



EMPLOYMENT TRIBUNALS

Claimant: Mr J Penalva

Respondent: Teesside University

HELD at Teesside Justice Hearing Centre ON: 23 January 2023

BEFORE: Employment Judge Johnson

Members: Ms D Newey
Mr D Dorman-Smith

REPRESENTATION:

Claimant: No attendance – no appearance

Respondent: Mr J Anderson of Counsel

JUDGMENT

1. The claimant's complaint of direct discrimination because of sex, contrary to section 13 of the Equality Act 2010, is not well-founded and is dismissed.
2. The claimant's complaint of direct discrimination because of race, contrary to section 13 of the Equality Act 2010, is not well-founded and is dismissed.
3. The claimant's complaint of direct discrimination because of philosophical belief, contrary to section 13 of the Equality Act 2010, is not well-founded and is dismissed.

REASONS

1. By a claim form presented on 4 July 2022, the claimant brought complaints of unlawful direct discrimination contrary to section 13 of the Equality Act 2010, because of sex, race and philosophical belief. By a response form presented on 10 August 2022, the respondent defended the claims.
2. The claims arise out of the claimant's application for the role of principal lecturer (initial teacher education) at the respondent university. The claimant was shortlisted for interview for that post and was interviewed on 8 June 2022. The claimant was not selected for the post, following that interview. The claimant complains that the manner in which that interview was conducted amounts to direct discrimination because of his sex (male), direct discrimination because of his race (Spanish) and direct discrimination because of his philosophical belief ("meritocracy – the notion of a political system in which economic goods and/or political power are vested in individual people based on talent, effort and achievement rather than wealth or social class"). The respondent's case is that, at the interview, the claimant had not demonstrated that he had the knowledge to meet the requirements for the role, that his presentation in the interview had been poor and not related to the assigned topic and that his responses to questions were inadequate and not of the standard for him to be considered for the role.
3. The claimant disclosed to the respondent after the interview, that he had (without the prior permission or knowledge of the university) made a recording of the interview. Within 10 minutes of the interview ending (the interview had taken place via video link) the claimant wrote to the respondent, raising the following complaints:-
 - (i) The panel was compounded by women at 100%.
 - (ii) The panel showed a clear cut authoritarian style. Comments were biased and some of them even showed lack of respect to the candidate.
 - (iii) The evaluation of candidates lacks public, objective criteria.
 - (iv) The hiring process lacks transparency.
4. Later the same day the claimant submitted another letter to the respondent stating as follows:-

"You already know just after the interview (or whatever this was) I reported to the Chancellor of the University the series of malpractices in this process of selection, which subsequently will be reported to the Adequate UK Government Department and further institutions on the matter. I wonder how the students at this university and particularly the potential student candidates of ITE, will view this interview. They have the right to get this information regarding the quality of education they are paying for, to evaluate if what this university is doing with them is a fraud. Evidence at hand shows that it is. Please, follow a debate of the students on social media. I have to specially congratulate Jennifer Duncan, who, when I asked her a question, she disrespectfully ignored me and treated me as if I was a shit, action which was supported by the head of the panel, for which I also congratulate. The panel of this interview (a 100% of the

panel are women) has shown that women can be as authoritarian, unfair and disrespectful as men when it comes to the use of power. Such an achievement in equality this university is fulfilling.”

5. The respondent treated the claimant’s correspondence as a formal complaint and the matter was passed to Phillip Radcliffe (director of HR) to undertake an investigation. On 10 June (2 days after the interview) a member of the respondent’s Office of Student Complaints Team, emailed the claimant confirming that the matter would be investigated. The claimant replied stating:-

“The Employment Tribunal will communicate with you on this matter. I will not communicate with you on this matter any longer.”

The claim form was presented on 4 July 2022.

6. A private preliminary hearing was conducted before Employment Judge Jeram on 21 September 2022, at which case management orders were made, including the listing of the final Hearing for Monday 23 January 2023 to Wednesday 25 January 2023 inclusive. Further Orders were made relating to disclosure of documents and the preparation of the final hearing bundle and exchange of witness statements.

7. By an email dated 17 November 2022 the claimant made the following application:-

“The case management orders says that the hearing will be conducted at ET Teesside Justice Centre, Victoria Square, Middlesbrough. It would take place over three days. I’d like this Tribunal to consider the difficulties of travelling to this site and spending three days, which is a difficulty for the claimant. For this reason I am respectfully requesting the hearing to take place by video conference.”

