



Neutral Citation Number: [2019] EWCA Civ 1720

Case No: A2/2018/2312/EATRF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**THE HON MR JUSTICE CHOUDHURY**  
**UKEAT/0040/17**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/10/2019

**Before :**

**LORD JUSTICE BEAN**  
**LADY JUSTICE SIMLER**  
and  
**LORD JUSTICE ARNOLD**

**Between :**

**ANNA GRAY**  
**- and -**  
**MULBERRY COMPANY (DESIGN) LTD**

**Appellant**

**Respondent**

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**Christopher Milsom and Rachel Barrett** (instructed by **Bindmans LLP**) for the **Appellant**  
**Tariq Sadiq** (instructed by **Croner Group Limited**) for the **Respondent**

Hearing dates : 8 & 9 October 2019  
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**Approved Judgment**

**Lord Justice Bean :**

This is the judgment of the court to which we have all contributed.

*Factual background*

1. The Respondent is a well-known design company which produces luxury leather handbags and other fashion items. The Claimant is a writer and film-maker. She commenced employment with the Respondent as a Market Support Assistant on 28 January 2015. She was part of a team which had access to some of the Respondent's designs ahead of their launch to market.
2. The Respondent seeks to protect its intellectual property rights by requiring all its employees (who number approximately 1500) to sign a contract of employment and a Confidentiality and Copyright Form, to which we shall refer as "the Copyright Agreement".
3. The contract of employment contained a confidentiality clause and (at clause 13) a clause relating to "Inventions, Improvements and Patents" in the following terms:

"You shall disclose to the Company any discovery or invention or improvement to an existing invention, design or process. improvements, designs or inventions, whether capable of registration or not, made by you during the course of your employment with the Company, shall be the property of the Company and you will sign all documents and do all necessary acts required to transfer title in such improvements or inventions to the Company without any additional compensation or payment, save for any expenses or disbursements incurred for the purposes of transferring title to the Company. Nothing in this clause shall affect any rights conferred by the Patents Act 1977, the Copyright, Designs and Patents Act 1988 or any statutory modification or re-enactment thereof."

4. The Copyright Agreement provided as follows:

"2.1. You undertake that you shall promptly disclose to Mulberry Company all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Company and shall hold them in trust for Mulberry Company until such rights shall be fully and absolutely vested in Mulberry Company.

2.2. You hereby assign to Mulberry Company by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world in respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Company.

2.3. You hereby unconditionally and irrevocably waive in favour of Mulberry Company and all moral rights conferred on you by Chapter IV of Part 1 of the Copyright Designs and Patent Act 1988 for any work in which copyright or designs is vested in Mulberry Company whether by operation of this clause or otherwise.

2.4. You agree and undertake that you will execute such deeds or documents and do all such things and acts as may be necessary or desirable to substantiate the rights of Mulberry Company in respect of the matters referred to in this clause. Each of the above terms is independent and separable from the remaining terms and enforceable accordingly. If any term shall be unenforceable for any reason but would be enforceable if part of the wording thereof were deleted, it shall apply with such deletions as may be necessary to make it enforceable.

5. The Claimant signed the contract of employment on 30 January 2015. However, she refused to sign the Copyright Agreement. She told the Respondent's HR department that she had difficulty signing it because it interfered with her own work as a writer and film-maker. She said that she had read the clause very carefully because "it is extremely important to me to own all rights, including copyright, to my own writing, film making and all creative output". She believed that the Copyright Agreement could extend to her artistic activities away from work.
6. The Respondent made it clear that it had no interest in obtaining the copyright to any of the Claimant's personal work; its interest only extending to that which related to its business. The Respondent responded to the Claimant's concerns by amending the standard Copyright Agreement to narrow it so that only work which related to the Respondent's business would be covered. Clauses 2.1 and 2.2 were amended as follows (amendments are shown in italics):

"2.1. You undertake that you shall promptly disclose to Mulberry Company all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Company *which relate to any business of Mulberry Company or any matter arising from your employment with Mulberry* and shall hold them in trust for Mulberry Company until such rights shall be fully and absolutely vested in Mulberry Company.

