Appeal No. UKEATPA/0521/20/DA & UKEAT/PA/0522/20/DA

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 November 2020

**Before**

**HONOURABLE MR JUSTICE GRIFFITHS**

**(SITTING ALONE)**

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SEVI OMOOBA — APPELLANT

(1) MICHAEL GARRETT ASSOCIATES LTD (T/A GLOBAL ARTISTS)
(2) LEICESTER THEATRE TRUST LTD — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

**RULE 3(10) APPLICATION- APPELLANT ONLY**

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# APPEARANCES

For the Appellant: Mr Pavel Stroilov (lay representative)

**Mr Justice Griffiths :**

1. This is my decision following a rule 3(10) hearing in respect of two proposed appeals by the Claimant, both appeals having failed to pass the paper sift under rule 3(7). At the conclusion of the argument, there was no time left for me to deliver an *ex tempore* judgment.

2. The question under rule 3(10) of the EAT Rules is whether any further action should be taken on either or both of the proposed appeals, which depends on whether, contrary to the view of the sift judge, either or both of them discloses reasonable grounds for bringing the appeals.

3. The argument on behalf of the Claimant/Appellant has been presented to me by Mr Pavel Stroilov, a lay representative who has studied the law. The Respondents have had representatives in attendance to observe and take notes, but not to make submissions orally over and above their written submissions in the papers.

**Background**

4. The Claimant is an actress. The First Respondent was her agent. The Second Respondent engaged the Claimant to play the role of Celie in a joint production (at the Curve Theatre, Leicester and the Birmingham Hippodrome) of a play based on Alice Walker's novel *The Color Purple*. The engagement was from 28 May to 20 July 2019 and the cast was publicly announced in March. The First Respondent was an employment services provider pursuant to section 55 of the Equality Act 2019 and the Second Respondent was the Claimant's employer. The Second Respondent terminated her employment on 21 March 2019. The First Respondent terminated its agency contract with the Claimant on 24 March 2019.

5. These events followed a Tweet on 15 March 2019 by another actor which publicised a Facebook post by the Claimant some years before, in which she said:

> "Some Christians have completely misconceived the issue of Homosexuality, they have begun to twist the word of God. It is clearly evident in 1 Corinthians 6.9-11 what the Bible says on this matter. I do not believe you can be born gay, and I do not believe that homosexuality is right, though the law of this land has made it legal doesn't make it right. I do believe that everyone sins and falls into temptation but it's by the asking of forgiveness, repentance and the grace of God that we overcome and live how God ordained us to. Which is that a man should leave his father and mother and be joined to his wife and they shall become one flesh Genesis 2:24. God loves everyone just because He doesn't agree with your decisions doesn't mean He doesn't love you Christians we need to step up and love but also tell the truth of God's word. I am tired of lukewarm Christianity, be inspired to stand up for what you believe and truth #our God is three in one #God (Father) #Jesus"

6. The First Respondent's ET3 Grounds of Resistance say that this tweet "gave rise to widespread and sustained anger, consternation and upset directed not only at the

Claimant but also at the theatre companies and the respondent [i.e. her agent] as well". According to para 10 of the Second Respondent's Grounds of Resistance, "Central to *The Color Purple* is a profoundly positive, loving and redemptive lesbian relationship involving Celie, the main character, and another character…"

7. The parties had a number of interactions between the posting of the tweet and the termination of the Claimant's contract to play the part of Celie on 21 March and the termination of her agent's contract on 24 March 2019. Given the issues in the case, which have yet to be determined, it is neither necessary nor desirable for me to say anything else about the history or the facts in relation to those events.

## Claims

8. Against her former agent (the First Respondent), the Claimant claims that she was discriminated against on the grounds of religion or belief (ET1 box 8.1). Specifically, she alleges harassment based on various acts of unwanted conduct, including termination of the agency, which are said to be "related to the Claimant's protected characteristic(s), namely her religious beliefs pleaded in paras 2-3 above and/or her Christian religion" (Particulars of Claim para 22); and also direct discrimination and indirect discrimination.

9. Against her former employers at the theatre (the Second Respondent), the Claimant claims breach of contract, harassment, direct discrimination and indirect discrimination on the grounds of her religion and/or religious beliefs.

## Procedural history

10. The First and Second Respondents are separately represented and have filed separate forms ET3 and Grounds of Resistance, but there is no conflict between the lines of defence which have been drawn up.

11. A List of Issues has been agreed.

12. A final hearing has been fixed to begin on 1 February 2020, to include evidence, submissions, and time for tribunal deliberations.

## The appeals

13. The two appeals are brought against two case management decisions of Employment Judge Elliott which were:

    i) To order that the final hearing takes place in person and to refuse the Claimant's application that it be conducted remotely ("Appeal One").

    ii) To refuse the Claimant's application to admit the evidence of two experts ("Appeal Two").

14. I will consider each of these in turn.

**APPEAL ONE** (UKEAT/PA/0521/20/DA)

15. EJ Elliott's order that the final hearing should take place in person was made following a busy case management hearing by telephone on 30 April 2020 at which all three parties were represented. It was noted that there would be seven witnesses and that the hearing would require 10 days, to include tribunal deliberation time.

