46 *New Zealand Truth,* Wellington, 26 August 1981, Editorial.
47 *The Weekender,* Dunedin, 14 June 1981, p.6.
48 *The Star,* Christchurch, 20 May 1981, p.4.
48a *The Star,* 16 April 1981, Editorial.
49 Assertion made in the Editorial of the *New Zealand Herald,* Auckland, 14 May 1981, p.2.
50 *The Southland Times,* Invercargill, 14 August 1981.
51 *The Dominion,* Wellington, 29 October 1981, p.2.

were insincere about the principles of human rights, but merely that the editorial stance taken by them, may very well have reflected the ends which they publicly coveted.

Another columnist described the decisions as 'ludicrous' and focusing upon the particular advertisements in question came to the absurd conclusion that "it is a human right to be lazy and denial of that right must be discrimination".[52]

Other publications took a more extreme view. *The Challenge Weekly* ran a feature article headlined "TWO YEARS - SIX WEEKS" which detailed the sequence of events, in a less than impartial fashion.[53]

> April 10: Mr. Sides undergoes a knee operation in Christchurch. Subsequent infection leaves him fighting for his life, but he recovers. By now many Christians and non-Christians are behind him with moral and financial support for his case.

The article then states that Sides never intended to discriminate. For, as it notes, he initially hired a Maori girl, he eventually hired an unemployed non-Christian, his leading counsel was actually a Jew, and the complainant's mother "depressed by the toll the case had taken, herself became a born-again Christian."

The Prime Minister was moved to say:[54]

> The approach is now being reversed, and will I think, solve the problem to the greatest extent possible. I have not the slightest doubt that public opinion was outraged by the experience of Mr Sides. It could be said that the public did not understand the matter. It could also be said that it was not fairly presented by the media. The public cannot see plainly why Muslim slaughtermen can cheerfully be employed while apparently Christian petrol pump attendants cannot. That is probably a gross over-simplification . . . one can have the utmost experience in the law and still not have common sense. The purpose of the amendment is to try to put a little common sense into what many people consider is very important legislation.

Junior counsel for the plaintiff, Jack Hodder, concluded that[55]

> In election year, (and given the current popularity of small businesses) an exception to Section 15 for employers of six or fewer persons may find speedy Parliamentary acceptance.

B. The 1981 Amending Bill

1. *Genesis of the Legislation*

> Finally the Bill prescribes religious bigotry . . . the Bill is not so much an advance in that field because there is very little religious bigotry in New Zealand today, and there would be few people who would not be perfectly happy to see enshrined in the Statute Book that discrimination on the grounds of religion be unlawful and subject to sanction.[56]

52 *The Dominion,* Wellington, 27 August 1981, p.8, James Gasson.

53 *The Challenge Weekly, Auckland,* 24 April 1981, feature article. See also the (Editorial p.2): "That the Equal Opportunities Tribunal should bring down its verdict in the Eric Sides case at Easter is certainly significant; for the death of Jesus Christ 2000 years ago was certainly centred on the rights of others."

54 N.Z. Parliamentary debates Vol. 442, 1981: 4196 (the Rt. Hon. R. D. Muldoon, Prime Minister).

55 (1981) 4 T.C.L. 13/142.

56 N.Z. Parliamentary debates Vol. 42, 1977: 229 (Mr. Brill M.P., speaking during the second reading of the Human Rights Commission Bill 1977).

Despite Mr Brill's confident speech during the passage of the Act of 1977 the Government found itself in a quandary. Few people seemed to want change but the Government was politically committed.[57] Despite the Prime Minister's earlier announcement that widespread changes would be made, in the event the change was confined to matters arising from the *Sides* case.[58] The commission itself however, was never formally consulted about the proposed amendment. While the commission has a specific function to report upon the implications of proposed legislation to the Prime Minister, the Minister of Justice believed that this was limited to the normal Select Committee submissions.[59]

After the First Reading the Bill was referred to a five man Select Committee. Initially only one half day had been set aside to hear submissions but eventually hearings took two full days. Some forty-five submissions from various organisations, ad hoc bodies and individuals were made on a Bill less than two hundred words in length. Overwhelmingly the submissions supported both the commission's actions and the retention of the Act without any amendment.