2.2. You hereby assign to Mulberry Company by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Company *which relate to any business of Mulberry Company or any matter arising from your employment with Mulberry.*"

7. These proposed amendments did not satisfy the Claimant. She considered that the additional words were “general and open to interpretation”. On 30 April 2015 she proposed instead an agreement in the following terms:

“The Employee (Anna Gray) holds an administrative role and has no contact with or part in the creation of copyrighted works for Mulberry Company.

The Employee holds all copyright and other propriety rights, to her own existing and future works in any form, media or technology now known or hereafter developed for the full term thereof throughout the universe.

The Employee hereby assigns to Mulberry Company by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world, in respect of any future copyright works and designs, originated, conceived, written or made by the Employee at the behest of Mulberry Company and during the Employee’s contracted working hours at Mulberry Company and for the furtherance of the business of Mulberry Company.”

8. The discussions about the Copyright Agreement continued over subsequent months but no resolution was reached. Matters came to a head on 16 September 2015 when a series of meetings took place between HR and the Claimant. As the Claimant had refused to sign the amended version of the Copyright Agreement, the amendment was withdrawn and the Claimant was asked again to sign the original version. She made it clear that she would not sign. After some consideration, the Claimant was dismissed with notice.
9. The Claimant’s dismissal was confirmed in writing on 22 September 2015. That letter, so far as relevant, stated that:

“Following our discussions, I have decided to dismiss you with effect from 16th September 2015. The reason for your dismissal is refusing to comply with conditions of your employment with Mulberry through your refusal to sign the Copyright Agreement and that we believe that by refusing to sign it you intend to copy Mulberry products which puts the Company at risk.”

10. On 1 February 2016 the Claimant lodged proceedings for unfair dismissal on the grounds of asserting a statutory right, namely the right to own her own copyright and intellectual property. That statutory right falls outside the scope of s 104 of the Employment Rights Act 1996; and the Claimant did not have sufficient length of service to claim “ordinary” unfair dismissal. At a hearing before the Regional Employment Judge on 3 June 2016 she was given permission to amend her claim to one of discrimination (direct and indirect) on the grounds of belief.

11. Section 4 of the 2010 Act provides that religion or belief is a protected characteristic for the purposes of that Act. Section 10, so far as relevant, provides:

“(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.”

12. Section 19(1)-(2), headed “indirect discrimination”, provides:-

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.”

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

13. The 2010 Act does not define “philosophical belief” but guidance is provided by paragraphs 2.52 and 2.57-59 inclusive of the Code of Practice on Employment 2011:-

“2.52. The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion). ... Meaning of belief ...

2.57. A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.

2.58. A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

2.59. For a philosophical belief to be protected under the Act:

- it must be genuinely held;
- it must be belief not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.”

14. The five bullet points set out at paragraph 2.59 of the Code of Practice are derived from the judgment of Burton J in the EAT in *Grainger plc v Nicholson* [2010] ICR 360 and are known to employment lawyers as “the *Grainger* criteria”. Only the fourth is in issue on this appeal.

*The Claimant’s belief*

15. That amended claim was heard at Bristol by a three-member employment tribunal (“ET”), Employment Judge Livesey presiding, on 17-18 October 2016. A precise description of the belief relied on was drawn up at the outset of the hearing, with the agreement of the Claimant, who at that stage was acting in person. The belief was stated to be in “the statutory human or moral right to own the copyright and moral rights of her own creative works and output.”

16. However, as the ET later put it at paragraph 5.5 of their judgment:-

“The first thing to say about the Claimant’s belief, as defined and recorded at the start of the hearing, was that the evidence demonstrated that it ought to have been read with an exception...

... ‘except when that creative work or output is produced on behalf of an employer’.

That was what the Claimant had accepted as the correct position within paragraph 10 of her [witness] statement.”

17. Before us Mr Milsom accepted that the belief on which his client relied was properly stated with this amendment (or, as he preferred to say, clarification). The amendment corresponds closely to copyright law as laid down in statute. Section 11(1)-(2) of the Copyright, Designs and Patents Act 1988 provides:-

“(1) The author of a work is the first owner of any copyright in it, subject to the following provisions.

(2) Where a literary, dramatic, musical or artistic work or a film, is made by an employee in the course of his employment,

is employer is the first owner of any copyright in the work subject to any agreement to the contrary.”

Section 215 of the 1988 Act makes very similar provision relating to design rights.