16. The question of whether the hearing should be held remotely or in person was argued on the basis of oral submissions from all three represented parties, together with a written submission (in addition to his oral submission) from the Claimant's representative, who also relied on a witness statement from Paul Huxley, a Communications Manager at CCFON Ltd (trading as Christian Concern). Mr Huxley's witness statement described the functionality of Skype for Business and Zoom, and offered assistance from Christian Concern with hosting and broadcast, and public access to witness statements and documents.

17. The ET decision was contained in a written Case Management Summary and Orders, which is a 7 page document dated 30 April 2020 (the date of the hearing), sent to the parties, with commendable speed and efficiency, on 1 May 2020. It includes 3 pages devoted to the issue of whether there should be a remote hearing, rehearsing the facts and the arguments, and giving reasons for the conclusion that the hearing should not be remote but should be in person, in the course of 14 numbered paragraphs.

18. It is astonishing that an appeal should even have been considered, let alone pursued through a rule 3(7) rejection and rule 3(10) hearing, in respect of a matter so clearly within the discretion of the Employment Judge, and particularly given the careful attention given to both to the decision itself and to the explanation of her reasons for reaching it.

19. It is even more remarkable given that the Claimant's skeleton argument for this appeal dated 21 October 2020 says, at para 55: "All parties' preference is for it to take place in person if that is practicable". Not only is it practicable: it has been ordered, and hearing dates have been set.

20. The only reason given for pursuing the appeal before me has been a fear that restrictions associated with the pandemic, or some other development, may yet prevent the in person hearing taking place. However, in person tribunal hearings have always been permitted, even during the strictest periods of the lockdown, by virtue of express provisions in the various iterations of the statutory Rules and official guidance in connection with the pandemic. No future development can justify an appeal against a decision already made, particularly when the result (the in person hearing currently due to begin on 1 February 2020) is satisfactory to all parties.

21. Ground 1 of the appeal is that the EJ did not accept the offer of "a single website specifically for this particular trial" curated by Christian Concern, rejecting "a ruling that carves this case out individually from other cases" (decision para 16).

22. This was not "an irrelevant and/or improper consideration" as argued in Ground 1. The EJ was entitled (and, indeed, right) to be wary of allowing one party to be the gate through which public access to the hearing or any of its materials should in any official sense be provided, without that being agreed between the parties.

23. Moreover, this was not the basis of the decision not to order a remote hearing. The main reason given for ordering an in person hearing was set out in para 17:

> "The tribunal is not currently satisfied that at present it can meet the requirements of the fundamental principle of open justice on the basis of a remote hearing as set out by the claimant. The overriding objective requires that cases must be dealt with fairly and justly. The hearing must take place in public in the interests of justice and to comply with that principle of open justice. The respondents say that there is extensive public media interest in the case and that extensive cross examination will be required where credibility is of "critical importance". Although the claimant says that most of the facts are not in dispute, this is not agreed by the respondents who say that they have extensive cross examination and indeed five days has been allowed for this. They have a right to this cross examination. I consider that there are highly contentious issues where the subtleties of observance of witnesses and the smooth running of the hearing, with the right of public and press to attend and observe, is particularly important."

24. No objection can plausibly be taken to this as an exercise of the case management discretion.

25. Ground 2 is that "The Tribunal's decision to refuse the application for a remote trial is plainly wrong". The Claimant's skeleton argument begins its argument on this point by observing "Justice delayed is justice denied". If this appeal is allowed to proceed, there is likely to be more delay, and, even assuming it is expedited, success in the appeal will not result in an earlier hearing. But, in any event, delay is only one of the factors to be taken into account in a case such as this, and the EJ's decision is not "plainly wrong"; it is within her discretion.

26. This is an appeal which is not only pointless but totally without merit; cf *London Underground Ltd v Mighton* [2020] EWHC 3099 (QB) para 44.

**APPEAL TWO** (UKEAT/PA/0522/20/DA)

27. Appeal Two is against the refusal of the Claimant's application to admit the evidence of two experts.

28. The expert evidence in question was:

    i) An 11-page report by David Lloyd Evans dated 12 May 2020. Mr Lloyd Evans is described in the Grounds of Appeal as "a theatre expert".

    ii) A 25-page report by Dr Martin David Parsons with an expert's declaration dated 11 May 2020. Dr Parsons is described in the Grounds of Appeal as "an expert in Christian doctrine".

29. These experts were first proposed at the telephone case management hearing on 30 April 2020 and orders were made for their reports to be filed, with an application, to which the Respondents were to respond.

30. The application to adduce that evidence was filed on 13 May 2020, and written submissions from the Second Respondent dated 27 May 2020 (which were adopted by the First Respondent as well) were filed in response.

31. The application was refused in a written decision of EJ Elliott, fully reasoned, of 21 pages, dated 4 June 2020 and sent to the parties on 5 June 2020 ("Decision Two").

32. Against this decision, the Claimant advances six Grounds of Appeal in her Notice of Appeal, which have been developed in a skeleton argument and in oral submissions before me by her representative.

