

2022/4

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

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ET DE LA SÉCURITÉ SOCIALE

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**INTERNATIONAL  
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**JO CARBY-HALL**

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## COVID-19 UNDER THE PRISM OF PHILOSOPHICAL BELIEFS IN BRITISH DISCRIMINATION LAW

The Claimant in the case of X against the Respondent Y<sup>1</sup> complained of unlawful discrimination by reason of the protected characteristic of religion or belief under section 10 (2) of the Equality Act 2010<sup>2</sup>.

### I - WHAT WAS THE CLAIMANT'S BELIEF?

The Claimant stated:

- a) « My belief is a philosophical belief (...) genuinely held by myself. I believe it is important and forms a substantial part of human life and behaviour. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination (...) usually (...) indirect discrimination ».
- b) « On 31st July 2020 I took the decision not to return to the workplace on the grounds of health and safety. I had reasonable health and safety concerns about the workplace surrounding Covid-19 and I was also very worried about the increasing spread of the virus. I had a genuine fear of getting the virus myself and a fear of passing it to my partner (who is at high risk of getting seriously unwell from Covid-19) ».
- c) « I made a protected disclosure in good faith and asserted my statutory employment rights about a danger to the health and safety to myself and others, which I reasonably believed to be serious and imminent ».
- d) « (My employer the respondent) told me that he would not be paying me, and he said "I do not accept you had a reasonable belief that returning to work would put you and your husband in serious and imminent danger" ».

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1 The Employment Judge Mark Leach ordered that the Claimant and Respondent Local Authority remain anonymous in Case No. 2413947/2020 28<sup>th</sup> November 2021 and 8<sup>th</sup> December 2021 (in Chambers).

2 A preliminary hearing was held to establish whether the belief of the Claimant fell within the provisions of s. 10 of the Equality Act 2010. Although the Respondent applied for the hearing to take place by CVP Video link, because of the pandemic, the Claimant objected on the grounds that the parties would be discussing sensitive personal information. The Employment Judge upheld the Claimant's objection.



- e) « I then had my wages withheld and suffered financial detriment ».
- f) « I claim this was discrimination on grounds of this belief in regard to coronavirus and the danger from it to public health. This was at the time of the second wave of Covid-19 and the huge increase in cases of the virus throughout the country ».

## II - WHAT DOES THE LAW SAY RELATING TO PHILOSOPHICAL BELIEFS?

The Equality Act 2010 states that<sup>3</sup> « Belief means any religious or philosophical belief and a reference to belief includes a reference to lack of belief ». With regard to a protected characteristic of a belief the Act states<sup>4</sup> « A reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief ».

In addition to statutory law there is also important case law which needs to be carefully considered and which provides the limits and criteria placed on the definition of the term philosophical belief. In *Granger plc v Nicholson*<sup>5</sup> the Employment Appeal Tribunal (EAT) set out those fivefold criteria which are that:

- 1 - the belief must be *genuinely held*;
- 2 - it must be a *belief* and not an opinion or viewpoint based on the *present state of information available*<sup>6</sup>;
- 3 - it must be a belief as to a *weighty and substantial aspect of human life and behaviour*;
- 4 - it must attain a *certain level of cogency, seriousness, cohesion and importance*<sup>7</sup>;

3 Equality Act 2010 s.10 (2).

4 *Ibid.* s. 10(3)(a).

5 [2010] IRLR 4 at § 24.

6 In *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, the EAT posited at § 45 that « to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes, it is not enough to have an opinion based on real or perceived logic or based on information or lack of information available ».

7 See the ECHR's case of *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293 from which a belief to have « sufficient cogency, seriousness, cohesion and importance » originates. See too the House of Lords case of [2005] 2 AC246 which relates to the European Convention on Human Rights where it was stated at § 23 of the judgment that «The belief must be consistent with basic standards of human dignity or integrity (...) relate to matters more than trivial (...). It must possess an adequate degree of seriousness and importance (...) it must be a belief of a fundamental problem (...). The belief must also be coherent in the sense of being intelligible and capable of being understood (...). Nor are an individual's beliefs fixed or static. The beliefs of every individual are prone to change over his lifetime. Overall those threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention ».

