

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 March 2018
Judgment handed down on 18 July 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY
(SITTING ALONE)

MS A GRAY

APPELLANT

MULBERRY COMPANY (DESIGN) LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR CHRISTOPHER MILSOM
(of Counsel)
Direct Public Access

For the Respondent

MS AMANDA BEATTIE
Croner Group Limited
Croner House
Wheatfield Way
Hinckley
Leicestershire
LE10 1YG

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

The Claimant asserted that a belief in “*the statutory human or moral right to own the copyright and moral rights of her own creative works and output*” amounted to a philosophical belief within the meaning of section 10(2) of the **Equality Act 2010**. In its approach to determining whether it was such a belief, the Tribunal correctly focused on manifestation of the belief and did not set the bar too high in respect of the fourth **Grainger** criterion (**Grainger plc v Nicholson** [2010] ICR 360 at paragraph 24). Accordingly, in circumstances where the Claimant had not done anything in relation to her employment that amounted to an expression of her belief, the Tribunal’s conclusion that the belief did not satisfy the fourth **Grainger** criterion was one that was open to it on the facts.

In relation to the claim of indirect discrimination, the Tribunal was correct to find that group disadvantage had not been made out. The sole adherent of a philosophical belief, who is unable to establish any group disadvantage, cannot succeed in a claim of indirect discrimination.

Finally, the Tribunal’s conclusion that the Respondent’s PCP was a proportionate means of achieving a legitimate aim was correct. The Claimant’s appeal would therefore be dismissed.

A **THE HONOURABLE MR JUSTICE CHOUDHURY**

B **Introduction**

B 1. The Appellant, to whom I shall refer as the Claimant, was dismissed by the Respondent for failing to sign a Copyright Agreement (“the Agreement”) as a condition of continued employment. The effect of the Agreement would be to confer certain rights on the Respondent in respect of works created by the Claimant. The Claimant refused to sign the Agreement

C because of her professed belief in “*the statutory human or moral right to own the copyright and moral rights of her own creative works and output*”. The issue in this appeal is whether that belief amounts to a belief within the meaning of section 10(2) of the **Equality Act 2010** (“the

D 2010 Act”) and whether the Claimant was the subject of indirect discrimination on the grounds of that belief.

E **Factual Background**

F 2. The Respondent is the well-known design company which produces luxury leather handbags and other fashion items. The Claimant is a writer and film-maker. She commenced employment with the Respondent as a Market Support Assistant on 28 January 2015. In that

G role, the Claimant was part of a team which had access to some of the Respondent’s designs ahead of their launch to market. Understandably, the Respondent seeks to protect its intellectual property rights and requires all of its employees to sign a contract of employment (“the Contract”) and the Agreement. The Contract contained a confidentiality clause and (at

G clause 13) a clause relating to “*Inventions, Improvements and Patents*”.

H 3. Clause 13 of the Contract was in the following terms:

 “You shall disclose to the Company any discovery or invention or improvement to an existing invention, design or process.

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All improvements, designs or inventions, whether capable of registration or not, made by you during the course of your employment with the Company, shall be the property of the Company and you will sign all documents and do all necessary acts required to transfer title in such improvements or inventions to the Company without any additional compensation or payment, save for any expenses or disbursements incurred for the purposes of transferring title to the Company. Nothing in this clause shall affect any rights conferred by the Patents Act 1977, the Copyright, Designs and Patents Act 1988 or any statutory modification or re-enactment thereof.”

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4. The Agreement provided as follows:

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“2.1. You undertake that you shall promptly disclose to Mulberry Company all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Company and shall hold them in trust for Mulberry Company until such rights shall be fully and absolutely vested in Mulberry Company.

2.2. You hereby assign to Mulberry Company by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world in respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Company.

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2.3. You hereby unconditionally and irrevocably waive in favour of Mulberry Company and all moral rights conferred on you by Chapter IV of Part 1 of the Copyright Designs and Patent Act 1988 for any work in which copyright or designs is vested in Mulberry Company whether by operation of this clause or otherwise.

2.4. You agree and undertake that you will execute such deeds or documents and do all such things and acts as may be necessary or desirable to substantiate the rights of Mulberry Company in respect of the matters referred to in this clause.

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Each of the above terms is independent and separable from the remaining terms and enforceable accordingly. If any term shall be unenforceable for any reason but would be enforceable if part of the wording thereof were deleted, it shall apply with such deletions as may be necessary to make it enforceable.

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5. The Claimant signed the Contract on 30 January 2015. However, she refused to sign the Agreement. She told the Respondent’s HR department that she had difficulty signing it because it interfered with her own work as a writer and film-maker. She said that she had read the clause very carefully because “*it is extremely important to me to own all rights, including copyright, to my own writing, film making and all creative output*”. She believed that the Agreement could extend to her artistic activities away from work.

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6. The Respondent made it clear that it had no interest in obtaining the copyright to any of the Claimant’s personal work; its interest only extending to that which related to its business. The Respondent responded to the Claimant’s concerns by amending the Agreement to make it

A clearer that only work which related to the Respondent's business would be covered. Clauses 2.1 and 2.2 were amended as follows (amendments are shown in italics):

B "2.1. You undertake that you shall promptly disclose to Mulberry Company all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Company *which relate to any business of Mulberry Company or any matter arising from your employment with Mulberry* and shall hold them in trust for Mulberry Company until such rights shall be fully and absolutely vested in Mulberry Company.

C "2.2. You hereby assign to Mulberry Company by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Company *which relate to any business of Mulberry Company or any matter arising from your employment with Mulberry.*"

D 7. This amendment did not satisfy the Claimant. She considered that the additional words were "*general and open to interpretation*".

E 8. The discussions about the Agreement continued over subsequent months but no resolution was reached. Matters came to a head on 16 September 2015 when a series of meetings took place between HR and the Claimant. As the Claimant had refused to sign the amended version of the Agreement, the amendment was withdrawn and the Claimant was asked again to sign the original version. She made it clear that she would not sign. After some consideration, the Claimant was dismissed with notice. The Claimant's dismissal was confirmed in writing on 22 September 2015. That letter, so far as relevant, stated that:

F "Following our discussions, I have decided to dismiss you with effect from 16th September 2015. The reason for your dismissal is refusing to comply with conditions of your employment with Mulberry through your refusal to sign the Copyright Agreement and that we believe that by refusing to sign it you intend to copy Mulberry products which puts the Company at risk."

G 9. The Claimant had at no stage during her employment suggested that she had a philosophical belief in the terms set out in paragraph 1 above or that that was the reason for her refusal to sign.

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A 10. The Claimant lodged proceedings for unfair dismissal on the grounds of asserting a
statutory right, namely the right to own her own copyright and intellectual property. It was
quickly established that that statutory right fell outside the scope of section 104 of the
B **Employment Rights Act 1996**. However, the Claimant was given permission to amend her
claim to one of discrimination (direct and indirect) on the grounds of belief.

C 11. That amended claim was heard by the Bristol Employment Tribunal, Employment Judge
Livesey presiding, on 17 and 18 October 2016. A precise description of the Claimant's stated
belief was drawn up at the outset of the hearing, with the Claimant's input and agreement. The
belief was stated to be as follows:

D "The statutory human or moral right to own the copyright and moral rights of her own
creative works and output."

