



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Cave

The Open University

Heard at Cambridge

**On: 17 April 2023
and 18 April 2023 (in chambers)**

Before: Employment Judge Manley

Appearances

For the Claimant: Dr A Z Loutfi, counsel

For the Respondent: Mr A Leonhardt, counsel

RESERVED PRELIMINARY HEARING JUDGMENT

- 1 The claimant's belief in English Nationalism does not fall within section 10 Equality Act 2010 as he has not shown it is worthy of respect in a democratic society. It is incompatible with human dignity and in conflict with the fundamental rights of others.
- 2 His claim for discrimination because of a philosophical belief is dismissed.

REASONS

Introduction and Issues

- 1 The claimant brought a claim on 3 November 2020 for discrimination because of religion or belief following his dismissal by the respondent from his post as acting project co-ordinator on 20 July 2020. He did not have two years' service.
- 2 After the presentation of the response, the claim was listed for a preliminary hearing to determine "*whether or not the claimant holds a belief within the definition of section 10 of the Equality Act 2010*". Orders were made for preparation for that hearing which was to have been in October 2022 but was postponed to the dates above. The issue to be determined was therefore fairly narrow but quite difficult

given that it entails consideration of relatively recent caselaw as well as the European Convention on Human Rights (the Convention). I remind myself that it is not for me to judge or assess whether the belief is valid, nor am I considering wider questions of freedom of thought and expression as set out in articles in the Convention, beyond how I should interpret s10 EQA. The central question is whether the claimant has the characteristic of having a philosophical belief which gave him protection against discrimination by his employers under Equality Act 2010 (EQA). The burden is on the claimant to show that he has such a belief and it is common ground between the representatives that I must apply the tests set out in Grainger plc v Nicholson [2010] ICR 360 (Grainger) which is dealt with in detail below.

The hearing

- 3 As well as the details attached to the claim form, the claimant had prepared a “*statement of further particulars*” as requested by a tribunal judge and a witness statement for this hearing. He had also answered questions at an internal investigation meeting, a disciplinary meeting and an appeal hearing. He gave evidence at this hearing, being cross examined by the respondent’s representatives and answering some questions from me and his own representative.
- 4 I then heard submissions from the representatives and decided to reserve my judgment, so that I could fully consider the relevant evidence, submissions and the law referred to.

The facts

- 5 I can only consider those facts which are relevant to the issue before me. The claimant worked for the respondent between 31 October 2018 and the dismissal on 20 July 2020. The respondent has various policies, including one on Equality and Diversity, which might be relevant to the reason for the dismissal but do not impact on the issue which I must decide.
- 6 Following internal and external complaints made on dates in June 2020 about the claimant’s posts on Twitter and a YouTube channel he had set up entitled “*Renew Britannia*”, which were characterised by the complainants as racist, the claimant was suspended and interviewed at an investigation meeting. A disciplinary meeting followed which resulted in his summary dismissal. His appeal was unsuccessful.
- 7 The claimant accepted at those meetings that he had set up the YouTube channel and had posted the Twitter comments complained of. He had used an alias when doing so and, at least some of the content had been deleted by the time he was spoken to by the respondent. Two matters, in particular, were discussed at those meetings and in this tribunal.

- 8 These appear at pages 81 and 82 of the preliminary hearing bundle. The first, at page 81, is a Tweet in reply to one from the actor, John Boyega, who was replying to someone and had tweeted:

“Will meet you by Mordor with the rest of the mandem. See you soon, bro! We will get that ring! Bye!”

The claimant tweeting as @Renew Britannia wrote:

“Why does a person who speaks and acts like a foreigner expect to be treated the same as an Englishman in England? The entitlement of these people....”

- 9 Asked to explain this in the context of his stated belief at the hearing, the claimant said he didn't consider Mr Boyega to be British because he is of African descent, has (or had) a Nigerian flag on his Twitter account and identifies with his Nigerian ancestry which the claimant states he views as positive. The claimant took exception to Mr Boyega's use of the word “*mandem*” which he stated was slang from Black immigration, specifically, the Caribbean diaspora, and that “*English people don't use that language*”. The claimant's belief is that this slang is different from English slang as it hasn't emerged from English people.