**GROUND 1: "The Learned Employment Judge has erred in holding that the Tribunal's permission is required to introduce expert evidence in ET proceedings (paras (18)-(24) [of Decision One])."**

33. The EJ decided that "leave is required in the employment tribunal to introduce expert evidence" (para 18; see also para 24; reasoning in paras 18-24). She had previously summarised the submissions made to her on the law at paras 5-7 and 14-17. She referred to rule 41 of the Employment Tribunal Rules, and to the decisions of the EAT in *De Keyser Ltd v Wilson* [2001] IRLR 324 (Lindsay J, President) and *Morgan v Abertawe Bro Morgannwg University Local Health Board* [2019] UKEAT/0114/19/JOJ (HHJ Auerbach).

34. Rule 41 of the ET Rules provides (with emphasis added):

> "**The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective**. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. **The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts**."

35. This empowers the ET, in the regulation of its own procedure, to decide what evidence should be admitted or excluded, provided it is done on a rational and principled basis. The flexibility provided by the last sentence does not derogate from the breadth of authority conferred by the first sentence; to the contrary, it enlarges it. The ET and the EAT have applied this power to admit or exclude evidence in countless cases, and they include cases of the admission or exclusion of expert evidence.

36. In *De Keyser Ltd v Wilson* [2001] IRLR 324, Lindsay J said, specifically in relation to expert evidence,

> "It by no means follows that because a party wishes such evidence to be admitted it will be."

37. This was part of a passage in which Lindsay J gave guidelines on the approach to be taken to the admission of such evidence (at para 36):-

> "We must not be thought to be encouraging the use of expert witnesses; their instruction might be thought by some to militate against the inexpensive, speedy and robustly "common-sensical" determinations by the "Industrial Jury" which Employment Tribunals were called into existence to provide. However, there plainly are cases where one or both parties or the Tribunal itself see experts to be necessary or desirable. We wish to procure that where they are necessary the arrangements for them are as economical and effective as is consistent with fairness and convenience. Our guidelines (and they are only that) are for guidance until more formal rules, including provisions as to the costs involved, emerge. They are as follows:-
>
> (i) Careful thought needs to be given before any party embarks upon instructions for expert evidence. It by no means follows that because a party wishes such evidence to be admitted that it will be. There are valuable observations about expert evidence in *Whitehouse v Jordan* [1981] 1 WLR 246 at 256H, HL (the expert's evidence should be and be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation); *Midland Bank v Hett, Stubbs & Kemp* [1979] 1 Ch 383 at 402 c–e per Oliver J (doubts as to the use of expert evidence when it strays beyond describing accepted standards of conduct within particular professions) and *Re M and R (minors)* [1996] 4 All ER 239 at 251–254 CA (the need for the Tribunal to keep in mind that the ultimate decision is for it) — see also the very recent cases of *Barings plc v Coopers & Lybrand*, The Times 7th March 2001 and *Liverpool Roman Catholic Diocesan and Trustees Inc* v Goldberg, The Times 9th March 2001. Although the Employment Tribunals' practices and rules differ from those of the High Court, guidance may be found on several subjects by way of analogy from the provisions of the Civil Procedure Rules 35.1 to 35.14 and the associated Practice Direction…
>
> (ii) Save where one side or the other has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances) the joint instruction of a single expert is the preferred course;
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> …
>
> (vi) Any letter of instruction should specify in as much detail as can be given any particular questions the expert is to be

> invited to answer and all more general subjects which he is to be asked to address;
>
> (vii) Such instructions are as far as possible to avoid partisanship. Tendentiousness, too, is to be avoided. Insofar as the expert is asked to make assumptions of fact, they are to be spelled out. It will, of course, be important not to beg the very questions to be raised. It will be wise if the letter emphasises that in preparing his evidence the expert's principal and overriding duty is to the Tribunal rather than to any party;
>
> …
>
> (ix) In relation to the issues to which an expert is or is not to address himself (whether or not he is a joint expert) the Tribunal may give formal directions as it does generally in relation to the issues to be dealt with at the main hearing;
>
> (xiii) If a party fails, without good reason, to follow these guidelines and if in consequence another party or parties suffer delay or are put to expense which a due performance of the guidelines would have been likely to avoid, then the Tribunal may wish to consider whether, on that party's part, there has been unreasonable conduct within the meaning of Rule 12 (1) (as to costs)."

38. Although Mr Stroilov submits that these observations are *obiter dicta*, he offered no plausible argument for saying that they were wrong. They are now well-established; they breathe good sense; and they come from a President of the Employment Tribunal. They specifically approve the application of the principles in the Civil Procedure Rules (CPR 35) and its associated Practice Direction, which EJ Elliott adopted in this case.

39. In *Morgan v Abertawe Bro Morgannwg University Local Health Board* [2019] UKEAT/0114/19/JOJ, HHJ Auerbach said at paras 19-23:-

> "19. As *De Keyser* explains, the CPR do not apply to litigation in Employment Tribunals as such. Nevertheless, in this area, the provisions of CPR 35 and the associated Practice Direction may provide a useful source of guidance by way, at least, of analogy. The opening section within paragraph 36 in *De Keyser*, and the discussion there under sub point (i), make clear that in the ET, as in the Civil Courts, permission is, in principle, required for expert evidence to be adduced. That is, in essence, because it is opinion evidence rather than evidence of fact. However,… *De Keyser…* does not specifically explore, in any detail… what the threshold test is for it to be appropriate, in principle, to admit expert evidence in relation to a given issue.
>
> 20. As to that, counsel before me agreed, rightly, that the position under the CPR is clear. CPR 35.1 states: "Expert

evidence shall be restricted to that which is reasonably required to resolve the proceedings." The "reasonably required" formulation is also repeated, I observe, in paragraph 1 of the Practice Direction.

