EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr RA Werner	**v**	**The Chancellor Masters & Scholars of University of Cambridge**

Heard by CVP **On**: 22 & 23 February 2021

Before: Employment Judge Manley

Appearances

For the Claimant: Ms K Mortimer, lay representative
For the Respondent: Mr A Ohringer, counsel

PRELIMINARY HEARING JUDGMENT

1. The claimant's statement that "big banks are a cancer on society" amounts to a philosophical belief under s.10 of the Equality Act 2010.

2. It is not possible, at this stage, to say that the discrimination claims now pursued have no reasonable prospect of success and they are not struck out.

3. It is not possible to say, at this stage, that the discrimination claims now pursued have little reasonable prospect of success and no deposit orders are made.

4. The claim for the race discrimination claim based on the claimant's German nationality is dismissed on withdrawal.

5. The application to amend to bring a claim of victimisation is refused.

6. The matter will now be listed for a four-day liability only hearing and orders for that hearing and dates will be sent in a separate document.

REASONS

Introduction and Issues

1 The claimant, who is a professor of banking, brought claims for direct discrimination and unfair dismissal arising from the respondent's withdrawal of a conditional offer of employment in September 2018. The unfair dismissal claim was rejected by the tribunal as the claimant was never an employee of the respondent. At a preliminary hearing on 13 March 2020 the issues were identified and appear in the summary of that hearing. The claim was one of direct discrimination because of the claimant's German nationality, his religion of Christianity and the belief that "big banks are a cancer on society".

2 It was decided at that preliminary hearing that there should be a further preliminary hearing to determine whether the claim that the withdrawal of the offer of employment was because of the claimant's nationality, religion or the alleged philosophical belief referred to above had no reasonable prospect of success and should be struck out or had little reasonable prospect of success and a deposit should be ordered.

3 The other matter, which has taken the majority of time in this hearing, is the question of whether the belief that "big banks are a cancer on society" amounts to a philosophical belief as defined in s.10 of EQA 2010.

The hearing

4 At the commencement of this hearing the claimant stated that he wished to withdraw the claim that there was discrimination because of his nationality. That claim is dismissed on withdrawal.

5 There was also a request to amend the claim to include one for victimisation but, after some discussion, I made it clear that I needed to first decide the preliminary hearing issues before any such amendment, if one was made, was considered. This matter is addressed towards the end of this judgment.

6 Before the hearing the respondent had sent an electronic bundle of documents which included those the claimant had asked to be included. It was over 1200 pages. In the event, although I looked through some of those documents, including the claim, response and case management summary, there are few that appeared relevant for the determination at this preliminary hearing (except one email which I will come to later). The respondent had also sent a skeleton argument as well as a bundle of authorities.

7 On the morning of the hearing, the claimant sent some other documents. There was his own witness statement and two others, a skeleton argument and documents which I have categorised as academic/political. These were an extract from Stanford Encyclopaedia of Philosophy which was published in November 2018. That document is

some 26 pages long with the bibliography. I was specifically asked to look at paragraph 5.2 which is entitled "*Finance, Money and Domestic Justice*" and, more specifically, a section entitled "*Money Creation*" and, in particular, a section whether there is reference to one of the claimant's writings. It is clear that there is academic argument which relates to this issue. One quote which could be relevant reads as follows:

> *"But there are also significant questions in political philosophy regarding the question of where, and by what sorts of institution, should the money supply be controlled. One complicating factor here is the extensive disagreement about the institutional basis of money creation, as described above. One strand of the credit theory of money emphasises that in today's world, money creation is a process in which commercial banks play a significant role. These banks in effect create new money when they make new loans to individual or business customers (see McLeay, Radia & Thomas 2014; see also Palley 1996; Ryan Collins et al 2012; Werner 2014 a,b). James Tobin refers to commercial bank-created money, in an evocative if now dated image as "fountain pen money" that is, money created with the swish of the bank manager's fountain pen (Tobin 1963)."*

8 I was also asked to consider a letter sent by the Rt Honourable Gavin Williamson MP, who is currently the Secretary of State for Education. This was dated 16 February 2021 and was a letter, reported in the wider general press, with the headline "*Strengthening academic freedom and free speech in higher education in England*." With that letter was a paper published by the Department for Education which it says: "*sets out tougher legal measures to strengthen free speech and academic freedom in English higher education.*" The claimant also asked me to read the foreword, also signed by Secretary of State Williamson in the accompanying paper. In summary, that provides the Government's proposals with respect to free speech and academic freedom.

