



EMPLOYMENT TRIBUNALS

Claimant Mr S Jackson
Represented by in person

Respondents Lidl Great Britain Ltd
Represented by Mrs G Williams (solicitor)

Before: Employment Judge Cheetham QC

**Hearing held on 2 & 3 September 2020 at
London South Employment Tribunal by Cloud Video Platform**

JUDGMENT

1. The Claimant's philosophical belief in Stoicism qualifies as a belief within the Equality Act 2010 s.10.
2. The Claimant was a disabled person within the Equality Act at the relevant time.
3. The Claimant's application to strike out the response is dismissed.
4. The Respondent's application to strike out/seek a deposit order in respect of some of the Claimant's complaints succeeds as follows:
 - (i) the complaint of direct disability discrimination is struck out as having no reasonable prospect of success;
 - (ii) the complaint of direct discrimination because of religion or belief in respect of the allegation of requiring people to behave in a proscribed emotional way during disciplinary proceedings is struck out as having no reasonable prospect of success;
 - (iii) deposit orders (as set out in the separate Order) are made in respect of the claim for discrimination arising from disability; the remaining allegation of direct discrimination because of religion or belief and the claim of indirect discrimination because of religion or belief.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I received were those contained in the Tribunal case file.*
2. At a Preliminary Hearing on 31 January 2020, EJ Webster listed this hearing to consider the following:
 - (i) whether Stoicism qualifies as a philosophical belief within the Equality Act 2010 s.10;
 - (ii) whether the Claimant was a disabled person within the Equality Act at the relevant time;
 - (iii) the Claimant's application to strike out the response; and
 - (iv) the Respondent's application to strike out/seek a deposit order in respect of some of the Claimant's complaints.
3. I heard evidence from the Claimant, who had prepared a witness statement on the issue of his philosophical beliefs and who gave his evidence on that and all other issues clearly and cogently. There was a hearing bundle containing all of the relevant documents, including the applications and the Claimant's impact statement. I am grateful to both the Claimant and Mrs Williams for their helpful and courteous approach to the hearing.

The Claimant's philosophical belief

4. S.10 of the Equality Act defines the protected characteristic of religion or belief. Under s.10(2) belief is defined as "*any religious or philosophical belief and a reference to belief includes a reference to a lack of belief*".
5. In ***Grainger plc and ors v Nicholson*** [2010] ICR 360, the Employment Appeal Tribunal provided guidance of general application on the meaning and ambit of philosophical belief. Drawing upon case law decided under Article 9 ECHR, Burton J held that a belief can only qualify for protection if it:
 - a) is genuinely held
 - b) is not simply an opinion or viewpoint based on the present state of information available
 - c) concerns a weighty and substantial aspect of human life and behaviour
 - d) attains a certain level of cogency, seriousness, cohesion and importance, and
 - e) is worthy of respect in a democratic society, is not incompatible with human dignity and is not in conflict with the fundamental rights of others.

6. In **Gray v Mulberry Company (Design) Ltd** [2019] ICR 175 EAT, Choudhury P. expressed the view that the proper approach to the application of the Grainger criteria was “*to ensure that the bar [was] not set too high, and that too much [was] not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs*”. Nevertheless, in assessing cogency and coherence, he commented that: “*One can readily envisage a scenario whereby a claimant professes a profound belief as to an important aspect of her life but seeks to apply that belief in a haphazard, arbitrary or random fashion such that it cannot be said that her belief has attained any measure of cogency or coherence.*”
7. Thus, in applying the **Grainger** criteria, and the fourth criterion in particular (which Choudhury P. considered could be regarded as the ‘overarching criterion’), the focus should be on the manifestation of the belief. Cohesion, in his view, is to be understood in the sense of being intelligible and capable of being understood. If, for example, a belief is expressed in relation to one act or omission but inexplicably not expressed in relation to another which is very similar, then it would be open to a tribunal to conclude that the belief was unintelligible and lacking a certain level of cogency or coherence.
8. The Claimant had prepared a detailed witness statement explaining Stoicism and he gave evidence orally, from which I would make these findings of fact.
9. The Claimant has a strong interest in philosophy and a thorough knowledge of the particular philosophical belief system known as Stoicism. He believes that there is an objective moral reality to which we are subject and that there are several ethical “values” to which he must adhere as a consequence of this belief. He identifies these values as wisdom, courage, moderation and justice.
10. The way his philosophical beliefs manifest themselves in his daily life is harder to define. His evidence – which I accept - was that: “*... when considering whether any act I perform is in and of itself an ethical and therefore permissible one, the act itself and its adherence to principles and virtues is the subject which must be considered, as opposed to determining the ethical nature of an act in a utilitarian or consequentialist manner. This belief system underpins almost every act that I perform in my life...*”.
11. From his description of the philosophy and of his own thought patterns, it may appear to an independent observer to be an emotionally narrow set of beliefs and indeed the Claimant said that it was inconsistent with Stoicism to display emotions. He described himself as not being a “consequentialist”, by which he meant that the consequences of what he says or does would not prevent him from saying or doing that thing. He told me that, “*The realisation that the consequence of what I say would cause offence would not stop me from saying it*”. Explaining further, he said: “*In interpersonal relationships, it would not be the potential for offence that prevented me from saying something*”.

