

Philosophical Belief: An unchartered minefield for employers?

1 May 2020

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Agenda

1: The concept of philosophical belief

2: Two recent cases

3: Discussion



Introducing the concept of ‘belief’

Section 10(2) EqA: *Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*

The 'Grainger' Criteria

Mr Justice Burton in *Grainger Plc v Nicholson* [2010] IRLR 4, para. 24:

...

- i. *The belief must be **genuinely held**.*
- ii. *It must be a belief and **not**, as in *McClintock*, 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 conflict with the fundamental rights of others...***

'Holding' vs. 'Manifesting'

- **European Human Rights Law:**
 - Article 9, European Convention on Human Rights
 - *Eweida and others v United Kingdom* 48420/10, 59842/10, 51671/10 and 36516/10
- **European Union Law**
 - Case C-157/15 *Achbita v G4S Secure Solutions NV* [2017] IRLR 466
- **Domestic law?**
 - No express reference to 'manifestation' in EqA
 - *Wasteney East London NHS Foundation Trust* UKEAT/0157/15, [2016] IRLR 388

Application of Grainger

Protected:

- **Power v Greater Manchester Police** – spiritualism (and ability to communicate with spirits) – ET finds not perverse
- **Hawkins v Universal Utilities** – should not lie under any circumstances
- **Anderson v Chesterfield High School** – commitment to public service for the common good
- **Henderson v GMB** – left wing democratic socialist beliefs

Not protected:

- **Kelly v Unison** – Marxist / Trotskyist views
- **Farrell v South Yorkshire Police** – a secret satanic ideology to enslave the masses and claim control of world resources
- **Ellis v Parmagon** – homosexuality contrary to God`s law and holocaust denial
- **Gray v Mulbery** – belief in own copyright
- **Conisbee v Crossley Farms** - vegetarianism

Casamitjana Costa v The League Against Cruel Sports

- Ethical veganism as a protected belief
- Claim arising out of investment of pension fund

Vegan Society Definition

"A philosophy and way of living which seeks to exclude—as far as is possible and practicable—all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose; and by extension, promotes the development and use of animal-free alternatives for the benefit of animals, humans and the environment. In dietary terms it denotes the practice of dispensing with all products derived wholly or partly from animals."

Applying Grainger

- No doubt whatsoever that the Claimant genuinely and sincerely holds his belief
- Clear that veganism is living according to a belief or conviction that it is wrong to exploit and kill living beings unnecessarily
- Is 'plainly a substantial aspect of human life, it has sweeping consequences on human behaviour'
- 'Without a doubt a belief which obtains a high level of cogency, cohesion and importance'
- Clear there is no conflict between veganism and human dignity or rights of others and does not offend society

What can we take from the decision?

- Not binding
- Consequences of using Vegan Society Definition
- *W v UK* (1993) 16 EHRR CD44
- EHRC Guidance
- Low threshold

Forstater v CDG Europe & Others

The belief relied on: Para 67

“The Claimant believes that “sex” is a material reality which should not be conflated with “gender” or “gender identity”. **Being female is an immutable biological fact, not a feeling or an identity.....**

The lack of belief relied on: Para 69

“Some people believe that everyone has an inner “gender”, which may be the same as or different to their sex at birth, and that gender effectively trumps sex, so that “trans men are men” and “trans women are women”.

C`s witness evidence

“I believe that it is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female.”



EJ`s finding on belief

“ The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. **It is impossible to change sex.** She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds.

“Sex is immutable” - passes every hurdle, until.....

“....I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned....”

“Gender recognition certificate irrelevant”

“The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act.”

“....**the Claimant is absolutist in her view** of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. **The approach is not worthy of respect in a democratic society.....**”

The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts.....”

What can we take from Forstater

- EJ decision
- EJ queries if determination of issue suitable for PH
- Absence of belief also subject to the Grainger test
- The bar is not set high regarding cogency, seriousness.....

“a scientific” belief may not be based on very good science without it being so irrational that it unable to meet the relatively modest threshold of coherence.

- Fact-sensitive – C`s views absolutist – room for a different decision if less so

Discussion

- In what direction are we heading?
- How to establish or disprove the threshold test for a philosophical belief claim.

Where are we heading?

- Widening of the landscape?
- Designed to be broad
- Cases we are currently seeing

- Fertile areas for discussion

Discussion

- Genuine belief
- Belief not opinion or viewpoint
- A weighty and substantial aspect of human life / behaviour
- Cogency, seriousness, cohesion, importance
- Worthy of respect in a democratic society, not incompatible with human dignity nor in conflict with fundamental rights of others.

Finally

Thank

you!

