Protecting philosophical beliefs, a decade on

John Bowers reflects on *Grainger plc v Nicholson*—a case believed to be important about how to qualify 'belief'

Some of the cases I appeared in were treated as important at the time but later they are overtaken by other cases; others were slow burners and take on importance when they are cited in other cases. The case of *Grainger plc v Nicholson* [2010] ICR 360, [2010] 2 All ER 253 was, however, clearly likely to be of importance at the time, as it was the first case to provide a definitive analysis of what was a philosophical belief that could be protected under the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).

Originally as enacted, this had protected religions or '*similar* philosophical beliefs' but this had been amended by s 77(1) of the Equality Act 2006 to remove the word similar. It is now consolidated into the Equality Act 2010 (EqA 2010). I appeared for the employers and came second to Dinah Rose who acted for Mr Nicholson.

Mr Nicholson (pictured) was the so-called Oxford Green Warrior. He was a surveyor and head of sustainability at Grainger plc, a company specialising in renting property. At that time his views were much less mainstream than they may appear to be now. This was, of course, well before Extinction Rebellion had been heard of. He said in his witness statement: 'I have a strongly held philosophical belief about climate change. I believe we must urgently cut carbon emissions to avoid catastrophic climate change.' He conducted his life in accordance with this philosophy as he saw it, but was it a philosophical belief for the purposes of the regulations which could be protected?

Redundancy

The employers claimed that his employment was terminated on grounds of redundancy. He asserted that there was more to it and that his green activities had influenced the dismissal. The facts had not been decided as the issue whether Mr Nicholson's views counted as a relevant belief was taken as a preliminary point. The case eventually settled after this first round.

The provision on discrimination on grounds of religion and belief is loosely based on Art 9 of the European Convention on Human Rights so it was natural that the judge should consider the authorities in that arena. For example, the Strasbourg Court had already held that pacifism is within the scope of the Article; *H v UK* [1993] 16 EHRR CD 44. Lord Nicholls in *R (on the application of Williamson and others) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [2005] All ER (D) 380 (Feb) had said 'a belief must satisfy some modest, objective minimum requirements' (para [23]). In respect of Art 10 the jurisprudence makes clear that the Convention applies to speech that offends, shocks or disturbs (*Handyside* (1981) 1 EHRR 737).

There was however precious little other guidance. During argument, it was plain that Mr Justice Burton was keen to place some limits on what could be seen as philosophical belief to ensure that extremist views were not protected. He had regard to *McClintock v DCA* [2008] IRLR 29 where the EAT said that it 'not enough to have an opinion based on some real or perceived logic or based on information or lack of information available' although it also said that 'belief can be intentionally personal and subjective'. A similar issue arises even in relation to religions as such as some may have beliefs which are inimical to many. In *Williamson* in a different context of the use of corporal punishment on children, the House of Lords said that religious views 'must possess an adequate degree of seriousness and importance'.

Floodgates

It was clear in the course of argument that the judge in the *Nicholson* case was concerned that the floodgates should not be opened to a too wide range of beliefs, some of which would be 'beyond the pale'. I contended unsuccessfully in order to restrict the range of beliefs covered that the belief must not be a one off and not a lifestyle choice; and that the belief must govern the entirety of a person's life. I also relied on Bertrand Russell's *History of Western Philosophy* (which the judge said had not been cited before!) to the effect that 'philosophy…is something intermediate between theology and science' (para [29]).

The judge decided that there were parameters to what would qualify by a list of five criteria which may be paraphrased thus:

- the belief must be genuinely held;
- the belief should not be merely an opinion or viewpoint;
- the belief should be as to a weighty and substantial aspect of human life and behaviour;
- the belief must attain a certain level of cogency seriousness cohesion and importance;
- the belief must be worthy of respect in democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others.

This was a skilful set of parameters which are still regularly cited. Some of these criteria are easier to apply than others. Burton J specifically resisted the notion that a racist or homophobic philosophy could be included. He decided that this green philosophy passed muster.

Burton J said that political party beliefs would not be covered, but did not rule out what might be seen as political philosophies such as socialism, marxism or free market capitalism (para [28]). Belief in the policies of the British National Party was held not to be a philosophical belief in an ET decision *Baggs v Fudge* Case no 1400114/2005 in which I also appeared.

Let us now fast forward to 2018 when an employment tribunal used this guidance to reach the view that ethical veganism qualified in *Costa v The League Against Cruel Sports* [2020] UKET 3331129/2018. The ET said that ethical veganism 'carries with it an important moral essential… it is founded on a longstanding tradition recognising the moral consequences of non-human animal sentience which has been upheld by both religious and atheists alike. This may be contrasted with *Conisbee v Crossley Farms* Case no 3335357/18 where it was held that veganism (without the adjective ethical) was merely a lifestyle choice.

The way in which the criteria should be used was the key point in *Harron v Chief*

Constable of Dorset Police [2016] IRLR 481 and it was said that the bar should not be set too high for what may qualify as a belief. This case concerned a claimant who described himself as having a 'profound belief in the proper and efficient use of public money in the public sector'. The ET applied the *Grainger v Nicholson* test and accepted the claimant's genuine motivation, but did not consider him to be within s 10 of EqA 2010, holding that it was 'not so much a belief but a set of values which manifest themselves as an objective or goal operating in the work place'. The EAT allowed an appeal and remitted the matter for further consideration. Mr Justice Langstaff held (at [34]):

> '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. That is a hint towards the approach that regards as substantial that which is more than merely trivial …. "Coherence" is to be understood in the sense of being intelligible and capable of being understood….'

The danger is, of course, that the tribunals and courts may be drawn into value judgments on the beliefs they are asked to include. In *Kelly v Unison* (case no 2203854/08) Marxist/Trotskyist views were held not to be worthy of respect in a democratic society as they involved a belief in the right of the individual to break the law to achieve political aims, and the right to deprive individuals of *their* homes and property, and a failure to afford the individual freedom of choice and opportunity to procure reward for endeavour.

A particular belief held by only one person may have difficulty in qualifying: in *Gray v Mulberry Co (Design)* Ltd [2019] ICR 175 it was the belief in the importance of copyright/moral rights for artists/creators, but this was rejected.

Limits

There are however outer limits: neither anti-semitic views (*Arya v LB of Waltham Forest* ET case 3200396/11 nor Holocaust denial (*Ellis v Parmagon Ltd* [2014] EqLR 343*)* have passed muster. Spiritualism and belief in life after death however qualified (*Greater Manchester Police Authority v Power* UKEAT 0434/09) and a belief that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion (*Maistry v BBC* ET case 1313142/10). Similarly in *Anderson v Chesterfield High School* [2014] EqLR 343, [2015] All ER (D) 220 (Apr) the elected Mayor of Liverpool relied upon a philosophical belief of 'a commitment to public service for the common good'. This went beyond a mere opinion, and was an important part of the claimant's life. It concerned a weighty and substantial aspect of human life and behaviour, and was sufficiently cogent and worthy of respect in a democratic society to warrant protection.

In *Henderson v General Municipal and Boilermakers Union* [2015] IRLR 451, Mrs Justice Simler upheld the finding that the claimant's 'left wing democratic socialist beliefs' were protected, noting that 'all qualifying beliefs are equally protected. Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as our religious beliefs'.

So eleven years on the from the *Nicholson* case it can be said that Burton J's criteria have stood the test of time and have not allowed the floodgates tov open. NLJ

John Bowers QC, Barrister and Principal of Brasenose College, Oxford.