Somewhat surprisingly the Auckland Council for Civil Liberties saw no harm in such amendment, arguing that as religious discrimination was not widespread before the passage of the Act, it would be small even if an exemption was allowed.[60] Only the Employers' Federation and the Church of Latter Day Saints welcomed the amendment.[61]

Other submissions disagreed about the need for a commission at all; they make fascinating reading, but took what can only be described as extremist points of view. The Ponanga Branch of the National Party (Pahiatua) described the Act as a 'waste of time'.[62] An action committee of forty seven people, formed in Eketahuna under the chairmanship of one J. L. Smith, thought that such legislation was not a proper matter for Government.[63] Others produced long jurisprudential essays on the meaning of rights; one submission considered the commission too costly, 'anti the British legal heritage' and called upon the Government to protect the country from 'this insidious projecting of humanistic thinking'. Citing the long title to the Act one submission linked the commission with the United Nations which is considered to be a front for international communism controlled by the directors of powerful business cartels.[64] Another gentleman in a printed booklet entitled *Niggers in the Woodpile — Why the Human Rights Commission Must Go* attempted to assimilate the wording of certain United Nations Declarations with

57 *Annual Report of Human Rights Commission* (31 March 1981) 16 — employment complaints on the grounds of ethical or religious belief comprised less than 0.8% of all complaints regarding employment received by the Commission. There was only one such complaint — that relating to Eric Sides Motors Limited.

58 *The New Zealand Herald,* Auckland, 12 May 1981, p3.

59 *The New Zealand Herald,* Auckland, 12 May 1981.

60 Submission 37. N.Z. Parliamentary debates Vol. 440, 1981: 3034 (Hon. Mr. McLay, Minister of Justice). The words of s.6(1)(c) are: "any proposed legislation".

61 Submission 30 (New Zealand Employers' Federation), and Submission 36 (Church of Latter Day Saints, Auckland).

62 Submission 43.

64 Submission 25 (K. H. Salt).

those of the Soviet Constitution.[65] Committee members made no comment on these submissions, though they represented the majority of support for the proposed amendment to the Act.

2. *Clause 3: discretion to discontinue investigation*

Despite opposition, Clause 3 in its unchanged form is now embodied in section 35(1A) of the Act:

> Notwithstanding anything in subsection (1) of this section, the Commission may in its discretion decide not to investigate further any complaint if in the course of the investigation of the complaint it appears to the Commission that, having regard to all the circumstances of the case, any further investigation is unnecessary.

One group thought the clause implied that the commission had some inability to make sensible decisions.[66] Another thought it might lead to bureaucratic abuse. Because most of the commission's work involves conciliation in which the commission acts as confidant to the complainant it was submitted that the amendment would detract significantly from this work, as complainants must be able to vent their frustration to someone.[67] They predicted that in practice Clause 3 would be ignored. Nonetheless the commission welcomed this Clause which it felt added greater flexibility to the Act.[68]

3. *Clause 2 — an invitation to be 'reasonable'*

Whereas the 1977 Bill used a style of drafting which was widely praised for its clarity, by contrast the new Bill proposed in Clause 2 a somewhat legalistic and vague test.[69] Into section 15 was to be inserted a new subsection:

> (7A) Nothing in this section shall apply to preferential treatment based on religious or ethical belief where—
>
> (a) That treatment is accorded by an adherent of a particular belief, and
>
> (b) Having regard to special circumstances that govern the manner in which the duties of the positions are required to be carried out, it is reasonable to accord that treatment to a person of the same belief.

Slightly more than half the submissions opposed any change in principle, whereas only three submissions were directed towards the desirability of some change favouring an employer. Most reflected what Mrs Batchelor, MP had said during the first reading:[70]

> If changes are to be made to the Human Rights legislation, a thorough investigation should be made, and any necessary revision for improvements recommended. That would be preferable to legislating for the majority because of the intolerance of a few . . . To change legislation on the basis of one case is not a good way to govern.

65 Submission 31 (I. Thompson).
66 Submission 3 (National Council of Women).
67 Submission 43, B. Elkind, Senior Lecturer, Faculty of Law, Auckland University.
68 Submission 16.
69 *Submissions to the Select Committee on the Human Rights Commission Bill 1977* where the text of the original Bill is reproduced. This material is available from the General Assembly Library, Wellington. The novel method of drafting "by example" was widely praised — N.Z. Parliamentary debates Vol. 413, 1977: 1249 (Hon. Dr. Finlay).
70 N.Z. Parliamentary debates Vol. 440, 1981: 3033 (Mrs. Batchelor M.P.). Not surprisingly the general public who were apparently outraged (refer media reports: Part III a) made no submissions concerning the Bill.

