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Case comment on *Harron v Chief Constable of Dorset*, [2016] IRLR 481

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The facts

The claimant, Mr Mark Harron, believed that public service was improperly wasteful of money. The Employment Tribunal accepted that this was a genuine belief. The claimant expressed these views while working at Dorset Police force, and claimed that as a result he suffered discrimination on the ground of his philosophical belief, contrary to the Equality Act 2010.

At a preliminary hearing the Employment Tribunal found that the claimant's belief did not come within the terms of the Equality Act 2010, and did not therefore qualify for protection under the Act. Section 10(2) of the Act provides that "Belief means any religious or philosophical belief ...". The Employment Tribunal relied on the five criteria set out by Burton J in *Grainger plc v Nicholson*¹ in determining whether the claimant's belief qualified for protection as a philosophical belief. These five criteria are that:

(i) the belief has to be genuinely held; (ii) it has to be a belief and not an opinion or viewpoint based on the present state of information available; (iii) it has to be a belief as to a weighty and substantial aspect of human life and behaviour; (iv) it has to attain a certain level of cogency, seriousness, cohesion and importance, and (v) it has to be worthy of respect in a democratic society, not to be incompatible with human dignity and not to conflict with the fundamental rights of others.

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¹ *Grainger plc v Nicholson* [2010] IRLR 4

The Employment Tribunal in *Harron* accepted that the first and fifth criteria had been met in respect of the claimant's belief, but found that the second, third and fourth criteria had not been met. In relation to the second criterion, the tribunal said that the belief contended for was "not so much a belief but a set of values which manifest themselves as an objective or goal principally operating in the work place".²

The claimant appealed to the Employment Appeal Tribunal on the grounds that (1) the word "philosophical" in the Equality Act 2010 was an unnecessary fetter on the scope of a "belief" in the light of article 9 of the European Convention on Human Rights, and recent case law from the European Convention on Human Rights; (2) that the tribunal had adopted too high a threshold when applying the *Grainger* criteria; (3) that the tribunal had been wrong to take into account the fact that his belief manifested almost entirely in relation to his work for the Dorset Police, and not in a wider context; and (4) that the tribunal had insufficiently explained its reasoning.

The EAT's decision

The Employment Appeal Tribunal held firstly that the requirements of article 9 of the European Convention on Human Rights, and the ECtHR's case law, are not materially different from the domestic approach, as set out in *Grainger* and in the Employment Statutory Code of Practice 2011.³ This is notwithstanding the fact that the term 'philosophical' belief does not appear in article 9. The EAT considered that the ECtHR requires belief to have the characteristics in essence which are set out in *Grainger*.

The tribunal referred to comments by Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*⁴, a case on whether a belief that teachers should be able to administer corporal punishment on behalf of parents was protected under article 9. Lord Nicholls stated in *Williamson* that 'a belief must satisfy some modest, objective minimum requirements', and that these requirements were implicit in article 9 of the ECHR and comparable guarantees in other human rights instruments. There is a requirement, for example, that the belief

² See *Harron v Chief Constable of Dorset* UKEAT/0234/15/DA, [2016] IRLR 481, para 28.

³ *Harron*, at paras 32 – 35.

⁴ [2005] 2 AC 246 HL.

must be coherent in the sense of being intelligible and capable of being understood, but the threshold for this test is low. The reason for the low threshold is that if the requirements were set too high, this would deprive minority beliefs of the protection they are intended to have under the ECHR.⁵

The second point in the EAT's decision was that the Employment Tribunal had erred in several respects. The Tribunal had needed to pay more attention to the way in which the *Grainger* tests were to be applied, as discussed in *Williamson*, and to ensure it was not setting the bar too high. It had also simply failed to explain sufficiently why the claimant's case failed on the third and fourth *Grainger* criteria. However, the Tribunal had not erred in excluding a belief that operated merely in the workplace. The relevance of this consideration is that where a belief has too narrow a focus, it may not amount to a fundamental problem, and so not reach the necessary level to be a belief for the purposes of section 10. The case was remitted to the original judge to decide, bearing in mind that the bar should not be set too high, while the belief still had to reach a certain measure of seriousness and cogency, and bearing in mind *Grainger* and *Williamson*.

Is the definition of 'philosophical belief' too wide following *Harron*?

The EAT in *Harron* did not decide that the claimant's belief that public service was improperly wasteful of money would necessarily constitute a belief that would be protected under the Equality Act 2010; however, the decision highlights that the test must not be restrictively construed. The EAT found that the definition of 'belief' is not wider in the ECHR jurisprudence, and that following *Williamson*, the test must not be too stringent.

In *Grainger*, the EAT had found that a belief in man-made climate change was capable of being a protected 'philosophical belief' for the predecessor legislation to the Equality Act 2010 on religion and belief, the Employment Equality (Religion or Belief) Regulations 2003.⁶ These regulations had, prior to amendment by the

⁵ R (on the application of Williamson and others) v Secretary of State for Education and Employment and others [2005] 2 AC 246, HL, para 23.

⁶ Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.