E 12. The Claimant gave evidence in support of her belief. The Tribunal referred to this as
follows:

"Claimant's stated philosophical beliefs"

4.8. The Claimant had undertaken a Masters degree at UCLA in America which had included
some teaching on certain aspects of the legal [principles] associated with film making and
intellectual property law. Paragraph 22 of her statement she said this:-

F *"I became passionate about my belief in the right of an individual, not only to own, but to
profit from and receive credit for their own work if they wished. In order to explore these
ideas further, I wrote a feature film screen play in 2010 which explored issues of
ownership of intellectual property."*

4.9. In a document that she produced to the Tribunal within her supplementary bundle ..., she
further provided the following information in relation to her beliefs ...:-

G *"I hope that the court will see that there is in this case an issue of deeply held belief, of
spiritual practice, of identity, of human rights, and of the attempted colonisation of those
private areas of person's life and mind by a commercial enterprise with no actual interest
in that individual's work, or devotions, or poems or hymns or life."*

4.10. Whilst the Claimant may have held those views privately, there was nothing in what she
did or said to the Respondent which made them aware that she held them. The Claimant
asserted that her actions, by not signing the Copyright Agreement, would have given that
indication. We did not accept that that was necessarily so and the Respondent's witnesses had
certainly not gleaned that she had possessed such beliefs as a result of her refusal to sign the
Agreement.

H 4.11. The Claimant failed to mention, discuss or elucidate her beliefs to the Respondent, either
generally during her time working for Mulberry or, for example, during the private and
candid conversations that she had with Ms Pitcher [the Claimant's line manager] whilst

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commuting. Further, she did not refer to them specifically during her discussions and negotiations over signing of the Copyright Agreement.”

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13. The Tribunal approached the issue of belief by reference to the questions set out in Grainger plc v Nicholson [2010] ICR 360 and paragraph 2.59 of the EHRC’s Code of Practice on Employment. Its conclusions are set out at paragraph 5.7 of the Judgment:

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“5.7.1. Was the belief genuinely held;

We accepted that the belief was genuinely held in the sense that the Claimant honestly believed it. The Respondent had attempted to challenge her veracity in that respect, but we broadly accepted her evidence on that issue;

5.7.2. Was it a belief, as discussed in the case of [*McClintock*] v *The Department of Constitutional Affairs* [2008] IRLR 29, or an opinion or viewpoint based on the present state of information available;

As in *Grainger*, particularly paragraph 16 of the judgment, the Claimant’s opinion was a viewpoint held by her as a belief. It was not just an opinion based upon logic which, if the foundations changed, was capable of causing her to have altered her view;

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5.7.3. Did the belief concern a weighty and substantial aspect of human life and behaviour;

That issue was not disputed by the Respondent. The fact that copyright law existed to reflect the Claimant’s belief perhaps indicated that it was sufficiently weighty and serious to warrant protection at law;

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5.7.4. Had the belief attained a certain level of cogency, seriousness, cohesion and importance;

There was, in our view, a considerable range of levels of cogency and seriousness in which these beliefs might have been held. At one end, they might be held by an individual who gave up her time and resources to lobby and campaign for a heightened awareness of copyright theft and an increase to the legal protection against it. At the other, there might have been somebody who was simply asked if they agreed with the notion that copyright theft was a bad thing. It was our view that, whilst the first type of person could well have been said to have held a belief which had a sufficient level of cogency and seriousness to qualify under the Act, we did not consider that the second type of person necessarily qualified.

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We did not seek to deny or decry the philosophical theories that underpinned such a belief, as perhaps reflected in the quotations listed within the legal text books as part of the Claimant’s submissions to the Tribunal [28], but we did not accept that a person who simply agreed with the notion that copyright theft was a bad thing, would necessarily hold a belief which carried a sufficient level of cogency and cohesion to qualify under the Act. It could have been said that Ms Wilkinson herself held such a view, but we considered it unlikely that she would have professed to having held a philosophical belief which qualified for protection under the Act. Such a person would not hold the type of cohesive belief pattern discussed in paragraph 26 of the judgment in *Grainger*.

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Accordingly, whilst we accepted that the Claimant strongly believed in the right of ownership to her own creative output, we did not accept that she held that belief as any sort of philosophical touchstone to her life. This was, as Mr Chaudhuri put it in closing submissions, a belief or theory that the Agreement would have threatened the Claimant’s ownership to her novel and/or her screenplay. That belief, even when set against the background belief that copyright law properly protected the fruits of an individual’s artistic endeavours, was not sufficiently cohesive to form any cogent philosophical belief system. The Claimant’s own expression of her belief, as set out in pages 14 and 15 of C1, concentrated upon an individual’s right to create, produce and

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write and the benefit that *she* had from those activities which was something entirely different;

5.7.5. Whether the belief was worthy of respect in a democratic society;

The Respondent accepted that that element of the test was met.”

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14. Although the Tribunal found that the Claimant did not hold a philosophical belief that was capable of protection under the **2010 Act**, it nevertheless went on to consider how her complaints would have been determined if they had been wrong in reaching that conclusion.

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The Tribunal rejected the claim of direct discrimination on the basis that her dismissal was due to her failure to sign the Agreement and not because of her philosophical beliefs, of which the Respondent had no understanding and knowledge. The Tribunal also found that the appropriate comparator to the claim of direct discrimination would have been treated in the same way.

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15. As to the claim of indirect discrimination, the Tribunal found the provision, criterion or practice (“PCP”) in question, namely the requirement to sign the Agreement or be dismissed, was not shown to have put other persons sharing her belief at a particular disadvantage. But, in any case, the defence of justification under section 19(2)(d) of the **2010 Act** applied in that the requirement to sign the Agreement (particularly in its amended form) was a proportionate means of achieving the legitimate aim of protecting the Respondent’s intellectual property.

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Belief and the *Grainger* Criteria

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16. Section 4 of the **2010 Act** provides that religion or belief is a protected characteristic for the purposes of that **Act**. Section 10 of the **2010 Act**, so far as relevant, provides:

“(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief -

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(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”

A 17. Guidance on the application of these provisions is provided in the **Code of Practice on Employment 2011** (“the Code”). The relevant paragraphs of the **Code** for present purposes include the following:

B 2.52. The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).

...

Meaning of belief

...

C 2.57. A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.

2.58. A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

2.59. For a philosophical belief to be protected under the Act:

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- it must be genuinely held;
 - it must be belief not an opinion or viewpoint based on the present state of information available;
 - it must be a belief as to a weighty and substantial aspect of human life and behaviour;
 - it must attain a certain level of cogency, seriousness, cohesion and importance;
 - it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.”
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F 18. The requirements set out in the five bullet points at paragraph 2.59 of the **Code** are derived from the judgment of Burton J in Grainger plc v Nicholson [2010] ICR 360 at paragraph 24. I shall refer to these requirements as the “*Grainger criteria*”.

G 19. The Claimant, ably represented here by Mr Milsom, concedes that the Grainger criteria constitute important guidance. However, he submits that three caveats should be added to their application.

H 20. Firstly, he says that the Grainger criteria are not to be treated as statute. That proposition cannot be disputed. However, it does not add anything to the issues in this case as

A there is nothing to suggest that the Tribunal did anything other than apply the **Grainger** criteria as appropriate guidance as to the correct approach.