5 - it must be *worthy of respect in a democratic society*, be not *incompatible with dignity* and not *conflict with the fundamental rights of others*.

### III - AN ANALYSIS OF THE JUDGMENT

Having considered the facts of the case and applied these to the five criteria in the *Granger plc. v Nicholson* case, Employment Judge Leach reached the following conclusions in each of these:

- Regarding the criterion of a genuinely held belief, the judge found that the Claimant had a « genuine concern or fear that she might catch Covid-19 and that she needs to take steps to protect herself and others »<sup>8</sup>.
- In connection with the second criterion, namely that the belief must exist and not be an opinion or viewpoint based on the current state of information available, the judge did not believe that the Claimant's fear qualified as a belief for the purposes of S.10 of the Equality Act 2010. He considered it « Rather as a reaction to a threat of physical harm, and the need to take steps to avoid or reduce that threat. Most (...) people instinctively react to perceived or real threats to physical harm in one way or another »<sup>9</sup>. The so called belief according to the judge could be described « as a widely held opinion based on the (...) state of information available that taking certain steps [such as] attending during the height of the (...) pandemic would increase the risk of contracting Covid-19... However a fear of physical harm and views about how best to reduce (...) the risk of physical harm is not a belief for purposes of s. 10 »<sup>10</sup>.
- The third criterion is that the belief be a weighty and substantial aspect of human life and behaviour. The judge did not consider that the Claimant's fear met this criterion although he did think that « Fears about the harm being caused by Covid-19 are weighty and substantial. They are certainly not minor or trivial. They are (...) aspects of human life and behaviour »<sup>11</sup>. The judge considered that the Claimant's concerns were time specific in that « the fear will only last as long as dangers caused by the (...) pandemic remain present »<sup>12</sup>. The facts of this case show that her fear was about the Claimant herself and « the protection of herself and her own steps to protect others (principally her partner) »<sup>13</sup>. The judge considered that « the Claimant does not rely on a belief in wider terms than this and for this reason I find that this criterion is not met »<sup>14</sup>.
- The fourth criterion requires a certain level of cogency, seriousness, cohesion and importance. The judge accepted that the belief as described was intelligible and capable of being understood. It therefore met the requirement of cohesion and the fear of contracting Covid-19 and the Claimant's requirements to take steps to avoid harm

8 X v Y Case No. 2413947/2020 26<sup>th</sup> November 2021 and 8<sup>th</sup> December 2021 (in Chambers) § 14.

9 *Ibid.*, § 15.

10 *Ibid.*, § 16.

11 *Ibid.*, § 18.

12 *Ibid.*, § 19.

13 *Ibid.*, § 19.

14 *Ibid.*, § 20.

to herself and others, satisfied the test of seriousness and importance. The criterion of cogency was also met.

- The final criterion that 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 met the Claimant's belief.

The Employment Tribunal decided that the Claimant's belief did not meet all five of the criteria as stated in the *Nicholson* case and therefore it did not qualify as a philosophical belief under the provisions of the Equality Act 2010 s. 10(2).

### Concluding Remarks

The Equality Act 2010 provides individuals with protection from being discriminated against because of their religion or belief or no religion or no belief. What the Act fails to do is to define the words « religion » and « belief » or « no religion » and « no belief », an approach in line with Article 9 of the Council of Europe's European Convention on Human Rights. As a result, it has been left to the courts to decide whether a particular religion or belief is protected under the Act. In the absence of a statutory definition of the meaning of those words their meaning has been developed through case law where Burton J, drawing from various sources<sup>15</sup>, laid down the five criteria which decide which beliefs should be entitled to protection under equality law. Resulting from this lack of statutory definition, uncertainty prevails for all concerned, employers and employees alike.

The Equality and Human Rights Commission in its Report<sup>16</sup> proposes to seek out appropriate test cases to assist towards a more concrete definition or in which to intervene as a third party. The Commission recommended that « No change be made to the broad definition of the protected characteristic of religion or belief in the Equality Act ».