Equality Act 2006,⁷ defined 'belief' as 'any religious or *similar* philosophical belief',⁸ with the word 'similar' being removed on amendment. This raised the question in *Grainger* of how similar a philosophical belief must be to a religious belief to qualify for protection. During the debate on the amendment, Baroness Scotland, the then Attorney General, is recorded as saying, in relation to the deletion of the word "similar", that

It was felt that the word 'similar' added nothing and was, therefore, redundant. This is because the term 'philosophical belief' will take its meaning from the context in which it appears; that is, as part of the legislation relating to discrimination on the grounds of religion or belief. Given that context, philosophical beliefs must therefore always be of a similar nature to religious beliefs.⁹

In the event, the EAT in *Grainger* did consider that 'notwithstanding the amendment to remove "similar", it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief.' It also placed considerable reliance on the fifth factor, that the belief must be worthy of respect in a democratic society, which could block 'an alleged philosophical belief based on a political philosophy which could be characterised as objectionable.'¹⁰ However, beliefs based on political philosophy, or science, were in themselves capable of falling within the terms of the legislation.¹¹

In *Henderson v General Municipal and Boilermakers Union*¹² the EAT held 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'. Other cases where beliefs have been considered as being within the scope of the Equality Act 2010 are spiritualism,¹³ a 'belief that an individual should not tell

⁷ Section 77(1).

⁸ Regulation 2(1)(b).

⁹ Hansard ((HL Debates), 13 July 2005, col 109)

¹⁰ Para 28.

¹¹ Paras 28-30.

¹² [2015] IRLR 451

¹³ *Power v Greater Manchester Police Authority* UKEAT/0434/09 [2010] All ER (D) 173 (Oct), [2011] EqLR 16

lies under any circumstances'¹⁴ and a philosophical belief of 'a commitment to public service for the common good'.¹⁵ Marxist/Trotskyist views have been held not to be worthy of respect in a democratic society, therefore not 'philosophical beliefs' for the purpose of the Act¹⁶ and nor was the assertion that a global elite was seeking to establish a New World Order.¹⁷

In balancing the interests between protecting employees' genuinely held beliefs and the needs of employers for certainty, has the test for philosophical beliefs now swung in favour of protecting beliefs that are too far removed from religious belief? *Grainger* has been criticised for allowing that the concept of belief might extend to those based on science rather than faith.¹⁸ There has also been concern that

Although clearly the beliefs about climate change are cogent, serious, cohesive and important and very worthy of respect, so are many other views and beliefs in scientifically proven facts, and it becomes difficult to see where boundaries are between the types of belief that should be covered and those that should not.¹⁹

The decision in *Harron* may be part of a trend to extend the category still further, with the EAT in that case reinforcing the fact that the threshold for finding a philosophical belief is a low one. Although the EAT stated that the requirements under article 9 ECHR were not materially different to those under domestic law, it did not give detailed consideration to the ECHR jurisprudence in deciding whether further restrictions on the definition of 'belief' were necessary. It is clear that tribunals are attempting to use the *Grainger* tests to keep the definition from becoming too wide and therefore unworkable, and it could be argued that in reinforcing the importance of the restrictions, and the fact that tribunals must clearly explain how each criteria has or has not been met, the EAT in *Harron* was in fact increasing certainty for employers. However, comments by employment law professionals have noted for

¹⁴ *Hawkins v Universal Utilities Ltd t/a Unicom* (case no: 2501234/12) [2013] EqLR 651

¹⁵ *Anderson v Chesterfield High School* [2014] EqLR 343

¹⁶ *Kelly v Unison* (case no 2203854/08)

¹⁷ *Farrell v South Yorkshire Police Authority* [2011] EqLR 935

¹⁸ 'Employment: Faith, hope and clarity', Professor Mark Hill QC and Spencer Keen, 160 NLJ 47; 'The Grainger case: a double-edged sword for climate change campaigners?' UK Human Rights blog, One Crown Office Row at <https://ukhumanrightsblog.com/2010/01/18/the-grainger-case-a-double-edged-sword-for-climate-change-campaigners/> (accessed 29 July 2016)

¹⁹ 'Religious discrimination in the workplace: an emerging hierarchy?', Lucy Vickers, (2010) 12 Ecc LJ 280–303.

example that 'we are left with the clear steer from the Tribunal system that the threshold of a protectable belief is low and getting lower',²⁰ and that the exercise will not necessarily be an easy one for employers:

What this case tells us is that when tribunals, and indeed employers, are confronted with an issue where it is claimed that discrimination has occurred because of a philosophical belief, then establishing whether that belief is protected is not a tick box - 'yes' or 'no' exercise - against the Grainger criteria. The fact that individuals cannot always be expected to express themselves with simplicity or precision also has to be taken into account. Reasons as to why each criterion have, or have not, been met have to be provided.²¹

As was pointed out in *Williamson*,

Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime.²²

This may mean that more questions about what kinds of philosophical beliefs can be protected under the Equality Act 2010 will continue to come before tribunals, and the ambit of the protection looks to be open for further expansion. The exact role of article 9 jurisprudence in these determinations may come to be examined again in the future.

²⁰ Paton Boggs, Employment Law Worldview blog at <http://www.employmentlawworldview.com/threshold-for-a-protected-belief-reaches-a-new-low/> (accessed 29 July 2016)

²¹ Simons, Muirhead & Burton newsletter at <http://www.smab.co.uk/media/226785/harron-v-chief-constable-of-dorset-police.pdf> (accessed 29 July 2016).

²² R (on the application of Williamson and others) v Secretary of State for Education and Employment and others [2005] 2 AC 246, HL, para 23.