

‘Philosophical belief discrimination’: Employment Law Protection for workers with strongly held beliefs about Animal Welfare

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This article reviews a significant development in the discrimination law of England & Wales and how that development came to protect an animal rights activist who was unfairly dismissed from his gardening job because of his beliefs about the rights of animals. The case was resolved in the Southampton Employment Tribunal, a court of first instance and is therefore not a legally binding precedent. However, the case tested new law and illustrated how that law could be relied upon by employees who are being discriminated against at work because of their beliefs about animal rights.

Employment Equality (Religion or Belief) Regulations 2003

In 2004 the Employment Equality (Religion or Belief) Regulations 2003 (‘the 2003 Regulations’) came in to force to protect workers from being discriminated against at work because of their religion or belief. The 2003 Regulations give effect to Council Directive 2000/78/EC¹, which sets out a general framework to promote and

ensure equal treatment in employment and occupation.

The Directive is clear in its aim to protect individuals holding ‘beliefs’ as well as those holding religious beliefs. It reads: ‘*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*’.² The fundamental right underpinning the Directive can be found in the European Convention of Human Rights (ECHR), which provides at Article 9 that ‘*Everyone has the right to freedom of thought, conscience and religion; ... Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society...*’³

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Regulations to offer some guidance. Unfortunately not, those regulations simply provide at section 2 that ‘belief’ means ‘*any religious or philosophical belief*’.⁴ The matter has been left for the courts to resolve and it was not until Mr Tim Nicholson brought an employment tribunal claim against his employer Grainger plc in 2009⁵ that this question received a clear, or clearer, answer in the UK courts.

Grainger Plc v Nicholson

Mr Nicholson had strongly held beliefs about climate change and was an active campaigner for protecting the environment. In particular, he held the belief that human beings would be the cause of catastrophic

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

² *Ibid.* Ch 1, Art 1.

³ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950, Art 9.

⁴ Employment Equality (Religion or Belief) Regulations 2003, s 2.

⁵ *Mr T Nicholson v Grainger plc & Others*, Case Number 2203367/2008, unreported employment tribunal claim withdrawn before hearing.

climate change unless immediate preventative action was taken. His beliefs were a part of the way he lived his everyday life and his job at Grainger plc as Head of Sustainability tied into his environmental objectives.

Represented by Shah Qureshi, Head of Employment Law at Bindmans, Mr Nicholson presented a claim to the Employment Tribunal relying on the 2003 Regulations asserting that Grainger plc had discriminated against him on the grounds of his philosophical beliefs. The question of whether Mr Nicholson held a philosophical belief for the purposes of the 2003 Regulations became a heavily contested issue. There was a preliminary hearing at which the tribunal of first instance decided that Mr Nicholson did in fact hold a philosophical belief and therefore that it would be unlawful to discriminate against him because of those beliefs. Grainger plc was inevitably unsatisfied with this and appealed against the decision to the Employment Appeal Tribunal ('EAT').

The EAT decision in *Grainger Plc & Ors v. Nicholson*,⁶ went in favour of Mr Nicholson and perhaps more significantly reviewed the existing jurisprudence to ascertain the current state of the law on philosophical belief. This was done with the assistance of Queen's Counsel on both side, Dinah Rose QC with Ivan Hare for Mr Nicholson and John Bowers QC for Grainger plc. Mr Justice Burton sitting alone considered that there was ample guidance within domestic and European jurisprudence to determine the issues. Helpfully he went on to crystalize that guidance into clear

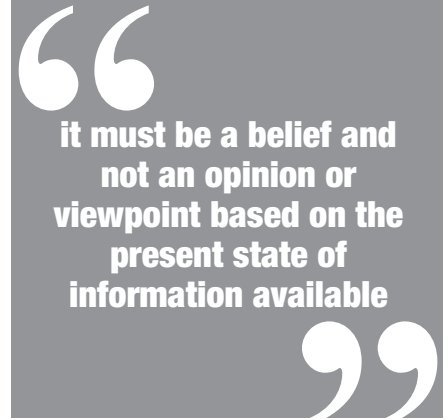
criteria for deciding whether a particular belief is capable of protection under the regulations. He set out those criteria in his judgment as follows:

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;
3. it must relate to a weighty and substantial aspect of human life and behaviour;
4. it must have a certain level of cogency, seriousness, cohesion and importance;
5. 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.⁷

Later in 2009 Bindmans was approached by Mr Joe Hashman, an international animal rights activist, journalist, author and gardener. Mr Hashman had heard about the decision in Mr Nicholson's case and wanted advice in relation to his employment at Orchard Park garden centre in Dorset. Mr Hashman had been an active hunt saboteur for many years and had previously successfully challenged a binding over order in the European Court of Human Rights (ECtHR) in the case of *Hashman and Harrup v United Kingdom*.⁸