- 10 The document at page 82 appears to be a response to something posted by Dr Shola Mos-Shogbamimu where she celebrated Africa Day with a quote about Africa and commenting:

“Proudly African from the roots of my hair to the soles of my feet. Always”

The claimant's comment, which appears above that post, was:

“Fuck off and go home!”

- 11 Explaining this, the claimant accepted it was aggressive. He was asked to which belief this comment related to. The claimant replied that he said “*Go home*” because she ought to reside there – nationalism means home. He agreed that swearing was not serious political discourse but felt that Twitter encourages adversity and that Dr Mos-Shogbamimu goads and attacks white people.

- 12 In meetings with the respondent the claimant said that he rejected the use of the words “*racist, sexist, homophobic, transphobic, islamphobic*” in relation to the respondent's policies. He also said that categorisations of race are useful, for instance in political discourse and decision making.

- 13 The claimant's written attachment to the claim form stated that he believed there had been discrimination on the grounds of philosophical, religious, and political belief, when he was dismissed. He stated that

belief is a protected characteristic but did not state directly what that belief was.

- 14 In his further statement to the tribunal of 9 March 2021, he spoke about “*seriously engaging*” with politics from 2017, for a while identifying most with libertarianism but, lately, he described his general philosophy as “*‘right wing’, ‘anti-egalitarian’, ‘liberal’ on some things, but generally take the ‘traditionalist’ stance on most issues*”. He went on to describe himself as “*English Nationalist*”. He stated that he believed that mass immigration has been “*destructive and unhealthy*” and there is a “*pernicious ideology*” which inflicts white guilt on people of “*white European descent*”. He explained in that statement that the philosophy of nationalism refers to the nation as a “*unique group which has sovereignty (self-governance) over its homeland. I believe that nations ought to be defined by shared heritage such as common language, culture, faith and ancestry*”. He stated that the respondent characterised these views as racist.
- 15 In his witness statement made on 1 July 2022 for this hearing, he gave details about his work for the respondent, how the investigation into his activities was carried out and concerns about the process, which is not relevant to this hearing.
- 16 As mentioned above, the claimant was asked further questions about his beliefs in this hearing. He said even those born in the UK are not necessarily British. It is his belief that citizenship does not count. It is ethnicity which counts rather than a passport. He repeated his ideas about a shrinking white population and what he stated was a “*traditional*” view of nationhood, that had been in place for thousands of years. He believed that ethnic groups equalled nations.
- 17 When asked further about this part of his belief, the claimant stated that someone who was born in this country and converted to Islam would be less British. He said that Jewish people were in a distinct ethno-religious group and could not be British. If a person is Black, he stated, they would have less claim to the land and be less British because it depended on ancestry. The claimant’s belief has a central theme of the importance of ancestry which he asserted goes back before parents or grandparents. He was not able to provide a date which would be considered as proving sufficient ancestry and mentioned the importance of surnames but gave no examples.
- 18 The claimant was asked how the belief in a nation would work on a practical level. He said that the government should discriminate in favour of British people, for instance, in the provision of social housing. He said a Black person would be a lower priority. He went on to say that he did not advocate treating others badly but his beliefs were a result of his love of nation. He is not a member of a political party and added “*recognised by the Electoral Commission*”. He does not believe it is a necessary part of his belief that he should try to persuade others

to that same belief but does feel it would be odd to have that world view and not also wish to spread the word.

- 19 There was no evidence that the claimant had discussed these beliefs at work nor that he advocated or used violence. His evidence was that he regarded ethnicity and nationality as one and the same and that there are emotional, mental and spiritual differences between races.

Law and submissions

- 20 The starting point for consideration of whether the claimant has a philosophical belief is s.10 EQA. 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] ICR 175 (Gray) had some important observations to make on the Grainger criteria. 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.