21. I also observe that the White Book commentary cites a number of authorities which have addressed particular, specific problems and scenarios, but the "reasonably required" test is a constant mantra. References, for example, to what is, "Necessary to ensure fairness" or "Necessary to resolve the proceedings justly" do not, in my view, signify a different test, but merely express in different words, or flesh out, the same test.

22. The authorities also, unsurprisingly, indicate that whether expert evidence is, "reasonably required" should be approached consistently with the overriding objective. However, that is not a separate or additional test. It merely informs the overall assessment of whether expert evidence is reasonably required. In my judgment, the starting point is to consider such matters as the degree to which the issue in question inherently turns on expert evidence, the likely significance of the contribution that expert evidence may make, and/or the importance of the issue itself in the context of the overall issues in the case. If the overall contribution of expert evidence by reference to such criteria would be low or marginal, then that might be outweighed by the cost, time, and/or complication that would be involved in obtaining it, when judging whether it is reasonably required. However, if the contribution of expert evidence would, on any view, be appreciably significant, then such considerations ought not ordinarily to tip the balance against allowing it to be adduced.

23. As the authorities establish, in some areas not otherwise covered by express provision in the Employment Tribunal Rules of Procedure, there are good reasons for ETs to follow their own distinctive approach from that taken by the CPR. However, in this particular area, both counsel agreed before me that the Tribunal was right to take the CPR approach as its guide. I see no good reason why an ET should not also apply the "reasonably required" test, informed by the overriding objective in the form in which it appears in the ET's own Rules. That is consistent with the approach already designated in the additional Rules, which specifically apply in equal value cases (where the need for expert evidence is generally taken as a given). In addition, the fact that the test is what is reasonably required enables Tribunals to determine this question in a way that is sensitive to the distinct characteristics of this jurisdiction, both procedurally and as to the types of issue that

> typically give rise to consideration by ETs of the need for expert evidence."

40. Mr Stroilov did not dispute that the ET has a general power to control evidence and that this extends to expert evidence. EJ Elliott's conclusion when excluding the proposed expert evidence was that it was "not reasonably required to resolve the agreed issues in these proceedings" (para 46; see also para 36). Mr Stroilov accepted that this was the correct test.

41. His objection to the suggestion that "leave is required" to introduce such evidence therefore appears to insignificant, particularly on the facts of this case, in which he appeals against a ruling against an application made by him to admit such evidence which was refused in the exercise of that power and applying that test.

42. However, even taken as an abstract point, it appears to me to be unarguable, given the existing authorities which I have cited.

**GROUND 2: "The Learned Employment Judge misapplied the test of relevance for the admissibility of expert evidence (paras (28)-(29), (33), (35), (45))"**

43. Irrelevant evidence is inadmissible and must, therefore, be excluded. However, as is apparent from the cases I have already cited, an ET (like any Court) is entitled to exclude even relevant evidence on a variety of grounds, such as lack of expertise or independence (in the case of expert evidence), or (in any case) proportionality, and the maintenance of the overriding objective. But these are only examples.

44. EJ Elliott's application of the test of whether the expert evidence shown to her was "reasonably required to resolve the agreed issues in these proceedings", which the authorities show was a perfectly proper test, allowed her a broad discretion with which no appellate court will lightly interfere.

45. The classic statement of this was by Henry LJ giving the judgment of the Court of Appeal in *Noorani v Merseyside TEC Ltd* [1999] IRLR 184:

> "The courts have long recognised that relevance is a matter of degree for the discretion of the trial judge. Thus in *Cross & Tapper on Evidence* (8th Edition) at page 61:
>
> > "Relevancy is a matter of degree and it is as idle to enquire as it is impossible to say whether the evidence was rejected in the above two cases because it was altogether irrelevant, or merely because it was too remotely relevant. It may also, on occasion, require a balance to be struck between the probative force of the evidence and external pressure vitiating its use, such as the time likely to be taken in resolving collateral issues, the danger of manufacture, and sensitivity to private and public sentiment. These will be considered in turn.
> >
> > (ii) Multiplicity of issues.

> The judgment of Willes J in *Hollingam v. Head* contains a timely reminder that litigants are mortal, and Rolfe B once pertinently observed that:
>
> > 'if we lived for a thousand years instead of about sixty or seventy and every case was of sufficient importance, it might be possible, and perhaps proper to raise every possible inquiry as to the truth of statements made… In fact mankind finds it to be impossible.'
>
> Evidence which might even by highly relevant in a protracted academic investigation is treated as too remote from the issue in a forensic inquiry because the body which has to come to the conclusion is controlled by the time factor, not to mention such considerations such as the danger of distracting the jury, and the undesirability of pronouncing upon matters which are not being litigated."