Most vociferous in their opposition were Jewish groups who did not want legislation permitting any religious discrimination. The New Zealand Jewish Council, representing some twenty-three other organisations,[71] labelled the amendment "an irrevocable breach allowing open discrimination". It was the first time in New Zealand history that any Jewish group openly opposed any legislation.[72] Their strong representations profoundly impressed many Members of Parliament.[73] Christian church leaders believed the Bill was ethically wrong because the teachings of Christ called for tolerance.[74] So too the women's groups, instrumental in promulgating the original concept of a commission, thought the amendment created a dangerous lobbying precedent which severely weakened the spirit of the Act.[75] The commission characterised the proposed amendment as wrong in principle, vague and unnecessary. It was concerned that it might be criticised for not carrying out the intention of the legislature if the amendment did not achieve what it purported to do.[76] Federation of Labour representatives insisted that had the reason for the amendment not been so well documented few people could understand what it really meant.[77] But Sides was fearful of having to bring his case before the tribunal once more. He was reported as saying: "As far as we can see they've just put another couple of words in the Act, which, if anything, make it even more confusing."[78] He asked for an exemption for small businesses or for those whose principal business objectives were the propagation of a particular belief.[79]

The greatest effect however, came from the submissions by the New Zealand Law Society which, without approaching the question as one of policy, submitted that more objective scrutiny ought to be attached to the circumstances and duties of the job.[80] This change was approved by the Statute Revision Committee. The Bill was unaltered by the Committee of the Whole and was passed on a Third Reading. The Bill received the Royal Assent on 23 October 1981.

IV. THE EFFECT OF THE NEW AMENDMENT

The year is 1983. Suppose that once more Ian Robinson applies for a job with Eric Sides Motors Company Limited. Suppose further that exactly the same circumstances reoccur. Surely Mr Sides is now "protected" by the amending legislation, since this was the avowed intention of the Minister responsible for the Bill? Despite the wide residual discretion given in the new section 35(1A) it

71 Submissions 6,7,14,23,24,27 (various Jewish groups and prominent citizens).
72 *Annual Report of the Human Rights Commission,* 31 March 1982, Government Printer, Wellington, 8-9.
73 N.Z. Parliamentary debates Vol. 442, 1981: 4193 (Mr. Brill, M.P.). N.Z. Parliamentary debates Vol. 442, 1981: 4263 (Hon. Mr. Quigley, M.P.).
74 Submission 9 (Joint Methodist — Presbyterian Public Questions Committee).
75 Submission 2 (National Advisory Council on the Employment of Women), and 3 (National Council of Women).
76 Submission 16.
77 Submission 18.
78 *The Bay of Plenty Times,* Tauranga, 28 November 198, p.4.
79 Submission 15 (Mr Eric Sides).
80. Submission 32.

is submitted that once more the case must go before the Equal Opportunities Tribunal.[81] This provision was taken directly from section 17(1)(b) of the Ombudsmen Act 1975. Given the other grounds for dismissal set out in section 35 of the Act,[82] it is difficult to see the practical effect of the amendment.

In this hypothetical case Mr Sides has asked questions which could reasonably have given the impression that he intended to discriminate. From all the circumstances and given the burden of proof, such a question in the absence of agreement is one properly to be decided by the tribunal. Quite possibly the commission would allege that Sides has breached section 18 (1) of the Act.[83] The case simply could not be dismissed under section 35 (1) (b) as trivial, even if every newspaper editor in the country thought it was so. Trivial in that context relates not to the policy of the Act, but to factual circumstances and has little, if any, significance in relation to the objectives of the Act; and though the amending legislation requires the commission to view all the circumstances of the case in deciding whether to continue investigation, such circumstances seem limited to those touching on technical breaches of the Act. The powers conferred must be read subject to the remainder of section 35 which is procedural in nature.

Sides could still make submissions that proceedings before the tribunal were unwarranted, but it is unlikely, given his views, that he would be prepared to conciliate and invoke section 37 (3) of the Act. The fact that members of the Government might be politically embarrassed is not a sufficient legal reason for the commission to discontinue its investigation. The commission must still implement its empowering Act, otherwise an order of mandamus may lie.

