

2021/4

## REVUE DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE

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- P. Andersson & T. A. Novitz** Risk Assessment and Covid-19: Systems at work (or not) in England and Sweden  
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ENGLISH ELECTRONIC EDITION

2021/4

DE DROIT COMPARÉ  
DU TRAVAIL  
ET DE LA SÉCURITÉ SOCIALE

REVIEW SUPPORTED BY THE INSTITUTE OF HUMAN AND SOCIAL SCIENCES OF THE CNRS

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**INTERNATIONAL  
LEGAL NEWS**



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## THE EVOLUTIONARY TRACT OF PHILOSOPHICAL BELIEFS CONSTITUTING PROTECTED CHARACTERISTICS IN BRITISH DISCRIMINATION LAW

There has been in recent years an important case law evolution of philosophical beliefs qualifying as protected characteristics which constitute one of the most interesting developing areas of discrimination law. There are nine protected characteristics under the Equality Act 2010<sup>1</sup> which protects people<sup>2</sup> against discrimination<sup>3</sup>. This article is more modest. It proposes to deal with only one of the nine protected characteristics, namely that of philosophical belief for it is in this very area that rapid evolution is taking place. The 2010 Act does not define the term philosophical belief. It provides<sup>4</sup> that « Belief means any religious or philosophical belief and a reference to the belief is a reference to a lack of belief ». The Act has left it to the tribunals and courts to define the notion of philosophical belief.

Lord Nicholls<sup>5</sup> sowed the seeds of the definition when he said that :

« a belief must satisfy some modest, objective minimum requirements (...). The belief must be consistent with basic standards of human dignity or integrity (...). The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance (...).it must be a belief on a fundamental problem (...). The belief must also be coherent in the sense of being intelligible and capable of being understood (...) But again too much must not be demanded in this regard (...). Overall those threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have...».

- 
- 1 Namely, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex, sexual orientation and religion and belief.
  - 2 People are protected in the workplace, public services, (e.g. National Health Service, educational establishments) organisations which provide services, (e.g. cinemas, shops, restaurants) transport, clubs and associations and local authorities and government departments.
  - 3 Discrimination may take place in four ways, direct and indirect discrimination, harassment and victimisation.
  - 4 Under section 10 of the Equality Act 2010.
  - 5 In *R (Williamson et al v Secretary of State for Education and Employment even though he suffered discrimination on grounds of his philosophical beliefs*. [2005] AC 248 UK HL 15 at para. 23 of his judgment.



Mr Justice Burton in *Grainger Plc v Nicholson*<sup>6</sup> following Lord Nicholls dictum in *Williamson* endeavoured to set out the five limitations or criteria of the definition of « philosophical belief ». He said<sup>7</sup> « (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 in conflict with the fundamental rights of others ».

Although there have been numerous cases which have failed to meet the philosophical belief criteria<sup>8</sup>, many have succeeded in doing so. A sample of these latter will be discussed below. It should be noted that all cases feature with other than philosophical belief issues such as redundancy, wrongful or unfair dismissal. Only the philosophical belief aspects of the cases are dealt with in a skeletal manner in this article.

In *Grainger's* case, mentioned above, a belief in man-made climate change and the resulting moral imperatives, is capable if genuinely held, of being a philosophical belief. The brief facts are that the claimant, Mr Grainger, who was the head of sustainability of the company, was made redundant. He claimed that his beliefs on climate change had contributed to his dismissal which was discriminatory because he asserted his beliefs on climate change, he had not agreed with the company's carbon emissions policy, he was obstructed from carrying out his duties by senior management and was deprived access to enable him to calculate the company's footprint :

Furthermore, he claimed that the company executives travelled in most highly polluting cars and when the CEO forgot his smart phone while abroad, he ordered an employee to catch a plane to retrieve it. The Employment Appeal Tribunal upheld the Employment Tribunal's verdict that the claimant's views fulfilled all five criteria and therefore constituted a philosophical belief.

