When is a belief not worthy of respect in a democratic society?

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Forstater v CGD Europe & Others UKEAT/0105/20/JOJ

[ ] paragraph number of the Employment Appeal Tribunal's ('EAT') judgment
Parties are referred to as they were in the Employment Tribunal ('ET')

Introduction

1. 'The Claimant holds the belief that biological sex is real, important, immutable and not to be conflated with gender identity. She considers that statements such as "woman means adult human female" or "trans women are male" are statements of neutral fact' [1]. The Claimant's belief means that she does not accept that it is possible to change sex in any circumstances or that there are any circumstances in which a trans woman is in reality a woman or that a trans man is in reality a man [14].

2. The Claimant expressed views related to her belief on Twitter. Subsequently the Claimant's consultancy contract was not renewed and she claimed that she had been discriminated against because of her belief, contrary to the Equality Act 2010 [1].

3. The Claimant's belief is undoubtedly highly controversial and considered deeply offensive by many. In those circumstances, is her belief one which qualified for protection as a philosophical belief under s.10 Equality Act 2010? The ET addressed that question at a Preliminary Hearing in November 2019. In doing so, it applied the criteria set out in *Grainger plc v Nicholson* [2010] ICR 360 which may be summarised 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 ascertain a certain level of cogency, seriousness, cohesion and importance; and

(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 (hereinafter 'worthy of respect in a democratic society')

4. Crucially, the ET held that the Claimant's belief fell at the final hurdle. According to the ET, the Claimant's belief was not worthy of respect in a democratic society. The Claimant appealed.

The main arguments on appeal

5. In the EAT, there was no dispute that the *Grainger* criteria were appropriate. There were six grounds appeal, however, oral submissions were focused on general principles.

6. Was the ET entitled to conclude that the Claimant's belief was 'not worthy of respect in a democratic society'?

7. In submissions the Claimant suggested that the effect of the ET's conclusion was "Orwellian" [2] as it is 'tantamount to state mandated – the Tribunal being the representative of the State in this context – adherence to a view she does not actually hold' [31].

8. In contrast, the Respondent argued that to overturn the ET's judgment would mean that no trans person would be safe from harassment in the workplace [2]. And that a 'core component' of the Claimant's belief 'is to cause trans people enormous pain by misgendering them… the belief is rooted in giving insult and slander' [37].

The EAT's judgment

9. The EAT conducted a detailed examination of the applicable principles at common law and those arising from the European Convention on Human Rights ('ECHR"). Such a discussion is outside the scope of this summary.

10. The EAT noted that the ET did not reject any part of the evidence given by the Claimant at the Preliminary Hearing [45]. That evidence included statements that the Claimant

would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun (although she would not feel bound to do so if, by way of example only, a trans person who was not assigned female at birth was in a "woman's space" [47]. The Claimant's evidence before the ET was also that it was not any part of her belief that trans people should not generally be treated in accordance with their wishes or that they should not be respected or protected from discrimination [47]. The EAT took the view that on 'a proper reading of the Tribunal's findings, it seems to us that the most that can be said is that the Claimant will *sometimes* refuse to use preferred pronouns if she considered it relevant to do so, e.g. in a discussion about a trans woman being in what the Claimant considered to be a women-only space' [49].

11. The EAT accepted that the Claimant's belief is not unique to her and the EAT regarded it as relevant that the belief is shared by many others [51-52]. And it reasoned that when deciding if a belief is worthy of respect in a democratic society, 'the bar is not to be set too high' [57].