18. The Claimant gave evidence about her belief. The ET referred to this as follows:

“Claimant’s stated philosophical beliefs

4.8. The Claimant had undertaken a Masters degree at UCLA in America which had included some teaching on certain aspects of the legal [principles] associated with film making and intellectual property law. Paragraph 22 of her statement said this:-

“I became passionate about my belief in the right of an individual, not only to own, but to profit from and receive credit for their own work if they wished. In order to explore these ideas further, I wrote a feature film screen play in 2010 which explored issues of ownership of intellectual property.”

4.9. In a document that she produced to the Tribunal within her supplementary bundle ..., she further provided the following information in relation to her beliefs ...:-

“I hope that the court will see that there is in this case an issue of deeply held belief, of spiritual practice, of identity, of human rights, and of the attempted colonisation of those private areas of person’s life and mind by a commercial enterprise with no actual interest in that individual’s work, or devotions, or poems or hymns or life.”

4.10 . Whilst the Claimant may have held those views privately, there was nothing in what she did or said to the Respondent which made them aware that she held them. The Claimant asserted that her actions, by not signing the Copyright Agreement, would have given that indication. We did not accept that that was necessarily so and the Respondent’s witnesses had certainly not gleaned that she had possessed such beliefs as a result of her refusal to sign the Agreement.

4.11. The Claimant failed to mention, discuss or elucidate her beliefs to the Respondent, either generally during her time working for Mulberry or, for example, during the private and candid conversations that she had with Ms Pitcher [the Claimant’s line manager] whilst commuting. Further, she did not refer to them specifically during her discussions and negotiations over signing of the Copyright Agreement.”

*The decision of the ET*

19. The ET approached the issue of belief by reference to the *Grainger* criteria. Its conclusions are set out at paragraph 5.7 of the judgment:

“5.7.1. Was the belief genuinely held? We accepted that the belief was genuinely held in the sense that the Claimant honestly believed it. The Respondent had attempted to challenge her veracity in that respect, but we broadly accepted her evidence on that issue;

5.7.2. Was it a belief, as discussed in the case of *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, or an opinion or viewpoint based on the present state of information available? As in *Grainger*, particularly paragraph 16 of the judgment, the Claimant’s opinion was a viewpoint held by her as a belief. It was not just an opinion based upon logic which, if the foundations changed, was capable of causing her to have altered her view;

5.7.3. Did the belief concern a weighty and substantial aspect of human life and behaviour? That issue was not disputed by the Respondent. The fact that copyright law existed to reflect the Claimant’s belief perhaps indicated that it was sufficiently weighty and serious to warrant protection at law;

5.7.4. Had the belief attained a certain level of cogency, seriousness, cohesion and importance? There was, in our view, a considerable range of levels of cogency and seriousness in which these beliefs might have been held. At one end, they might been [sic] an individual who gave up her time and resources to lobby and campaign for a heightened awareness of copyright theft and an increase to the legal protection against it.

At the other, there might have been somebody who was simply asked if they agreed with the notion that copyright theft was a bad thing. It was our view that, whilst the first type of person could well have been said to have held a belief which had a sufficient level of cogency and seriousness to qualify under the Act, we did not consider that the second type of person necessarily qualified.

We did not seek to deny or decry the philosophical theories that underpinned such a belief, as perhaps reflected in the quotations listed within the legal text books as part of the Claimant’s submissions to the Tribunal, but we did not accept that a person who simply agreed with the notion that copyright theft was a bad thing, would necessarily hold a belief which carried a sufficient level of cogency and cohesion to qualify under the Act. It could have been said that Ms Wilkinson [the Respondent’s Head of Group Legal Services] herself held such



a view, but we considered it unlikely that she would have professed to having held a philosophical belief which qualified for protection under the Act. Such a person would not hold the type of cohesive belief pattern discussed in paragraph 26 of the judgment in *Grainger*.