9 The witness statements were from two people, one of whom shares the claimant's values as a Christian and also his view about "*big banks are a cancer on society*". The other witness statement was from someone in higher education who also shares that view of the banking industry and in particular big banks and concentrated banking systems. Those witnesses state that they believe those views amount to a philosophical belief. The respondent did not suggest that they had any questions for those witnesses and I read those documents referred to.

10 I took some time to read the documents before the claimant was cross-examined on his witness statement. I then heard submissions from the claimant and Ms Mortimer who was assisting him and from Mr Ohringer for the respondent. I took some time to deliberate and gave a very short oral judgment on the morning of the second day so that we could carry on with case management for the case to continue.

The facts

11 The relevant facts can be shortly stated. I have been particularly careful to ensure that I only find facts which are largely undisputed, because this matter is proceeding and it is important not to find any facts which might be challenged or changed at the next hearing, when further evidence will be heard.

12 The claimant had been working for some years at Southampton University when he applied in January 2018 for the post of Director at the Cambridge Centre of Housing and Planning Research (CCHPR) which is based at the respondent university. As I understand is common in the field of academic posts, the application form which he submitted was very lengthy and included either extracts or a summary of many of his writings. To give a sense of the extent of the application, what I have seen in the documents shows that it extends to over 90 pages.

13 To put it as shortly as is needed at this stage the claimant was interviewed in May 2018, I am told by six professors. After some discussion, by letter of 22 June 2018 the claimant was made a conditional offer for the agreed start date of "*no later than 1 October 2018*". It was said that the offer was conditional upon "*references which it regards as satisfactory*" as well as passing any probationary period and documents showing the right to work in the UK.

14 There were then further discussions between the claimant and the Professor Lizieri who was the Head of the Department of Land Economy, being the person who primarily dealt with the claimant. The bundle contained a number of emails between them which I will not go into at this point because it is likely, at a future hearing, questions will be asked about those emails.

15 The respondent's case is set out in the grounds of response and in the previous preliminary hearing summary. There were some concerns about funding for the CCHPR and also some concerns about the direction the respondent believed the claimant might take the CCHPR. In particular, without going into too much detail at this stage, I was taken to an email dated 29 August 2018 which has been disclosed to the claimant, which he says shows that the respondent had concerns that might indicate discriminatory motives. This appears at page 266 of the bundle and it is worth quoting part now although I want to emphasise that, as indicated, there were many other emails which will need to be looked at later. One potentially relevant important part of this reads:

> *"b) there are other reputational issues as it has emerged that he has some unorthodox views (these did not emerge in the CV or in academic searches, nor in his references) that, had we known about them, we would probably not have made the offer – given that it was a somewhat leftfield appointment, albeit the consensus of the interview panel."*

16 In any event the claimant had written accepting the offer on 2 August 2018 and met again with Professor Lizieri. Various discussions ensued on a number of issues relating to the post. By letter of 14 September 2018 Professor Lizieri wrote to say that he was "*not satisfied that we have reached agreement on a number of issues*" and that the respondent was "*no longer in a position to proceed with the appointment and are therefore withdrawing the offer of employment*". An ex-gratia sum was offered. The claimant had been aware that Professor Lizieri was considering the financial position of CCHPR.

17 The claimant brought his tribunal claim on 24 January 2019. As I understand it the claimant had already left Southampton University and is now at De Montfort University.