12. Ultimately, the EAT held that:

> The two passages on which Burton P relied on in formulating Grainger V clearly establish the extremely grave threat to Convention principles that would have to exist in order for a belief not to satisfy that criterion… only if the belief involves 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. We do not consider that the ECtHR would have referred to Article 17, or the House of Lords to "torture and punishment", if a belief involving some lesser violation of others' rights – not sufficiently grave to engage Article 17 – was also capable of being not worthy of such respect [62].
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> …
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> Ms Russell's further objection to any approach based on Article 17 is that it would mean only beliefs akin to Nazism or espousing totalitarianism would fail to qualify for protection. However it is clear from Convention case law that that is as it should be; a person is free in a democratic society to hold any belief they wish, subject only to "some modest, objective minimum requirements"; per Lord Nicholls in **Williamson**. It is only in extreme cases involving the gravest violation of other Convention rights that the belief would fail to qualify for protection at all [emphasis added] [70]

13. In light of the above, the EAT accepted that in deciding whether a belief is worthy of respect in a democratic society, the focus should not be on the manifestation of the belief [77].

14. The EAT emphasised that [79]:

> In our judgment, it is important that 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 in 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 the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.

15. Applying the above to the ET's judgment, the EAT held that the ET erred by straying into an evaluation of the Claimant's belief, failing to remain neutral and/or failing to 'abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements [85]. The ET's finding that the Claimant was unwilling to consider the possibility that her belief may not be correct was irrelevant [86].

16. It was also irrelevant that the ET might have considered the scientific foundations for the Claimant's belief to be weak: an ET is not entitled to use 'the tools of logic or science, to challenge the basis for a belief; were that not so then many might consider that no religious belief satisfies Grainger IV [87].

17. Similarly, the ET's view that the Claimant's belief was 'absolutist in nature' did not support its finding: while it was unclear exactly what the ET meant by that term, the firmness with which a belief is held is not a reason to deny protection under s.10 Equality Act 2010 [88].

18. The ET's conclusion was also not a necessary consequence of the Gender Recognition Act 2004. 'The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the Claimant, continues to believe that a trans woman

with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not [99].

19. It was also noted that the first stage of determining whether a belief qualifies for protection at all does not involve balancing competing rights as the balancing exercise arises at the second stage of the analysis, when deciding whether any restriction of the right is justified in light of the specific context [102].

20. The ET was not entitled to impose a requirement on the Claimant to refer to a trans woman as a woman in order to avoid harassment [103]. Such a blanket approach is not permissible: 'refusing to refer to a trans person by their preferred pronouns… could amount to unlawful harassment in some circumstances [but] it would not always have that effect' [103].

21. The EAT also clarified that the ET was wrong to suggest that, for a lack of belief to qualify for protection, one must hold a positive view opposed to the belief in question: a lack of belief is merely the absence of belief which may arise from simply not having any view on an issue at all because of indifference, indecision or otherwise [106]. There was no 'sleight of hand', as the ET suggested, in the Claimant putting her case on the basis of the lack of her belief in gender identity: the belief that everyone has a gender which may be different to their sex at birth such that trans men are men and trans women are women [107-108].

22. In view of the above, the EAT concluded that the 'Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own to find that Grainger V is satisfied' [111].

23. It was noted that the Preliminary Hearing in this case took six days and that the ET was presented with hundreds of pages of evidence. Given the clarification of the law provided by this judgment, the EAT indicated that it would only rarely be necessary for several days to be spent considering whether a belief qualifies for protection under s.10 Equality Act 2010 [119]. The bar is not a high one.

Comment

24. Whatever view one takes of the EAT's conclusion on this matter, in practice, employees who maliciously misgender others, or engage in similar behaviour, are likely to be found to have committed unlawful discrimination or harassment. Indeed, the EAT stressed that:

    a. it was not expressing any view on the merits of the transgender debate;

    b. its judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity';

    c. its judgment does not mean that trans persons do not have protection against discrimination or harassment; and

    d. its judgment does not mean that employers will not be able to provide a safe environment for trans persons [118].

It is understood that the Respondent does not intend to appeal against the EAT's judgment. Accordingly, the matter will now return to the ET for findings of fact and a determination about whether the Claimant suffered unlawful discrimination or harassment because of or related to her belief [117]. At that hearing the ET will need to consider all of the circumstances including the competing rights of the Claimant and others.

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