

Neutral Citation Number: [2022] EAT 114

Case No: EA-2021-SCO-000023-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 21 July 2022

Before :

THE HONOURABLE LORD SUMMERS

Between :

SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS

Appellant

- and -

POLLY JONES

Respondent

Mr David Hay (instructed by BRO Solicitors LLP) for the **Appellant**
Anya Palmer (instructed by Thompsons Solicitors) for the **Respondent**

Hearing date: 28 January 2022

JUDGMENT

SUMMARY

UNFAIR DISMISSAL – 11

CONTRACT OF EMPLOYMENT - 9

RELIGION OR BELIEF DISCRIMINATION – 26

The EAT considered the interpretation of ss. 108(4) of the **Employment Relations Act 1996** and in particular whether the **ERA** enabled an employee to claim unfair dismissal in the first two years of employment where the dismissal “relates to” political opinions or affiliation. Held that where the putative unfair dismissal was because the employee had asked for permission from her employer to stand as a candidate in a General Election and where it was expressly accepted by the Claimant that her employer’s refusal was unconnected to her political opinions or membership of the Scottish Labour party and where her terms of contract contained a political neutrality clause, ss. 108(4) did not apply. Since the employee had been dismissed prior to completing two years of employment her claim was therefore excluded by the **ERA**. Held further that the Claimant’s protected characteristic under s. 10 of the **EA** had been established. The EJ was satisfied that she believed in participatory democracy and that her belief in this connection met the **Grainger** test. There was no basis upon which to hold that the EJ’s decision was flawed. Appeal allowed in part and refused in part.

THE HONOURABLE LORD SUMMERS:

Introduction

1. In this case the Employment Judge (EJ) held a Preliminary Hearing to determine the following issues. First, to decide whether s. 108(4) of the **Employment Rights Act 1996 (ERA)** applied to the claim. Second, whether a belief asserted by the Claimant was a protected belief within the meaning of the **Equality Act 2010 (EA)**. Third, whether an email that had come into the possession of the Claimant was subject to legal professional privilege. No appeal has been stated in relation to the third issue. This judgement is therefore concerned with issues one and two.

Does the Claim qualify under s. 108(4) ERA?

2. The first issue was whether the claim was covered by ss. 108(4) **ERA**. Section 94(1) **ERA** states that an employee has the right not to be unfairly dismissed by his employer. Section 108(1) states that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination. An exception is stated in ss. 108(4).

Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.

3. A Preliminary Hearing was held at which the EJ tested the admissibility of the Claimant's claim. Thus the EJ assumed that the Claimant had been dismissed because she had asked for permission to stand as a candidate for Scottish Labour at the 2019 General Election and asked herself whether in such a situation the Claimant was entitled under ss. 108(4) to bring her claim even though she had not worked for the qualifying period set by ss. 108(1). . The EJ concluded that the claim was covered by ss. 108(4) and held that the Claimant was entitled to bring her claim.

4. The facts and circumstances relevant to that conclusion were as follows. The Claimant was employed by the Respondent on 29 April 2019. The Respondent represents housing associations in Scotland. She was Head of Membership and Policy and reported to its CEO. Her terms and conditions of employment included a clause headed “Political Activity”. It was agreed that this clause did not prevent her from belonging to a political party but did prevent her from having a “formal role” of a political nature. If she had been adopted as Scottish Labour’s candidate at the 2019 General Election it was agreed this would have been a “formal role”.

5. On 4 October 2019 the Claimant informed her employers that she wished to stand for Scottish Labour in the Argyll and Bute constituency at the next General Election. On 11 October 2019 the Respondent’s board advised her that it did not consent to her standing as a candidate for Scottish Labour. The Claimant withdrew her candidature. The Claimant avers that at a meeting with Ms Thomas the CEO concern was expressed that she had she had sought permission to stand. At a later meeting she was dismissed from her employment. In her letter of dismissal of 14 November 2019 the Respondent gave a variety of reasons for dismissal but did not rely on her request for permission to stand for Scottish Labour.

6. The Claimant does not accept that reasons given for her dismissal. She submits that the true reason for her dismissal was that she asked her employer for permission to stand as a candidate for Scottish Labour in the General Election of 2019.

7. The Claimant accepted by exchange of correspondence prior to the Preliminary Hearing that she was not dismissed because she was a member of the Scottish Labour Party or because of her political opinions.

8. The EJ held (paragraph 56) that if the Claimant could show that she had been dismissed because she sought to stand for election, she could rely on ss. 108(4). The EJ noted that the subsection covers dismissals that relate to political opinions or affiliations. The EJ concluded that the words “relates to” in ss. 108(4) meant that even although her political opinions and affiliation to the Labour Party had nothing directly to do with her dismissal, they were nevertheless related to her dismissal since without such opinions and affiliation she would not have sought to stand as a candidate. Her opinions and affiliation with Scottish Labour had an indirect relationship with her dismissal but this was sufficient to bring her within ss. 108(4).