In *D. Maistry v British Broadcasting Corporation*<sup>9</sup> the claimant's belief was that broadcasting is founded on the philosophy of « public space », a space which is neither government, nor the state, nor purely governed by commercial transactions.

6 [2010] ICR 360 (EAT).

7 *Ibid.*, § 24 of his judgment. The learned judge also considered the European Convention of Human Rights, art. 9 case of *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293 from where criteria (iv) and (v) above originate. See too the Code of Practice of the Equality and Human Rights Commission which repeats those criteria.

8 For example, the importance of not wearing a poppy in November (*Lisk*); homosexuality being against God's law and the Holocaust having never happened (*Ellis*); the 9/11 and 7/7 terrorist attacks being government led conspiracies (*Farrell*); refusal to place children for adoption, care or fostering with same sex partners (*McClintock*); refusal to sign a copyright agreement (*Gray*); wearing a silver cross round a claimant's neck against British Airways rules (*Eweida*); there are only two sexes and therefore sex is biological and immutable (*Forstater*); vegetarianism is not a philosophical belief (*Conisbee*) political correctness (*Dunn*); refusal to identify patients by their chosen sex when carrying out medical assessments (*Mackereth*).

9 Case no. ET/1313142/2010.

A person can thus encounter culture, education and debate and where such person can share experiences. The claimant's view of public space has been given the cohesion, cogency and importance by philosophers such as Jurgen Habermas and Dewey. The claimant's life's record was such that the judge had no doubt in finding that the five criteria in *Nicholson* were fulfilled.

Similarly, a belief on the sanctity of life, namely fox hunting and hare culling, was found to constitute a philosophical belief in *Hasham v Milton Park (Dorset) Ltd t/a Orchard Park*<sup>10</sup>. The claimant lived and worked to prevent cruelty to animals and his beliefs affected every aspect of his life. Apart from the food he ate and the clothes he wore, his belief affected the work he did and places he visited and how he spent his time and resources.

The judge found the claimant's evidence to be credible and having applied the five criteria established by case law concluded that the claimant's philosophical beliefs qualified for protection under the legislation.

Republicanism as a philosophical belief was upheld in *A Gibbins v British Council*.<sup>11</sup> The claimant believed that the UK should not be ruled by a hereditary monarch and that it should be a democratic and secular republic. She developed this belief over time from involvement in antiracism demonstrations, the death of Blair Peach, the influence of Tony Benn a staunch republican whose books she read, through contact with him, trade union and Labour Party membership and Amnesty International and much more. She had atheist and socialist beliefs and became known as « the quiet Corbynista »<sup>12</sup>.

The judge posited « We understand the claimant's belief as an identification with opposition to inherited wealth and privilege of which the monarchy is (...) and wider system of rule by an aristocratic elite. This sits with left wing views on other matters of social organisation (...). The belief is also a belief on how we should be governed, weighty and substantial (...). We concluded that it was a philosophical belief, such as its holders are to be protected from discrimination ».

The claimant in *C. Oliver v Department of Work and Pensions*<sup>13</sup> stated that the Labour Party is not simply an organisation; it also encapsulates and enshrines a set of beliefs known as democratic socialism.

The judge considered the five criteria setting out the limits placed on the definition of philosophical belief and said :

« I find (...) that this amounts to a belief and not just an opinion and viewpoint (...) is a belief to a weighty and substantial aspect of human life and behaviour; and which has attached a certain level of cogency, seriousness, cohesion and importance (...). It follows that the constituent elements of a philosophical belief are met. I find the claimant's belief in "democratic socialism" is within the definition of philosophical belief and is sufficient to be potentially protected by s.10 of the Equality Act 2010 ».

10 Case no. ET/3105555/2009.

11 Case no. ET/2200088/2017.

12 Referring to the former leader of the Labour Party, Mr Corbyn who had very left-wing tendencies.

13 Case no. ET/701407/2013.

Mr Alan Power in *A.Power v Greater Manchester Police Authority*<sup>14</sup> was a « committed spiritualist » who held genuine and *bona fide* beliefs on the existence of psychic, spiritualism and paranormal phenomena. The Employment Tribunal held<sup>15</sup> that the claimant's spiritualist and psychic beliefs, God and eternal life were capable of constituting a religious and philosophical belief for the purposes of the legislation.