Accordingly, whilst we accepted that the Claimant strongly believed in the right of ownership to her own creative output, we did not accept that she held that belief as any sort of philosophical touchstone to her life. This was, as Mr Chaudhuri [for the Respondent] put it in closing submissions, a belief or theory that the Agreement would have threatened the Claimant's ownership to her novel and/or her screenplay. That belief, even when set against the background belief that copyright law properly protected the fruits of an individual's artistic endeavours, was not sufficiently cohesive to form any cogent philosophical belief system. The Claimant's own expression of her belief, as set out in pages 14 and 15 of C1, concentrated upon an individual's right to create, produce and write and the benefit that she had from those activities which was something entirely different;

5.7.5. Whether the belief was worthy of respect in a democratic society? The Respondent accepted that that element of the test was met.”

20. Although the ET found that the Claimant did not hold a philosophical belief that was capable of protection under the 2010 Act, it nevertheless went on to consider how her complaints would have been determined if they had been wrong in reaching that conclusion. The ET rejected the direct discrimination claim, holding that her dismissal was due to her failure to sign the Copyright Agreement and not because of her philosophical beliefs, of which the Respondent had no understanding or knowledge. They found that anyone refusing to sign the Copyright Agreement would have been treated in the same way.
21. As to the claim of indirect discrimination, the tribunal found that the provision, criterion or practice (“PCP”) in question, namely the requirement to sign the Copyright Agreement or be dismissed, was not shown to have put other persons sharing her belief at a particular disadvantage. They held that in any event the defence of justification under s 19(2)(d) of the 2010 Act applied, in that the requirement to sign the Copyright Agreement (particularly in its amended form) was a proportionate means of achieving the legitimate aim of protecting the Respondent's intellectual property.
22. The Claimant gave notice of appeal to the Employment Appeal Tribunal (EAT) on a number of grounds. Three were permitted to proceed to a full hearing. These were as follows:
  - a) Ground 1: The ET erred in concluding that the Claimant's belief was not a philosophical belief within the meaning of section 10 of the 2010 Act;

- b) Ground 2: The ET erred in its assessment of the particular disadvantage aspect of the test for indirect discrimination;
  - c) Ground 3: Having failed to accept the importance of the Claimant's belief to her life and to identify correctly the disadvantage to which she was subject, the ET's conclusions on justification could not stand.
23. The ET's dismissal of the direct discrimination claim was not the subject of the full appeal to the EAT, nor (consequently) of the appeal to this court.
24. The appeal to the EAT was heard before the President, Choudhury J, sitting alone. By a reserved judgment handed down on 18 July 2018 and reported at [2019] ICR 175 he dismissed the appeal. Since it is primarily the reasoning of the ET which is under scrutiny on an appeal to this court, it is sufficient for present purposes to repeat the headnote in the Industrial Cases Reports which clearly summarises the most important elements of the President's careful and learned judgment:

“(1) that to qualify as a philosophical belief under section 10(2) of the Equality Act 2010 a belief had to attain the same threshold level of cogency, seriousness, cohesion and importance as a religious belief; that the proper approach to whether the required threshold level had been attained was to ensure that the bar was not set too high, since it was not for the court to judge the validity of such beliefs; that, similarly, in focusing on the manifestation of a philosophical belief, the same threshold requirements applied and whether or not doing, or not doing, a particular act, amounted to a direct expression of the belief concerned, and was intimately linked to it, was a question to be determined on the facts of each case; and that, although the claimant's refusal to sign the agreement might have been dictated by her stated belief, she had not made that known to the company and, accordingly, the tribunal was right to conclude that that belief was not sufficiently cohesive to form any cogent philosophical belief so as to achieve protection under the Act.

(2) that since, on a claim of indirect discrimination under section 19 of the Equality Act 2010, a claimant had to prove evidence of group disadvantage, the sole adherent of a philosophical belief could not rely on that belief in a claim of indirect discrimination; that, therefore, having regard to the employment tribunal's finding that the provision, criterion or practice applied by the company in requiring employees to sign the agreement had not been shown to have caused any group disadvantage, the claim of indirect discrimination failed; and

(3) that, in any event, requiring the claimant to sign the agreement or be dismissed was a proportionate means of achieving the legitimate aim of protecting the company's intellectual property and, accordingly, its defence of justification under section 19(2)(d) would have succeeded”