B 21. Secondly, Mr Milsom invites me to conclude that **Grainger** was wrongly decided, insofar as the EAT in that case went on to say as follows at paragraph 26:

C “26. [The] submission is that what is required is a philosophical belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. Both sides refer to dictionary definitions of philosophy, as did the regional employment judge, but I do not find them particularly helpful to resolve the question, since, as one would expect, each dictionary referred to has a number of definitions of philosophy. It is, as I have said, common ground that there must be some limitation, and hence Malcolm Evans, cited by Mr Vickers, from a work “Religious Liberty and Non-Discrimination” is plainly right to say that “no system could countenance the right of anyone to believe anything and to be able to act accordingly”. I am satisfied that, notwithstanding the amendment to remove “similar”, it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief. However, as is apparent from the decision in *Eweida v British Airways plc* [2009] ICR 303, which is a decision of the Employment Appeal Tribunal on these Regulations, and not part of the Convention jurisprudence, even a religious belief is not required to be one shared by others ...”

D 22. It is the underlined words to which Mr Milsom takes objection. He submits that by stating that a philosophical belief needed to have “*similar status or cogency to a religious belief*”, the EAT was thereby impermissibly reintroducing a requirement of similarity in the definition of belief which had been expressly removed by amendment. (The **Employment Equality (Religion or Belief) Regulations 2003** had provided that “‘belief’ means any religious or similar philosophical belief”. The word “similar” was removed with effect from 30 April 2007 by an amendment introduced by section 77(1) of the **Equality Act 2006**.) This is relevant, says Mr Milsom, because the Tribunal in the present case expressly referred (at paragraph 5.7.4) to paragraph 26 of **Grainger** in analysing whether the Claimant’s belief attained the required level of cogency and cohesion.

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H 23. I do not agree that **Grainger** was wrongly decided in this respect. As is apparent from the analysis in **Grainger** of passages in *Hansard* dealing with the amendment, the removal of the word “similar” from the original definition of belief was because that word was not thought

A to add anything to the definition and was therefore redundant. The amendment was not
intended to lower the threshold requirements in respect of philosophical beliefs as compared to
religious beliefs. Philosophical beliefs, just as with religious beliefs, were still required to
B attain a certain level of cogency, seriousness, cohesion and importance in order to qualify for
protection.

24. Furthermore, in **Maistry v BBC** [2014] EWCA Civ 1116, Underhill LJ referred to
C **Grainger** and the need stated therein for a philosophical belief to have “*a similar status or
cogency to a religious belief*” without demur or criticism: see **Maistry** at paragraphs 3 and 13.
The fact that no distinction is to be drawn between religious and philosophical beliefs in terms
D of the level of cogency, seriousness, cohesion and importance to be attained, was also
confirmed in **R (Williamson) v Secretary of State** [2005] 2 AC 246 at paragraph 76, where
Baroness Hale of Richmond stated as follows:

E “76. Convention jurisprudence suggests that beliefs must have certain qualities before they
qualify for protection. I suspect that this only arises when the belief begins to have an impact
upon other people, in article 9 terms, when it is manifested or put into practice. Otherwise
people are free to believe what they like. The European Court in *Campbell v Cosans v United
Kingdom* (1982) 4 EHRR 293, 303, para 36, equated the parental convictions which were
worthy of respect under the first Protocol with the beliefs protected under Article 9: they must
attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in
a democratic society; and not incompatible with human dignity. No distinction was drawn
between religious and other beliefs. In practice, of course, it may be easier to show that some
religious beliefs have the required level of cogency, seriousness, cohesion and importance.”

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25. However, the fact that it may be easier for some religious beliefs to attain the said level
of cogency, seriousness, cohesion and importance, does not mean that philosophical beliefs
G should not also be required to attain that same threshold level. This is not a requirement that
philosophical beliefs be the same as or similar to religious beliefs; merely that philosophical
beliefs must meet the same threshold requirements. This also does not mean that philosophical
H beliefs, if they meet those threshold requirements, would be afforded any less protection than
those holding religious beliefs. Once the threshold requirements are met, any qualifying belief

A would have the same protection as any other: see **Henderson v GMB** [2015] IRLR 451 at paragraph 62 per Simler J (President).

B 26. Mr Milsom’s third suggested caveat is that when considering whether a belief attains “*a certain level of cogency, seriousness, cohesion and importance*”, the bar must not be set too high. Reliance is placed upon the judgment of Langstaff P (as he then was) in **Harron v Chief Constable of Dorset Police** [2016] IRLR 481, in which the belief in question was a profound
C “*belief in the proper and efficient use of public money in the public sector*”:

D “34. As to the question of threshold, however, and the question of sufficiency of Reasons, I take a different view. It is an error of law not to adopt the proper approach. The proper approach to determining whether or not there was a qualifying belief is not simply to set out the wording in the Code of Practice or that in paragraph 24 of Burton J’s decision in *Grainger*, but to have regard also to the way in which the criteria there set out are to be applied, as, for instance, indicated by the speech of Lord Nicholls, whose words I have quoted above. He made it clear that the belief must relate to matters more than merely trivial. That is a hint towards the approach that regards as substantial that which is more than merely trivial. The fact that he meant it in that sense is indicated by the use of the word “again” in the expression, “But, again, too much should not be demanded in this regard”, when talking about the meaning of “coherence”. “Coherence” is to be understood in the sense of being intelligible and capable of being understood. Clearly, the belief that the Claimant had would meet that test if that test had been applied in isolation. The paragraph ends with a plea not to set the threshold requirements at too high a level. The Tribunal did not indicate in its decision that it had had particular regard to those matters that related to approach. When that is coupled with the absence of any description as to what it found to lack weight, or not to be in respect of a substantial aspect of human life and behaviour, it has not said sufficient to persuade me that an error of law may not have been committed.”

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F 27. I agree with Mr Milsom that the bar is not to be set too high. The reference in the **Grainger** criteria to the attainment of a “*certain level of cogency, seriousness, cohesion and importance*”, has to be read having regard to the jurisprudence which gave rise to those criteria, and, in particular, to the judgment of the Supreme Court in **Williamson**, which is referred to in
G the passage from **Harron** above, and in which Lord Nicholls of Birkenhead said as follows:

H “23. Everyone ... is entitled to hold whatever beliefs he wishes. But when questions of ‘manifestation’ arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this

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regard. ... Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ [2003] QB 1300, 1371, para 258."

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28. It follows from these passages in Williamson and Harron that, in considering whether a "certain level" of cogency, seriousness, cohesion and importance has been attained, the Tribunal must guard against applying too stringent a standard. Mr Milsom suggested that for all of the Grainger criteria, the level should be set no higher than "more than merely trivial".

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However, whilst that level might be apt in assessing seriousness and importance, it seems to me to be less apt in assessing cogency and coherence. The mere fact that a genuinely held belief relates to subject matter which is more than merely trivial does not necessarily mean that that

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belief was either cogent or coherent. One can readily envisage a scenario whereby a Claimant professes a profound belief as to an important aspect of her life but seeks to apply that belief in a haphazard, arbitrary or random fashion such that it cannot be said that her belief has attained

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any measure of cogency or coherence. The attributes of cogency and coherence are not susceptible to measurement against a standard of "more than merely trivial". In my judgment, the proper approach to the application of the Grainger criteria (and in particular to the fourth

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Grainger criterion) is simply to ensure that the bar is not set too high, and that too much is not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs.

