



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000379/2023

Held via Cloud Video Platform in Edinburgh on 23 February 2024

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Employment Judge Sangster

Mr R Mysakowski

**Claimant
In person**

Broxburn Bottlers Limited

**Respondent
Represented by
Ms C Maher
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that:

- The claimant made a protected disclosure, for the purposes of section 43B of the Employment Rights Act 1996, on 13 April 2023.
- At the relevant time (namely the period from 13 February to 18 April 2023) the claimant held a philosophical belief for the purposes of section 10 of the Equality Act 2010, namely ethical veganism.

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REASONS

Introduction

1. This was a preliminary hearing which took place remotely to determine whether the claimant had a protected philosophical belief and whether he had made a protected disclosure.
2. The claimant gave evidence on his own behalf. The respondent led evidence from Tom Young (TY), Bottling Leader for the respondent.
3. A joint set of productions was lodged, extending to 251 pages.

Issues to be determined

4. The issues to be determined by the Tribunal were discussed at the outset of proceedings. The issues to be determined by the Tribunal were agreed to be as follows:

Protected Disclosure

- a. Did the claimant make a qualifying disclosure in terms of S43B of the Employment Rights Act 1996 (**ERA**), in particular:
 - i. Did the claimant disclose any information?
 - ii. If so, what information did the claimant disclose, to whom and when? The claimant states he made a verbal disclosure to Tom Young on 13 April 2023, when he stated that he had witnessed inappropriate behaviour from a senior employee, which potentially constituted sexual harassment, suggested that Tom Young speak to all employees or issue a note to say that behaviour of that nature was unacceptable, and asked what the process was to make a formal complaint.
 - iii. Did any information disclosed tend to show that a breach had taken place, was taking place or was likely to take place in terms of section 43B(1) ERA. The claimant asserts that the information disclosed tended to show that there had been a failure to comply

with a legal obligation, namely obligations under the Equality Act 2010.

5 iv. Did the claimant have a reasonable belief that the information disclosed tended to show one of the relevant failures set out at paragraph (iii) above?

v. Did the claimant reasonably believe that the alleged disclosures were made in the public interest?

b. If the claimant made a qualifying disclosure, was it also a protected disclosure?

10 *Philosophical Belief*

c. Did the claimant have a philosophical belief within the meaning of section 10 of the Equality Act 2010 (**EqA**) at the relevant time. It was agreed that the belief relied upon was ethical veganism and the relevant time was 13 February to 18 April 2023.

15 **Findings in Fact**

5. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

20 6. The claimant has been vegetarian since the age of 3.

7. In 2007 the claimant worked for one day at a pharmaceutical company. He could not continue with the role beyond that day, after being shown the premises, where animal testing was conducted. He stopped wearing animal products and purchasing and using products tested on animals in 2007, as a result. The only exception to this is prescription medication, which he seeks to limit the use of as much as possible.

8. In 2010, the claimant started his own business selling pre-owned clothing, computer and camera parts on eBay. He quickly realised that accessories sold

best, particularly handbags and focussed on them going forward. This included vintage leather handbags. This was his sole occupation.

- 5 9. The claimant adopted a vegan diet from 2016 onwards. He stopped eating honey and ice cream at that point, stating this was the only change to his diet required by that stage.
- 10 10. In September 2021, the claimant became an ethical vegan. To him, that represents a philosophy and way of life that seeks to exclude all forms of exploitation of animals. He has sought to exclude the consumption and use of any products which may involve animal exploitation since then. For example, he now uses Michelin tires on his car, which are vegan and he does not eat avocados, kiwis or figs, which can require exploitation of animals (bees and wasps) for commercial production.
- 15 11. The claimant also describes himself as an activist. As part of that he paints small stones, with non-toxic paint, promoting veganism and ethical veganism and leaves these at the top of Munros in Scotland. He also photographs them and posts the photographs, with commentary, on his Instagram account.
- 20 12. When the claimant became ethical vegan in September 2021, he stopped buying vintage leather handbags to sell in his business, but had existing stock. He continued to sell that stock, via his eBay site, up to April 2022.
- 25 13. An article about the claimant appeared in the Daily Mail on 22 April 2022 with the headline *'Vegan activist who litters the Scottish Highlands with stones reading 'be kind to animals or I'll kill you' secretly flogs designer leather handbags on eBay'*. It included pictures of the claimant, the leather bags sold on his website in 2022 and some of the painted stones he had placed at the top of mountains (taken from his Instagram account), such as one which spelt out 'MEAT', with the acrostic 'Murder Evil Agony Torture'.
- 30 14. In April/May 2022, the claimant stopped selling items via eBay altogether and started to look for employment. He informed the agency that he was registered

with that he would only work for companies who were not involved in animal exploitation.