Decision

9. In interpreting the subsection I consider that it is helpful to identify the mischief towards which the subsection is directed (Uber BV v Aslam & Ors [2021] ICR 657 paragraph 70). Although I was directed to various excerpts from **Hansard** that it was said illuminated Parliament’s intention, it is not necessary to go beyond the words of the subsection. The words “the reason for the dismissal is... the employee’s political opinions...” indicate that that the subsection was concerned with dismissals based on political opinions or affiliation. The subsection is designed to provide protection to those who are dismissed because of their political opinions or affiliation. Dismissals in such cases are brought under the aegis of the **ERA** even where they occur inside the first two years of employment. While such a dismissal is not automatically unfair, the subsection affords extended protection in such a case. There are restrictions to the scope of the subsection. Parliament did not extend the coverage of the **ERA** to every case where political opinions or affiliation had a role to play in the dismissal. The extended protection is given only if they are the reason or principal reason for dismissal. In cases where the employee’s political opinions or affiliation are subsidiary considerations no protection is afforded by ss. 108(4).

10. Counsel for the Respondent drew my attention to the legislative history of the subsection. It was added to the **ERA** by the **Enterprise and Regulatory Reform Act 2013** as a consequence of a decision of the **European Court of Human Rights** in **Redfearn v United Kingdom** [2013] IRLR 51. I was advised that the amendment to the **ERA** was designed to bring UK law into alignment with the decision of the **European Court of Human Rights**. The facts of the case were as follows. Mr Redfearn was a bus driver and BNP member. His work involved carrying passengers to whom his political opinions and affiliation were offensive. He was dismissed by his employer. He was unable to claim unfair dismissal because he had not worked for two or more years with the employer. The **European Court of Human Rights** held that the lack of a remedy was a breach of his right to freedom of association under Article 11 of the **European Convention on Human Rights**. The EJ provides a helpful outline of the circumstances of the **Redfearn** decision (paragraphs 40-46).

11. It is easy to see the alignment between ss. 108(4) and the facts of **Redfearn**. Mr Redfearn was not dismissed because of his political opinions or affiliation as such. He was dismissed because his political opinions and affiliation caused his employer operational difficulties it was anxious to avoid. Had ss. 108(4) been in place before his dismissal Mr Redfearn could have relied on the words “relates to” so as to show that although he was not dismissed because of his political opinions or affiliation as such, his dismissal related to those opinions and affiliation.

12. It would appear to me that in referring to “opinions” Parliament is directing attention to the fact that employees may hold a variety of opinions on political issues. Some will be mainstream and some will not. In referring to “affiliation” Parliament is directing attention to the possibility that employees may be members of or affiliated to a variety of political parties. Where the content of the employee’s opinions or the identity of the party she wishes to stand for do not form part of the reasoning leading to dismissal, it would appear to me that the subsection has no application. The dismissal is not in such a situation related to the employee’s political opinions or the identity of their

political party. I consider that the subsection does not deal with the dismissal of employees who are dismissed because they lack neutrality or who propose to act in a way that threatens their political neutrality. Neutrality is the antithesis of the issue addressed by ss. 108(4). I consider that it was designed to address the mischief of dismissals arising from the content of a person's political opinions or the identity of the party with which the person is affiliated. That was the situation in **Redfearn**. So whether the purpose of the subsection is expressed as the need to provide extended protection to those dismissed because of their political opinions or more prosaically, to give effect to **Redfearn**, the outcome is the same.

13. I accept that but for her candidacy for Scottish Labour she would not have been dismissed. In that sense her dismissal is related to her opinions and affiliation. But I consider the scope of the words "relates to" must be interpreted in light of the purpose Parliament was seeking to achieve. While a literal interpretation would I accept bring the Claimant within the subsection I am not persuaded that a literal construction is appropriate. I do not accept that the relationship between her dismissal and her political opinions and affiliation was sufficiently proximate to the purpose of the subsection to come within its scope. Her political opinions and affiliation were not the reason or principal reason for dismissal. If she was dismissed because she had expressed a desire to be a political candidate and the reason for dismissal did not involve her membership of Scottish Labour or political opinions, the only possibility left is that she was dismissed because she was not willing to keep politically neutral. That state of affairs is in contrast to the terms of subsection 108(4). Thus I do not accept that the EJ was correct in holding that a "requirement to appear to be politically neutral is a requirement that relates to someone's political opinions or affiliations" (paragraph 56). I do not accept that ss. 108(4) went farther than was required by the **Redfearn** decision. In this connection I respectfully differ from the EJ (paragraph 49).