18 In the claimant's witness statement for this hearing, he provided me with some background about his beliefs and his academic background. He says that he became a "*practising, believing and active Christian*" in June 1991. He gave details about how that came about and, in his view, its connection to the work he was carrying out at that time in Japan as a graduate student. He was carrying out research on large Japanese capital flows of the 1980's and had been looking for a link between those and high land prices. In summary the claimant explained how, through prayer, he was led to a revelation about the link which he describes in paragraph 5 of his statement and, in short, was that bank lending was new *"money creation*". He then obtained the relevant data which he believed supported that hypothesis. He does believe that big banks and concentrated banking systems are a cancer on society and sets out in some detail why he has formed that view after years of research. The claimant proposed something called "*The Quantity Theory of Disaggregated Credit*" and formulated a "*Post Banking Crisis Monetary Policy*" which has become known as "*Quantitative Easing*" which he says is now a household phrase.

19 He links many of his beliefs and academic research to Christianity and to the bible. He also points out that, for many people who share his view about banks, there is no link to Christianity. He has been undertaking academic work on banking and its role in society and, in particular, the concentration of power in the large and bigger banks. He set out details of a number of events where he has been asked to speak, some of them linking Christianity to matters such as capitalism, finance, money and banking. He argues that his belief that "big banks are a cancer on society" amounts to a philosophical belief.

Law and submissions

20 The starting point for consideration of the alleged philosophical belief is s.10 of the Equality Act 2010. This section states "*Belief means any religious or philosophical belief*". The parties agree that the leading case on that question is that set out in Grainger plc v Nicholson [2010] ICR 360 (Grainger) which is now included in the Equality & Human Rights

Commission's Code of Practice on Employment (2011) at paragraph 2.59. The five point criteria laid out there are as follows:

(i) The belief must be genuinely held;

(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available;

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour;

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance;

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

21 The case of Gray v Mulberry Company (Design Clothes) Ltd [2019] RCI 175 (Gray) had some important observations to make on the Grainger criteria. Mr Ohringer, for the respondent, pointed out that case stated that the Grainger criteria should be read as guidance not as if it were statute; that the comment in paragraph 26 which said: "*It is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief*" was correct but that the tribunal should "*guard against applying too stringent a standard*" and should not judge the validity of the philosophical belief. In that case the claimant's belief was found not to have been protected. I return later to the respondent's arguments about the Grainger decision.

22 This hearing was also to determine whether parts or all of the claim had no or little reasonable prospects of success. These questions arise from Rule 37 and 39 of the Employment Tribunal Rules of Procedure 2013. The relevant parts read as follows:

Striking out

37.*—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) -
(c) -
(d) -
(e) -
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

***39.**—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

23 My task is first to consider, largely based on undisputed facts, whether any part of the claimant's case, when put at its highest (Mechkarov v Citibank NV [2016] ICR 1121), cannot hope to succeed. If that is my conclusion, I may decide to strike out that part of the claim. It is settled law that it is only in exceptional circumstances that a claim with contested facts will be struck out (Eszias V North Glamorgan NHS Trust [2007] ICR 126 and Anyanwu v South Bank Students Union [2001] ICR 391). Strike out is a draconian sanction because it means that the claimant cannot take that claim further so I must consider the matter with considerable care.

24 The test for whether any allegations or arguments have little reasonable prospect of success is, by definition, a lower test than having no reasonable prospects. Again, looking primarily at undisputed facts, I should try to assess if there are weak arguments in parts or all of the claims. If I think the claims are very weak, I can then consider whether to make an order that a deposit be paid.

Claimant's submissions

25 The claimant presented written submissions and he and Ms Mortimer added to them orally. In essence it is said by the claimant, and on his behalf, that his belief that "big banks are a cancer on society" is a shorthand statement for a longer philosophical belief which he sets out in his written submissions referring to a number of academic arguments. To take an extract from the written submission he says as follows:

"As banking systems get more and more concentrated, their allocation powers increase, while accountability decreases. Fewer people have more and more power. Also, more and more individuals and small firms are cut out from bank funding: big banks prefer to focus on big deals with big customers and automated computer systems and call centres leave an increasing number of individuals and small firms without good banking services. Big customers are increasingly non-bank financial institutions such as private equity funds, hedge funds and other financial sector firms and those borrowing from banks for asset purchases."