Arguably the discretion can be exercised only at the investigation stage and not during conciliation between the parties. The crux of this vaguely defined power lies in the further necessity of investigation. It is therefore submitted that any investigation deemed 'unnecessary' must be unnecessary in a purposive sense. That is, the result that could have been achieved from investigation would lead to an insubstantial legal result. Such an interpretation limits the commission's discretion to terminate an investigation as "unnecessary". More importantly a complainant may still take proceedings before the tribunal — the right to do so is unaffected by the new section. On a more practical level it is likely that the commission will be very reluctant to exercise this discretion in analagous circumstances.[84]

Section 2 of the Human Rights Commission Amendment Act 1981 inserted the following subsection into section 15 of the Act:

81 Section 35 (1A) is noted previously in Part IIIB of this article.

82 Section 35 provides for the dismissal of complaints by the Commission, which are trivial, vexatious, frivolous, not made in good faith, prolonged for twelve months or where there is an alternate remedy.

83 Supra n.18, and related text.

84 In the face of political pressure from the Government and hostile media attention, Chief Commissioner Downey seems undaunted. His unswerving attitude toward principle is one of the great strengths of the Commission. See 6 C.L.B. 297.

(7A) Nothing in this section shall apply to preferential treatment based on religious or ethical belief where —

(a) That treatment is accorded by an adherent of a particular belief to another adherent of that belief; and

(b) Having regard to special circumstances that —
(i) Govern the manner in which the duties of the position are required to be carried out; and

(ii) Make it reasonable to require those duties to be carried out in that manner, it is reasonable to accord that treatment to a person of the same belief.

While accepting the legal validity of the earlier decision, Sides must now argue that section 15(7A) legitimates his actions. The onus of proving such an exemption from section 15 of course falls upon the person who wishes to invoke it.[85] It would apparently be open to Sides to argue:

(a) (Altering the original facts)[86] that his garage business, is a commercial enterprise having as its principal aims the serving as a platform for the Lord's work. (The aim if proved, constituting "special circumstances").

(b) In contrast to section 15 (7) (b) of the Act which refers to the "sole or principal duties of the position", section 15 (7A) merely refers to "the duties of the position". Therefore such duties may be minor duties or those which an employer stipulates.

(c) Sides stated that Christians only need apply. Therefore he is not discriminating but applying "preferential treatment".

(d) Thus given the alleged special circumstances (which envisage the dissemination of the Christian faith) Sides as a reasonable employer, is justified in giving preference to a Christian despite the fact that previously non-Christians had poured petrol.

Notwithstanding the foregoing argument, it is submitted that the new subsection cannot permit Sides to employ Christian staff on the basis of their religious belief and that the amendment does not in substance affect the original position before the passage of the legislation. Government members claimed that Sides is given "an opportunity which he did not previously have to argue his case",[87] but such an opportunity is of no real assistance to him. The amendment does not assist him because:

85 Section 39.

86 See the text accompanying n.34. While Sides claimed he was the owner of a quasi-religious business organisation devoted to the propogation of the Lord's work, the tribunal found that he was in fact the owner of a commercial service station. Arguably on the real facts there were no special circumstances. Indeed it seems special circumstances can only be ascertained by reference to the concepts embodied in the other words in the section.

87 Mr Brill M.P., Chairman of the Statutes Revision Committee claimed; "That is an argument and an opportunity that was not open to Mr. Sides when his case was heard". He would not concede however, that Mr. Sides would be successful, because to do so "would require removing all reference to religious or ethical belief": N.Z. Parliamentary debates Vol. 442, 1981: 4198.

(a) There is no "particular belief" — arguably Sides did not want mere Christians, but evangelical or born-again Christians.

(b) "Special circumstances" are not those imposed by an employer. To give the words such meaning, deprives them of any special relevance.

(c) The phrase "duties of the position", must be given the same meaning throughout the legislation. "Position" refers to the actual job (a forecourt attendant) and not to a position in a particular firm. This later contention was decisively rejected by the tribunal in the *Sides* case when it was stated.[88]

> It is however a different thing to contend that the job of a forecourt attendant, even in a business said to be entirely devoted to Christianity must be performed by a Christian, i.e. that Christianity is an essential qualification for the job.

The statute quite specifically equates "position" with "job" and does not introduce notions of a particular commercial endeavour.

(d) Certainly section 15 (7) (b) does refer to 'sole or principal' duties while section 15 (7A) merely refers to "the duties". But it is submitted that the word "manner" relates to the preponderence of the duties involved in the position. Indeed it seems inconceivable that Parliament would require as a basis for exemption that pastors' or clergymen's duties be the sole or principal duties of their position, while permitting non-religious positions such as forecourt attendants to have minor duties of a Christian nature super-imposed merely at an employer's whim — duties which are not, moreover, essential to the position of forecourt attendance. Put simply Parliament can not be taken to have prohibited religious discrimination in section 15 (1) while legitimating it in section 15 (7A) if and when an employer chooses to impose it. The test of liability is not subjective but objective.