A modern affirmation of that rule was made by Lord Templeman in his speech in *Ashmore v. Corporation of Lloyd's* [1992] 2 All ER 486 and 493. Lord Templeman said how in an earlier case he:

> "… warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong."

He then went on to say (after a passage which I need not cite) at the bottom of the page at G:

> "An expectation that the trial would proceed to a conclusion upon the evidence [that the party wishing to call are sought] to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings."

I am satisfied, contrary to what the Employment Appeal Tribunal found, the ET were here exercising the classic discretion of the trial judge in the issue of witness summonses and in like matters. Such examples of such a discretion lie not

> only in the issue of witness summonses but whether to grant an adjournment or whether to order the trial of a preliminary issue etc. These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was "outside the generous ambit within which a reasonable disagreement is possible", see *G v. G* [1985] 1 WLR at 647."

46. This case has been regularly cited and applied in the Employment Appeal Tribunal ever since it was reported. One such reference is in *Makar v Triad Group plc* [2006] UKEAT/0513/06/RN at paras 26-27:-

> "**The Test on Appeal**
>
> 26. The Appeal Tribunal has jurisdiction only in respect of a matter of law. Case management decisions, including decisions on the scope of expert evidence are matter of discretion; points of law will seldom arise in them. In *Noorani v Merseyside TEC Ltd* [1999] IRLR 184, the Court of Appeal said of such decisions:-
>
> > "Such decisions are essentially challengeable only on what loosely may be called Wednesbury grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was "outside the generous ambit within which a reasonable disagreement is possible", see *G v G* [1985] 1 WLR at 647 ."
>
> 27. Mr Downes submitted that due deference should be given to a decision on case management matter by a Chairman steeped in the case, especially one who might subsequently hear the matter. It is inherent in the *Noorani* test that a substantial margin of appreciation is given to the decision maker. It does not seem to me however, logically to matter at all whether the decision maker will subsequently hear the case."

47. All the remaining Grounds (Grounds 2-6) appear to me to apply an excessively microscopic analysis to what, taking a step back, was a case management decision, made on legitimate grounds, in the exercise of the overriding objective. It is highly unlikely that any such appeal could be expected to succeed and it is highly

undesirable that such appeals, which are disruptive to the progress of the case, as well as time consuming and (at least in terms of the finite resources of the court and tribunal system) costly, should be brought at all, except on substantial grounds. Grounds 2-6 (like Ground 1), have already been adjudicated by a different judge of the EAT to disclose "no reasonable grounds for bringing the appeal" during the rule 3(7) sift, for reasons explained, taking each Ground in turn, in an unusually detailed written decision 3 pages long. Nevertheless, they are pursued under rule 3(10) and I will consider them.

48. In support of Ground 2, Mr Stroilov argues, in summary, as follows:

    i) The EJ proceeded "on a false premise that the expert evidence is only relevant if the expert is asked, and answers, the very questions identified in the List of Issues as the questions for the Tribunal."

    ii) The questions put to the experts were relevant.

    iii) "It is only fair that the Claimant should rely on expert evidence to rebut the opinion evidence on the same issues which the Respondents have been allowed to rely on, namely, the opinions of the authors of the novel and the musical".

49. As to the first point, the questions asked of the experts must be, not only relevant to the issues, but directly connected to them in a way which justifies their proposed contribution. Otherwise, their evidence is a waste of time. Their answers to the questions may not be relevant at all or, if relevant, may be so in too limited or remote a sense to make them a proportionate and useful contribution to the trial process. These are matters for the EJ to assess, which is what EJ Elliott did. There is no prospect of her assessment being successfully challenged on appeal.

50. As to the second point, the questions put to the experts bore no obvious relation to the issues, let alone the key issues, in the agreed list of issues (which runs to 7 pages and 31 numbered paragraphs, many of which have sub-paragraphs each containing separate issues). EJ Elliott's decision was directed, not only to the questions asked, but to the actual reports in response to them. These ranged far away from anything that could be described as proportionate and in many places were apparently irrelevant altogether, particularly given the areas of agreement between the parties.

51. As to the third point, neither of the authors is being called as a witness, whether of fact or as an expert. This point is dealt with in para 37 of the ET decision.

**GROUND 3: "The Learned Employment Judge has erroneously taken into account, and/or accepted, various criticisms of the experts' expertise (paras (26)) and impartiality (paras (30)-(31))"**

*Expertise*

52. In relation to the theatre expert, Mr Evans, EJ Elliott said at para 36 of her decision: "I am not satisfied that he has relevant expertise".

53. Mr Evans did not attach a separate CV to his report but he did say this in support of his claim to relevant expertise:

> "I am a theatre-maker and a professional theatre critic. I have reviewed plays for *The Spectator* since 2003. I've covered the West End, the London fringe and the Edinburgh Festival. In the last 17 years I've seen and reviewed roughly 1600 plays.
>
> I have written and produced my own plays in London and at Edinburgh. I've had experience holding auditions, casting actors for roles, and working as an assistant to the director.
>
> I have also written drama for Radio Four and BBC TV.
>
> At school I studied drama as part of my O- and A-levels in English literature. I took classics at Oxford (Balliol) where I read Aeschylus, Sophocles and Euripides in the original"

54. No other details were given, particularly of the second paragraph (which appears to have been the most important for present purposes).