26 In the claimant's case he ties in this philosophical belief with his own Christian belief but also argues that it is part of a world view that is shared by people from other faiths, being not faith dependent but akin to a faith. He makes reference to a number of academics and senior economists such as the former Bank of England Governor, Lord Mervyn King, Sir Vince Cable and Lord Adair Turner. These are other people who he says has been critical of big banks. He also referred us again to Reverend Professor Northcott whose witness statement I have read. The claimant's case is that the belief as stated is a philosophical belief and should be protected under the Equality Act.

27 In terms of the question of whether it had little or no reasonable prospect of success, the claimant believes that the respondent's stated reason for withdrawing the offer of employment is questionable. This is shown by the use of the phrase "*unorthodox views*" in the email (at paragraph 15) by Professor Lizieri when consideration was being given to withdrawing the offer. A number of references were made to the claimant's claim against Southampton University but I will come to that when I deal with the application to amend shortly.

Respondent's submissions

28 The respondent's representative, Mr Ohringer, referred me to various parts of the relevant authorities. In particular he asked me to read Gray (above). Mr Ohringer accepts that the decision in Grainger is binding on the tribunal but there are some aspects of Grainger which he submits might well be wrong. Those are set out in written submissions. He is not asking me to determine these at this point. As far as the Grainger criteria are concerned, the respondent does not accept that they are met in this case. Mr Ohringer says that the alleged belief as set out that "*big banks are a cancer on society*" is a statement of opinion or a viewpoint rather than a belief. It is submitted that it is not a stand-alone belief but rather an aspect of the claimant's Christian beliefs. It is about a particular socio-economic issue, not about the economic or political system generally (which he contrasts with Marxism or Democratic Socialism). It is also submitted by the respondent that it is not cogent; banks are not a cancer.

29 As far as prospects of success are concerned, Mr Ohringer reminds me that the claimant bears the initial burden of proof in a discrimination claim and that would involve showing some credible reason to suggest the less favourable treatment was because of the protected characteristic relied upon. I am reminded that the claimant needs to show facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed such an act. I am reminded of the leading cases of Madarassy v Nomura International plc [2007] IRLR 246 and Igen v Wong as well as Reynolds v CLFIS UK Ltd [2005] IRLR 562. Mr Ohringer accepts that there are cases which caution the tribunal against striking out discrimination cases in all but the clearest case but submits that it is not right to say that a discrimination claim should

never be struck out and he quotes ABN Amro Management Services v Hogben [2011] where he pointed out that a discrimination "*can and should be struck out if the tribunal can be satisfied that it has no reasonable prospect of success.*" In that case it was agreed that it was appropriate to strike out a claim which was "*fanciful*" or indeed implausible. I am also reminded that it is inappropriate to strike out where there is significant dispute on the facts and in particular the case of Patel v Lloyds Pharmacy Ltd UKEAT/0148/12. The EAT said that the claimant's case should be taken "*at its reasonable highest and then to decide whether it can succeed*". Mr Ohringer says the claimant's case, "at its highest" is the email referred to above (paragraph 15 and page 266 of the bundle) and that that is not sufficient to suggest any reasonable prospect of success. Similar considerations apply to a little reasonable prospect of success and a Deposit Order.

Conclusions

30 This is a challenging case to determine because the definition of philosophical belief at s10 Equality Act 2010 is very short and there are very few cases at the moment to give assistance to the tribunal in relation to that question. Mr Ohringer is right that I have to consider Grainger. Although I have been referred to a dictionary definition of philosophy, in common with Burton J in the Grainger judgment at paragraph 26, I do not find that particularly helpful. The definition which I am concerned with is that under s.10 of the Equality Act 2010. Also, as Burton J pointed out in paragraph 30, it cannot be the case that a philosophical belief would not be protected if it is based on the science.