That application was opposed by the respondent, on the basis that the requirement for there to be an “in person” hearing had been discussed at the preliminary hearing when the claimant had made no objection to an “in person” hearing. Under the Presidential Guidance about taking oral evidence by video or telephone from persons located abroad (April 2022), permission must be obtained from the country from which evidence is to be given. There is a list of countries who have given permission. Turkey is not one of those countries. The claimant’s application for the hearing to be conducted by video was refused. At the same time, Employment Judge Jeram refused the claimant’s application for her to recuse herself from any further involvement in the case. That application had been made by the claimant because he had objected to being told by Judge Jeram at the preliminary hearing that he could not record that hearing, as to do so would amount to a criminal offence.

8. By a letter dated 28 November 2022 the claimant stated, “I appeal the decisions of the Judge expressed in the email of 28 November 2022”.

9. Following the deadline for disclosure of documents but prior to the date for the preparation of the final hearing bundle, the respondent disclosed additional documents to the claimant. Those documents comprised:-

- (i) Handwritten notes by Dawn Westwood of the claimant’s and other candidates’ interviews on 8 June 2022.
- (ii) Handwritten notes by Joanne Irving-Walton of the claimant’s and other candidates’ interviews on 8 June 2022.
- (iii) Respondent’s internal email exchange re ITEPL interviews dated 10, 11 and 20 May 2022.

10. The claimant objected to that late disclosure by letter dated 29 November in the following terms:-

“First, according to the case management order, the deadline has long passed and no further documents can be added at this stage. In two days the witness statements are to be submitted. Second the University of Teesside has already constructed false evidence for this case (as I will show in my statement). I interpret these new documents the university said they have found and are trying to add as a new intention tampering, offering new false evidence for this case. Third the respondent submitted an objection to my request for the hearing to be held by video, arguing that it is not in accord with the case management order. For this reason the respondent’s request of further documents to be added to the bundle should be rejected.”
11. Following a further exchange of correspondence, the Tribunal directed that additional documents should be put into a separate bundle, so that the Employment Tribunal would consider their admissibility at the start of the final hearing. At the same time, in answer to the claimant’s specific request, the Tribunal informed the parties that there would be no audio or video recording taken at the hearing because the Tribunal simply does not have the facilities to do so.
12. By email sent later the same day, the claimant stated as follows:-

“I’m respectfully appealing the decisions that the judge has communicated to both parties in the email of 22 December 2022. The judge of this case has been recused for lack of impartiality. Further the judge is to be recused to the Employment Appeal Tribunal because of lack of impartiality. I appeal the decision of Employment Judge Johnson who was directed that the respondent’s additional documents should be put into a separate bundle and the Employment Tribunal will consider their admissibility at the start of the hearing. I consider this decision to be a trick, which plays once again in favour of the respondent. I appeal the decision of Employment Judge Johnson who has directed that there will be no audio or video recording of the hearing. That decision based on technical reasons (arguing that the Employment Tribunal has no facilities to do so) is inconsistent. There are no difficulties in audio recording the hearing. Today anyone with a mobile phone can do it.”
13. By letter dated 26 December the claimant wrote to the Tribunal and the respondent in the following terms:-

“I have submitted my appeal to the Employment Appeal Tribunal. The decisions taken by the current judge of this case have been appealed and the current judge of this case has been recused for lack of impartiality. For this reason I am hereby requesting the hearing to be postponed.”
14. By letter dated 3 January, the respondent opposed the application to postpone the hearing. By letter dated 4 January the Tribunal wrote to the parties stating that the hearing would proceed as listed, as the Tribunal had received no communication from the Employment Appeal Tribunal.
15. By a further letter dated 4 January the claimant stated,

“I appealed a decision that the current judge of this case has ordered today in immediate response to the respondent and following the orders that the respondent has ordered to the judge of this Tribunal. The judge of this case seems unashamedly submissive to the will of the respondent who is a powerful institution in their state in the UK. I have submitted my appeal to the

Employment Appeal Tribunal as is my right. The decisions taken by the current judge of this case have been appealed and the current judge of this case has been recused for lack of impartiality. Thus its according to law and justice that the judge of this Tribunal should wait for that response.”

16. By letter dated 5 January, solicitors for the respondent informed the claimant and the Tribunal that they had heard nothing from the Employment Appeal Tribunal regarding any appeal and remained in a position to proceed with the hearing on 23 to 25 January.