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29. The justification for not setting the bar too high is that it is not for the Court to judge the validity of a philosophical belief. It was said by Lord Nicholls in Williamson that, "Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising" (paragraph 22). The same may be said in respect of

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philosophical beliefs. However, it is important to remember that in an application of the

A Grainger criteria, and the fourth Grainger criterion in particular, the focus should be on the manifestation of the belief. As Lord Nicholls stated in Williamson:

“23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of ‘manifestation’ arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. ...”

B 30. Lord Walker, at paragraph 64 of Williamson, agreed with Lord Nicholls that a focus on manifestation was necessary “*in order to prevent article 9 becoming unmanageably diffuse and unpredictable in its operation*” (see paragraph 62):

“64. I am therefore in respectful agreement with Lord Nicholls that, at any rate by the time that the court has reached the stage of considering the *manifestation* of a belief, it must have regard to the implicit (and not over-demanding) threshold requirements of seriousness, coherence and consistency with human dignity which Lord Nicholls mentions.” (Emphasis in original)

D 31. Those “objective minimum” or threshold requirements are reflected in the Grainger criteria. Those criteria are therefore to be applied to the manifestation of the belief. An act which is motivated by a belief is not necessarily a manifestation of it. Whether or not it is in a particular case will depend on the facts. In Arrowsmith v UK [1981] 3 EHRR 218, the ECHR had to consider whether the Article 9 rights of Ms Arrowsmith had been violated following her conviction and sentence under the **Incitement to Disaffection Act 1934** for distributing leaflets seeking to dissuade soldiers from serving in Northern Ireland. Ms Arrowsmith was a pacifist, and she argued that her conviction and sentence amounted to an interference with her right to manifest that belief. The ECHR held as follows:

G “69. The Commission is of the opinion that pacifism as a philosophy and, in particular, as defined above, falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief (‘conviction’) protected by Article 9(1). It remains to be determined whether or not the distribution by the applicant of the leaflets here in question was also protected by Article 9(1) as being the manifestation of her pacifist belief.

H 70. Article 9(1) enumerates possible forms of the manifestation of a religion or a belief, namely, worship, teaching, practice and observance (*‘par le culte, l’enseignement, les pratiques et l’accomplissement des rites’*), and the applicant submits that by distributing the leaflets she ‘practised’ her belief.

71. The Commission considers that the term ‘practice’ as employed in Article 9(1) does not cover each act which is motivated or influenced by a religion or a belief.

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It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9(1), even when they are motivated or influenced by it.

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75. The Commission finds that the leaflets did not express pacifist views. The Commission considers, therefore, that the applicant, by distributing the leaflets, did not manifest her belief in the sense of Article 9(1). It follows that her conviction and sentence for the distribution of these leaflets did not in any way interfere with the exercise of her rights under this provision.

Conclusion

76. The Commission is therefore unanimously of the opinion that Article 9(1) of the Convention has not been violated.” (Emphasis added)

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32. In Eweida v UK [2013] 57 EHRR 8, it was said that in order to count as a manifestation within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. However, it was also said that acts or omissions which do not directly express the belief concerned may fall outside the protection:

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“82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9(1) (see *Skugar v Russia* (40010/04) 3 December 2009; and, e.g. *Arrowsmith v United Kingdom* (1981) 3 EHRR 218; *C v United Kingdom* (10358/83) 15 December 1983; *Zaoui v Switzerland* (41615/98) 18 January 2001). In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question ...” (Emphasis added)

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33. The question therefore is whether doing an act, or, as in this case, not doing a particular act (i.e. not signing the Agreement), amounts to a direct expression of the belief concerned and whether it is “intimately linked” to it. If the act or omission does not satisfy those requirements then it does not fall to be protected.

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34. These considerations may well be particularly relevant to an analysis of cogency and coherence under the fourth Grainger criterion (which can in some senses be regarded as an

A overarching criterion). Cohesion is to be understood in the sense of being intelligible and
capable of being understood: see **Harron** at paragraph 34. If, for example, a belief is expressed
B in relation to one act or omission, but inexplicably not expressed in relation to another which is
very similar, then it would be open to a Tribunal to conclude that the belief was unintelligible
and lacking a certain level of cogency or coherence. The same conclusion might be available to
C a Tribunal where there is no expression of the belief at all. There is no good reason why a
person whose belief is not manifested at all should necessarily be in a better position than one
who manifests it inconsistently. Whether or not, in a particular case, the belief has attained a
sufficient level of cogency and cohesion (bearing in mind that not too much is to be demanded
D in this respect) will depend on the facts.

The Grounds of Appeal

E 35. The Claimant was given permission to proceed with three grounds of appeal. These are
as follows:

- F a. Ground 1: The Tribunal erred in concluding that the Claimant's belief was not a
philosophical belief within the meaning of section 10 of the **2010 Act**;
- G b. Ground 2: The Tribunal erred in its assessment of the particular disadvantage
aspect of the test for indirect discrimination;
- c. Ground 3: Having failed to accept the importance of the Claimant's belief to her
life and to identify correctly the disadvantage to which she was subject, its
conclusions on justification cannot stand.

H 36. I shall deal with each ground in turn

A Ground 1: Error in concluding that the Claimant did not hold a philosophical belief

Submissions

37. The Claimant submits that the Tribunal’s reasoning in support of its conclusion that her belief did not attain a certain level of cogency or cohesion was wrong in four central respects:

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a. First it is said the Tribunal confused “cogency” with “importance”. It is, submits Mr Milsom, axiomatic that a belief as to something as worthy of respect in a democratic society as the right to copyright - a right recognised by Article 27 of the Universal Declaration of Human Rights and by domestic law - is cogent and coherent.

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b. Secondly, the Tribunal’s attempt to assess cogency and seriousness by reference to a “*range of levels of cogency and seriousness in which these beliefs might have been held*” led them into error. That was because the Tribunal did not assess the belief as defined in paragraph 3.2 but the belief that “Copyright theft was a bad thing”; and the range or spectrum of belief appears to require that there be a public display of one’s belief through proselytising and/or campaigning.

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c. Thirdly, Mr Milsom submits that the Tribunal appears to have wrongly analysed the Claimant’s belief as being no more than “*a belief or theory that the Copyright Agreement would have threatened the Claimant’s ownership to her novel and/or screenplay*”.

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d. Finally, it is submitted that there is a discontinuity in the Tribunal’s reasoning in that, having accepted that the Claimant’s belief was not simply a viewpoint based on the present state of information, it is entirely unclear why her belief had not also attained the level of cogency, seriousness, cohesion or importance set by

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Williamson and Harron. Fundamentally, the Tribunal has set the bar far too

A high and appears to have ruled out the Claimant's belief on the basis that it concerned a "*single issue*" and did not affect all aspects of her life.

B 38. Ms Beattie submitted that the Tribunal was not considering a different belief to that stated, that the range or spectrum identified by the Tribunal was merely an example of the kinds of acts which might or might not satisfy the fourth **Grainger** criterion, and that on the facts of this case, the Tribunal was fully entitled to conclude that the Claimant's belief did not satisfy that criterion.

