Employment

Faith, hope & clarity

Professor Mark Hill QC & **Spencer Keen** investigate a legal minefield

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IN BRIEF

- What philosophical beliefs are worthy of protection?
- Can an employee be compelled to act contrary to her religious principles?
- Is Jewishness no longer self defining?

Last year was highly significant for the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) (the Regulations). The Employment Appeal Tribunal and the higher courts began to explore some very difficult issues that, until now, have merely basked in the detail of the Regulations or in arid discussion in academic legal journals.

The EAT has grappled with the breadth of the Regulations in determining which beliefs are worthy of protection: *Nicholson v Grainger* UKEAT/219/09 and *Power v Greater Manchester Police* UKEAT/0434/09: the Court of Appeal has considered whether a religious belief may constitute a conscientious objection to requirements of the workplace: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357: and nine Supreme Court Justices have provided mutually contradictory analyses of race and religion in a school's admissions policy: *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15, [2009] All ER (D) 163 (Dec).

Nicholson v Grainger

Courts have been placed in the unenviable position of having to devise a practical test that can be used to answer an age old question: what is a "philosophical" belief? In *Nicholson v Grainger* the employment tribunal at first instance found that a belief in climate change was a philosophical belief under the Regulations. An appeal in this case was heard by Mr Justice Burton in the EAT and a judgment was handed down on 3 November 2009. In that case the belief in question was described by the claimant in his witness statement as follows: "I have a strongly held philosophical belief about climate change and the environment. I believe that we must urgently cut carbon emissions to avoid catastrophic climate change…It is not merely an opinion but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and fears."

Burton J was quick to distinguish the test for whether a belief was a religious belief from that for a philosophical belief, recognising that while tribunals should be reticent to embark upon an assessment of the validity of a professed religious belief the same could not be said of a claimed philosophical belief. How does a tribunal judge decide whether or not a belief is "philosophical"? Burton J set out what he considered to be the correct test:

(i) The belief must be genuinely held.
(ii) The belief 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.

This test was derived from Strasbourg jurisprudence dealing with Art 9 and with Art 2 of the First Protocol of the European Convention on Human Rights and in particular the case of *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293.

The problem with this test is its lack of objective certainty. At every stage of Burton J's proposed test there is a vast ambit for different opinions to be articulated with sincerity. Naturally, Burton J's judgment discusses what might qualify as a philosophical belief rather than what might not. In doing so it helps to dispose of a number of misconceptions about the scope of the protection, for instance that a political philosophy, doctrine or scientific belief cannot qualify as a philosophical belief.

However in amongst isolated passages from the works of random philosophers, Burton J cites Bertrand Russell and refers to a play he happened to see at London's Old Vic entitled *"Inherit the Wind"*. The judge draws upon his experience of West End theatre to support his assertion that some beliefs, based on science, *might* qualify as philosophical beliefs. But his example of a belief in Darwinism is surprising given that the second element of his test requires that the belief must not be an opinion or viewpoint based on the present state of information available. Surely many "believers" of Darwinism base their views solely on the information available and would undoubtedly, if new information showed that the theory was no longer valid, change their beliefs accordingly. However, it is understandable that Burton J admits scientific beliefs since any other conclusion would admit absurd results. Why should those who believe in

Darwinism irrespective of the scientific facts be afforded protection while those who base their belief on the evidence not be?

This little philosophical digression is included for a purpose. It is a good example of how the test for whether something qualifies as a philosophical belief, while stringent on its face, is so liberally applied in practice that almost any belief will qualify for protection under the Regulations. It admits beliefs rather like the Turner Prize admits art. The next time a client asks whether a belief in the Jedi Knights is covered by the Regulations you may wish to pause before sending him packing. In the case of *Power v Greater Manchester Police,* which came before the EAT a few weeks later, Burton J's test was applied to a spiritualist's belief in psychics.

The real battleground will not be whether a philosophical belief is covered by the Regulations but whether the manifestation of that belief merits protection by intervention of the courts.