17. By letter dated 5 January, the claimant states as follows:-

“I am hereby informing this Tribunal that the decision that the judge took on 2 January 2023 of not postponing the hearing following the respondent’s order has been appealed. I am also remembering that the current judge of this case has been recused to the Employment Appeal Tribunal and that the previous decisions that the judge has taken has been appealed to the Employment Appeal Tribunal. The Tribunal in immediate submission to the respondent’s order is ignoring this fact. Therefore this Tribunal incurs perversion of justice. I am also informing this judge that the way the respondent is behaving in this case reminds me of the practices that the mafia uses, including alleged extortion. And as I said before, students and potential students at this university will know, and not only through social media, of the facts of this case and how the seals of malpractices surrounding this case implies the covering of what I believe iis a fraud to the students, to the British society and to the international community.”

18. By a further letter dated 8 January the claimant stated as follows:-

“I am hereby requesting the judge who was managing this case (better say that is helping the respondent, Teesside University to manage this case, as per evidence already submitted to the EAT) to disclose the following information; her relation to Teesside University including the following:

- Has she been a student or affiliated or collaborated with Teesside University or is expecting to do so?*
- Does she have relatives at Teesside University either as students or working or collaborating?*
- Does she have any other connection or relation with Teesside University?*
- Has Teesside University contacted this judge for reasons other than this case?”*

19. In a further letter dated 10 January the claimant stated as follows:-

“The respondent requested an answer to the judge and the judge replied in less than 24 hours. I have requested this information (see email below) to the judge and the judge has not replied. This fact shows the double standard the judge is using in this case which shows once more that she is playing in favour of the respondent.”

That letter was sent due to the Tribunal’s failure to reply to the four questions set out in the above paragraph.

20. By an email dated 12 January, the claimant stated: *“I hereby reject all statements that the respondent has provided in the email they sent today.”*

21. By a letter dated 13 January the Tribunal informed the parties as follows:-
- “Employment Judge Loy has considered your request to postpone the hearing and has refused it. The judge’s reasons for refusing the request are:-*
- The claimant’s further request for a postponement of the final hearing on 23-25 January 2023 is refused. There has been no material change in circumstances since Employment Judge Sweeney’s decision (set out in the Tribunal’s letter of 4 January 2023) refusing the claimant’s initial application for a postponement. The Tribunal has still not received any communication from the Employment Appeal Tribunal. The case remains listed for hearing on 23, 24, 25 January 2023.”*
22. The claimant replied by letter dated 13 January, stating:-
- “This reply from Newcastle Employment Tribunal shows once more that the judges replying to the questions made by the respondent and ignoring my emails. The judge shows once more lack of impartiality, playing systematically in favour of the respondent who is a powerful institution in the region and of the same nationality.”*
23. At no stage has the claimant informed the Tribunal or the respondent that he would not be attending the hearing on 23, 24 and 25 January. When the hearing convened at 10 o’clock on Monday 23 January, the claimant was not present. The claimant failed to attend at any time during the hearing. The Tribunal had time to read the claimant’s witness statement and the three witness statements tendered on behalf of the respondent. By the time that had been done, the claimant had still not appeared and had still not contacted the Tribunal to state that he would not be attending.
24. On Friday 20 January the claimant submitted an email to the Tribunal at 16:30 on the following terms:-
- “The Employment Tribunal – the respondent is copied to this email. Find attached the appeal to the Employment Appeal Tribunal regarding the orders this Tribunal took on 4 and 13 January 2023.”*
- Attached to that message is an email dated 20 January 2023 timed at 10:15am from the Employment Appeal Tribunal in London which states:-
- “This is an automatic response to confirm that your email has been received at the EAT. It has not been read or checked. We will respond in due course.”*
- The Tribunal caused enquiries to be made of the Employment Appeal Tribunal in London and received a reply by email at 11:05 on 23 January in the following terms:-
- “I can confirm that Mr J Penalva has lodged an appeal. We have a backlog from mid-November 2022 and his appeal will be processed in due course.”*
- All this information was imparted to Mr Anderson, counsel for the respondent. Mr Anderson confirmed that the respondent and its witnesses were present and ready to proceed with the hearing. In particular, Mr Anderson informed the Tribunal that he did not wish to make or pursue an application to strike out the claim, but would prefer to have the case heard and dealt with on its merits. The Tribunal agreed to that proposal.
25. The Tribunal heard sworn evidence from Dawn Westwood (who sat on the interview panel), Jo Irving-Walton (who sat on the interview panel) and from Phillip Radcliffe (director of HR) who attempted to deal with the claimant’s complaint about the

conduct of the interview. The Tribunal also read the claimant's statement and examined those documents referred to in the statements of the claimant and the three witnesses for the respondent.