- 22 We now have some other more recent cases and both representatives referred me to Forstater v CGD Europe and others [2022] UKEAT/105/20 (Forstater). That case concerned the debates around gender identification and differences of beliefs as between those who hold what are sometimes referred to as "*gender-critical*" as

opposed to “*trans rights*” views. This passage from the headnote gives an overview of the part of the test most relevant to this case:-

“in determining whether the belief identified by the tribunal amounted to a “philosophical belief” within section 10 of the Equality Act 2010, it was appropriate to consider first the effect of articles 9 and 10 of the Human Rights Convention, given that domestic statutory provisions were to be read and understood conformably with the Convention; that, in that regard, the paramount guiding principle was that it was not for the court to inquire into the validity of the belief, and the bar should not be set too high; that the particular threshold requirement relevant to the present case was that the belief must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others, but only if the belief involved a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society and fail to qualify for protection; that, in applying section 10, any manifestation of a belief should be considered only in determining whether the belief met the threshold requirements in general; that, while the claimant’s belief might in some circumstances cause offence to trans persons, it was not a belief that sought to destroy their rights, and, further, it was widely shared, including amongst respected academics, and was consistent with the law; and that; accordingly, the claimant’s belief as to the immutability of sex did amount to a philosophical belief within section 10”

23 At paragraph 45, the EAT stated that it was not incorrect for a tribunal to seek to identify the “core” elements of a belief in order to determine this preliminary issue.

24 At paragraph 62, which appears in a section headed “*What approach should the tribunal take in determining whether the claimant’s belief was a “philosophical belief” within the meaning of section 10 Equality Act 2010?*” – this is said:-

“Far from being merely one of the factors to be taken into account, it appears to us that article 17 was mentioned (judge’s note - in Grainger) because it is the benchmark against which the belief is to be assessed; only if the belief involves a very grave violation of the rights of others, tantamount to a destruction of those rights, would it be one that was not worthy of respect in a democratic society”

25 And, at paragraph 79, this is said:-:

“in applying Grainger V, tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred of the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and

which fall into the less grave forms of hate speech would not be excluded from protection”

- 26 When deciding whether the claimant’s belief is protected by the EQA, the cases make it clear that I need to consider some of the articles in the European Convention on Human Rights. Those referred to in considering the question of philosophical belief are as follows:

“Article 9 – Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change her/his religion or belief and freedom, either alone or in community with others and in public or private, to manifest her/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.*

Article 10 – Freedom of expression

- 1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 17 – Prohibition of abuse of rights

Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

- 27 Furthermore, Article 14 of the Convention requires that the enjoyment of the rights and freedoms must be secured without discrimination on any ground “*such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.
- 28 At first, it seemed that the European Court of Human Rights (ECHR) case of Redfearn v United Kingdom [2013] 57 EHRR might have some relevance to this case as it involved the dismissal of an employee who was elected as a British National Party (BNP) councillor when his job as a driver, under a contract for Bradford Council, meant he regularly interacted with people of Asian origin. However, that case was concerned with a violation of Article 11, the right to freedom of association which is not directly relevant here.
- 29 I was also referred to a number of cases in the written and oral submissions some of which are mentioned below. Where a case is not mentioned, it was either not directly referred to by the representatives or it seems to be of little value in this case.

Claimant’s submissions

- 30 The claimant’s representative, Dr Loutfi, had prepared written submissions and added to them orally. She submitted that the belief relied upon was English Nationalism and that other aspects referred to were encompassed in it – including libertarianism, traditionalism, property rights and anti-immigration. She submitted that the claimant’s English Nationalism included the belief that ancestry is of more significance than others (such as faith). She referred me to several cases on the first and second Grainger test, that the belief should be genuinely held and not simply an opinion or viewpoint based on present state of information. These were helpful as guides but I do not repeat them here as there is little challenge to these parts of the Grainger tests. Again, there is little challenge to the third Grainger test, that the belief should concern a weighty or substantial aspect of human behaviour. I was referred to the tribunal judgment in Thomas v Surrey and Borders Partnership NHS Foundation Trust and Ms A Brett (ET 2304056/18) which is a case on English Nationalism where an employment judge found such a belief was capable of constituting a philosophical belief but failed to show, in that case, on the facts of that case where the claimant held anti-Islamic views, that it was worthy of respect in a democratic society.
- 31 Rather more consideration needs to be given to the fourth and fifth tests, although the main challenge by the respondent relates to Grainger V. As far as “*cogency, seriousness, cohesion and importance*” for Grainger IV is concerned, Dr Loutfi referred to McEleney v Ministry of Defence (S/4 105347/2017) where a belief in Scottish independence and how a country should be governed was sufficiently serious. In oral submissions, Dr Loutfi argued that the belief

relied on here was analogous to religious faith and that some aspects of the claimant's belief, like some tenets of orthodox religions, were not necessarily compatible with modern ideas. She submitted that, as someone would not be penalised for how they practice in a Mosque, they should not be penalised for what they write on Twitter or other social media. She reminded me that the claimant had not referred to his belief at work and there was no cause for complaint about his behaviour at work.