12. Given that his job is in communications, one can see the potential for conflict, but that is a separate issue. Considering the Claimant's evidence carefully and also the contextual evidence from this claim, it is clear to me that the Claimant does try to adhere to his philosophical belief in Stoicism in his daily life and that he believes this requires him to behave in a particular way towards others. As far as I can judge, his beliefs guide and, to an extent, dictate what he says and does.
13. The values which he seeks to follow are in many ways similar to the values many other people will hold, whether they are derived from a religion, a philosophy or some inherent belief in how one should behave. There is nothing unique about them, but I accept that they are important to the Claimant. He is striving towards what Stoics would term "apatheia", which might be seen as a state of equanimity.
14. I consider the Claimant serious in his views and also that he applies them consistently and with a single-minded logic. From his communications with his employers, it would appear that at times he has an unrealistic and even naive expectation that others will easily use and understand terms such as "deontological" and "epistemology", but these are terms that he uses and that define the parameters of how he chooses to live.
15. Applying the guidelines in **Grainger**, I would draw the following conclusions. As a starting point, there can be no dispute that Stoicism as a philosophical belief system has been with us for about 2,300 years. The Claimant provided reference to its founder, Zeno of Citium, and there have been many others who have written about Stoicism, such as Aurelius and Seneca.
16. Is the Claimant's belief genuinely held? In my view, the Claimant's philosophical beliefs based upon Stoicism are genuinely held. Mrs Williams made the fair point that the Claimant had listed Stoicism as just one of a number of philosophical definitions in writing to his employer, but I accept his evidence that Stoicism was the only moral belief system he named.
17. Am I satisfied that this is not simply an opinion or viewpoint, based on the present state of information available? I am satisfied that this is not simply an opinion. I accept the Claimant's evidence that he has had a strong interest in and adherence to this philosophical belief system for a number of years and that it transcends merely holding an opinion.
18. Does it concern a weighty and substantial aspect of human life and behaviour? Plainly it does. Stoicism is just one of innumerable schools of thought attempting to answer the most profound questions that we ask and the Claimant has further demonstrated this through his contextualisation of Stoicism alongside the major religions.
19. Does this belief attain a certain level of cogency, seriousness, cohesion and importance? If this is the overarching criterion, then one must be sufficiently convinced by the manifestation of this belief, as that will demonstrate its

cogency, seriousness, cohesion and importance. Based upon my findings above, the Claimant applies his belief consistently and it is an important part of his life. It is relevant that he is striving to achieve a state of equanimity, because that suggests a guiding purpose, which gives cohesion to his beliefs.