14. It follows from the above that ss. 108(4) has no application to this case.

Did the Claimant hold a protected belief?

15. The Claimant also submitted that she held a protected philosophical belief under the **Equality Act 2010**. She formulated that belief as follows, “those with the relevant skills, ability and passion should participate in the democratic process”. This belief was articulated in support of the Claimant’s claim of discrimination. If the Respondent had dismissed her because she wished to “participate in the democratic process” and that belief was a protected characteristic then she would be entitled to bring a claim under the **EA** s. 10.

16. The EJ accepted that this was a protected belief under the **EA** section 10 (paragraph 99). In this connection the Claimant gave evidence in support of her position by way of a witness statement and in oral evidence. The ET made a number of findings in fact between paragraphs 63 to 81. From these it is evident that the Claimant has from an early age demonstrated an interest in politics and has campaigned on behalf of a variety of worthy causes (paragraph 65, 66). She has campaigned against apartheid and promoted disability rights (paragraphs 65, 66). She held the post of Student Activities Secretary when an undergraduate (paragraph 67). She was employed by Unison and Oxfam (paragraphs 71-73) prior to being employed by the Respondent. She believes that women are underrepresented in politics and that work is needed to redress that state of affairs (paragraphs 77, 78). She believes that those who enter politics should do so for the proper motives and those who do not do so damage the process (paragraphs 74, 75). She believes that people should participate in politics by voting, standing as candidates, campaigning or lobbying irrespective of their political stripe (paragraphs 70, 73 and 76).

17. Parties were agreed that the leading case in this arena was **Grainger plc v Nicholson** [2010] IRLR 4. At paragraph 24 of Burton, J’s judgement he sets out the constituent elements of a “protected belief” under section 10. These were that the belief must be honestly held, it must be a belief as distinct from 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 and must be worthy of respect in a democratic society. The Respondent submitted that the EJ had fallen into error in her assessment of the cogency and cohesion of the Claimant's belief. The EJ's conclusion in this connection was expressed at paragraph 98 -

Mr Hay suggests that the belief lacks the necessary cohesion and cogency as required by *Grainger*. I do not agree. As Mr Briggs submitted, the belief can be set out in one short sentence. It is cogent and easy to understand. It is serious and important and does not lack cohesion. The claimant has manifested that belief by seeking to stand for election. She sought to manifest that belief at a stage in her life when she felt able to do so.

18. Mr Hay submitted that the reasons supplied by the EJ in this paragraph did not explain why the EJ was satisfied that the Claimant's belief was coherent and cogent. He submitted that it in no way followed that because the Claimant's credo was simple to understand and was expressed in a short statement, that it must be coherent and cogent. He submitted that the statement of belief lacked precision or focus. Mr Hay submitted that her credo was no more than an expression of her personal choices.

19. I accept that most of what the EJ states in paragraph 98 is assertion rather than reasoning. I would be reluctant to accept that beliefs that are not easy to explain or which cannot be reduced to one sentence are by definition lacking in cogency or cohesion. I can see that beliefs that are cogent and coherent are usually capable of brief expression. It must be acknowledged however that some beliefs are complex or nuanced. In such a case a belief that is cogent and coherent may require lengthy explanation. I am therefore reluctant to repose much faith in the fact that the Claimant found it possible to express her belief in a short sentence.

20. In her reasoning in this connection the EJ pointed to the fact the Claimant's belief was "serious" and "important". Mr Hay did not seek to challenge that. A belief in participatory democracy is a belief that relates to a crucial aspect of the form of government exercised in the UK. The desirability of securing participation at all levels in a Parliamentary democracy is obviously a matter of great moment. Without adequate engagement by the electorate and by extension candidates from among the electorate, democracy as a mode of government would lose its efficacy and legitimacy. It is easy to accept therefore that the Claimant's belief was a serious one in the sense that it dealt with a serious issue and important on that account. The EJ's reference to the Claimant's decision to stand for Parliament demonstrates that she took her belief seriously and was demonstrative of the genuineness of her beliefs.

21. It was further submitted that the words "those with the relevant skills, ability and passion..." was too vague. Plainly the Claimant thought she had the necessary skills, ability and passion. This formulation of her belief was obviously designed to explain why she had put herself forward as a candidate. Although the difference between "skills" and "ability" is obscure, this statement of belief expresses the proposition that not everyone is fitted for public office and that the Claimant thought that those that should stand for office should have an appropriate combination of ability and motivation.

22. While the phrase "...should participate in the democratic process" is somewhat nebulous I accept that in context the Claimant is referring to a specific form of participation namely standing as a candidate and holding political office. If it is intended to express the belief that all that are fitted for public office should stand for office, it is a somewhat unrealistic belief. But the sentiment that lies behind it is easy to understand. I would be reluctant on that account to discount it as unworthy of protection.