55. The ET decision noted at para 26 that he "does not indicate having experience of having produced a play in a large commercial theatre venue such as for the production in question." Mr Stroilov concedes this is correct.

56. In those circumstances, no amount of reading classics in the original at Oxford, or theatre criticism, or anything else in the passage I have quoted, can render the EJ's assessment of his lack of relevant expertise *Wednesbury* unreasonable, to the extent that there is any prospect of an appeal succeeding on this Ground. The body of Mr Evans' report did not identify any other relevant experience in support of his opinions; nor did it tie those opinions to the experience he had identified.

*Impartiality*

57. Para 30 of EJ Elliott's decision says:

> "Despite there being a range of opinions on the matters dealt with in the report, Mr Evans does not comply with the Practice Direction as he does not summarise the range of opinions and then give reasons for his opinion".

58. This point succinctly expresses a well-established and important requirement of expert evidence: that an expert does not merely state his own opinion, but informs the Court or tribunal of the full range of reasonable expert opinion (from his expert knowledge of the field) and the position of his own opinion within that range. The Court is not obliged to accept any expert opinion, and this requirement enables the Court or tribunal to perform the exercise of forming its own judgment. It also serves to discipline and check the thought processes of the expert himself, by putting even strongly held personal opinions into the context provided by other experts in the field.

59. The Law Commission in its influential report (Law Com No 325) on *Expert Evidence in Criminal Proceedings in England And Wales* (2011) at para 5.35 makes the point thus:

> "…we recommend that a trial judge who has to determine whether an expert's opinion evidence is sufficiently reliable to be admitted should be directed to have regard to:
>
> (1) the following factors (insofar as they appear to be relevant)…
>
> (g) whether there is a range of expert opinion on the matter in question; and, if there is, where in the range the expert's opinion lies and whether the expert's preference for the opinion proffered has been properly explained;"

60. This is reflected (as noted in para 30 of the ET decision quoted above) in para 3.2(d) of Practice Direction 35 (Experts and Assessors) attached to CPR 35 as follows:

> "**Form and Content of an Expert's Report**
>
> 3.2 An expert's report must –
>
> (…)
>
> (6) where there is a range of opinion on the matters dealt with in the report—
>
> (a) summarise the range of opinions; and
>
> (b) give reasons for the expert's own opinion"

61. It was correct to say, as the EJ does, that Mr Evans failed to do this. His report is full of opinion, but reads like an opinion or comment piece of journalism, rather than an expert report to a Court or tribunal, and his failure to go beyond his own opinion, or to identify with names and source material anyone else's views, is one reason for that difference. I am unable to accept Mr Stroilov's submission that this is because one must assume that no other respectable opinion exists on these matters (see, for example, Mr Evans' comment at para 58 in relation to a boycott threat when the Claimant's Facebook post was publicised, that "all publicity is good publicity").

62. In the only passage of his report which refers to other points of view (para 60), Mr Evans says:

> "Although my reaction, as a producer, would be to welcome any 'public anger' about a show, I can't say with certainty that my attitude would have been shared by the theatre itself or its publicity agents".

63. Again, no source material is quoted, no other person or other production is named or identified, and no details of his relevant experience "as a producer" are provided.

64. In those circumstances, there is no force in the criticism advanced under Ground 3.

**GROUND 4: "The Learned Employment Judge misdirected itself as to the test of 'bias' for an expert witness (para (31)). Alternatively, her finding of 'bias' in para (31) is perverse."**

65. Para 31 of the ET decision said:

> "As the respondents identify, it is a requirement of PD 35 paragraph 2.2 that the expert should provide objective, unbiased opinions on matters within their expertise, and they should not assume the role of an advocate. I agree with their submission that Mr Evans' comments about other actors' attitudes being "intolerant" and by describing their views on paragraph 61 of his report as "presumptuous and even insulting" is not unbiased and on my finding Mr Evans is seeking to argue the case of the claimant and stepping outside the role of an expert."

66. Para 61 of Mr Evans' report said, quoting it in full:

> "It's worth considering the assumptions made by those threatening a boycott. Miss Omooba did nothing more than express a religious belief which provoked fury among certain actors. The attitude of these actors strikes me as intolerant. And their assumption that playgoers would share their illiberal view seems to me presumptuous and even insulting to the people who support the theatre."

67. Para 2.2 of Practice Direction 35 says:

> "Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate."

68. The passage in EJ Elliott's judgment to which objection is taken, and which I have quoted, is in line with that statement in the Practice Direction. It is justified by the passage from Mr Evans' expert report to which EJ Elliott refers, and which I have quoted.

69. Mr Stroilov argued, in relation to this ground and the previous Ground 3, that the remedy for any criticisms of this nature was for the expert to be cross examined. That assumes that the expert's evidence should, in the judge's discretion, have been admitted in the first place. Postponing the objections to the report until the expert is cross examined is not an answer to those objections. The ET was entitled, for all the reasons it identified, and in the exercise of its discretion, to decide that the evidence should not be admitted at all and that it was better that the hearing should proceed without it.