20. Is it worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others? This is the question that has concerned me most, because of the relegation of consequence to the periphery. Is a conscious disregard of the consequence of saying or doing something where that might - or probably will - cause offence inconsistent with the values of a democratic society?
21. There is no fundamental right not to be offended. If one takes as an example harassment under the Equality Act 2010 s.26, that gives a person who has been caused offence by unwanted conduct a cause of action, subject to the limitations in that section. It does not, however, create a right not to be offended; rather, it creates a remedy if that offence occurs.
22. Clearly there will be beliefs that, although genuinely held, would not be worthy of respect in a democratic society, such as a belief founded upon racial superiority. However, it does not seem to me that the Claimant's belief in Stoicism can be considered in this way. The fact that he is driven in what he says and does by consideration of whether the action is right or wrong, rather than by what may be the consequence, may indeed cause offence, but that does not make the Claimant's Stoicism unworthy of respect in a democratic society, incompatible with human dignity or in conflict with the fundamental rights of others.
23. My conclusion is therefore that the Claimant's philosophical belief in Stoicism comes within the statutory definition under s.10 of the Equality Act.

The Claimant's disability.

24. Pursuant to section 6(1) of the Equality Act 2010, disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the individual's ability to carry out normal day-to-day activities.
25. There is no issue that the Claimant is dyslexic, nor that this is a condition that can amount to a disability. The agreed focus of the evidence and submissions was its effect on his ability to carry out day-to-day activities. There was no independent evidence, such as a diagnosis or test results. The Claimant told me – and I accept – that he has been unable to get tested by the British Dyslexia Society, since tests appear to be unavailable at present.
26. Therefore, the only evidence was from the Claimant himself, but I found him to be a truthful witness and I accept his self-description as accurate and unexaggerated. The day-to-day effect of his dyslexia was set out in the

impact statement and, as described, provided a clear list of ways in which the impact of his dyslexia has been significant. These included slower reading and writing, frequent errors and error blindness, difficulty with sequential processing and word substitutions.

27. Mrs Williams did not challenge that evidence as such. What she pointed to was the precision and accuracy with which the Claimant had composed the lengthy written arguments sent to the Respondent, his impact and witness statement and other documents. She pointed to his fluency at this hearing.

28. In my view those observations, although correct, are of limited assistance. As the Claimant submitted, if a person has dyslexia, that does not mean they are incapable of writing accurately, but that they will need more time and space to do so. The documents to which Mrs Williams referred were documents which were capable of being written and re-written, read and re-read.

29. I appreciate that it is often difficult to state at what point the condition of dyslexia, which is shared by many people, crosses the line to be classed as a disability. However, the statutory test requires asking whether it has a substantial and long-term adverse effect on the individual's ability to carry out normal day-to-day activities and, in my judgment, that is the case with the Claimant. I accept his self-description and that the impact is substantial and therefore I conclude that he was disabled at the relevant time by reason of his dyslexia.

The Claimant's application to strike out the response

30. The Claimant applied on 14 July 2020 to strike out the response for non-compliance with the tribunal's orders. That was because EJ Webster had given a direction for service of information by the Respondent, which should have been done by 26 June. In fact, it was not done until 17 July, although the Respondent provided an explanation. Striking out would be a wholly disproportionate sanction for a minor failure to comply with directions and the application is dismissed.

The Respondent's application to strike out complaints/seek a deposit order

31. With regard to the disability discrimination claim, this is brought as both direct discrimination and discrimination arising from disability.

32. With regard to the direct discrimination, the treatment was:

- (i) being accused of saying "Asians are greasy" at the end of October 2018; and
- (ii) being dismissed partly or entirely because of the above comment.

33. With regard to the discrimination arising from disability, the treatment was:

- (i) accusing the Claimant of saying "Asians are greasy";
- (ii) requiring the Claimant to communicate in a way that cannot be misinterpreted; and
- (iii) dismissing the Claimant.

34. Mrs Williams submitted that the reason why the Claimant was subjected to disciplinary proceedings was because he failed to apologise sufficiently. That is what the dismissal letter makes clear and what contributed to his dismissal. It cannot be formulated as direct discrimination, because he was not dismissed for being dyslexic. At most it would come within s.15, but the sanction was for the failure to apologise, not the words used.

35. The Claimant's position was that, as a dyslexic, he mixed up his words. An apology was the consequence of his mixed words, which was not his fault. He was being penalised for not apologising (or not apologising sufficiently), but that was the consequence of something he had not intended. When asked whether that was merely unfair, rather than discriminatory, he disagreed and said this arose from his disability, because if he was not dyslexic, the situation would not have arisen. As to the requirement to communicate in a particular way, he said that this was something which, as a Stoic, he could not do.