31 Turning then to the Grainger tests as set out in the Code of Practice, I answer them in this way:-

(i) The belief must be genuinely held. There is no challenge to this aspect of the claimant's stated belief and that part of the Grainger test is clearly met.

(ii) As for the question of whether the statement is a belief and not an opinion or viewpoint based on present information, I am satisfied that it is more than an opinion. The claimant is passionate about this and has written extensively about it. It is clearly thought out and based on an assessment of data. I accept that it is more than a scientific based belief and it has some connection to the claimant's wider view of the world encompassed in his Christianity.

(iii) As for whether the stated belief is about a "weighty and substantial aspect of human life and behaviour", I accept that, given the central importance the banking system has on everyone's lives, the 2008 crash alone indicating such importance, it is indeed weighty and substantial. I do not

consider that it is only relevant to that particular area, namely banking.

(iv) I am also satisfied that it has a level of cogency, seriousness, cohesion and importance. I do not question its validity nor comment on whether others will agree with the statement or not. Clearly there are likely to be a number of people in the same academic area who do not agree with that belief. The statement is an expression of concern which is cogent and serious. It is connected to other philosophical views and has importance.

(v) The statement is, in my view, worthy of respect in our democratic society. There is nothing to suggest that it is incompatible with human dignity and I have heard nothing about any potential conflict with the human rights of others. The claimant explains the hyperbole by stating that the statement about the "big banks being a cancer" is a shortcut for the wider view and I accept his evidence on that. The claimant was asked about his comment about banks being linked to the devil in his witness statement but he was reporting that other people felt that rather than he himself having stated it. It is a separate philosophical belief from his Christianity. Although it may have some links to religious beliefs, in his case, that does not stop it being a separate philosophical belief.

32 Having weighed all these matters up I am satisfied that that the belief that "*big banks are a cancer on society*" can amount to a philosophical belief and a tribunal can now consider whether the claimant can show facts from which they could conclude that the action taken was because of that philosophical belief (and, separately, his religion).

33 I go on to consider the issue of little or no reasonable prospect of success. I will deal with this relatively shortly. Now that the claimant has withdrawn his claim that discrimination occurred because of his German nationality, I am of the view that I cannot decide, at this early stage, that the remaining claims or religious and/or philosophical belief have either no or little reasonable prospects of success.

34 It may be a difficult claim to succeed in but that is often the case with discrimination cases. It is partly because the respondent appears to have provided several different reasons for the withdrawal of the offer that it is important that the respondent clearly articulates and is cross-examined on the decision taken. I accept that the comment about "unorthodox views" does need to be explained and it is possible that other comments made in the course of the decision to withdraw the offer need to have some context attached to them. It is also necessary for the tribunal to consider whether the respondent's case that they did not know about the claimant's Christianity is factually accurate and what it knew, if anything, about the philosophical belief now identified. It is simply not possible to assess the

prospects of success at this very early stage without a witness statement from the person who took the decision to withdraw the offer and for him to be cross-examined. I do not strike out the claim, nor do I make a deposit order.

Application to amend

35 During the course of the first day of the hearing the claimant and Ms Mortimer suggested that they wanted to add a claim of victimisation. We had some discussion about that on the first day and I asked them to look at s.27 of Equality Act 2010 to help them formulate what it was that they were seeking to ask me to do. We had some brief discussion about it and I said that I would deal with it after I had given judgment on the matters already listed.

36 After I gave a short judgment of the matters above, the claimant and Ms Mortimer indicated that they wished to pursue an application to amend to include a claim for victimisation. There was quite a lot of discussion but I pressed them for information on the alleged protected act and the alleged less favourable treatment. They eventually identified two letters to Southampton University from the claimant where he was employed at the time, one was of 18 July 2018 and one was 31 July 2018 which I was told contained reference to alleged breaches of the Equality Act. The detriment for which the respondent was said to be responsible was the withdrawal of the job offer (as in the direct discrimination claim) on 14 September 2018.