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Discussion

D 39. As to Mr Milsom's first point under this ground, I am not persuaded that the Tribunal did confuse cogency with importance as suggested. The fact that the Claimant's belief concerned an important aspect of human life and behaviour was addressed under the third **Grainger** criterion considered at paragraph 5.7.3 of the Reasons. The Tribunal noted that the existence of copyright law was an indication of the importance of creative ownership to an aspect of human life and behaviour. However, the mere fact that the Claimant's belief in the importance of owning one's creative output was reflected in existing laws relating to copyright did not mean that her belief had necessarily attained a certain level of cogency or cohesion. Having a belief relating to an important aspect of human life or behaviour is not enough in itself for it to have a similar status or cogency to a religious belief.

G 40. At first blush, Mr Milsom's second point, namely that the Tribunal may not have had the agreed formulation of the Claimant's belief in mind when conducting its analysis based on the range of levels of cogency and seriousness, would appear to have some merit. At paragraph H 5.7.4 the Tribunal refers on more than one occasion to the notion that "*copyright theft was a*

A *bad thing*”. That may be contrasted with the way in which the Claimant put her belief, which was that it was a belief in “*the statutory human or moral right to own the copyright and moral rights of her own creative works and output*”. That may be said to be somewhat broader than
B simply an objection to copyright theft. The Claimant’s evidence also refers to the importance of writing in her life, which, she claimed, amounted to a “*spiritual practice*”. In those circumstances, the commercial disadvantage of copyright theft might be said to be only one of several disadvantages experienced by the Claimant in losing control of her work.

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D 41. However, as stated above, the focus must be on manifestation by reference to the act or omission in question. In the present case, the act or omission in question was the refusal to sign the Agreement. Whilst that refusal might have been dictated by the Claimant’s belief, it did not amount to a manifestation of it in the sense described above. As the Tribunal found, she had not at any stage made her belief known to the Respondent. Furthermore, her only stated reason
E for her refusal to sign was her concern that the Respondent would obtain rights over her private creative output and a commercial concern that signing the Agreement might make it more difficult for her to sell her work to others. That refusal to sign would not, and did not in this case, give rise to any suggestion that the refusal was motivated by a philosophical belief; the
F Tribunal having expressly rejected (at paragraph 4.10) the Claimant’s contention that the mere fact of her refusal to sign would have indicated to the Respondent that she was manifesting her belief. In that context, the Tribunal was not incorrect, in my judgment, to draw the belief in the way that it did when considering whether it had a certain level of cogency and cohesion. The
G Claimant’s actions had done little more than indicate that she was concerned about losing control of the copyright to her private creative output, or, as the Tribunal put it (perhaps somewhat bluntly), her stated concern was about “copyright theft”.
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A 42. Mr Milsom’s next criticism was as to the Tribunal’s range or spectrum of cogency,
seriousness, cohesion and importance, which, at one end, had a person who was very publicly
B active in lobbying and campaigning for heightened awareness of copyright theft, and, at the
other, had a person who simply agreed that copyright theft was a bad thing. Mr Milsom
contends that by apparently ascribing higher levels of cogency and seriousness to those who
C seek to proselytise or publicly promote their beliefs, the Tribunal fell into error, because it is
quite possible for a person to have a sufficiently cogent and serious belief without actively
seeking to promote those beliefs in any way. Article 9 of the Convention provides:

“1. Everyone has a right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either *alone* or in community with others and in public or *private* to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” (Emphasis added)

D 43. It is quite right, of course, to say that a belief that is manifested only in private may be
E just as cogent, serious and coherent as a belief that manifests itself more publicly, although
outward manifestation may be evidence of cogency and coherence. It seems to me that in
F considering the spectrum referred to in paragraph 5.10, the Tribunal was merely seeking to give
an example, by reference to the degree of outward manifestation, of the kinds of acts which
G might amount to a manifestation of a belief having a certain level of cogency, seriousness,
cohesion and importance. The fact that the Tribunal did not expressly place the Claimant
anywhere on the spectrum, and the fact that it did not consider that the person who merely
H agreed that copyright theft was a bad thing “necessary qualified”, supports the view that this
was no more than an example, and that the Tribunal was not in fact suggesting that the
Claimant herself had to be a campaigner or proselytiser in order to qualify for protection.

A 44. It is in the next paragraph of 5.7.4 that the Tribunal’s analysis turns specifically to the
Claimant. There, the Tribunal states that it accepted that the Claimant strongly believed in the
right of ownership to her own creative output - notably, the Tribunal was not here describing
B her belief as merely an objection to copyright theft - but that it did not accept that she held that
belief as any sort of “*philosophical touchstone to her life*”. If, by that, the Tribunal considered
that the belief had to be one that affected all or many aspects of the Claimant’s life in order to
C qualify then that would have been an error, as it would have amounted to setting the bar too
high. It is quite clear that a belief in a single issue, which affects perhaps only a single but
important aspect of a person’s life, could qualify for protection: see **Grainger** at paragraph 27;
Harron (belief in the proper and efficient use of public money in the public sector) at
D paragraph 34; and **Maistry** (belief in BBC values) at paragraph 3. However, it is clear from
reading the rest of the paragraph, that that is not what the Tribunal meant. First, it identifies
that her belief was that the Agreement would have threatened the Claimant’s ownership to her
E novel and/or screenplay. That was not inconsistent with the statement of her belief at paragraph
3.10. However, the question is whether there was manifestation of the belief through an act or
omission, as opposed to such act or omission merely being motivated by the belief. In the
F present case, given the terms of the stated belief and the fact that the Claimant was being
required to sign the Agreement, the manifestation of that belief would axiomatically be in
raising it as a reason for refusing to sign. She did not do so. In fact, the impression she clearly
G gave to her employer was that her objection was because of the difficulty it might create for her
in seeking to sell her private work.

H 45. The Respondent referred me to evidence which supported that finding. In particular,
there is an email from the Claimant to Ms Wilkinson dated 22 June 2015, in which she set out
her reasons for not signing the amended Agreement. She said:

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“The issue for me is that any work I sell is subject to scrutiny by the lawyers of the buyer. The first thing they check is if I own copyright to the work I have created whether I have signed any contracts that might be in conflict with their outright or partial purchase of my work.

...

Because I sell work to companies who further develop that work, it is very important to limit my copyright agreement with Mulberry to work created at the behest of Mulberry, during my working hours at Mulberry and for the furtherance of the business of Mulberry.

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...”

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46. Not only does the Claimant not articulate or even express her belief here, she in fact puts forward an objection to signing which could be described as purely commercial and designed to protect her private interests. That does not, on any view, amount to an actual expression of her belief so as to amount to a manifestation of it. Given these facts, the Tribunal’s view that that belief, so expressed, was not held as any sort of philosophical touchstone to her life, and was “*not sufficiently cohesive to form any cogent philosophical belief system*”, was one that it was plainly entitled to reach.

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47. The final reason given by the Tribunal for concluding that there was no philosophical belief was that the Claimant’s expression of her belief concentrated upon her right to create, produce and write, and the benefit that *she* derived from those activities. That was said to be “*something entirely different*” from that which might give rise to any “*cogent philosophical belief system*”. In my judgment, this was just another way of stating that the evidence as to the benefits she derived from the practice of her belief says little or nothing about the manifestation of her belief in a manner which involves an actual expression of it, and/or that it does not establish any intimate link between her belief and the act or omission in question, namely the refusal to sign the Agreement. The refusal to sign could, objectively viewed, have been for any number of reasons, none of which had anything to do with a philosophical belief. In the absence of any meaningful expression of her belief, the necessary intimate link, in the circumstances of this case, simply does not exist.