25. Choudhury J gave permission to appeal to this court on all three grounds.

*Ground 1: the Claimant's belief*

26. Precision in pleading is not equally important in every case heard by employment tribunals, but in our view it is essential, before considering whether a belief amounts to a “philosophical belief” protected under ss 4 and 10(2) of the 2010 Act, to define exactly what the belief is. In this case, as already noted the belief relied on is “the statutory human or moral right to own the copyright and moral rights of her own creative works and output, except when that creative work or output is produced on behalf of an employer”.
27. On this issue, the ET’s reasoning, as set out at paragraph 5.7.4 of their judgment is not entirely easy to follow: in particular the reference to an individual who gave up her time and resources to lobby and campaign for “a heightened awareness of copyright theft and an increase to the legal protection against it” contrasted with someone “simply asked if they agreed with the notion that copyright theft was a bad thing”. The discussion of copyright theft might perhaps have been more appropriate if the Claimant had been asserting a belief that she should own the rights in her own creative output irrespective of whether that creative output was produced on behalf of an employer.
28. Nevertheless, the ET’s reference to copyright theft is only a preliminary to the more important passage in the final subparagraph of 5.7.4. This included the following findings:-
- (i) The ET accepted that the Claimant strongly believed in the right of ownership to her own creative output, but did not accept that she held that belief as “any sort of philosophical touchstone to her life”;
  - (ii) The tribunal found that the Claimant also had “a belief or theory that the Copyright Agreement would have threatened her ownership to her novel and/or screenplay”; but held that such a belief, “even when set against the background belief that copyright law properly protected the fruits of an individual’s artistic endeavours, was not sufficiently cohesive to form any cogent philosophical belief system”.
29. We take a slightly different route from the ET and EAT, although it leads to the same conclusion. If the belief relied on is confined, as Mr Milsom accepts it should be, to the view set out at paragraph 26 above, then whether or not it amounts to a philosophical belief within the terms of s 10 is irrelevant, because it did not put the Claimant at a disadvantage. There was no causal link between that belief and either the Claimant’s refusal to sign the Copyright Agreement (original or amended) or the Respondent’s decision to dismiss her. As the ET found, what led to her refusal to sign and thus to her dismissal was her concern or theory that the wording of the relevant clause, in either version, leaned too far in the direction of the employer or failed sufficiently to protect her own interest. We agree with the ET that this debate or dispute about the wording or interpretation of an agreement could not be a philosophical belief within the meaning of s 10. The appeal must therefore fail however the claim is put.

30. It is unnecessary in these circumstances for us to consider whether Choudhury J was right to require the focus to be on manifestation when determining whether there is a protected belief by reference to the *Grainger* criteria. Our judgment is not to be taken as endorsing this approach.

*Ground 2: the group disadvantage issue*

31. This is not a case about a sole adherent of a belief. The Claimant's views about the importance of an author's copyright, as set out in paragraph 26 above, are no doubt held by many people, including many of the 1500 employees of the Respondent, though not necessarily with the same strength of feeling as hers. The issue under s 19(2)(b) of the 2010 Act in this case is rather whether the employer's PCP (in this case the requirement to sign the Copyright Agreement as a condition of employment) put, or would put, others who shared her belief at a particular disadvantage when compared with people who did not share it. As to this, the ET said at paragraph 5.14:-

"5.14. The next question was whether the PCP put those with whom the Claimant shared her protected characteristic at a particular disadvantage. That issue required us to consider whether other holders of the claimed philosophical belief would also have suffered the same disadvantage; would they have refused to sign the Agreement and been dismissed? That question could not safely have been answered in the Claimant's favour since there was no evidence that the clause would have been reprehensible to *all* of those who shared the Claimant's belief. Other people may not have viewed the restrictions imposed by the Agreement in the same way that she had. The clause was not obviously unreasonable nor did it obviously go beyond what was reasonably necessary to protect the Respondent's legitimate interests." [emphasis added]

32. Mr Milsom submitted that the ET erred in asking itself whether *all* persons sharing the Claimant's belief would have been disadvantaged by the PCP. It was rightly accepted before the EAT and before us that not all such individuals need to be shown to have suffered disadvantage. But we agree with Choudhury J that it is clear from a fair reading of paragraph 5.14 of the ET judgment as a whole, that the tribunal did have in mind the correct test, which is whether *others* sharing the belief - not necessarily all others, but some others - were put at a disadvantage.
33. Mr Milsom fairly conceded that there was no evidence that anyone else among the Respondent's 1500 employees had actually suffered disadvantage by reason of sharing the Claimant's belief. Nevertheless, he submitted before us, as he did in the EAT, that in the context of religious or philosophical belief there is no room for the requirement that there be group disadvantage.
34. His submission was concisely summarised by Choudhury J at paragraph 52 of his judgment:-
- "A belief may well be held by only one person in which case it would not be possible to adduce evidence of others sharing that belief; but to hold that that person did not for that reason satisfy

the requirements of section 19(2)(b) of the **2010 Act** would be contrary to Article 9 which does not require there to be any group disadvantage.”

