

Climate change - the new religion?

By Caroline Doran,
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The case of Nicholson v Grainger plc is one of which all employers should be aware since it could have far-reaching (and expensive) implications for them. In this case, the Employment Tribunal acknowledged for the first time that an individual's views on climate change were capable of being protected under the Employment Equality (Religion or Belief) Regulations 2003 ("the Regulations").

Mr Nicholson was initially employed by Grainger plc, a residential property investment company, in September 2007, as its Head of Sustainability. However, he was made redundant on 31 July 2008 and, since he had not achieved one year's continuous service, he was not able to lodge any claim for unfair dismissal.

This being so, the only grounds open to him to make any claim of any financial worth were if he had been discriminated against or if he could argue that he had been dismissed for "whistle-blowing" under the *Public Interest Disclosure Act 1998*.

Mr Nicholson opted for the former and subsequently emailed the senior managers of Grainger plc stating:

"...my dismissal was automatically unfair on the grounds of me having made protected disclosures (the nature of which are not stated) and, in terminating my employment, the company has discriminated against me on the grounds of my philosophical beliefs".

Nicholson told the Tribunal that his beliefs were protected under the Regulations because of his views on the subject of climate change and the need to cut carbon emissions. He said that this was:

"...not merely an opinion by philosophical belief which affects how I live my life, including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and fears. For example, I no longer travel my airplane, I have "eco-renovated", I try to buy local produce, I have reduced my consumption



of meat, I compost my food waste and encourage others to reduce their carbon emissions and I fear very much for the future of the human race, given the failure to reduce carbon emissions on a global scale”.

The Tribunal decided that it had to determine whether his beliefs could be protected under the umbrella of the Regulations or, alternatively, he should be cross-examined on his views.

To believe or not

An individual who holds philosophical beliefs, but who indicates that he/she would be open to consider other evidence, may find an admission to having an enquiring or open mind may be fatal to hopes of the Tribunal accepting that he/she had a cogent belief system which could be protected under the Regulations. As such, this would seem to indicate that only those with “fundamentalist-type” beliefs would pass the Employment Tribunal test.

The points that the Tribunal had to consider were whether the “belief” had:

- *sufficient cogency;*
- *seriousness;*
- *cohesion;*
- *importance; and*
- *whether it was worthy of respect in a democratic society.*

It has long been accepted that examples of philosophical beliefs that would meet the criteria are pacifism, atheism and humanism.

On the other hand, beliefs that would not meet the relevant criteria are patriotism, loyalty to the flag and membership of the British National Party.

The Tribunal judge stated of Mr Nicholson’s views on climate change:

“they command the highest respect in democratic societies as can be seen from the conduct of modern global politics”.

This being the case, this area of the law may create an abundance of litigation in the future since Tribunals will have to weigh the beliefs of an individual against the yardstick of current popular thinking and this could become a potential minefield for employers.

Take the example of staff who are instructed that they must wear a particular uniform. One employee might argue that he/she will not do so on the grounds that the fabric is not of “fair-trade” origin. Another – possibly a Vegan – might refuse to wear it because it contains animal products such as wool or leather.

In such a case, the employer will have to determine whether either of the employees has refused to wear the uniform based on an opinion and, whether such an opinion is of the type that would be protected under the Regulations as a “philosophical belief”.

A failure to do so could have unlimited financial repercussions for the employer if it resulted in any subsequent detriment to the employee such as dismissal or disciplinary action.

This is a decision that will, inevitably, create many more grievances and complaints from employees who consider that they have vehemently held beliefs. On the basis of the five step test referred to earlier, it is not easy to see how an Employment Tribunal could deny protection to employees with committed beliefs in such areas as veganism, animal rights, nuclear disarmament etc.



It is relatively simple to see how Mr Nicholson's views can be protected today. However, ten or so years ago – had the Regulations been in force then – it seems unlikely that his views would have met the Tribunal's subjective view of whether or not they were "worthy". As a result, employers could now be in the (financially costly) position whereby the same issues could now be retried in Tribunals with far different results depending on the *vox populi* at any given time.