Hashman and Harrup v United Kingdom

On 3 March 1993 Mr Hashman and one of his fellow saboteurs, Ms Harrup, had sought to disrupt the activities of the Portman Hunt by blowing a hunting horn and hallooing



to distract the hounds from hunting and killing foxes. On 7 September 2013 they were "*bound over to keep the peace and be of good behaviour in the sum of 100 pounds sterling for twelve months*".⁹ Significantly, the binding over order was made despite the fact that they had not been charged with a criminal offence and were found not to have breached the peace. The legal challenge that followed and which was not concluded until 1999 was fought on the ground that the findings and order against them unlawfully interfered with their right under Article 10. The ECtHR found in particular that the sabotage "*constituted an expression of opinion within the meaning of Article 10*"¹⁰ and therefore that the order imposed did interfere with their fundamental rights. Further, it found that the interference was not "*prescribed by law*"¹¹ within the meaning of Article 10 because the applicants had not breached the peace and the nature of the order was such that it was not sufficiently clear what they were being bound over not to do.

The finding was a major triumph and had shown that the United Kingdom had arbitrarily and unlawfully breached Mr Hashman's human rights in an attempt to prevent him from continuing his ant-hunting activities. Mr Hashman's freedom to manifest his strongly held beliefs about the welfare of animals had been infringed.

⁶ *Grainger Plc & Ors v. Nicholson* [2009] UKEAT 0219_09_0311.

⁷ *Ibid.* Para 24.

⁸ *Hashman and Harrup v United Kingdom* – 25594/94 [1999] ECHR 133 (25 November 1999).

⁹ *Ibid.* Para 5.

¹⁰ *Ibid.* Para 28.

¹¹ *Ibid.* Para 41.

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Hashman v Orchard Park

In 2009 Mr Hashman had taken up employment on a freelance basis at Orchard Park Garden Centre. His work involved running a show-plot in the garden centre growing fruit and vegetables and educating customers in gardening. Mr Hashman continues to work as a professional gardener and has published several books on the subject (in some cases using the pseudonym ‘Dirty Nails’).

At the end of 2009 Mr Hashman was unexpectedly asked by his manager to give the garden centre a miss for a few days, and then later told that his services were no longer required. This had come completely without warning and some days later Mr Hashman started making enquiries in an attempt to understand what was behind the decision. Finally, in a conversation with his Manager he was reluctantly told that the owners of the business, Mr and Mrs Clarke, had given the order for his contract to be terminated and that the decision was related to certain issues from the past. The decision had coincided with the funeral of a local huntsman and friend of the Clarke’s, Mr Andrew Prater. It emerged that part of the funeral proceedings would make use of the garden centre during the day and this was the day on which Mr Hashman had been asked to stay away. The circumstances eventually led Mr Hashman to conclude reluctantly that his dismissal was related to his beliefs about hunting.

Mr Hashman lodged a claim in the Southampton employment tribunal under section 3 of the 2003 Regulations (whose provisions are now contained in the Equality Act 2010) asserting that the termination of his employment was direct discrimination on the grounds of belief.¹² That section provides that ‘a person (“A”) discriminates against another person (“B”) if — (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons...’¹³ A pre-hearing review (PHR) was listed to determine the issue of whether Mr Hashman held a ‘philosophical belief’ that would qualify him for protection under the 2003 Regulations.

Pre-hearing Review

Mr Hashman presented a bundle of evidence documenting his life’s work campaigning to protect the welfare of animals. This clearly showed his active commitment to animal welfare from the early age of 13 years (Mr Hashman was born in 1968) including: participating in demonstrations, civil disobedience campaigns and hunt sabotage; being an active member of the Hunt Saboteurs Association and working with other animal rights and anti-

blood sports organisations and pressure groups; consulting on hunting issues for the International Fund for Animal Welfare; being a vegan and only consuming vegan products; and, writing extensively on this area throughout his life. Mr Hashman summarised his belief at the PHR as a belief in the ‘sanctity of life’ which included active opposition to fox hunting and hare coursing.

Employment Judge Guyer heard arguments from Orchard Park in relation to each of the criteria set out in *Grainger plc v Nicholson*.¹⁴ Orchard Park attacked Mr Hashman’s belief on a variety of grounds arguing among other matters; that the belief was incoherent because Mr Hashman had advocated the killing of certain insects in relation to gardening vegetables and because he worked for an organisation (Orchard Park) that butchered meat; that his belief was more political than philosophical because it related to ‘class war’; and, that it infringed the fundamental rights of others, said to be demonstrated by the illegality of some of Mr Hashman’s campaigning actions. Employment Judge Guyer was not persuaded by Orchard Park’s arguments and in his judgment dated 4 March 2011 commented in relation to the alleged inconsistencies in Mr Hashman’s conduct, ‘Sometimes ones moral decisions cannot be based on a simple set of black and white principles...’ He went on: ‘I have no hesitation in finding that Mr Hashman thinks very deeply about the issues arising from his beliefs and that he attempts to live his life in accord with those beliefs. I find that his beliefs are truly a part of his philosophical belief both within the

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¹² *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 310555/2009, unreported employment tribunal claim.