37 I had previously pointed out that if those were the dates we were looking at, there would be some issues raised about the time limits on the delay in raising this as a possible issue. The claimant reminded me of page 266 which we have already looked at. I was then asked to look at an internal email between Professor Lizieri and someone in HR dated 20 July 2018 (page 241 of the bundle at paragraph (e)) which reads as follows: "*how can we reverse a job offer (in the absence of any clear evidence of misleading information and the application or interview – there is none, so I suspect the answer is that we can't do other than sticking to the terms of the offer)"* I was told by the claimant that that document was not seen until 17 February 2021 whereas the claimant said it should have been in his subject access request documentation.

38 Mr Ohringer had some time to consider the application and was content to deal with it after he had taken some instructions. The respondent resisted the application to amend. Firstly, it was said that the letter of 18 July 2018 to Southampton University which the claimant had forwarded to Mr Ohringer, was headed "without prejudice" and therefore should not be relied upon. He accepted that the open email of 31 July 2018 did make reference to alleged breaches of the Equality Act.

39 On the face of it, there might well be something that amounted to a protected act under s.27 Equality Act 2010. Mr Ohringer referred to British Gas Services Ltd v Basra UK EAT 0194/14 and, in particular, he

suggested to myself and the claimant and Ms Mortimer that we read between paragraphs 46-48. Mr Ohringer said the balance of prejudice was against allowing the application to amend. I was reminded that I should take account of the relevant time limits and the reason and explanation for the delay as well as, to some degree, the underlying merit of the suggested amendment. In this case, the amendment amounted to a new cause of action.

40 As far as the documents referred to are concerned, Mr Ohringer said that the claimant had clearly seen the document at page 266 even before he put in his claim form as he quoted the "unorthodox views" part in that ET1 (page 13 paragraphs 15, 16 and 17). As far as page 241 is concerned this had been sent to the claimant in disclosure in August 2020. The claim is made well over two years out of time and there is no explanation for the application being made so late. It is said, in any case, the claim was inherently weak, there is nothing to suggest any link between the letter written to Southampton University and the decision by the respondent to withdraw the offer of employment. The respondent would be significantly prejudiced by the amendment because the direct discrimination claim covered the same ground but the reason for the treatment would have to be investigated in wholly different ways. The scope of enquiry would be different leading to the possibility of further delays.

41 The claimant and his representative responded to say that they had not noticed that page 241 was not in the subject access request until recently and raised a number of concerns, mostly about the Southampton University matter. I reminded Professor Werner and Ms Mortimer, on a number of occasions, that what had happened at Southampton University did not appear, on the face of it, to connect to this respondent and there was no evidence to that effect.

42 Upon reflection I decided that I would not allow the amendment. The new cause of action is made considerably out of time and was not even put in writing before it was mentioned at the commencement of this hearing. Although it appears linked to the current claims, it really adds nothing to the claimant's main concern which is the withdrawal of the conditional job offer which he indicated some years ago when he put in his claim form that he believed was connected to his religion and an alleged philosophical belief, not that it was, in some way a response to a letter sent by him to Southampton University. There is no explanation for this application being made so late.

43 What is more, there is nothing to suggest in these two documents any connection whatsoever between any concerns that the claimant had raised with Southampton University and what then occurred with the respondent university. It adds nothing to the claimant's claim and clearly the prejudice to the respondent is a significant one, requiring further evidence and different legal tests to be applied. The prejudice to the claimant is very limited as his claim can proceed as intended and as

clarified at the case management hearing in March of last year and discussed at length over these last two days.

44 The application to amend is refused. I then went on to make case management orders for the determination of this hearing which will be in a separate document.

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Employment Judge Manley

Date: …05/05/2021…………………

Sent to the parties on: ....

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For the Tribunal Office