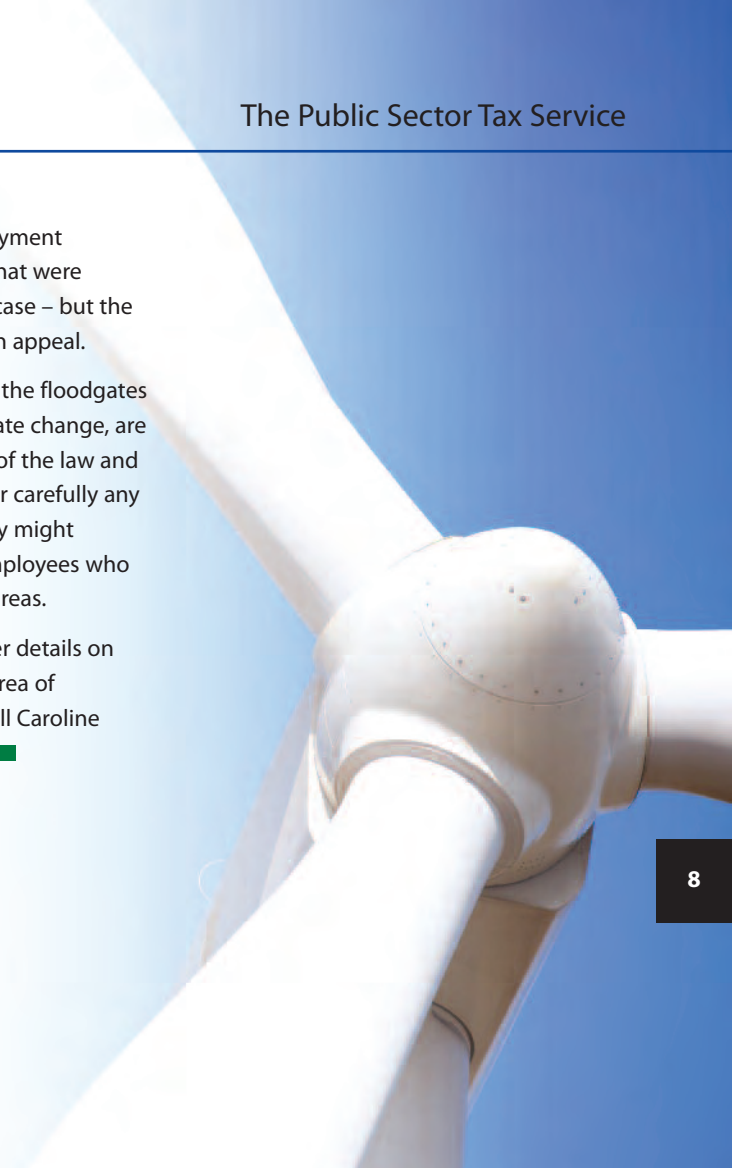
Are some beliefs more equal than others?

The answer is probably "yes". In 2008, a lady by the name of Ms Ladele who had worked in the Registration Service of the London Borough of Islington for nearly 16 years stated that she held "orthodox Christian beliefs" concerning marriage and same sex unions and, because of these beliefs, was not happy to perform civil partnerships for gay couples. The Tribunal originally found in her favour –

primarily due to her employment contract and other issues that were specific to the facts of the case – but the decision was overturned on appeal.

The case potentially opens the floodgates since matters, such as climate change, are protected by the full force of the law and employers need to consider carefully any disciplinary action that they might propose to take against employees who hold strong views in such areas.

If you would like any further details on this issue or on any other area of employment law, please call Caroline Doran on 0207 7264 4444. ■



More refund opportunities for the public sector?

By Joe Francis

The recent judgment in the ECJ case of TNT (C-357/07) might throw up refund opportunities for certain public sector bodies.

TNT claimed that they were entitled to exempt their postal services in the same way as the Royal Mail. TNT lost the case but the Court ruled that the exemption does not apply to supplies for which the prices were individually negotiated.

The opportunity arises where the qualifying supplies had been incorrectly treated as exempt; had they been standard rated - and subject to the caveats below - the customer could have

recovered input VAT on the supply. A three year retrospective claim could now be submitted.

There are three main caveats.

- 1) *The prices paid by the customer of the Royal Mail must be individually negotiated. The Royal Mail publishes a standard set of prices that have volume related discounts and contracts under this arrangement are unlikely to qualify as individually negotiated. However, if there were to be an arrangement that was different from the standard set of prices, it could qualify.*
- 2) *The contract between the customer and the Royal Mail must be silent on the question of VAT; this means that if the consideration is standard rated it is treated as VAT-inclusive.*

- 3) *HMRC might invoke unjust enrichment in refusing the refund claim.*

HMRC are unlikely to concede easily and repay claims that are made and, this being the case, further litigation may be necessary.

In our experience, most public bodies use the standard volume related discounts. However, we recommend that you review the arrangements that your organisation has with the Royal Mail since, if the necessary criteria are met, the VAT refunds could be significant. ■