

Neutral Citation Number: [2014] EWCA Civ 1116

A2/2013/3785

**IN THE SUPREME COURT OF JUDICATURE**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
(LADY STACEY)

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 9 July 2014

**B e f o r e:**

**LORD JUSTICE UNDERHILL**

**Between:**

**MAISTRY\_**

**Appellant**

v

**BRITISH BROADCASTING CORPORATION\_**

**Respondent**

DAR Transcript of the Stenograph Notes of  
WordWave International Limited  
A Merrill Communications Company  
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Tel No: 020 7404 1400 Fax No: 020 7404 1424  
(Official Shorthand Writers to the Court)

The **Appellant** appeared in person

The **Respondent** did not appear and was not represented.

**J U D G M E N T**  
(As approved by the Court)

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1. LORD JUSTICE UNDERHILL: This is a renewed application for permission to appeal against a decision of Lady Stacey sitting in the Employment Appeal Tribunal summarily rejecting, under rule 3(10) of the Employment Appeal Tribunal Rules 1993, two appeals against two decisions of an Employment Tribunal sitting in Birmingham. By the first, sent to the parties on 4 April 2012, the Tribunal dismissed the Applicant's claims of discrimination and harassment on the grounds of age and/or philosophical belief and of unfair dismissal. By a second decision, made on 21 August 2012, it awarded costs against him in the sum of £10,000. The Applicant is an educated and intelligent man who represented himself throughout in the proceedings below and has done so today before me. I gather he may also have had other experience as a litigant.
2. I need not on an application of this kind set out the factual background in any detail. It is sufficient to say that the Applicant is a journalist who was employed by the BBC for many years, latterly on the BBC Asian Network, but who was dismissed on 1 October 2010, with effect from 1 July 2011, on the grounds of alleged poor performance. It is his case that the real reason for his dismissal, and for the various acts of which he complained in the period leading up to it, was his age -- he was in his late 50s at the time of his dismissal -- and/or that he had a belief in what I will describe for the moment by way of shorthand as "BBC values" which constituted a "philosophical belief" within the meaning of the Employment Equality (Religion or Belief) Regulations 2003.
3. There was a pre-hearing review in February 2011 before Employment Judge Hughes, one of issues at which was, as she herself summarised it, "whether the Claimant held a belief amounting to a philosophical belief for the purposes of... [the 2003 regulations]...", being a belief "that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion". Judge Hughes made it clear that the latter formulation was a shorthand only. She considered elaborate and lengthy evidence, both oral and in writing, from the Applicant about the belief in question. This included both reference to philosophical and academic writings about the role of public service broadcasting in community cohesion and reference to his own life experience, particularly as a journalist under the apartheid regime in South Africa. She said at paragraph 8 of her decision:

"I accept that the Claimant had a genuine and strongly held belief in what I will describe in short as the higher purpose of public service broadcasting. It is clearly of great personal significance to him, given his journalist particular career, shaped as it has been by events in South Africa, and by a clear desire to ensure that journalism via the medium of public service broadcasting provides an opportunity for important issues such as the question of apartheid to be debated."

She then considered, by reference to the well-known decision of the Employment Appeal Tribunal (Burton J) in Grainger PLC v Nicholson [2010] IRLR 4, whether a belief of that character fell within the Regulations as having "a similar status or cogency to a religious belief". She held that it did, rejecting a submission that the BBC's values amounted to no more than a "mission statement": see paragraph 9 of her

decision.

4. The Applicant's case proceeded to a full hearing on that basis. His complaints were identified in a schedule incorporated in the Employment Tribunal's reasons as comprising 28 acts complained of. The Tribunal went through those one by one. As regards some it held that the act complained of did not take place; but as regards a number of others it found that, although the act had occurred, it was not on the grounds of the Applicant's age or philosophical belief, as the case might be.
5. As regards the findings in relation to philosophical belief, in each such case the essential point made by the Tribunal was that the individual responsible for the act in question was not aware of the Applicant's belief and was therefore not in any way motivated by it. I will quote paragraph 28.2 of the reasons, though there are a number of other paragraphs in substantially identical terms, albeit referring to other individuals. It reads:

"In order to be able to treat a person less favourably because of a philosophical belief (consciously or subconsciously), it is necessary that the alleged discriminator has knowledge of that belief in order for that belief (consciously or subconsciously) to influence the discriminator's mind. It was the unchallenged evidence of the Respondents that Mr Curtis had no knowledge of the Claimant's belief in the higher purpose of public service broadcasting, neither were there any facts before us from which we could infer that this was the case. Accordingly, this claim fails. For the avoidance of doubt, even if such evidence had been before us and the burden of proof was reversed, we were satisfied that the explanation for the treatment was in no way tainted by the Claimant's belief, but was because of the performance concerns."