The judge traced the history of the Spiritualist church and the fact that the claimant's belief in afterlife and communicating with spirits was worthy of respect in a democratic society and had the necessary cogency, seriousness, cohesion and importance such as to amount to a philosophical belief.

*Hawkins v United Utilities Ltd.t/a Unicorn*<sup>16</sup> unlike the other cases was decided on supposition. The claimant was dismissed for failing to meet his targets. He claimed that the real cause for his dismissal was his Christian beliefs not to tell lies. He alleged that he was advised to lie and heard some of his colleagues lie to potential customers on the telephone thus deceiving them. The claimant lost his case because he was unable to produce sufficient evidence to support his claim that the employer required him and his colleagues to lie to customers and thus deceive them.

The Employment Tribunal did however say that a well-founded belief that a person should not tell lies and thus deceive potential customers to obtain sales would qualify as a philosophical belief under s.10 of the Equality Act 2010 if the five criteria in *Nicholson* are met.

Commitment to public services can qualify as a philosophical belief according to *J. Anderson v Chesterfield High School*<sup>17</sup>. The claimant inspired by his parents and a local community activist had a deep-seated belief and conviction to serve the community for the common good. His belief in public service made him participate in local government and he became a Liverpool councillor. He served on the board of Liverpool Vision which is dedicated to the economic development of Liverpool. As Mayor he contributed to the common good of that city including the return of cruise liners to the port, the Oliver King Foundation, opposition to the « bedroom tax » and much more.

The claimant in *M Harron v Chief Constable of Dorset Police*<sup>18</sup> had a belief that the public service was improperly wasteful of money. He felt compelled to express those beliefs even though he suffered discrimination for his philosophical beliefs. With the intervention of the Employment Appeal Tribunal such belief was held to constitute a philosophical belief.

14 [2010] UKEAT 0087/10 and [2010] EWCA Civ. 534 before Stanley Burton L.J.

15 The decision of the Employment Tribunal on the claimant's philosophical belief was upheld by the Employment Appeal Tribunal and the Court of Appeal. The EAT and Court of Appeal dealt with other matters raised in the case.

16 Case no. ET/2501234/2012.

17 Case no. UKEAT/2006/14/MC.

18 Case no. UKEAT/0234/15/DA.

The Employment Tribunal in *C. McEleny v Ministry of Defence*<sup>19</sup> found that the claimant's belief in Scottish independence amounts to a philosophical belief within the meaning of s.10 of the Equality Act 2010 and relied upon by the claimant as a protected characteristic for the purposes of claiming direct discrimination. The judge said<sup>20</sup> :

« based on the evidence (...) I found that the claimant believes that Scotland should be an independent country (...) that the claimant supports the SNP because achieving independence is its principal policy (...) the claimant has believed in the right of the Scottish people to self-determination since childhood (...) the fact that there was a referendum in which 1.5 million of the Scottish electorate voted in favour » all of which contributed to it qualifying as a philosophical belief.

The claimant in *J. Casamitjana Costa v The League Against Cruel Sports*<sup>21</sup> was not only on a vegan diet but also was against the use and abuse of animals for any purpose. Ethical veganism thus controlled every aspect of his life.

The tribunal concluded that ethical veganism, in this case, was worthy of protection as a philosophical belief for the claimant lived his life in a manner in which many would consider to be extreme. The relevant factor in this case was the strength of the claimant's beliefs and the pervasiveness of those beliefs in all aspects of his life.

The decision of the tribunal in this case does not indicate a desire to protect all or even a majority of employees who are vegan, but only employees whose views and actions will meet the highest level of ethical veganism. This is a high threshold and the chances of employers encountering employees of this degree of adherence to such a belief are rare. This may be said of all such cases involving philosophical beliefs.