Ladele v London Borough of Islington

Ms Ladele was a registrar of births, marriages and deaths whose job was extended to include registering civil partnerships for the London Borough of Islington. She objected to providing this facility for gay couples because, she said, her Christian belief was that marriage was the union of one man and one woman and she could not reconcile this belief with taking an active part in enabling same-sex unions to be formed.

There were discussions at work between Ms Ladele and the council aimed at resolving the problem. Two gay registrars also complained about Ms Ladele's conduct. Eventually the council warned Ms Ladele that she would be dismissed if she did not perform civil partnership ceremonies for gay couples. The employment tribunal at first instance found that the council had discriminated against Ms Ladele on the grounds of her religious beliefs under the Regulations by, amongst other things, subjecting her to disciplinary proceedings.

The council appealed. The EAT allowed the appeal and Ms Ladele appealed to the Court of Appeal which handed down its judgment on 15 December 2009. The Court of Appeal agreed with Elias J in the EAT that it was "not possible to infer from the fact that the real reason they acted as they did was [Ms Ladele's] belief rather than her conduct." Any less favourable treatment that was afforded to Ms Ladele arose not on the grounds of her belief, but because of the way that she had acted.

This distinction between belief and conduct reflects the different nature of protection provided under Art 9 and Art 2 of the First Protocol of the European Convention on Human Rights to *beliefs themselves* as opposed to the *manifestation of beliefs*. The right to hold a belief is absolute whereas the right to manifest that belief is qualified.

In *Ladele* the Court of Appeal also considered whether the council's requirement for its registrars to register civil partnerships was indirectly discriminatory. The Court of Appeal accepted that it would be discriminatory if it was not a "proportionate means of achieving a legitimate aim" within Reg 3(1). The Court of Appeal also agreed with the EAT that the council had a legitimate aim of "requiring all its employees to act in a way which does not discriminate against others". Once this was accepted it followed inevitably that it was also proportionate, in order to achieve that aim, "to require all registrars to perform the full range of services."

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Ladele should be of particular interest to those litigating discrimination claims under the Regulations. The distinction between the manifestation of a belief and the belief itself is frequently difficult to draw. There will be cases where the distinction, if wrongly made, will significantly erode the protection afforded by the Regulations and practitioners will need to ensure that their cases are presented clearly from the outset.

R (on the application of E) v Governing Body of JFS

This case, one of the first to be decided by the new Supreme Court concerns the admissions policy of the Jewish Free School. Jewish children were given priority when applying for entry to the school. The definition of Jewishness was prescribed by the Chief Rabbi: at the time of the child's birth, the mother must be Jewish, either by descent or recognised conversion. The issue in this case was whether a child, who was refused entry to the school because he did not so qualify although he was considered by less orthodox criteria to be Jewish, could claim discrimination under the Race Relations Act 1976, s 1.

Lord Phillips, leading the majority, held that it was not helpful to apply a "but for" test when considering whether or not there had been discrimination. He considered that it was better simply to ask what were the facts considered to be determinative when making the relevant decision. Whether there was discrimination depended on whether race was the criterion that was determinative of the treatment and not on the underlying motive.

Lord Phillips held that in the present case it was impossible to say that the decision turned only on religious and not ethnic status. Since motive was irrelevant he held that there had been direct racial discrimination, irrespective of whether there was an overlying religious motive for the treatment.

Discussion

What is clear from these decisions is that great latitude will be afforded to those who assert a particular religious or philosophical belief. The level of scrutiny will be mild if Burton J's minimum threshold gains currency. However the protection to be afforded to such religious or philosophical beliefs is likely to be similarly mild. In *Power*, the employee lost on the merits because the police authority demonstrated a legitimate reason for his dismissal wholly unrelated to his asserted belief in spiritualism. In *Ladele*, the religious belief was effectively trumped by the rights afforded to same-gender couples and the secular and neutral nature of the workplace. And in *JFS,* the legitimate action of a faith school in selecting pupils on grounds of religious belief, was rendered unlawful because it had the coincidental effect (not withstanding the religious motivation) of racial discrimination. In addition to their legal knowledge, practitioners will need to demonstrate a nuanced approach to faith and doctrine, together with a working knowledge of the London theatre. NLJ

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