Protected beliefs and social media storms

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Omooba v Michael Garrett Associates Ltd (t/a Global Artists) & Anor [2024] EAT 30

Did the Tribunal err in dismissing an actor's claims for religion or belief discrimination, harassment and breach of contract following her termination due to protests over a controversial social media post from years past? No, according to the President of the EAT, in a 74-page judgment that offers some insights into the delicate balance to be struck in cases alleging workplace discrimination for protected beliefs.

Background

The claimant was cast in a production of *The Colour Purple* at the Curve Theatre in Leicester. She was to play Celie, an iconic lesbian character. During pre-production publicity, it came to light that the claimant had expressed the view, via an old Facebook post, that homosexuality was a sin. This led to widespread online protests on Twitter (now X) that jeopardised the production and triggered the termination of her agency contract. The theatre offered to pay her full contract fee. The claimant rejected that offer and issued Tribunal proceedings against her agent and the theatre company.

Shortly before trial the claimant acknowledged that, in light of her views, she would never have played the role of Celie and would have resigned had she not been terminated. At trial, it was common ground that the claimant's Christian religion and her related belief that homosexuality was a sin met the test in *Grainger v Nicholson* [2010] ICR 360 and thus fell within the protection of section 9 of the Equality Act 2010 ('EqA 2010'). However, the Tribunal concluded that the claimant's termination was because of the commercial risk to the respondents' businesses, rather than her protected belief. It dismissed her claims (and ordered her to pay the respondents' costs in full).

The appeal proceedings

The claimant appealed against the Tribunal's findings on liability (as well as its related procedural orders on costs and the use of the trial documents). The first respondent ('MGA') cross-appealed against the Tribunal's findings on whether termination amounted to a detriment and the Tribunal's failure to find that upholding the claimant's discrimination claim amounted to '*compelled speech*', contrary to its rights under article 9 (freedom of thought, conscience and religion) and article 10 (freedom of expression) of the ECHR. The second respondent, Leicester Theatre Trust ('LTT'), also cross-appealed the Tribunal's findings on termination on the same grounds as MGA as well as the Tribunal's failure to find that there was an occupational requirement that the role of Celie was played by a person who did not harbour the claimant's beliefs, (pursuant to paragraph 1, schedule 9 of the EqA 2010).

The EAT's judgment

Direct discrimination

The claimant attacked the Tribunal's central finding that her religion or belief was not the operative reason for the decisions to terminate. She argued that the Tribunal had muddled the respondents' reasons with their motives: the real reason was because they objected to her belief, even if they had other commercial motives. She also argued that the social media storm and its impact on business were directly connected to her protected belief and thus the respondents' decision-makers could not have separated one from the other.

In rejecting the claimant's grounds, the EAT applied direct discrimination case law decided under materially similar predecessor legislation in the Race Relations Act 1976[1], to the effect that the protected characteristic must be the reason or part of the reason for the less favourable treatment, as opposed to merely part of the *context* for the less favourable treatment. The EAT held that the Tribunal had carefully examined the mental processes of the respondents' decision-makers and reached clear findings that the claimant's belief was not the reason for their decisions, nor did it inform or influence them (§§154-159). The EAT's conclusion was reinforced by the approach of the Court of Appeal in a series of whistleblowing cases[2] that had rejected a '*but for*' approach to the determination of the reason for detrimental treatment.

[1] Namely, *Amnesty International v Ahmed* [2009] ICR 1450 EAT at §37 and *Gould v St John's Downshire Hill* [2021] ICR 1, EAT at §66.
[2] *Fecitt & Others v NHS Manchester (Public Concern at Work Intervening)* [2012] ICR 372 CA at §51 and *Kong v Gulf International Bank (UK) Ltd* [2022] IRLR 854 CA at §56.

Harassment

The claimant argued that when considering the objective question of whether it was reasonable for the termination to have had the requisite effect of harassment under section 26(4) of the EqA 2010, the Tribunal failed to consider the respondents' actions in the context of the public protest against the claimant and thus failed to take into account the '*other circumstances of the case*'. She also argued that there had been an unjustifiable interference with her ECHR rights under articles 9 and 10, which should have given rise to automatic harassment due to violations of her dignity.

The EAT concluded that the Tribunal had not succumbed to such errors but had kept all the relevant circumstances in mind when answering the objective question in section 26(4). Critically, the Tribunal had found that the respondents had not done anything to inflame public protest against the claimant. There was no factual basis for answering the objective question in her favour. As the Tribunal had not found that there were any unjustifiable breaches of the claimant's ECHR rights, the argument for automatic harassment was '*academic*' (§§160-162).

Given the rejection of the claimant's discrimination and harassment grounds, it was unnecessary for the EAT to decide the respondents' cross-appeals, but it noted that the second respondent's occupational requirement defence would call for careful assessment of the protected characteristic relied on under schedule 9 of the EqA 2010. No view was expressed on the first respondent's argument that upholding the claimant's direct discrimination claim would have amounted to forced speech contrary to its rights under ECHR articles 9 and 10 (§165).

Breach of contract

The claimant contended that the Tribunal erred in finding that she was in repudiatory breach of her contract. She asserted that her actions during the short lifespan of the contract were not so serious as to have completely abandoned her obligations of performance.

The EAT held that the Tribunal was entitled to conclude that from the point of entering the contract, the claimant was under obligations as to her conduct and performance which she should have known she could not fulfil (§§169-171). Since she would have abandoned the role because of her beliefs in any event, she would not have been entitled to any meaningful remedy.

Comment

The EAT dismissed the claimant's appeal for essentially the same reasons that the Tribunal rejected the claim and applied established authorities en route. That approach may be unsurprising given President Eady's earlier judgment in *Higgs v Farmor's School* [2023] EAT 29, where she emphasised that such claims are inherently fact-specific, with limited scope for prescriptive guidelines. More detailed guidance may have to await the Court of Appeal's judgment when it considers *Higgs* later this year.

For now, *Omooba* provides several points of principle for employment lawyers to consider:

(1) At §92, the judgment draws out two important distinctions that often arise in religion or belief discrimination cases. The first is the distinction between a person's belief and the objectionable manifestation of that belief, (where often there may be '*no clear dividing line*'). That distinction matters because while the right to hold a belief is absolute (see article 9(1) of the ECHR), the right to manifest it is qualified and subject to considerations of proportionality (see article 9(2) as discussed in *Higgs*). The second distinction is between contextual matters and the reason for an employer's decision. Where a protected belief forms part of the context but not part of the reason for a decision, that will be insufficient to establish religion or belief discrimination;

(2) These points underscore the need for employers to have well-documented, fair and transparent decision-making processes focused on the commercial or reputational consequences of an individual's protected belief or their expression of it, as opposed to the belief itself;

(3) In teasing out the reason for a decision, a useful question to ask is whether the employer would have treated the same a person with a different religion or belief who had otherwise said or done something similar to the claimant (see §156);

(4) A troubling issue that the reasoning in *Omooba* did not fully engage with is whether the safest option for an employer is to be a neutral bystander to a social media storm around an employee's protected beliefs. If public outcry is itself discriminatory, will an employer that bows to such pressure avoid liability for discrimination or harassment? Is reliance on commercial reasons sometimes a fig leaf for siding with the prevailing views of the majority of clientele, whatever the merits of those views? It seems to me that, in certain circumstances, maintaining neutrality might well expose an employer to liability but, as ever, much will depend on the facts.

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