**GROUND 5: "The Learned Employment Judge has misapplied (paras (39)-(42)) the principle in R (Williamson) v Secretary of State for Education and Employment (2005) 2 AC 246."**

70. This ground relates to the other proposed expert, Dr Parsons, put forward as an expert on Christian doctrine.

71. In this case, the following common ground is recorded in para 2 of the agreed List of Issues:

> "It is agreed that:
>
> a. C's Christian religion is a protected characteristic for the purposes of section 10(1) of the Equality Act 2010 (EqA 2010");
>
> b. C held the religious beliefs set out in paragraphs 3.a and 3.b of the particulars of claim, namely (a) a belief in the truth of the Bible, in particular Genesis 2 v 24 and 1 Corinthians 6 v 9 and (b) a belief that although God loves all mankind, He does not love all mankind's acts, in particular she believes that Homosexual practice (as distinct from homosexual desires) is sinful/morally wrong;
>
> c. C does not assert a belief that homosexuality, as a matter of orientation or desire (as opposed to homosexual practice), is in itself sinful or wrong."

72. It is, therefore, an agreed fact that these beliefs are "religious beliefs" and that her religion is a protected characteristic.

73. This makes many pages of Dr Parsons' report apparently irrelevant to any issue between the parties, it being primarily his exposition of "Christian doctrine in relation to homosexuality" (paras 5-51; pp 2-13, in a report of 25 pages). This focus on matters not in issue continues into the second and final section, "Miss Omooba's stated beliefs and the Respondents' pleadings in relation to those beliefs" (paras 52-100, pp 13-25), which links her agreed religious beliefs to various passages in the Old and New Testaments of the Bible.

74. I do not say that it is without exception absolutely irrelevant to the agreed issues, but most of it is, and it is difficult to sort the wheat from the chaff. Anything which might be said to be conceivably relevant is only tangentially so and the difficulty in identifying what might be relevant, and how, let alone in applying it to the resolution of the identified issues in the case (and Mr Stroilov has argued valiantly in that respect), appears to be out of all proportion to its potential utility.

75. In those circumstances, I cannot conceive of any appeal which would result in the admission of this report, against the judgment of the EJ, who gives her reasons for concluding that "Dr Parsons' report is not reasonably required to resolve the agreed issues in these proceedings" in paras 38-46 of the ET decision.

76. So far as Ground 5 in particular is concerned, the ET decision deals with the *Williamson* authority in para 39, where it says:

> "Much of Dr Parsons' report consists of reciting Biblical verses and commenting upon them. It is not for the tribunal to make findings as to matters of Christian doctrine and it will not do so. The respondents cite Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, who says at paragraph 22
>
> > "…emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion".
>
> This tribunal is no different and is bound by that decision."

77. This was a valid and relevant application of *Williamson* to the issues in the case (which included the admissions about the Claimant's religious beliefs and their protected status which I have quoted) and to Dr Parsons' report (which is largely, if not wholly, an essay in support of those beliefs by reference to selected passages of the Bible).

78. In developing his argument on Ground 5, Mr Stroilov referred also to *Grainger v Nicholson* [2010] ICR 360, a very different case in which the whole subject matter of the appeal was whether the belief that "mankind was heading towards catastrophic climate change and everyone was under a moral duty to lead their lives in a manner which mitigated or avoided that catastrophe for the benefit of future generations", was capable of being a "philosophical belief" within the meaning of the Employment Equality (Religion or Belief ) Regulations 2003 and, therefore, a protected belief. In that context, Burton J said (at para 24)

> "I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers's suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of

> *Campbell v United Kingdom* 4 EHRR 293 and para 23 of *Williamson's* case [2005] 2 AC 246)."

79. Mr Stroilov emphasised the observation of Burton J at the end of his judgment, at para 32, that "there will indeed need to be evidence", and says that this made the admission of Dr Parsons' report essential, and the reasons for permitting it compelling. He referred to the issues which are not agreed and, in particular, issues 3 and 4 in the agreed List of Issues:

> "2. Is C's assertion in her Facebook post that "I do not believe you can be born gay" a religious belief caught by section 10(2) EqA 2010?
>
> 3. As to the belief set out in paragraph 3.c of the particulars of claim, namely "that not to speak out in defence of [the beliefs set out in paragraph 3.a and 3.b of the particulars of claim] would be sinful/contrary to her beliefs":
>
> a. Did C hold such belief?
>
> b. Was this a belief qualifying for protection under the Equality Act 2010?"