- 5 15. His remaining stock of leather handbags was ultimately donated to Lothian Cat Rescue in December 2022.
- 10 16. The claimant initially started working with the respondent, via an agency, in June 2022. He was employed by the respondent as a Case Erector Machine Operator from 7 November 2022 to 19 April 2023.
17. There were 3 levels of management between the claimant and TY.
- 15 18. By 13 February 2023, as a result of the claimant's commitment to ethical veganism, the claimant had almost entirely excluded from his life the consumption and use of products which may involve animal exploitation. The only remaining items which he continued to use at that point was the leather steering wheel in his car, which was purchased second hand in 2018 and prescription medication, where necessary.
- 20 19. On 13 April 2023, the claimant went to TY's office to speak to him and raise concerns about an incident he had witnessed the previous day. During their discussion, the claimant informed TY that he had witnessed a senior male manager massaging the shoulders/neck of a junior female employee, that he believed this to be inappropriate and that he understood the individual felt uncomfortable during the incident. TY asked the claimant who the individuals were. The claimant stated that he did not wish to provide names, as the female involved had asked him not to. TY stated that he could not investigate unless the claimant gave him the names of who had been involved. The claimant stated that he did not feel he could do so and asked if TY could instead issue
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30 a note to everyone in the workplace to set out what is appropriate/inappropriate conduct in the workplace.

Submissions

20. Ms Maher, for the respondent, submitted, in summary, that:

- 5 a. While the respondent accepts that ethical veganism can amount to a protected belief, the claimant has failed to establish that he genuinely held this belief. His previous business selling leather handbags undermines his assertion. In addition, the manner in which he manifests his views is not worthy of respect in a democratic society, given that it involves vandalising beauty spots.
- b. The claimant did not make a protected disclosure. He did not convey information to TY. If he did, the information was not disclosed in the public interest.
- 10 21. The claimant gave a short oral submission stating that his beliefs were genuinely held and very important to him. He made a report to TY as he saw something he thought was wrong.

Relevant Law

Protected Disclosure

- 15 22. Section 43A of the Employment Rights Act 1996 (**ERA**) provides:
- 20 *“In this Act a ‘protected disclosure’ means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.”*
23. A qualifying disclosure is defined in section 43B ERA as *“any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*
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- a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
 - b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
 - 30 c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*

- d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
- e. *That the environment has been, is being or is likely to be damaged; or*
- f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”*

24. Section 43C ERA states that:

‘A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person....”

25. In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

“35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a ‘disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in subparagraphs (a) to (f).’ Grammatically, the word ‘information’ has to be read with the qualifying phrase ‘which tends to show [etc]’ (as, for example, in the present case, information which tends to show ‘that a person has failed or is likely to fail to comply with any legal obligation to which he is subject’). In order for a statement or disclosure to be a qualifying disclosure according to this language,

it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).”

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*“36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”*

26. In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

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*’43...As the Court of Appeal in *Kilraine v Wandsworth London Borough Council* [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.*

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69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.’

Philosophical Belief

27. Section 10 EqA states that:

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

(3) *In relation to the protected characteristic of religion or belief-*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*

(b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.'*

28. For a religious or philosophical belief to be protected under the Act it must meet what have become known as the Grainger criterion, namely: (i) it must be genuinely held; (ii) it 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; and (v) it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others (***Grainger plc v Nicholson*** [2010] IRLR 4).

29. The EAT conducted a detailed consideration of the scope of the limitation imposed by the fifth Grainger criterion in ***Forstater v CGD Europe and ors*** [2021] IRLR 706. In that case, the EAT held that, only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society. Accordingly, it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. At the stage of applying the Grainger criteria, the focus should not be on manifestation: at the preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the

analysis. There is no balancing exercise between competing rights at this first stage, because it is only a belief that involves, in effect, the destruction of the rights of others that would fail to qualify.

Observations on Evidence

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30. TY's position, in examination in chief, was that no details or names were provided by the claimant on 13 April 2023. He stated that he required to tease information out from the claimant and by the end of the conversation he had no idea what the claimant had been talking about and whether the question he stated the claimant posed to him, namely what he would do if he saw, or it was reported to him, that someone put hands on someone else, was hypothetical or not.

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31. In cross examination it was put to him that the claimant had told him that he had witnessed a senior individual massaging the shoulders/neck massage of a junior employee. TY agreed that the claimant had informed him of this, but stated that he only did so after a period of time and that 'we teased that out in the end'. He agreed that the claimant had indicated to him that the female employee, who was the recipient of the massage, did not want to provide her name. He agreed that he had stated to the claimant that he could not take any action unless the claimant provided the names of the individuals involved. He agreed that the claimant had asked him to issue a note to people in the workplace to set out what is appropriate/inappropriate in the workplace.