35. Mr Milsom referred to the approach of the Court of Appeal in *Mba v Merton LBC* [2014] 1 WLR 1501: whereas the protection of freedom of religion conferred by article 9 does not require a claimant to establish any group disadvantage (the question being whether the interference with that individual right by the employer is proportionate given the legitimate aims of the employer), it is not possible to read down the concept of indirect discrimination in s 19 of the 2010 Act, to ignore the need to establish ‘group disadvantage’. Instead the concept of justification can be read compatibly with article 9 where that provision is engaged.
36. Mr Milsom submits that this conclusion in relation to the different requirements of s 19(2)(b) and article 9, triggers an interpretative obligation pursuant to ss 3 and 6 of the Human Rights Act 1998, so that s 19(2)(b) should be construed consistently with Community law obligations and/or Convention rights to achieve conformity “so far as possible”. He contends that this can be achieved by two alternative avenues. First, he submits that it is sufficient for a claimant to show hypothetical disadvantage, treating the concept of particular disadvantage as not requiring any particular level or threshold of disadvantage but covering any disadvantage flowing from an act that has a “sufficiently close and direct nexus” with the underlying belief (see *Eweida v UK* [2013] IRLR 231, ECtHR). Secondly, he relies on obligations contained in Articles 52 and 53 of the Charter of Fundamental Rights of the EU which apply where a Member State is implementing EU law. The Equality Act is an implementation of EU law (see *Benkharbouche v Embassy of the Republic of Sudan and others* [2017] 3 WLR 957, CA). Accordingly, he submits, in so far as s 19 of the 2010 Act cannot be read so as to obviate the requirement for group disadvantage, Articles 52 and 53 of the Charter require it to be disapplied. In either event he contends that the ET erred in concluding that the Claimant had not made out the requisite disadvantage: she had shown a clear and direct nexus between her belief and her refusal to sign the agreement and he relies on the EAT’s tacit recognition of the possibility that her refusal to sign was “motivated by the belief”.
37. First and fundamentally, as already indicated, we do not accept Mr Milsom’s characterisation of this case as a ‘minority belief’ or ‘sole adherent’ case. Far from it. As defined by the Claimant herself and adopted by the ET (see paragraphs 3.2 and 5.5 of the ET Judgment), her belief was that a creative person should own the copyright in her own creative works and output subject to the ‘course of employment’ exception. Such a belief is entirely consistent with the Copyright, Designs and Patents Act 1988 and is a belief that we infer accordingly is widely held. The problem for the Claimant, as the ET found, was that there was no evidence that any of the 1500 members of the respondent’s workforce who may have shared her belief, would have had the same difficulty (in other words, suffered the same disadvantage) as her in relation to the Copyright Agreement: as the ET put it, others may not have viewed the restrictions imposed by the Copyright Agreement in the same way as she did.
38. We agree. In reality the issue the Claimant had was as to the wording of a particular clause in the Copyright Agreement. The dispute was as to how narrowly or broadly the copyright assignment should be defined, a question on which equal and opposite views about the reasonableness or legitimacy of the clause could be held. The

Claimant's crisis of conscience (in Mr Milsom's phrase) about signing and/or refusal to sign was not the result of her belief, as defined, but the result of her wish to achieve greater protection for her own creative works. Nor for these reasons is this a case in which the PCP was intrinsically liable to disadvantage a group with her shared protected characteristic.