(e) Quite independently of the foregoing contention it is submitted that all the conditions in section 15 (7A) must be simultaneously fulfilled. Sub-section (7A) (b) (i) stipulates that it must be "reasonable to require those duties to be carried out in that manner." The test is one of double reasonability. It will allow an objective view of the position, not a subjective choice:[89]

> Looked at in a reasonable and objective way it is apparent that a non-Christian forecourt attendant can do virtually all that is required in the work.

The word "reasonable" clearly imports an objective test for determining whether religion is a valid qualification for employment. Elkind[90] has commented that what is reasonable is now a matter for the tribunal or the courts. But it is

88 *Sides* supra n.1, 461.

89 Ibid. 462.

90 Elkind "The H.R.C. Amendment Act" [1981] N.Z. Recent Law 381, 383. It is also Elkind's opinion that hallal slaughter is "saved" by s.15(7) since the slaughterers are religious functionaries involved in the "propagation" of the belief. With respect, propagation involves the dissemination or diffusion of some principle, belief or practice. It is therefore difficult to see how slaughter of an animal "disseminates" the religious practice. The better view seems to be that the holding of such a religious belief is a genuine occupational requisite: S.15 (1)(a) or, as I have submitted, falling within s. 15(7A).

submitted that the Equal Opportunities Tribunal, or upon final appeal the Administrative Division of the High Court, will not have an unfettered discretion. They cannot operate in a void. They will necessarily look to the legislation for a guiding principle. That principle is set out in section 15 (1). Any requirement for employment on the basis, inter alia, of religious belief, must be an essential qualification for the particular job. The very essence of this distinction permeates the exemptions of section 15. For instance it is an essential qualification to be a Catholic if the sole or main duties of the job are the propogation of the Catholic faith — that is the very essence of section 15 (7) (b) (i). So too it is an essential qualification that a Catholic priest be a man, because his religion dictates that it is so — that is of the very essence of section 15 (6).

On this analysis of the new section 15 (7A), the test applied by the tribunal remains intact. It could therefore be inferred that the real problem arising from the *Sides* case was not Sides' problem, but the apparent lack of public understanding of the hallal slaughter issue. Now it appears that hallal slaughter by Muslim butchers is expressly validated by the amendment, whereas one previously had to find its sanction by implication in section 15 (1).

Which raises the question of whether the Government cynically intended that the new amendment should be 'mere window dressing'[91] so far as the *Sides* case is concerned.

V. CONCLUSION

The Government claimed that the amendment was to stop the 'ridiculous Sides persecution.' It seems inconceivable however, that the Minister of Justice who introduced the measure (a person with legal training) could not have foreseen the likely legal interpretation of the words of section 15 (7A). The Minister did not proceed with a Bill which would have allowed an exemption to small firms ostensibly because "this would not have cured Mr Sides situation".[92] But a blanket cover of firms with say, less than six employees, would clearly have removed the 'Sides situation' from the purview of the commission. The tribunal itself had suggested such an amendment, the commission's lawyers agreed it was likely, and Sides himself asked for such an exemption.[93] However given the very high proportion of small businesses in New Zealand that sort of amendment could have had a devastating effect. To have granted an exemption to small businesses allowing for discrimination on the basis of religion, but not upon the basis of sex, marital status or race, could not be justified by logic nor policy.

Perhaps the Government was aware of its international obligations.[94] Perhaps

91 Szakats in 1 Mazengarbs *Industrial Law Bulletin* 6, 7 notes that some cynics describe the 1977 Act as 'mere window dressing'.

92 N.Z. Parliamentary debates Vol. 440, 1981: 3034.

93 See nn. 32, 55, 79.

94 Mentioned both by the Hon. J. McLay, Minister of Justice, N.Z. Parliamentary debates Vol. 442, 1981: 3033, and the Hon. Mr. Quigley, N.Z. Parliamentary debates Vol. 442, 1981: 4263. When interpreting section 15(7A) the tribunal could have regard to the Title of the Act: ". . . to promote the advancement of human rights in New Zealand

the lobbyists at the Select Committee hearings, particularly the Jewish groups, did have some effect after all.[95] Perhaps the Justice Department advised their Minister that the only way to resolve Sides dilemma was to repeal any reference to religion or ethical belief in section 15 of the Act — but clearly the Government was not prepared to do that.[96] Perhaps the Prime Minister had committed the Government to some form of cosmetic change — though this was most strongly denied.[97] Perhaps the Minister was in fact committed to the actual principles behind the Act.[98] All this remains a matter of conjecture.