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A 48. I therefore reject Mr Milsom’s submission that the Tribunal has erred in its approach to
the fourth **Grainger** criterion. Far from setting the bar too high, the Tribunal properly
considered that criterion with regard to its manifestation, and, based on the facts in this case,
B found the claimed belief to be lacking. Accordingly, ground 1 of the appeal fails.

Ground 2: Indirect Discrimination and Disadvantage

C 49. For the claim of indirect discrimination, the Tribunal was required to consider, pursuant
to section 19(2) of the **2010 Act**, whether the PCP was discriminatory in relation to the
Claimant’s belief in that:

- D a. the Respondent applied the PCP to persons who did not share the Claimant’s
belief;
- E b. the PCP puts or would put persons with whom the Claimant shares her belief at a
particular disadvantage when compared with persons who do not share that
belief, i.e. had she established that there would be group disadvantage;
- F c. the PCP puts or would put the Claimant at that disadvantage; and
- d. the Respondent cannot show it to be a proportionate means of achieving a
legitimate aim.

F 50. The Tribunal’s conclusion as to the second of these questions, namely whether there is
group disadvantage, is at paragraph 5.14:

G “5.14. The next question was whether the PCP put those with whom the Claimant shared her
protected characteristic at a particular disadvantage. That issue required us to consider
whether other holders of the claimed philosophical belief would also have suffered the same
disadvantage; would they have refused to sign the Agreement and been dismissed? That
question could not safely have been answered in the Claimant’s favour since there was no
evidence that the clause would have been reprehensible to all of those who shared the
Claimant’s belief. Other people may not have viewed the restrictions imposed by the
Agreement in the same way that she had. The clause was not obviously unreasonable nor did
H it obviously go beyond what was reasonably necessary to protect the Respondent’s legitimate
interests.”

A *Submissions*

51. The Claimant submits that the Tribunal erred in that it asked itself whether *all* persons sharing the Claimant's belief would have been disadvantaged by the PCP. Reliance is placed upon the judgment of Maurice Kay LJ in **Mba v Merton London Borough Council** [2014] 1 WLR 1501, which concerned a Claimant who was disciplined for refusing to work on Sundays due to her strong Christian beliefs. In that case, the Tribunal found that the Claimant's belief that Sunday should be a day of rest was "*not a core component of the Christian faith*" and concluded that the imposition of the PCP - to work on Sundays - was proportionate. Finding that the Tribunal erred in its approach to disadvantage, Maurice Kay LJ said as follows:

D "17. I do not agree that there was no error of law in the ET's reasoning. Regulation 3(1)(b)(i) envisages a PCP which applies or would apply equally "to persons not of the same religion or belief" as the claimant and which puts or would put "persons of the same religion or belief" as the claimant at a particular disadvantage when compared with other persons. The fact that those at the requisite particular disadvantage are described in the plural - "persons" - is the reason why the test is sometimes described as one of "group disadvantage". However, the use of the disjunctive - "religion or belief" - demonstrates that it is not necessary to pitch the comparison at a macro level. Thus it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage. It is permissible to define a claimant's religion or belief more narrowly than that. In my judgment, this is where the ET went wrong. It described [the claimant's] Sabbatarian belief as "*not a core component of the Christian faith*". By so doing it opened the door to a quantitative test on far too wide a basis."

52. It is further submitted that in the context of philosophical belief there is no room for the requirement that there be group disadvantage. A belief may well be held by only one person in which case it would not be possible to adduce evidence of others sharing that belief; but to hold that that person did not for that reason satisfy the requirements of section 19(2)(b) of the **2010 Act** would be contrary to Article 9 which does not require there to be any group disadvantage. It is said that **Mba** provides support for the proposition that the requirements as to group disadvantage should be read down in order to give effect to Article 9 of the Convention. Further, it is said that the Tribunal should have found that others holding the Claimant's belief would have faced an additional disadvantage if required to sign the Agreement. In this case, there was a sufficiently close and direct nexus between the act of refusing to sign and the

A underlying belief, and the disadvantage in being required to sign was obvious. Finally, it was
submitted that the Tribunal wrongly took account of matters, such as whether the Agreement
was reasonably necessary to protect the Respondent's legitimate interests, which were relevant
B to justification and not to whether or not there was a disadvantage.

53. The Respondent accepted that not all individuals need to be shown to have suffered
disadvantage but contended that, when read fairly and in context, paragraph 5.14 showed that
C that was not the test being applied by the Tribunal. In any event, says the Respondent, given
that the Respondent had made perfectly clear that it had no interest in the Claimant's private
creative output, there was no nexus between the act of refusing to sign and the Claimant's
D belief.

Discussion

E 54. On the face of it, the reference to there being no evidence that the clause would have
been reprehensible to *all* those who shared the Claimant's belief might suggest that the Tribunal
was indeed applying a test of universal disadvantage. If that had been the case then there would
have been an error of law as "*there is no requirement that the PCP in question put every*
F *member of the group sharing the particular protected characteristic at a disadvantage*": see
Essop v Home Office [2017] ICR 640 at paragraph 27, per Baroness Hale of Richmond.
However, it is clear from a fair reading of the whole of paragraph 5.14 that the Tribunal did
G have in mind the correct test, which is whether *others* sharing the belief were put to a
disadvantage. The Tribunal identifies the issue as requiring it "*to consider whether other*
holders of the claimed philosophical belief would also have suffered the same disadvantage;
would they have refused to sign the Agreement and been dismissed?" Furthermore, the
H Tribunal says later in the same paragraph that, "*other people may not have viewed the*

A *restrictions imposed by the Agreement in the same way she had*". In my judgment, and having
regard to these parts of the Judgment, it cannot be said that the single reference to the word
"all" means that the Tribunal had the wrong test in mind. It must be remembered that in this
B case there was no evidence of *any* other person sharing the Claimant's belief, let alone of any
person suffering the same disadvantage as her. Had there been evidence of *some* others sharing
her belief and suffering a disadvantage, then a conclusion that the requirements of section 19
C had not been met because not *all* those sharing that belief had suffered might demonstrate an
error of law. But that is not this case. It seems to me that if there had been evidence of some
group disadvantage then the Tribunal would not have concluded as it did.

D 55. That takes me to the Claimant's second point which is that there should be no
requirement for any group disadvantage to be shown at all in an indirect discrimination
complaint based on religion or philosophical belief. I do not accept Mr Milsom's submission
E that the majority of the Court of Appeal in Mba found that the requirements as to group
disadvantage should be read down in order to give effect to Article 9 of the Convention. In
fact, Elias LJ said as follows in Mba:

F "33. ... I find it difficult to imagine that once a *prima facie* group disadvantage has been
established - as it was in this case and must be in order for justification to be required - a court
will give much weight to the fact that the size of the pool adversely affected is in principle
potentially large if that is not in fact the case in relation to the particular employer. ...

...