39. The Claimant's case failed on that basis and we can detect no error of law whatever in the ET's approach.
40. In these circumstances, it is unnecessary to address in detail the arguments advanced by Mr Milsom by reference to the Charter. However, since they were developed in argument we deal with them shortly and in summary terms.
41. We consider, in agreement with Elias LJ at paragraph 35 of *Mba*, that although article 9 does not require a claimant to establish any group disadvantage, it is simply not possible to ignore (by reading it down) the threshold requirement of group disadvantage in the concept of indirect discrimination in s 19(2)(b) of the 2010 Act.
42. Both as a matter of domestic law and under Article 2(b) of Council Directive 2000/78/EC (equal treatment in employment and occupation) and the case law of the CJEU (see for example *CHEZ Razpredelenie Bulgaria AD v Komisia Za Zashtita ot Diskriminatsia* Case C-83/14 [2015] IRLR 746), the concept of indirect discrimination has consistently been formulated and treated as arising where an apparently neutral PCP "works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it" (see *CHEZ* Judgment at [101] and the similar approach of Baroness Hale DPSC in *Essop v Home Office (UK Border Agency)* [2017] ICR 640 at [27]); or, to put it another way, the question is whether the apparently neutral PCP puts one group at a comparative disadvantage to the other. Unsurprisingly in the circumstances, it is not suggested that there is any incompatibility between domestic law and the Directive.
43. Like Sedley LJ in *Eweida v British Airways plc* [2010] ICR 890 CA, we endorse the statement of Elias J, as he then was, in the EAT in that case (at [24]) that:

"... in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group."
44. However, as the court held in *Mba*, there is no reason why the concept of justification should not be read compatibly with article 9 where that provision is in play. In that context, it does not matter whether a claimant is disadvantaged along with others or not and it does not weaken her case with respect to justification that her beliefs are not more widely shared.
45. Moreover, we do not accept Mr Milsom's incompatibility arguments in the present context. We accept that there may be cases where it is sufficient for a claimant to show hypothetical 'group disadvantage' because the impact of a PCP on the holder of a particular religious or other belief is so obvious that, in effect, judicial notice can be

taken of it (as was the case, for example, in *Pendleton v Derbyshire County Council* [2016] IRLR 580).

46. Nonetheless, in every case the disadvantage must result from action on the part of a claimant that is intimately linked to the religion or belief; or to put it another way, on the facts of the case there must be a sufficiently close and direct nexus between the action of the claimant (here, a crisis of conscience about signing and or a refusal to sign) and the underlying belief, that results in shared disadvantage to her and other holders of her belief: see *Eweida v UK* at [82].
47. On the facts of this case, where the Claimant's manifestation of her belief is so individual that she is the only person in a group holding the same belief who is put at a disadvantage, she does not in our judgment satisfy the test required by article 9 that the manifestation of her belief (here, her refusal to sign the Copyright Agreement) has a sufficiently close and direct nexus with the underlying belief itself. That being the case she cannot bring herself within the protection of article 9.

### *Ground 3: justification*

48. The decision of an ET as to whether a PCP is a proportionate means of achieving a legitimate aim rarely gives rise to a successful appeal. The legitimacy of the Respondent's aim in protecting its intellectual property has not been in dispute. In granting permission to appeal to this court on ground 3 Choudhury J wrote that "this ground lacks merit on its own, but if either of the other grounds were to succeed, then the decision on justification may warrant reconsideration".
49. Mr Milsom reminded us that when the Claimant indicated that even the amended Copyright Agreement was one she could not sign, the Respondent withdrew the offer of the amended version and required her to sign the original version; it was thus her refusal to sign the *original* version which was the ground for her dismissal. Since the amended version was more favourable to the Claimant than the original, he argued, this showed that it was unnecessary and therefore disproportionate for the employer to have insisted on the more stringent original version.
50. This argument is ingenious but singularly unattractive. The ET found, as they were plainly entitled to do, that the provisions of the Copyright Agreement (in its original form) were reasonable, and that the Respondent's PCP of requiring all employees to sign it was a proportionate means of achieving the admittedly legitimate aim of protecting its intellectual property. The fact that the employers tried in vain to accommodate the Claimant's concerns by offering her a specially amended version cannot detract from the correctness of the ET's finding.

### *Conclusion*

51. The Claimant would have had to succeed on all three grounds of appeal in order to overturn the decision of the ET, affirmed by Choudhury J, that her claim should fail. For the reasons we have set out, she has not succeeded on any of them. The appeal is accordingly dismissed.