Allied to the above is the fact that the pandemic, - whether it be Covid-19 or its strands such as Delta , Omicron or any other unknown ones which may develop in the future, - requires employers to make difficult decisions which would generate more cases being heard and which could lead to a rapid and unprecedented increase in Employment Tribunal cases. The Employment Tribunals are already overburdened with pandemic cases involving, redundancies and unfair dismissal cases, health and safety cases, the furlough scheme and their calculation of payments, employees refusing to work, working from home and much more.

The *X v Y* case discussed and analysed in this article is an indication on how identical or similar cases to this case might be decided in the future. The « digestive system of the judge » notion should also be born in mind, for a different judge could well find differently on a different day or interpret the facts of the case differently. However, the *X v Y* decision points towards the way in which, on the same or very similar facts, a future Employment Tribunal may reach its verdict thus giving employers who are faced with the same or similar situations some indication on how to deal with

15 *Williamson v Secretary of State for Education and Employment* [2005 AC 246 (HL)]

16 Entitled « Religion and Belief - Is the Law Working?», 2 (1), Introduction.

such cases thus relieving them from some stress. It should also be born in mind that Employment Tribunal decisions are not legally binding on other tribunals and courts and that cases may well be overruled on appeal.

The understanding of the pandemic and the legal requirement as stated in *Nicholson* that the belief must be based on<sup>17</sup> « the present state of information available » is another issue which needs analysis. Covid has metamorphosed itself since it first appeared in the United Kingdom in March 2020. At that time there was little known on this virus, the progression in scientific research since March 2020 provided a significant degree of knowledge on the corona virus. Such research has since added the Delta and Omicron strains to that virus and there is a possibility that new and yet unknown strains may develop in the future. The case of *X v Y* was decided on « the present state of information available ». Would it provide persuasive evidence for future similar cases or would future cases be decided on the state of information available at the time of the hearing? It is submitted that the latter is the preferred option.

The issue of people refusing to be vaccinated for religious or other reasons has not come before the Employment Tribunals yet. Nice problems are anticipated in such cases. It is submitted that refusal to be vaccinated may well qualify as a protected characteristic under the Equality Act if it is shown that the belief affected the individual's whole life.

The *X v Y* decision is an Employment Tribunal case. It will be recalled that in her statement the Claimant said that she had<sup>18</sup> « reasonable and justifiable health and safety concerns about the workplace » because of Covid-19 and when asked by the judge during the hearing to state precisely what her belief was she replied<sup>19</sup> « A fear of catching Covid-19 and a need to protect myself and others ». This clearly brings up an important health and safety issue. Such issue was neither considered nor discussed in the judge's statement. The health and safety concern expressed by the Claimant, especially that regarding « others », constituted a *protected disclosure* and should have been raised as it is of significant importance to the general public. There does not appear to have been a discussion on that topic. Could that lacuna trigger an appeal? There have been many cases heard relating to the pandemic<sup>20</sup> but it is thought that the *X v Y* case is the first case which was heard on the fear of Covid. Since the Claimant expressed her concern for the health and safety of others generally, such wider concern could be the subject of an appeal.

To sum up, the case law indicates clearly that in order to qualify as a protected belief such belief must *affect* the individual's *whole life*, namely how the individual *chooses* to live, how the individual's *ideology* rules her/his life and how such

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17 See p. 1 *ante*.

18 *X v Y* [2021] Case No.2413947/2020 § 10 (3).

19 *Ibid.*, § 11.

20 See p. 3 *ante*.

individual *organises* her/his life<sup>21</sup>. The Tribunal in *X v Y* did not think that the Claimant's belief possessed all five of the necessary ingredients which sum up the « *whole life* » requirement to qualify as a protected philosophical belief.

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21 For a detailed study see J. Carby-Hall, « Ethical Veganism, as a Philosophical Belief, is a Protected Characteristic under British Discrimination Law in an Evolving Society », *International Perspectives*, Routledge, 2022 (forthcoming).

REVUE

DE DROIT COMPARÉ  
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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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