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32. The Tribunal concluded, on the balance of probabilities, and taking into account the concessions made by TY during cross examination, that the claimant's evidence regarding what he stated to TY during the meeting on 13 April 2023 should be preferred. In the main this was, in any event, consistent with the concessions made by TY in cross examination.

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30 Discussion & Decision

Protected Disclosure

33. The Tribunal was mindful that five elements require to be considered in determining whether the asserted disclosure amounted to a qualifying

disclosure (as set out at paragraph 4.a. above). The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure.

34. The terms of the conversation between the claimant and TY on 13 April 2023 are set out at paragraph 19 above. The Tribunal found that information was disclosed in this discussion, namely that a senior male manager had massaged the shoulders/neck of a junior female employee and that the claimant understood that the individual felt awkward and uncomfortable at him doing so. The Tribunal found that this had sufficient factual content and specificity capable of tending to show that there had been a failure to comply with a legal obligation, namely obligations under the EqA. The Tribunal found that the claimant believed that the information disclosed tended to show that there had been a failure to comply with obligations under the EqA. The Tribunal found that that belief was reasonably held. The claimant saw the incident and then spoke to the female employee involved. The Tribunal also concluded that the claimant believed that the information disclosed was in the public interest and it was reasonable for the claimant to believe that the disclosure of information was in the public interest. He gave evidence to the effect that he had heard rumours about the senior male manager's conduct towards female employees and wanted raise what he had witnessed to try to protect others in the workplace.
35. Given these findings, the Tribunal concluded that the claimant made a qualifying disclosure to TY on 13 April 2023. Given that it was made to his employer, it was also a protected disclosure.

Philosophical Belief

36. The respondent accepted that ethical veganism can amount to a philosophical belief. They asserted however that the first, second and fifth of the Grainger criterion were not satisfied in this case.
37. The Tribunal agreed that ethical veganism would meet the third and fourth of the Grainger criterion: it involves a weighty and substantial aspect of human life and behaviour and it is a belief which has a high level of cogency, cohesion and importance.

38. The respondent's challenge, in relation to whether the first and second of the Grainger criterion were satisfied, rested solely on the claimant selling leather handbags in his business, in the period up to April 2022. The Tribunal was not however assessing the claimant's belief at, or prior to, that date. The Tribunal required to consider whether the claimant had a protected characteristic at the relevant time, namely in the period from 13 February to 18 April 2023. In relation to this, the Tribunal accepted the claimant's unchallenged evidence that:
- a. He became ethical vegan in September 2021 and sought, from that point onwards, to ensure that he did not consume or use products which may involve animal exploitation;
 - b. He did not buy any more leather handbags from that point onwards;
 - c. While he did continue to sell existing stock, he did not do so after April 2022;
 - d. As at 13 February 2023 he had almost entirely excluded from his life the consumption and use of products which may involve animal exploitation.
39. In light of this, and the other findings in fact set out above, the Tribunal was satisfied that, at the relevant time (from 13 February to 18 April 2023), the claimant genuinely held the belief of ethical veganism, and that he sought to adhere to that belief in his day to day life. It impacted what he ate, what he wore, the products he used and where he worked. The Tribunal was satisfied that that adherence formed something more than merely the assertion of a view or an opinion. The Tribunal accordingly concluded that, at the relevant time, the first and second of the Grainger criterion were satisfied.
40. The respondent also challenged whether the claimant satisfied the fifth Grainger criterion, given the way in which he manifested his belief. Namely by, in their submission, vandalising beauty spots. That approach would however place the focus on how the claimant, on occasion, chose to manifest his belief and might lead the Tribunal to consider whether a particular expression or mode of expression of the belief is protected, rather than

concentrating on the belief in general and assessing whether it meets the Grainger criterion and, therefore, the requirements of s10 EqA.

41. As confirmed in *Forstater*, in applying the fifth Grainger criterion, it is incumbent upon the Tribunal to bear in mind that only those beliefs or acts of expression that would fall to be excluded from protection by virtue of art 17, ECHR would fall outside the scope of s 10, EqA. Thus, the Tribunal would, in order to exclude the protection, have to be satisfied that the belief in question or its expression gave rise to the gravest form of hate speech, was inciting violence, or was as antithetical to Convention principles as Nazism or totalitarianism. That very high bar was not met in this case. The claimant's belief did not have the effect of destroying the rights of others. The Tribunal accordingly concluded that the fifth Grainger criteria was also satisfied.
42. Given the above findings, the Tribunal concluded that the claimant's belief does fall within the scope of s10 EqA and constitutes a protected philosophical belief.

Conclusions

43. The claim will now proceed to the final hearing on the merits, where the remaining issues will be determined.

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Employment Judge Sangster

Employment Judge

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1 March 2024

Date of Judgment

Date sent to parties

01/03/2024