The above is a selection of cases which have proved to constitute a philosophical belief, there are many others which do not allow for further discussion because of limitations of space. Cases brought on the issue of philosophical beliefs can be complicated.

The claimant needs to show evidence to, and thus convince, the tribunal that the particular belief held qualifies as a philosophical belief which satisfies the provisions of the Equality Act 2020 s. 10 (2). The claimant, having proved the factual situation, it is for the tribunal to decide whether the facts of the case qualify under the defining five criteria hurdle of the legal definition as provided for by Mr Justice Burton in the *Nicholson* case. The concept of philosophical belief is one of the most interesting areas for the development of discrimination law. Tribunals have consistently emphasised the importance of the individual facts in determining whether the claimant holds a philosophical belief. This could mean that the range of protected beliefs is more limited than the cases seem to suggest, for many claimants may fall short of the level of conviction required.

<sup>19</sup> Case no. ET/4105347/2017 with a judgment date of 9<sup>th</sup> February 2019 as it was a complex case dealing with other issues.

<sup>20</sup> *Ibid.*, § 4-6 of the judgment.

<sup>21</sup> Case no. ET/3331129/2018 heard on 2<sup>nd</sup> January 2020.

The establishment of a philosophical belief capable of protection under discrimination law is only the first step. As Employment Judge Hughes said in *Maistry* « the real battleground is whether there has been less favourable treatment and, if so, whether it was on grounds of the belief related to ».

REVUE

DE DROIT COMPARÉ  
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## Notes and bibliographical references

The annotations and bibliographic references of the works and articles cited must be integrated within the article and placed in footnotes.

Their presentation will be as follows:

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- For a contribution into collective books: Initial of the First Name, Name, «Title of article», in initial of the First Name, Name (dir.), Title of the book, place, publisher, date, p.

## IALLJ CALL FOR PAPERS ~ 2022 MARCO BIAGI AWARD

To stimulate scholarly activity and broaden academic interest in comparative labour and employment law, the **International Association of Labour Law Journals** announces a **Call for Papers** for the **2022 Marco Biagi Award**. The award is named in honor of the late Marco Biagi, a distinguished labour lawyer, victim of terrorism because of his commitment to civil rights, and one of the founders of the Association. The Call is addressed to doctoral students, advanced professional students, and academic researchers in the early stage of their careers (that is, with no more than three years of post-doctoral or teaching experience).



1. The Call requests papers concerning comparative and/or international labour or employment law and employment relations, broadly conceived. Research of an empirical nature within the Call's purview is most welcome.
2. Submissions will be evaluated by an academic jury to be appointed by the Association. Submitted papers should include an abstract.
3. The paper chosen as the winner of the award will be assured publication in a member journal, subject to any revisions requested by that journal.
4. Papers may be submitted preferably in English, but papers in French, or Spanish will also be accepted. The maximum length is 12,500 words, including footnotes and appendices. Longer papers will not be considered.
5. The author or authors of the paper chosen as the winner of the award will be invited to present the work at the **Association's 2021** meeting which is to be announced soon on the website of the Association. Efforts are being undertaken to provide an honorarium and travel expenses for the presentation of the paper. Until that effort bears fruit, however, the Association hopes that home institutional funds would be available to support the researcher's presentation.
6. The deadline for submission is **1 March 2021** (final date of submission). Submissions [and a short bio of the author] should be sent electronically in Microsoft Word both to Lavoro e diritto at [lavoroediritto@unife.it](mailto:lavoroediritto@unife.it) and to Frank Hendrickx, the President of the Association, at [frank.hendrickx@kuleuven.be](mailto:frank.hendrickx@kuleuven.be) and his secretariat: [iar@kuleuven.be](mailto:iar@kuleuven.be).