36. I agree with Mrs Williams that, on any view, this is not direct discrimination and I strike out that complaint as having no reasonable prospect of success.

37. However, although I think the s.15 complaint has little reasonable prospect of success, I cannot say it has no reasonable prospect of success. There is some confusion in the documentation over whether an apology was given and there may be an argument that this arose from the disability, which would then raise the issue of justification. Therefore I am making it the subject of a deposit order, which I will set out in a separate Order.

38. Turning to the complaint of discrimination because of religion or belief, the treatment for the claim of direct discrimination was:

- (i) requiring people to behave in a proscribed emotional way during disciplinary proceedings; and
- (ii) dismissing the Claimant.

39. The indirect discrimination claim is formulated around a practice of requiring all staff to communicate in a way that cannot be misinterpreted by colleagues.

40. I cannot see how "*requiring people to behave in a proscribed emotional way during disciplinary proceedings*" in the context of this claim could amount to direct discrimination. It does not allege that the Claimant was treated in this way because of his Stoicism, but rather that there was a practice applied to everyone. If anything, it would amount to indirect discrimination, but I am not asked to make any amendments. I agree with Mrs Williams that there

is no reasonable prospect of that complaint of direct discrimination succeeding and I agree with her that it should be struck out.

41. The remaining allegation of direct discrimination and the complaint of indirect discrimination seem to me to have little reasonable prospect of success. Nevertheless, I accept that there are references in the dismissal letter and other documents to behaviours that the Claimant would say are inextricably linked to his philosophical beliefs and it may be necessary to hear evidence to decide the issues. That being the case, I am making a deposit order in respect of the religion and belief discrimination claims also.
42. Finally, there is the equal pay claim. Although there are parallel directions and a hearing listed in January to deal with this claim, Mrs Williams made her application to strike out the claim on the basis that there is a self-evident difference between the Claimant and his comparators, as shown in their respective CVs.
43. A material factor defence under the Equality Act s.69 will operate to prevent a sex equality clause from applying only if the employer can show that the variation between the claimant's contract and the comparator's contract is due to a factor that is "material" and that reliance on that factor is neither direct sex discrimination nor unjustified indirect sex discrimination. In **Rainey v Greater Glasgow Health Board** [1987] ICR, HL, Lord Keith stated that: "*The difference [i.e. the factor explaining the pay differential] must be "material", which I would construe as meaning "significant and relevant".*"
44. In **CalMac Ferries Ltd v Wallace and anor** [2014] ICR 453, EAT, Underhill P. said: "*Where a pay disparity arises for examination, it is not sufficient for an employer to show why one party is paid as one party is. The statute requires an explanation for the difference, which inevitably involves considering why the claimants are paid as they are, on the one hand, and separately, why the comparator is paid as he is.*" In other words, simply because a factor is potentially capable of constituting a material factor for the purposes of s.69 does not mean that it will always be sufficient; it must be of actual significance and relevance to the particular case.
45. There are two comparators. Laura Johnson has a degree in Public Relations and over 9 years' experience relevant to her role. Sarah Catterick also has a degree, which is in Business with Marketing, and about 9 years' relevant experience. The Claimant has an HND in Natural Sciences, rather than a degree, and what he describes in his CV as "*3 years at the forefront of Social and a year as Insight Analyst*". Mrs Williams submitted that this shows a clear basis for a material factor defence.
46. The Claimant said that there should not have been a difference in pay where there is a perceived ability to carry out the same or an equivalent role. He also said that his experience was with a direct competitor in an equivalent role and that his HND, although not a degree, was of more use in a technological role.

47. I am not convinced that the difference in respect of the educational qualifications is significant, because I can see that the Claimant's HND in Natural Sciences might have additional benefits equivalent to those of a degree. The difference in the amount of experience is more significant and is potentially capable of explaining the difference, but I cannot say at this stage that was of actual significance and relevance. Put another way, I cannot say this claim has no or little reasonable prospect of success and this part of the application is dismissed.
48. I have set out in a separate case management order the directions for the final hearing.

Employment Judge S Cheetham QC
Dated 3 September 2020