G 35. Article 9 cannot be enforced directly in employment tribunals because claims for breaches
of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg
court in *Eweida* does not seem to have appreciated that fact): see *X v Y* [2003] ICR 1138. The
Eweida decision in Strasbourg has not, and could not, affect the reach of the statutory
jurisdiction, and therefore the claimant's Article 9 right is incapable of direct enforcement in
the Employment Tribunal. However, domestic law must be read so as to be consistent with
Convention rights where possible, in accordance with section 3 of the Human Rights Act 1998.
H In my judgment, it is simply not possible to read down the concept of indirect discrimination
to ignore the need to establish group disadvantage. But I see no reason why the concept of
justification should not be read compatibly with Article 9 where that provision is in play. In
that context it does not matter whether the claimant is disadvantaged along with others or not,
and it cannot in any way weaken her case with respect to justification that her beliefs are not
more widely shared or do not constitute a core belief of any particular religion. It is for this
reason that in my view the Employment Tribunal was wrong to make reference to this factor
as one assisting the employer.

36. This is not to say that the number of employees sharing a particular belief will necessarily
be irrelevant to a justification challenge where Article 9 is engaged. Assuming that the

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employer's criterion is designed to achieve a legitimate end, the greater the number of employees affected, the more difficult it is likely to be for an employer to accommodate those beliefs in a way which is compatible with his business objectives. So, paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against." (Emphasis added)

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56. It is clear from the underlined passage in that analysis that, at least in the present context, the group disadvantage requirement cannot be read down, although the concept of justification can be read compatibly with Article 9. In Mba, there was evidence that others would be disadvantaged; it was not a sole adherent case. The Court of Appeal was not tasked with considering the sole adherent scenario and the consequences of that in relation to the requirement to show group disadvantage. In my judgment, Mba provides no warrant for treating the group disadvantage requirement as redundant in claims of indirect discrimination involving belief.

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57. Religion or belief discrimination does not fall into a separate category under section 19 of the **2010 Act**. It is implicit in Baroness Hale's recent analysis in Essop of the salient features of indirect discrimination that the need to show group disadvantage remains:

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"27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

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29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

A 58. I note in passing that the “wise employer”, referred to in paragraph 29 of Baroness
Hale’s judgment, would be wholly unable to monitor how his policies and practices impact
upon the sole adherent of a belief of which he has no knowledge. In my judgment, the correct
B approach to be taken in a claim of indirect discrimination is that set out by Sedley LJ in **Eweida**
v British Airways plc [2010] ICR 890, where he endorsed part of the judgment of Elias J (as
he then was) in the EAT:

C “24. The Employment Appeal Tribunal’s considered judgment on this part of the case can be
found at [2009] ICR 303, paras 26-64. While my reasoning on it follows a slightly different
course, and at one point differs from it, my conclusion is the same as theirs. In particular I
would respectfully endorse what they held at para 60:

“In our judgment, in order for indirect discrimination to be established, it must be
possible to make some general statements which would be true about a religious group
such that an employer ought reasonably to be able to appreciate that any particular
provision may have a disparate adverse impact on the group.””

D 59. It is also instructive, in the context of sole adherents, to consider what Elias J said in the
paragraph that followed the one to which Sedley LJ referred:

E “61. It is conceivable that a particular specialist religion, perhaps a subset of a major religion,
may operate in a particular region or locality and employers in that area may have to cater for
that belief even though employers elsewhere do not. But there must be evidence of group
disadvantage, and the onus is on the claimant to prove this. We recognise that this means that
if someone holds subjective personal religious views, he or she is protected only by direct and
not indirect discrimination. There is hardly any injustice in that if the purpose of indirect
discrimination is to counter group disadvantage and there is none.” (*Eweida v British Airways
plc* [2009] ICR 303)

F 60. In my judgment, the EAT’s recognition that a person holding subjective religious views
is not protected by indirect discrimination, applies equally to the sole adherent of a
philosophical belief. Equally, there is no injustice in a sole adherent only having the protection
G of direct discrimination since the purpose of indirect discrimination is to eliminate unjustified
group discrimination.

H 61. That analysis is not undermined by the fact that in **Eweida v UK** [2013] 57 EHRR 8, the
ECHR held that the UK had failed sufficiently to protect Ms Eweida’s Article 9 rights. The

A ECHR expressly refers to the passage from Eweida in the EAT endorsed by the Court of
Appeal: see paragraph 16 of Eweida v UK. Furthermore, it noted Ms Eweida’s submission that
B the requirement in the UK that there be group disadvantage for a claim of indirect
discrimination was “*legally uncertain and inherently vulnerable to returning arbitrary results*”:
see paragraph 66 in Eweida v UK. However, the ECHR’s assessment focuses on justification
and not on whether the requirement of group disadvantage had the effect of curtailing Ms
Eweida’s Article 9 rights. In fact, the ECHR held as follows at paragraph 92:

C “92. ... Nonetheless, while the examination of Ms Eweida’s case by the domestic tribunals and
court focused primarily on the complaint about discriminatory treatment, it is clear that the
legitimacy of the uniform code and the proportionality of the measures taken by British
Airways in respect of Ms Eweida were examined in detail. The Court does not, therefore,
D consider that the lack of specific protection under domestic law in itself meant that the
applicant’s right to manifest her religion by wearing a religious symbol at work was
insufficiently protected.”

E 62. For these reasons I consider that the sole adherent of a philosophical belief, who is
unable to establish any group disadvantage, cannot succeed in a claim of indirect
discrimination. That seems to me to be not only consistent with the purpose of indirect
discrimination, which is to prohibit unjustified group disadvantage, but also accords with
F common sense. If group disadvantage was not a requirement then the sole adherent of a
philosophical belief could claim that a particular PCP put her at a disadvantage. The employer
would then be required to justify a PCP which it could not possibly have predicted or
anticipated as having a disparate impact.

G 63. The Tribunal considered whether other holders of the Claimant’s belief would have
suffered the same disadvantage as her. It concluded that, “*That question could not safely have
H been answered in the Claimant’s favour since there was no evidence that the clause would be
considered reprehensible to all of those who shared the Claimant’s belief*”. Although there was
no evidence that there were any others sharing her belief, the Tribunal appears to have

A considered whether the PCP “would put” the hypothetical adherent at a disadvantage. In doing
so it may have been overly generous to the Claimant: see **Eweida** (Court of Appeal) at
B paragraphs 16 to 19. Nonetheless, in my judgment, the Tribunal’s conclusion that the “*question*
C *could not safely be answered in the Claimant’s favour since there was no evidence ...*”
D amounts, in effect, to a finding that, due to a lack of evidence, group disadvantage had not been
E and could not be shown. Having so concluded, the claim of indirect discrimination failed and
F there was no need for the Tribunal to go further. The Respondent in this case could not
G possibly have anticipated that the PCP of requiring employees to sign the Agreement (which the
H Tribunal found to be not obviously unreasonable) could have adversely affected a group of
I which had no knowledge.

64. The Tribunal’s finding that there was no group disadvantage could have been treated as
dispositive of the claim of indirect discrimination. The fact that the Tribunal did not state its
conclusions in those terms - perhaps because the argument below was not put in the same
sophisticated terms that were developed before me - does not undermine its judgment. The
Tribunal’s conclusion that there was no indirect discrimination was unarguably correct. For
those reasons, ground 2 of the appeal also fails,

65. The Tribunal went on, nevertheless, to consider the potential defence of justification.
That takes me to the third ground of appeal.