80. However, the question was not whether *some* evidence might be necessary or admissible on these issues, but whether Dr Parsons' evidence in particular, as set out in his report, was "reasonably required" to resolve them. EJ Elliott found it was not. Her reasons were lack of relevance (decision paras 39-40), lack of proportion (para 40, "Dr Parsons' opinion is not necessary on any of these matters as they are not in dispute and this takes up a large proportion of his report") and (in paras 41-42) the following:

> "41. It is an issue for the tribunal as to whether the claimant's assertion that "I do not believe that you can be born gay" is a religious belief. Dr Parsons' comments on this in paragraphs 74 – 81 of his report will not assist the tribunal on what the claimant herself believed – this is a matter for cross-examination of the claimant. There are different views on this matter amongst Christians themselves. The issue for the tribunal will be a matter for submissions after hearing the claimant's evidence on what she believes and as set out above, the tribunal will not be making a finding as to the correctness of Christian doctrine.
>
> 42. Dealing with the *Grainger* authority, this sets out the principles to which the tribunal must have regard, but I am unconvinced that the tribunal requires the evidence of an expert on Christian doctrine in order to consider and make decisions on these principles, particularly given the matters which are not in dispute. Tribunals are accustomed to applying those principles without the benefit of expert evidence. It is entirely

> within the remit of the tribunal to apply the *Grainger* principles in this case without Dr Parsons' or any other expert's views."

81. This was a reasonable exercise of the EJ's broad discretion and I can find no substance in Ground 5.

**"GROUND 6: The Learned Employment Judge has erred in holding that Dr Parson's report was not relevant to the issue of group disadvantage and/or justification of indirect discrimination. (paras (43)-(45))"**

82. In support of this final Ground of appeal, the Claimant argues:

> "The Claimant has to prove group disadvantage as part of her indirect discrimination case (Issue 19 on the agreed list); and the extent of such group disadvantage is relevant to the issue of justification (Issue 21): see *Mba v Merton LBC* [2013] EWCA Civ 1562."

83. Issue 17 is in relation to the indirect discrimination claims and is whether a provision, criterion or practice ("PCP"), the terms of which are set out in Issue 17, was applied by the Second Respondent to the Claimant. Issue 18 is, if so, whether the same PCP was applied, or would have been applied, to others who are not Christians or who did not hold the religious beliefs relied on by the Claimant. Issue 19 is then as follows:

> "If so, did the PCP put, or would it put, others who are Christian or who hold the religious beliefs relied on by C at a particular disadvantage when compared with others who do not have that religion or who do not hold those religious beliefs, namely that
>
> a. (in the case of R1) their ability to benefit from R1's services is or would be diminished?
>
> b. (in the case of R2) their ability to perform in plays produced or co-produced by R2 is or would be diminished?"

84. Issue 19 is one of the issues, but by no means the central issue in this case of many issues. It is the issue referred to in this appeal by the usual shorthand of "group disadvantage".

85. Whether evidence is required on group disadvantage and, if so, how much, and in what form, will no doubt vary from case to case.

86. In *Mba v Merton LBC* [2013] EWCA Civ 1562, which is the principal authority relied upon to support this Ground of Appeal, the question was whether a requirement that Ms Mba should work on Sundays, which interfered with her Christian belief that Sunday was a day of rest and worship, was proportionate. Evidence that it did indeed interfere with her Christian belief had been apparently been given by a bishop (para 8) but Maurice Kay LJ doubted whether that was necessary, saying (at para 18):

> "It is clear (and, if it is necessary for it to have an evidential foundation, it was provided by the evidence of Bishop Nazir-

> Ali) that, for some Christians, working on Sundays is unacceptable."

87. In another case cited by Mr Stroilov, *Page v NHS Trust Development Authority* [2019] UKEAT/0183/18/DA, on the other hand, the Claimant was said to hold a "faith based belief" that it is "not normal" for a child to be adopted by a single parent, or by a same-sex couple. In that case, the ET decided "there is no sufficient evidence on which the tribunal could make any finding of group disadvantage" (para 23) and, on appeal to the EAT, it was argued that "where Article 9 is engaged, there is no requirement to establish group disadvantage, or that if there is such a requirement it is not an onerous one" (para 44). That argument failed, but the judgment of the EAT given by Choudhury J does not deal with whether expert evidence is required in any case, let alone any particular case, in order to establish the alleged group disadvantage. Nor, indeed, does it give any guidance at all on how group disadvantage should be established. Instead, it leaves the matter to the ET as the fact-finding tribunal. Per Choudhury J (President) at para 49:

> "On the footing that there was a need to establish group disadvantage, it seems to us that the Tribunal was entirely correct to consider whether the Claimant had done so. It concluded that the evidence in this regard was not sufficient: see [79]. That was a finding which the Tribunal was entitled to reach and is not one that is challenged as being perverse or otherwise unsound."

88. In the present case, EJ Elliott was not persuaded that Dr Parsons' report could be said to be "reasonably required" because of any contribution it might be able to make to the evidence of group disadvantage. She said (at paras 44-45):

> "44. In this claimant's case, the respondents acknowledge that some Christians have a belief that homosexual practice is sinful. Evidence (expert or otherwise) is not needed to establish this and as I have said above, the tribunal will not carry out a doctrinal analysis of the correctness of this view.
>
> 45. Neither in *Mba* from Bishop Nazir-Ali nor in Dr Parsons' report, is there any analysis of the issue of group disadvantage and how this is relevant to the question of justification. Dr Parsons does not analyse the question of group disadvantage other than to acknowledge that different groups of Christians may hold different views."

89. That was a conclusion open to the EJ (and, having read Dr Parsons' report myself, I agree with it). This Ground cannot therefore proceed.

## Conclusion

90. The result is that the Claimant's application under rule 3(10) of the EAT Rules for the appeal to proceed must be refused.