23. The Claimant submitted that in attacking the cogency and cohesion of the Claimant's belief the Respondent's submission was in reality challenging the EJ's assessment of the facts and was therefore a perversity appeal. Ms Palmer correctly pointed out that the Respondent did not seek to advance a perversity appeal.

24. While I acknowledge the force of this submission I am inclined to accept that the Respondent is entitled to submit that the EJ had erred by failing to apply part of the **Grainger** test or that in purporting to apply it, she had misunderstood what it required. On balance I am satisfied that although the EJ does not provide a great deal of explanation the Respondent's appeal in this connection must fail. As I have indicated a belief that persons should stand for office if democracy is to thrive is a cogent view. It is cogent in that it is a reasonable belief that is supportive of and logically connected to a powerful political imperative. It is cohesive in that it fits with other aspects of the Claimant's belief system and is capable of rational support having regard to her belief in Parliamentary democracy. Although the EJ does not supply any reasoning in support of that aspect of the **Grainger** test her conclusion arises by necessary implication from the Findings in Fact and the other considerations identified by the EJ as pertinent to the Claimant's belief. On that account I consider that I should reject this ground of appeal.

Postscript

25. I notice that the belief expressed by the Claimant is absolutist in its terms. It contains no qualifications. I do not criticise it on that account. I have no doubt that the written expression of her belief lodged for the purpose of her claim was not intended to be a complete account of every aspect of the Claimant's beliefs in connection with participatory democracy. In the course of argument I asked whether such a belief could be reconciled with the political neutrality clause that she had accepted. I adjourned the appeal so that counsel could address me further on the interaction between political neutrality clauses and her claim for unfair dismissal. I am grateful to counsel for their further researches in this connection. I was directed to **Gibbons v The British Council** (case 2200088/2017). In that case an employee was dismissed for criticising the Royal Family. While an employee's beliefs about the monarchy would not ordinarily justify dismissal, her employer was the British Council whose function, among other things, was to promote British values. In that connection it had a policy of political neutrality. The ET upheld her dismissal. The case might be seen as authority for the proposition that there are types of employment where restraints can properly be laid on the expression of political opinions. Counsel for the Respondent referred me to the Civil Service Code published under section 5 of the **Constitutional Reform and Governance Act 2010**. Paragraphs 14 and 15 of the Code set out the need for political impartiality. Mr Hay indicated that other organisations similar to the Respondent had political neutrality clauses in their contracts of employment. In the Respondent's Grounds of Resistance it explains as follows -

It is a fundamental aspect of the Respondent's operations that it must remain politically neutral at all times. Given its dealings with Government and other political parties it cannot at any stage have any allegiance or affiliation to any specific political party. This is a well-known factor and is important to many of the Respondent's member organisations.

26. Ms Palmer accepted that political neutrality clauses were lawful in principle. She accepted that they were appropriate to the case of civil servants. Having checked my notes carefully, she did not concede that a political neutrality clause was appropriate in this case. I assume that had the Claimant accepted that her work for the Scottish Federation of Housing Associations required political neutrality she would either not have taken the job or would not have asked for permission to stand for the Westminster Parliament. It would appear that her belief in the importance of participatory democracy was such that she considered it overrode the term of employment or that she did not believe that her belief should give way to the need for political neutrality while working for the Respondents. Ms Palmer reminded me of s. 203(1) **ERA** which voids any term of employment which is inconsistent with the rights conferred by the **ERA**. If the Claimant proves that she was dismissed in whole or in part because she sought permission to stand as the Scottish Labour candidate the question of the Respondent's wish to keep her role politically neutral may arise again, not as a consideration going to the cogency or coherence of the Claimant's belief, but in connection with s. 13(2) of the **EA** and the need to demonstrate that dismissal was a proportionate response.

27. I accept Mr Hay's submission that this issue does not arise on appeal. Ms Palmer made a submission to the same effect. There was no attempt at the Preliminary Hearing to explore the scope of any qualifications the Claimant may have been disposed to accept and in particular no exploration of how her belief in participatory democracy fitted with the Respondent's operational desire for neutrality. It remains therefore to note that this appeal does not address the question of whether an employee whose belief is otherwise cogent and cohesive is entitled to the protection of the **EA** where it might be submitted that there is a compelling qualification relevant to her belief. The Respondent did not explore the implications of the neutrality clause for the Claimant's own expression of belief in participatory democracy and no attempt was made to argue that a belief that made no allowances for political neutrality in appropriate cases was not a cogent and cohesive belief.

Conclusion

28. In these circumstances I shall allow the appeal in part and permit the claim to proceed to a full hearing at which the question of the unfairness or otherwise of the dismissal can be decided.