- 32 Finally for Grainger V, Dr Loutfi submitted that the claimant's views were not in conflict with the rights of others. She first submitted that the respondent had made a concession in the written skeleton argument, but said, even if that was not the case, it showed that the belief was not an obvious candidate for not being worthy of respect in a democratic society. She referred me to the first instance judgment in Kelly v Unison 2203854/2008 where the belief held there including the overthrow of the state, which is not the case here. She submitted that the claimant's version of English Nationalism is not extreme and does not seek to overthrow the state. She submitted that, whilst his belief may include views that are "*offensive, shocking or even disturbing*", it is protected by the law, both under s10EQA and articles 9 and 10 ECHR.

Respondent's submissions

- 33 The respondent's representative, Mr Leonhardt, also relied upon written submissions prepared by a colleague, save for paragraph 16e which reads "*In the way the Claimant's belief is set out in the "Statement of Further Particulars", the respondent accepts that his views do not fall foul of the Grainger V definition*". Mr Leonhardt submitted that was not a concession but, even if it was, it cannot take into account the claimant's evidence at this hearing which provided more information on the stated belief.
- 34 The respondent submitted that the claimant's belief, as articulated by him, is not simply Nationalism but "*ethno-centric*" nationalism; that is that ethnicity is based on ancestry going back hundreds of years which would identify who is in the English nation, with the reference to surnames lacking cogency and being entirely arbitrary.
- 35 Mr Leonhardt submitted that, although the claimant states his belief is not based on hostility, he promotes the denial of public services because of race. That amounts, it is submitted, to being destructive of human dignity because of the effect on the individual. It is not a case of being unfashionable or not respectable because it is, in effect, racist. The belief put forward is not simply not inclusionary but advocates treating people less favourably on the basis of their race.
- 36 He also submitted that the Grainger V bar has, in recent cases, been set too high. He argued that I must look at article 17 as it is the benchmark, as stated in Forstater in paragraph 79, (quoted above at paragraph 25). He accepted that there is no evidence of the claimant

advocating violence and queried how useful, or in line with article 17, is that reference to Nazism and totalitarianism. In the alternative, argued the respondent's representative, the claimant's belief could well be said to be "akin" to Nazism as it has, at its core, a belief in ethno-centric nationalism.

37 He responded to Dr Loutfi's submissions about some aspects of religious beliefs being arguably discriminatory, but said that might mean that they also could not meet the Grainger V test. He referred me to Dr D Mackereth v Department for Work and Pensions and anor [2022] EAT 99 where there is an exploration of the Grainger tests and the somewhat difficult task of separating the manifestation of beliefs from the belief itself, which is required to answer the initial question of whether the belief is protected by s10 EQA.

38 As far as the Grainger criteria are concerned, the respondent does not accept that they are met in this case. Mr Leonhardt did not address me on the first four Grainger tests (save for arguing that it is for the claimant to show that he meets them). He concentrated his submissions on Grainger V and submitted that it cannot be met.

Conclusions

39 This is a challenging case to determine because the definition of philosophical belief at s10 EQA is succinct and there is a need to refer to the Convention and to several recent cases. It is a case where the rights of members of different groups, many of whom will possess one or more of the protected characteristics as set out in EQA, the Convention and caselaw, have to be balanced.

40 My first task is to identify the belief relied upon. The claimant says it is "*English Nationalism*" and I accept that it is an accurate shorthand description. I also think that I must take into account what the claimant tells me about the version of English Nationalism that he believes in, which may vary from individual to individual. The claimant helps in this regard by the other ways he describes his belief to include being "*anti-egalitarian*" and "*traditionalist*" as well as his core belief in nationhood depending on "*ancestry*" and "*ethnicity*".