26. In the absence of the claimant, the evidence given by the respondent's witnesses was unchallenged.
27. The first two pages of the claimant's witness statement are effectively an introduction, in which he states that the respondent treated him unfairly because of his philosophical belief, his Spanish nationality and his sex. He describes his philosophical belief as "meritocracy – the notion of a political system in which economic goods and/or political power are vested in individual people based on talent, effort and achievement rather than wealth or social class." In the final two paragraphs of that introduction the claimant states, "I claim that the panel of the interview discriminated against me because of my belief in meritocracy. The panel displayed a clear cut meritocracy phobia towards me. The panel of the interview displayed a clear cut hate towards me because of my belief in meritocracy; they not only treated me differently, unfairly, but also humiliated and harassed me over the course of the interview. Furthermore, this field of knowledge (teacher education) is a female dominated realm with a growing nepotism tendency in the UK context and it happens to be that all members of a panel of the interview were female of UK nationality and I am a male of Spanish nationality. The main piece of evidence from these facts (2 and 3 namely that I received from the respondent less favourable treatment than other candidates because of my philosophical belief, my Spanish nationality and sex is the video recording of the interview. This piece of evidence should be watched in full in the hearing because not only the verbal expressions are relevant but also the non-verbal form of communication, particularly the expression of some faces."
28. The next 14 pages of the claimant's statement contain no reference whatsoever to any acts of alleged discrimination on the grounds of his sex and nationality. Every allegation contained in the main body of the statement referred to discrimination on the grounds of the claimant's philosophical belief in meritocracy.
29. Nowhere in his statement does the claimant provide, or purport to provide, any kind of evidence whatsoever relating to how "meritocracy" is capable of being a genuine philosophical belief. There is no evidence to show whether the claimant's belief is more than simply an opinion or view point based on the present state of information available to him, or whether it concerns a weighty and substantial aspect of human life and behaviour. There is no evidence as to whether meritocracy has attained a certain level of cogency, seriousness, cohesion and importance. There is no evidence as to whether "meritocracy" 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.
30. The claimant's version of the manner in which the interview was conducted is directly contradicted by the evidence of Ms Westwood and Ms Irving-Walton. 5 candidates (including the claimant) were originally shortlisted for interview, from 14 original applicants. One of those 5 withdrew, leaving 4 (including the claimant) to be interviewed. Interviews were conducted on 8 June 2022. Each candidate was given one hour, during which they were to conduct a 10 minute presentation on "Provide an overview of your conception of curriculum within the context of ITT/ITE. Explore how this will shape our courses and how you will lead and manage the team to develop this area."

31. Ms Westwood's evidence was that when he was asked to start his presentation, the claimant asked the panel if they had read his previously published work (which they had not) and then he began a dialogue around his ideology of education and made adverse comments about the subjectivity of the recruitment process. Ms Westwood stated that the claimant's presentation did not seem to relate to the assigned topic and only gave a fairly rambling outline of initial teacher training, which was not accurate. Ms Westwood stated that the claimant did not give good responses to the questions asked of him and he failed to address relevant matters in his responses. Ms Westwood concluded that, "it became apparent as the interview went on from Mr Penalva's responses, that he was not meeting the requirements of the role." Ms Westwood went on to state, "Mr Penalva's interview was like no interview I have experienced before. It was difficult to manage and he appeared to have a deliberately argumentative approach. Despite Mr Penalva's approach I feel the panel remained courteous to him throughout. I believe we gave him ample opportunity to show his knowledge/experience and best qualities and actively wanted to hear the best of him. We tried to expand on questions to allow him time to consider his responses. However, he did not demonstrate to the panel the knowledge that he appeared to have in the research described in his application. His answers lacked any substance and it was clear he did not have some of the key experiences such as leading and managing a team through an inspection process. After Mr Penalva's poor interview he was discounted from the process. The panel agreed there was one stand out person/candidate, who gave an excellent presentation on the assigned topic and demonstrated relevant knowledge and experience in her responses to the question."
32. Jo Irving-Walton was the chair of the interview panel. Her evidence to the Tribunal about the claimant's performance in the interview includes the following:-