I make two points about that formulation.

6. First, although the Applicant has focused entirely on the part of the reasoning about the putative discriminator's knowledge of his belief in the higher purpose of public service broadcasting, the final sentence contains an alternative reasoning which it is very difficult to challenge. Secondly, the Tribunal's reference to it being the "unchallenged evidence" that the individual in question had no knowledge of the Applicant's belief in the higher purpose of public service broadcasting is important.
7. At paragraph 21 of the reasons, it had made a point of noting that the Applicant had not put to any of the individual witnesses called, who comprised of all or almost all of those against whom complaints were made, that they knew of, and were motivated by, his holding that belief.
8. It is on those findings that the Applicant focuses in his grounds of appeal. Lady Stacey in the Employment Appeal Tribunal held that they were all matters of fact and were unchallengeable and were unappealable for that reason.

9. The principal focus of the Applicant's challenge to the liability decision is a passage in paragraph 21 of the reasons where the Tribunal is considering his credibility. It makes the point that in none of the elaborate grievance and appeal procedures which he went through prior to his dismissal did he assert that he was being treated in the way complained of because of his age or, materially for present purposes, the philosophical belief which he asserted. In that context, the Tribunal acknowledges:

"...that the Applicant does occasionally make reference to the "BBC values" in the context of there being a lack of BBC values applied to him or, as he stated at his appeal against dismissal, that he was dismissed for upholding the BBC values."

But, it continues:

"The evidence before us from the Respondent was that the BBC values are a mission statement incorporating the following behavioural characteristics.

Trust: The BBC is independent, impartial and honest.

Audiences are at the heart of what the BBC does.

Quality: The BBC takes pride in delivering quality and value for money.

Creativity is the life blood of the BBC.

Respect each other and celebrate diversity so that everyone can give their best at working together.

BBC: Where great things happen.

That these were the BBC values was not challenged by the Claimant and it seems to us, therefore, that the BBC values are distinct from the belief which the Claimant holds in the higher purpose of public service broadcasting which has been found to be a protected belief. Even if, when the Claimant referred to the BBC values, he actually meant the higher purpose of public service broadcasting, it is noteworthy that nowhere is this set out or explained, particularly given the degree of detail in which the Claimant felt able to complain about his treatment."

10. The Applicant says that this is a false distinction and one which goes back on what Employment Judge Hughes had already decided: when, in his dealings with his colleagues and managers, he had referred to BBC values he meant the matters that constituted the philosophical belief which Employment Judge Hughes had found that he held. He had in fact sought to advance that point in an application for a review of the Tribunal's decision which he made on the back of a BBC report published subsequent to the hearing (the "Respect at work review") which described "respect" as part of the BBC's values. His overall point was the BBC repeatedly and publicly proclaimed its

values and it is wholly implausible to say that the managers and colleagues responsible for the acts complained of were unaware that he subscribed to those values.