### Prior Recipients of the Marco Biagi Award

- 2020 Harry Stylogiannis** (KU Leuven, Belgium), Platform work and the human rights to freedom of association and collective bargaining.
- 2019 Giovanni Gaudio** (Bocconi University, Milan, Italy), «Dapting labour law to complex organisational settings of the enterprise. Why re-thinking the concept of employer is not enough».
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- 2017 Nicolas Buenos** (University of Zurich, Switzerland, Insitute of Law), «From the right to work to the freedom from work».
- 2016 Mimi Zou**, «Towards Exit and Voice: Redesigning Temporary Migrant Workers's Programmes».
- 2015 Uladzislau Belavusau** (Vrije Universiteit Amsterdam, Pays-Bas), «A Penalty Card for Homophobia from EU Labor Law: Comment on Asociația ACCEPT (C-81/12)».
- 2014 Lilach Lurie** (Bar-Ilan University, Israel), «Do Unions Promote Gender Equality?».
- 2013 Aline Van Bever** (University of Leuven, Belgium), «The Fiduciary Nature of the Employment Relationship».
- 2012 Diego Marcelo Ledesma Iturbide** (Buenos Aires University, Argentina), «Una propuesta para la reformulación de la conceptualización tradicional de la relación de trabajo a partir del relevamiento de su especificidad jurídica».



# ABBREVIATIONS LIST

(PUBLISHERS, JOURNALS, BOOKS)

AuR = Arbeit und Recht (Germany)  
AJLL = Australian Journal of Labour Law (Australia)  
AJP/PJA = Aktuelle juristische Praxis - Pratique juridique Actuelle (Suisse)  
BCLR = Bulletin of Comparative Labour Relations (Belgium)  
CLELJ = Canadian Labour & Employment Law Journal (Canada)  
CLLPJ = Comparative Labor Law & Policy Journal (United States)  
DRL = Derecho de las Relaciones Laborales (Spain)  
DLM = Diritti Lavori Mercati (Italy)  
E&E = Employees & Employers: Labour Law & Social Security Review (Slovenia)  
EuZA = Europäische Zeitschrift für Arbeitsrecht (Germany)  
ELLJ = European Labour Law Journal (Belgium)  
DLRI = Giornale di Diritto del Lavoro e delle Relazioni Industriali (Italy)  
ILJ = Industrial Law Journal (UK)  
IJCLLIR = Giornale di Diritto del Lavoro e delle Relazioni Industriali (Italy)  
ILR = International Labour Review (ILO)  
JLR = Japan Labor Review (Japan)  
JCP = Juris-Classeur Périodique (France)  
LD = Lavoro e Diritto (Italy)  
OIT = Revue internationale de travail  
PMJK = Pécsi Munkajogi Közlemények (Pecs Labour Law Journal) (Hungary)  
RL = Relaciones Laborales (Spain)  
RDS = Revista de Derecho Social (Spain)  
RDCTSS = Revue de Droit Comparé du Travail et de la Sécurité Sociale (France)  
RDT = Revue de Droit du Travail (France)  
RGL = Rivista Giuridica del Lavoro e della Previdenza Sociale (Italy)  
TL = Temas Laborales (Spain)  
ZIAS = Zeitschrift für ausländisches und Internationales Arbeits und Sozialrecht (Germany)

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(PRINT) ISSN 2117-4350  
(E-JOURNAL) ISSN 2262-9815

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Achévé d'imprimer en janvier 2022  
sur les presses de l'imprimerie Aquiprint  
Dépôt légal 1<sup>er</sup> trimestre 2022  
Imprimé en France

REVUE

2021/4

DE DROIT COMPARÉ  
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The Comparative Law Review of Labour and Social Security [Revue de Droit Comparé du Travail et de la Sécurité Sociale] has been published by COMPTRASEC, UMR 5114 CNRS of the University of Bordeaux since 1981. It is edited three times a year in order to contribute to the development of analyses and exchanges on labour and social security law around the world. The Comparative Law Review of Labour and Social Security is a member of the International Association of Labour Law Journals (IALLJ), an international network for the exchange of ideas and publications on labour law and social security.

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COORDINATED BY LOÏC LEROUGE

WITH THE CONTRIBUTIONS OF:

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