Ground 3: Justification

66. The Claimant’s failure to succeed under grounds 1 and 2 renders any challenge to the
Tribunal’s assessment of justification academic. However, as Mr Milsom made detailed
submissions on this issue as well, I shall deal with it. The discussion below presumes that,

A contrary to my conclusions above, the requisite disadvantage *is* established and the Respondent is required to justify the PCP as being a proportionate means of achieving a legitimate aim.

B *Submissions*

C 67. Mr Milsom submits that any analysis of justification would necessarily be flawed if the Tribunal had erred in its approach to group disadvantage. He relies on the general principle that “*the greater the impact, the harder it is to justify the provision*”: see **Mba** at paragraph 31; and
D submits that an error as to group disadvantage, which goes to impact, would tend to undermine the analysis on justification. However, this was not a case where there was any evidence of more than one person being adversely affected by the PCP. The only person affected was the
E Claimant; the level of impact remains unaffected and the justification analysis is not undermined.

F 68. Mr Milsom also submits that the Tribunal erred in its approach to impact in a different respect: that is that the Tribunal considered justification by reference only to the requirement to sign the Agreement, and omitted to consider that the consequence of not signing was dismissal. I do not accept that submission. The Tribunal found that the Respondent *required* its
G employees to sign the Agreement (see paragraph 4.6), and it refers to dismissal being a consequence of not signing in paragraphs 5.12 and 5.14. The latter reference, in particular, relates to the consequence of the PCP. The Tribunal asks itself whether others sharing the
H Claimant’s belief “*would ... have refused to sign the Agreement and been dismissed?*” Although there is no express reference to dismissal in the section dealing with justification, it cannot fairly be said that the Tribunal would not have had that in mind. The refusal to sign was inexorably bound up with the consequence of dismissal, as is clear from a fair reading of the

A whole of the Tribunal’s Judgment, and it may reasonably be inferred that that was the consequence that the Tribunal had in mind when it turned to the question of justification.

B 69. The Tribunal found that there was a legitimate aim in that the Respondent desired to protect its own intellectual property. Mr Milsom accepts that that is a legitimate aim. However, he submits that the Tribunal erred in that that justification was assessed by reference to the failure to sign the amended Agreement¹, whereas by the time of dismissal the amendment had been withdrawn. In my judgment, that does not undermine the Tribunal’s analysis. That is for the simple reason that the Claimant had unequivocally refused to sign even the amended Agreement. Although the Claimant had suggested that she had been advised that her proposed draft and the amended version were “*very close*”, there was nothing to indicate that by 16 September, when the matter came to a head, the Claimant had moved any closer to signing the amended version. Nor had it been suggested by the Respondent at any time that the consequences of failing to sign even the amended Agreement would be any less serious than not signing the original.

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F 70. In those circumstances, the question for the Tribunal was whether requiring the Claimant to sign the amended Agreement or be dismissed was a proportionate means of achieving the legitimate aim of protecting its intellectual property. That, in my judgment, is precisely the question which the Tribunal considered. The Tribunal answered it as follows:

G “5.18. ... We could not see that anything more than the Respondent’s own intellectual property would have been covered by the Clause, particularly by the amended wording. If the Claimant had written a play, a book, a poem or a screenplay about anything other than the Respondent or matters arising from her employment with the Respondent or matters which did not relate to any business of the Respondent, we could not see how such work would have been caught. ...”

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¹ The Tribunal had referred to the Agreement being amended twice. It was agreed that that was incorrect. However, given that the amended version is correctly set out in the Judgment, that error as to the perceived number of amendments makes no difference.

A 71. In my judgment, the Tribunal was correct to conclude as it did. The clause in its
amended form leaves little or no scope for any argument that work produced by the Claimant in
her own time and for her own private purposes unconnected with the Respondent's business,
B would be subject to the requirement to disclose it to, or hold it in trust for, the Respondent. The
Claimant's Notice of Appeal, however, suggests that even the amended version might prevent
her from writing about other subjects and that it was "*too general and therefore open to*
C *interpretation*". She further suggests that, "*Had she signed the Agreement, and had she wished*
to publish, upload to the Internet, or submit to a contest, any piece of work she was working on
during that period, she would have had to challenge and to seek to overturn the Agreement as it
related to each individual piece of work". These suggestions, which were not pursued orally,
D seem spurious. The Claimant's approach (as is apparent from the evidence before the Tribunal
- see page 86 of the Supplementary Bundle) appeared to be that nothing less than a self-drafted
document imposed on the Respondent would do.

E 72. If, as the Tribunal effectively found, the Agreement (in its amended form) went no
further than was necessary to protect the Respondent's legitimate intellectual property interests,
then it would be proportionate to make the signing of that Agreement a condition of continued
F employment.

G 73. The Claimant's further argument in respect of justification is that the Tribunal ought to
have found that clause 13 of the Contract, which the Claimant had signed, was sufficient to
protect the Respondent's interests. As to this argument, the Tribunal said as follows:

H "5.19. As to the Claimant's second argument, that the clause was no more than had already
been achieved by clause 13, we considered that she was wrong in that respect. It might have
been said that clause 13 did nothing more than re-state the position in law since it vested any
intellectual property rights in the Respondent if the creation was made for or on its behalf.
Clause 2 did two different things, as Ms Wilkinson explained; first, it created a positive duty to
disclose creations that were made on the Respondent's behalf and, secondly, it made
employees aware of the position that they were in [in] terms of copyright law and legislation."

A 74. Mr Milsom submits that the first of these matters takes the position no further forward
in that such duties of disclosure are already owed under common law or copyright law.
However, the Agreement imposes an obligation to disclose “*promptly*” and also refers expressly
B to all copyright works, whereas clause 13 focuses on “*any discovery or invention or
improvement to an existing invention, design or process*”. It cannot be said in those
circumstances that the Agreement is otiose or goes further than is necessary to protect the
interests in question.

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D 75. As to the second matter relied upon by the Respondent - namely, that it made employees
aware of the position as regards copyright law and legislation - Mr Milsom submits that there
can be no doubt that the Claimant was already aware of her position in this regard. That does
not seem to me to be a good answer to the point. The Respondent is entitled, in seeking to
protect its intellectual property, to make it clear to employees what their obligations are. The
E fact that one or more of those employees might already have some awareness of those
obligations does not undermine the need to issue a document to all employees dealing with the
subject. The Respondent has 1500 employees. It would hardly be reasonable to expect it to
ascertain, in respect of each one of them, what his or her level of knowledge of copyright law
F was and issue a draft document accordingly.

G 76. In conclusion, therefore, it is my judgment that the Tribunal did not err when it came to
justification. The Agreement, as amended, was found to go no further than is necessary to
protect the Respondent’s interests. Whilst the impact on the Claimant refusing to sign was
severe, the Respondent’s interests as a design company, in seeking to protect its intellectual
H property and in ensuring that employees were aware of their obligations in this regard, were
correspondingly greater.

A 77. Thus, even if the Tribunal had found that there was a philosophical belief giving rise to group disadvantage, it was correct to find that the Respondent's imposition of the PCP was likely to have been proportionate.

B
Conclusion

78. For all of those reasons, this appeal fails and is dismissed.

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