"I recall that Mr Penalva launched into a description around the interview process being unfair and implied corruption and that he did not believe in the interview process. He suggested the interview was flawed and suggested it was not based on merit and was subjective. I believe we listened to what Mr Penalva said, but then tried to move on to the presentation. I recall Mr Penalva ask the panel if we had read his research. I or one of the panel members that we had not read his research, but we had read the information in his application which had been the basis for him being shortlisted for interview. Around this point, Mr Penalva again made comments about the selection process not being based on merit. We then started asking questions. I do not recall Mr Penalva addressing the questions asked in his responses, he seemed to refuse to properly answer and reverted back to his arguments about the education system and his opinion that the recruitment process was flawed. After the first four or so questions, it was apparent that the interview was going nowhere. Mr Penalva was not addressing questions fully and seemed quite abrasive to the questions. The panel therefore moved on to one of the final questions about handling difficult people. Mr Penalva seemed to suggest that there were not difficult people just difficult workplaces and did not outline clearly how he would manage those situations. At this point the panel confirmed that this was the last question and asked Mr Penalva if he had any questions. He then ended the interviewing by thanking the panel stating that he knew he did not have the job and that the decision was not based on merit. Mr Penalva had not performed well in his interview at all. His presentation was poor and not on the assigned topic and his responses to the questions were inadequate and not of a standard for him to be considered for the role."

The law

4 The protected characteristics

The following characteristics are protected characteristics—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *pregnancy and maternity;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

10 Religion or belief

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

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

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland.

33. Section 136 imposes upon the claimant the burden of establishing facts from which the Employment Tribunal could (in the absence of an explanation from the respondent) infer that there may have been a discriminatory reason for any treatment administered to the claimant. The Tribunal find that the claimant had

failed to discharge that burden, in that he had failed to establish any facts from which the Tribunal could make the appropriate inference. There is no evidence whatsoever to support the claims that the claimant was treated less favourably because of his sex or race. The claimant's position is simply that the interview panel comprised four females whilst he was a male candidate and that therefore because he was not selected that amounts to less favourable treatment because of his sex. A difference in sex and a difference in treatment is insufficient to discharge the burden of proof. (**Madarassy v Nomura International Plc** [2007] EWCA Civ 33). If there is no explanation from the respondent employer for any alleged unreasonable treatment, the absence of such explanation may find an inference or discriminatory conduct. In the present case, the respondent provided more than adequate explanation for its refusal to appoint the claimant. That reason was his wholly inadequate performance at the interview. The claimant did not include in his witness statement any evidence whatsoever as to why the failure to select him was because of his male sex or Spanish nationality. Accordingly, the complaints of unlawful direct discrimination on the grounds of sex and race, contrary to section 13 of the Equality Act 2010 are not well-founded and are dismissed.

34. The main thrust of the claimant's claim was that he was treated less favourably because of his philosophical belief in meritocracy.
35. In **Granger Plc and Others v Nicholson** [2010] ICR 360 (the Employment Appeal Tribunal provided important guidance of general application on the meaning and ambit of "philosophical belief". In the course of its Judgment, the Employment Appeal Tribunal drew heavily on caselaw decided under Article 9 ECHR and distilled from that some basic criteria that must be met in order for a belief to be protected under section 10 of the Equality Act 2010.
36. The present state of the law is that a belief can only qualify for a protection if it:-
 - Is genuinely held.
 - Is not simply an opinion or viewpoint based on the present state of information available.
 - Concerns a weighty and substantial aspect of human life and behaviour.
 - Attains a certain level of cogency, seriousness, cohesion and importance.
 - 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.
37. In his submissions to the Tribunal, Mr Anderson argued that there is nothing in any of the claimant's evidence to discharge the burden imposed upon him by the decision of the Employment Appeal Tribunal in **Grainger**. The claimant's position appears that he is firmly of the opinion that "meritocracy is the notion of a political system in which economic goods and/or political power are vested in individual people based on talent, effort and achievement, rather than wealth or social class." The Tribunal accepted Mr Anderson's submission in this regard. The Tribunal found that the claimant's belief in meritocracy does not satisfy the **Grainger** test of establishing a philosophical belief satisfies the definition 10 of the Equality Act 2010.
38. Furthermore, the claimant has not proved any facts from which the Tribunal could infer that the claimant was treated less favourably because of that belief. The reason why he was unsuccessful at the interview was because of his poor performance during that interview and had nothing to do with his philosophical belief.

The claimant's complaint of unlawful direct discrimination on the grounds of philosophical belief, contrary to section 13 of the Equality Act 2010, is not well-founded and is dismissed.

Employment Judge Johnson

Date: 2 February 2023

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