The amendment did not engender significant parliamentary controversy. Yet some change had to be made — the general public, it was thought, had demanded it. Sides was beginning a movement to secure real change but the Prime Minister's comments pacified him.[99] It is difficult to escape the conclusion that some sort of face saving device was required which fell short of undermining the basic principles of the Act. It was alleged that the commission was dealing with trivia. To a non-legal mind the reference in section 35 (1A) to "all the circumstances of the case" superficially answered that criticism. It was also claimed that an employer must be given greater flexibility. Quite convincingly Government members stressed moderation;[100] they could not condone bigotry and could only permit a preference to be given by an employer. But of course preference is a euphemism for discrimination; to give preference to one automatically means excluding another — preference is however, a less offensive term. Thus "preferential treatment" when "reasonable" superficially appeared to allow a middle path.

The tribunal's decision was released on 15 April 1981 and by 23 October 1981 the amendment was on the statute books with a month remaining before the General Election. The amendment altered neither Sides position nor that of the newspapers, and seems effectively redundant. For the value of a classified advertisement a newspaper must now attempt to apply a haphazard legal test which few people can readily comprehend.

in general accordance with the United Nations International Covenants on Human Rights." Emphasis may be given to the phrase "in general accordance with", but the interpretation given by the court could not be "in flagrant violation of". See *Van Gorkom v. Attorney-General* [1977] 1 N.Z L R. 335, 342, per Cooke J.

95 Supra nn. 71-73, and accompanying text.

96 This was claimed by Mr. O'Flynn M.P., N.Z. Parliamentary debates Vol. 442, 1981: 4266.

97 The Hon. J. McLay said that not only the Prime Minister, but also his colleagues "regard the law as nonsense". N.Z. Parliamentary debates Vol. 440, 1981: 3034.

98 The original Bill also preserved a objective test for job qualifications: N.Z. Parliamentary debates Vol. 442, 1981: 4197 (Mr. G. Palmer, M.P.) The Hon. J. McLay, reminded Parliament that it was the National Party which "has a record in human rights that is second to none": N.Z. Parliamentary debates Vol. 440, 1981: 3034.

99 Supra n. 47.

100 The Hon. Mr Quigley seemed most concerned to assure Parliament that the Bill only permitted positive discrimination in advertising and not what he termed 'negative discrimination': N.Z. Parliamentary debates Vol. 442, 1981: 4263. See headline, *The Evening Post,* Wellington, 19 October 1981 "Human rights change aimed to be positive".

So what does the passage of the amendment really signify? Probably that the 'teeth' of the Act are a political embarrassment, for the Government would prefer the commission to take a more conciliatory role. Introducing the Bill for a first reading the Minister commented:[101]

> If I have one criticism of the way in which the Human Rights Commission works at the moment, it is that it tends to carry out its task far too much by the book. I am not criticising the fact that it has to remain within the empowering statute, but problems arise when an overly legalistic approach is adopted to the very human problems of discrimination. I believe fewer difficulties would arise if the Commission adopted an approach that was more akin to that of the ombudsmen or the Race Relations Conciliator.

The following conclusions may be drawn from this legal and political saga:

(a) The Human Rights Commission waited too long before initiating proceedings before the Equal Opportunities Tribunal.

(b) The tribunal took an unduly conservative (though appeal-proof) view of the evidence before it.

(c) The media were responsible, inter alia, for changes to the law. It is suggested that in doing so they were strongly influenced by their own distaste for the advertising provisions of the Act.

(d) The objective standards set out in the Human Rights Commission Amendment Act 1981 preserve the test as stated by the tribunal, that religious requirement in employment must be an essential qualification for that position.

(e) Although the Government claimed that the 1981 amendment was designed to regularise Mr. Sides' wishes to advertise for and discriminate in favour of, the employment of Christians, the new amendment does not facilitate this desire, and it is difficult to understand on what basis the Government could have believed the amendment would do so.

101 The Hon. J. McLay was the Minister responsible for the Bill: N.Z. Parliamentary debates Vol. 440, 1981: 3034.