41 I must also take into account other aspects of his belief as expressed in the hearing. These include his belief that a person who is otherwise British would become less so if they adopted the religion of Islam; that a Jewish person is less British as is a Black person. He explained this by reference to the need to show ancestry. He further stated that he believed the government should discriminate in favour of "*native*" people. Finally, in relation to this alleged philosophical belief, he stated that someone who showed some allegiance to their heritage, such as Mr Boyega, should not be treated as an Englishman and Dr Mos-Shogbamimu who should "*go home*". In summary, the claimant's belief is one of a particular kind of English Nationalism, having the other features described by the claimant.

42 I do not consider that the statement at paragraph 16e of the respondent's written submissions amount to a concession, not least because it specifically refers to the claimant's belief as set out in his further particulars and without reference to his evidence at this hearing. In any event, it is clearly a matter for me as the judge to decide the issue, assessing all that I have before me at the hearing.

43 I now consider the first four Grainger tests and answer them in this way:-

- (i) The belief must be genuinely held. There is no express challenge to this aspect of the claimant's stated belief and that part of the Grainger test is clearly met. His belief appears to be genuine.
- (ii) As for the question of whether the belief is not simply an opinion or viewpoint based on present information, I am satisfied that it is more than an opinion. The claimant is articulate about his beliefs, has done some reading and displays relatively well-expressed views about it. It is clearly thought out and based on an assessment of reading the claimant refers to.
- (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 of the right of people to live in this country, to access public services and to comment on how the country is run, it is indeed weighty and substantial.
- (iv) I am also satisfied, on balance, that it has a level of cogency, seriousness, cohesion and importance. I do not question its validity nor comment on whether others would agree with what is said about nationalism and who can be part of the nation as described by the claimant. Clearly there are likely to be a great many people who do not agree with that belief. I am rather more concerned about whether the belief is cogent. In particular, the vagueness about how far back a person's ancestry needs to be shown to be part of the nation and the reference to the importance of surnames did not appear to me to be logical or convincing. On balance though, given that many acceptable beliefs, including those that form part of a religion, are sometimes difficult to accept on a rational and scientific basis, I would be prepared to accept that the claimant's belief just meets that part of the Grainger test.

44 I come now to Grainger V test. I find, after very careful consideration, that the claimant's belief in English Nationalism, as described by him, does not meet that test. It is not worthy of respect in a democratic society for several reasons. I find that it is incompatible with human dignity and conflicts with the fundamental rights of others. In particular,

there is a clear denial of the rights of those without the requisite ancestry to be part of the envisaged nation. The claimant's unequivocal belief that those who are Black or Jewish are not part of the English nation, for example, patently seriously discriminates against people within those groups. It is, at the very least, ethno-centric, as described by the respondent's representative and could also arguably be described as racist and/or anti-semitic.

- 45 I accept, as I must, that the EAT has provided the guidance that the bar should not be set too high in this respect. The claimant's belief in this form of English Nationalism, as described by him, does amount to an "*affront to Convention principles*" as outlined in Forstater, because it is a clear breach of article 17; arguing that people without the ancestry as described by the claimant are not part of this nation, to the extent that they should "*go home*" is a destruction of their rights. This is not just a belief that is shocking, offensive or disturbing to others, though it may well be all those things. It is a belief that, in at least some respects, is akin to Nazism.
- 46 I take into account that articles 9 and 10 in the Convention provide for freedom of thought, conscience and religion and expression, but they are both highly qualified rights, referring to legally prescribed limitations which are necessary in a democratic society and to protect the rights of others. Article 17 of the Convention, which is the prohibition of the abuse of rights, was said in Forstater to be "*the benchmark*". I find that the claimant's belief, as articulated to me, is aimed at the destruction of the rights and freedoms of those the claimant seeks to exclude from the English nation. It seems to me, as far as the claimant seeks to rely on any Convention rights, he is abusing those freedoms. The specific reference in Article 14 to the grounds where there should be no discrimination in the enjoyment of the rights includes references to characteristics where the claimant advocates for discrimination.
- 47 Having weighed all these matters up I am not satisfied that that the claimant's belief is one which is protected by s10 EQA. The claim must be dismissed.

Employment Judge Manley

Date: 26 April 2023

Sent to the parties on: 5 May 2023

For the Tribunal Office