11. I have considered those points carefully, but I am sorry to say that I do not think they gave give rise to any reasonable prospect of success on appeal. My reasons are as follows.
12. The starting point is that since this is a claim based on discrimination what matters is what motivated the various individual colleagues and managers who were responsible for the acts complained of. What the Applicant himself thought or meant by anything he said is not directly relevant. The Tribunal was, therefore, unquestionably right that if the individuals in question were unaware that the Applicant held the philosophical belief in question they could not be motivated by that fact or, therefore, be guilty of discrimination; nor could the BBC be so guilty as their employer. Whether they were so aware is a question of fact. The Tribunal's finding that they were not can only be challenged on appeal if it was not open to it on the evidence. That is always a high hurdle for would-be appellants. It is particularly so here where none of them were cross-examined to establish what they knew about the applicant's beliefs.
13. The Applicant's essential answer, as I have said, is that it was impossible that the individuals in question could have been unaware of his belief in BBC values given that they are pervasive in the BBC, and perhaps also because he had, in the case of the disputes which gave rise to the acts of complaint or acts complained of, referred to those values, as the Tribunal acknowledged in the passage that I have read. But I am afraid to say that I do not believe that it is arguable that a generalised assumption that senior management employees will subscribe to BBC values can be equated with the knowledge that a particular employee has a philosophical belief in those values. That is not the same thing. The fact that to the applicant those values constituted a belief with similar status and cogency to a religious belief does not mean that will be so in every case. To others it might indeed be no more than their employer's mission statement about the values that they were expected to observe at work.
14. That is not in any way contrary to what Employment Judge Hughes decided. Her conclusions were based on the Applicant's own evidence particular to himself and his life experience in two aspects -- first (though in fact he put them the other way round) whether the values in question were capable of constituting, so to speak, the subject matter of a philosophical belief; and secondly whether his belief in those values was of such a character as to qualify as a philosophical belief. Her finding on the first point was not a finding that subscribing to those values would be a philosophical belief in every case. That is, I believe, the distinction that the Tribunal was making in the passage in paragraph 21 to which the Applicant takes particular exception; but on that basis, it is in fact wholly unexceptionable. I think that it is that which Employment Judge Hughes had in mind when refusing the review.
15. In any event, paragraph 21 is not central to the Tribunal's reasoning on the dispositive issue. It is concerned with his credibility. He did not lose on the points with which we are concerned because he was not believed but because of what the Tribunal found

about the knowledge and motivations of the individuals whose acts were complained about.

16. As for the references which the Applicant apparently made from time to time over the sequence of events leading to his dismissal to BBC values, these are, I repeat, only material if and to the extent that they would have conveyed to the individuals with whom he was dealing that he had the philosophical belief in question though even then he would face a further and high hurdle in establishing that they acted in the ways complained of because or at least partly because, he held those values. As to the latter, it is important to appreciate that to take action against the Applicant because of a disagreement about whether a particular course of action was or was not consistent with BBC values would not as such be taking action against him because he subscribed to those values (or, more accurately, had a philosophical belief in them) but on the Tribunal's reasoning those issues did not arise and I need say no more about it. I can see nothing in the Tribunal's factual findings that could begin to ground a case that what the Applicant may have said from time to time about "BBC values" must have conveyed that he held a philosophical belief of the kind in question. On the contrary, the subject matter of the various complaints seems to have been specific disputes about matters of editorial judgment and the like. Even if the attitude adopted by the Applicant in those disputes or as regards those issues was, as he tells me, motivated by his views about what BBC values required, that is not good enough unless that was articulated. The Tribunal's findings clearly establish that nothing of that kind was articulated. Indeed, if he was saying, as appears to have been the case at least at the appeal stage, that he was being dismissed on the grounds of BBC values because he was not being treated with respect and respect was a BBC value, that is an evident non sequitur.

17. Those arguments, which for the reasons I have given I reject, underlie the entirety of the Applicant's pleaded grounds of appeal going to the liability point (which are numbered (i) to (vii)) and I need say no more about them. But in fact my conclusion on those points also undermines the two grounds numbered (viii) and (ix) which go to the costs judgment. They read as follows:

(viii) The Tribunal erred in finding the claims of discrimination and harassment were misconceived from the start.

(ix) The Tribunal erred in regarding the Respondent's costs warning letters as an aggravating factor."

As developed in the Applicant's skeleton argument, both points are essentially based on the proposition that he was right, or at least had an arguable case, on the central issues going to discrimination, and that accordingly it could not be said, on the one hand, that the proceedings were misconceived or, on the other, that it was unreasonable of him to disregard the costs warning which he had been given. But if I am right it was, I fear, entirely open to the Tribunal to decide, on the points already covered, first that his case was indeed misconceived, because it proceeded on a fundamental misunderstanding about what he had to prove; and, secondly, that it was a relevant consideration that he had disregarded costs warnings given by the Respondent.

18. For those reasons I refuse permission to appeal.