¹³ Employment Equality (Religion or Belief) Regulations 2003, s 3.

¹⁴ *Grainger Plc & Ors v Nicholson* [2009] UKEAT 0219_09_0311, Para 24.

ordinary meaning of such words and within the meaning of the 2003 regulation.”¹⁵

The belief itself was defined by Judge Guyer in the judgment as follows: “*The Claimant has a belief in the sanctity of life. This belief extends to his fervent anti fox-hunting belief (and also his anti hare coursing belief) and such beliefs constitute a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003.*”¹⁶ Judge Guyer was cautious however to clearly record that the finding applied to Mr Hashman only and was a finding of fact in relation to the specific facts of Mr Hashman’s case. In April 2011 Orchard Park presented a Notice of Appeal to the EAT challenging the decision but, having no reasonable prospects of success, the challenge failed to pass the EAT’s initial sift stage.

Full Merits Hearing

The parties resumed their preparation for the full merits hearing at which the test in *IGEN Ltd & Ors v Wong*¹⁷ would need to be satisfied for a finding of discrimination to be made; Mr Hashman would need to prove a prima facie case of discriminatory dismissal and Orchard Park would then need to fail to show that the dismissal was in no way whatsoever because of belief.

Mr Hashman had been recruited and managed by an employee of the garden centre and only discovered later that the Garden Centre was part-owned by the Clarkes, who Mr Hashman knew from his own experience were very closely involved with the local South and West Wiltshire hunt. He suspected that his

dismissal was linked to Andrew Prater’s death and his reputation as a hunt saboteur. Mr Hashman relied on emails and contemporaneous notes of conversations with his manager about his dismissal and was able to show a prima facie case of discrimination because of his belief. Orchard Park, calling only one witness, Mr Hashman’s manager, was then unsuccessful in persuading the tribunal that the decision to dismiss was for business reasons and not because of Mr Hashman’s belief. One of Orchard Park’s major difficulties was that the decision to dismiss had been taken by Mr and Mrs Clarke but they did not attend the tribunal to defend the basis of their decision.

On 26 October 2011 after final deliberations on the operation of the shifting burden of proof (*IGEN v Wong*), the scope of the 2003 Regulations (and whether a line could be drawn between discriminating on the grounds of belief and discriminating on the grounds of how a belief has been manifested, for example where it was manifested by illegal actions), and the parties credibility, judgment was given in favour of Mr Hashman. The tribunal ruled, “*The unanimous Judgment of the tribunal is that the Respondent directly discriminated against the Claimant on the grounds of his anti-fox hunting belief in breach of the provisions of the Employment Equality (Religion or Belief) Regulations 2003’ ... ‘Their views [the Clarkes’] were diametrically opposed to those of the claimant and the recent events, particularly the death of Mr Prater, had rendered it intolerable for them to continue to sanction the continuing arrangement*

“**the decision to dismiss had been taken by Mr and Mrs Clarke but they did not attend the tribunal to defend the basis of their decision**”

between the respondent and the claimant.”¹⁸

This case was a triumph for workers and for animal rights. The case confirmed that where a genuine philosophical belief that satisfies the criteria in *Grainger Plc v Nicholson* is held by a worker it will be unlawful for an employer to discriminate against them because of that belief. Individuals such as Mr Hashman who have strongly held philosophical beliefs about the welfare of animals are entitled, in the same way as individuals holding religious beliefs, not to be discriminated against at work because of their beliefs.

Since Mr Hashman presented his case, the 2003 Regulations have been replaced by equivalent provisions in the Equality Act 2010. That act groups ‘religion and belief’ as a ‘protected characteristic’ (together with race, sex, age, etc.) Belief is again defined as ‘*any religious or philosophical belief*’,¹⁹ but helpfully the criteria set out in *Grainger plc v Nicholson*²⁰ are included in the explanatory notes.²¹

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Nick Fry and Shah Qureshi acted for Joe Hashman in his employment tribunal claim.

¹⁵ *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 3105555/2009, unreported employment tribunal claim, Judgment on Pre-Hearing Review.

¹⁶ *Ibid.*

¹⁷ *IGEN Ltd & Ors v Wong* [2005] 3 All ER 812, Para’s 5-37.

¹⁸ *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 3105555/2009, unreported.

¹⁹ *Equality Act 2010*, S 10.

²⁰ *Ibid.* S 10(2).

²¹ *Ibid.* Explanatory Notes, Para 52.