Employment Tribunal and the EAT were in agreement that there was an infringement of Article 11 and, based on the European case law, it is likely that the European Court of Human Rights would agree.

The ultimate impact of this particular case could be seismic. Domestically, the right to take industrial action is barely tolerated on a legislative level and such a decision may pave the way to an accepted right to take industrial action in English Law. This being said, it is likely that any such decision brought about by association with the European Convention on Human Rights and, by extension, the Court of Human Rights, would not be politically welcomed by the current administration set against the backdrop of its present weakening relationships with other European institutions. In any case, if the decision is met with tolerance, then more claims should be expected regarding the definition of 'industrial action' over the coming years, with Parliamentary intervention a possibility in the absence of any politically favourable judicial pronouncements.

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Free speech – freedom from discrimination – duty of diversity - dismissal from office

Page v Lord Chancellor [2021] EWCA Civ 254; *Page v NHS Trust Development* Authority [2021] EWCA Civ 255

Court of Appeal

The Facts and decision

In the first case - *Page v Lord Chancellor* - a lay magistrate (P) appealed against a decision of the Employment Appeal Tribunal, upholding an employment tribunal's conclusion that he had not been victimised by the respondents, the Lord Chancellor and the Lord Chief Justice. In 2014, P sat as a member of the family panel determining an unopposed adoption application by a same-sex couple. Based on his beliefs as a Christian, he expressed views to his fellow magistrates making it clear that he objected to same-sex couples adopting children; he then declined to sign the adoption order. These acts led to a disciplinary hearing and his being formally reprimanded by the Lord Chief Justice and the Lord Chancellor. Subsequently, P gave an interview on national television in which he expressed his belief that it was better for a child to be adopted by a man and a woman (in court accepted as the "broadcast words"). That led to further disciplinary proceedings and his removal from the magistracy. P complained to the employment tribunal of victimisation, alleging that the second round of disciplinary proceedings had been brought because he had done a protected act within the meaning of s.27 of the Equality Act 2010, namely complaining that the first round of proceedings was discriminatory. The employment tribunal dismissed his claim, finding that he had been removed because he had publicly stated that in adoption cases he was not prepared to put aside his own beliefs and discharge his functions as a magistrate according to the law and the evidence. The tribunal conceded that his removal interfered with his right to freedom of expression under Article 10 of the European Convention on Human Rights 1950, but then found that the interference was justified under Article 10(2) in the interests of maintaining the authority and impartiality of the judiciary. The Employment Appeal Tribunal upheld the tribunal's decision.

P appealed to the Court of Appeal on the following grounds:

(1) In identifying the protected act, the employment tribunal and EAT should have looked beyond the broadcast words and seen that they substantiated his allegation that he had been discriminated against because of his religious beliefs;

(2) The tribunal and EAT had erred in their analysis of the decision in *Martin v Devonshire Solicitors* [2011] ICR 352, which distinguished between unlawful victimisation and punishment for a separate feature of the complainant's conduct;

(3) The EAT erroneously conflated the respondents' "reason" for removing him with their "motive" for doing so;

(4) The tribunal and EAT had erred in their analysis of Article 10 of the Convention.

In the Court of Appeal, it was held that the Lord Chancellor and the Lord Chief Justice had not victimised P by removing him from office after he gave a television interview. This was because he had not been removed for the protected act of alleging that he had been discriminated against, but for publicly declaring that in cases involving adoption by same-sex couples he would proceed not on the basis of the law and the evidence but on the basis of his own beliefs.

In dismissing P's appeal, the Court of Appeal firstly considered whether there had been a protected act which P could rely on as the basis of his victimisation claim. The Court held that although the broadcast words did not *of themselves* constitute a protected act, it was legitimate to look beyond them. In the Court's view, the tribunal had done that by allowing P to characterise the interview, as a whole, as an assertion that he had been disciplined because of his Christian views. Thus, the tribunal could not be criticised in that respect. (At paras 51-52).

With respect to the tribunal's interpretation of *Martin* – the Court followed that case and *Panayiotu v Kenaghan* ([2014] IRLR 500). It noted that *Martin* established that a dismissal in response to a complaint of discrimination would not constitute victimisation if the reason for it was not the complaint as such, but some feature of it that could properly be treated as separable. In the Court's view, while it was important that the protection provided by the anti-victimisation provisions should not be undermined, the circumstances did not have to be exceptional for the *Martin* principle to apply. Tribunals could be trusted to recognise those features that were properly separable from the making of the complaint.[1] In any event, the instant case was not in *Martin* territory because P's decision letter identified the relevant misconduct as the magistrate's statement of how he would perform his duties in the case of a same-sex adoption. The tribunal's unchallenged finding was that the letter was a true reflection of the reasons for removal. It was easy to see why the Lord Chancellor and the Lord Chief Justice would regard it as unacceptable for a magistrate to state on television that he had a bias against same-sex adoption. Finally, one of the three stated reasons for the decision to refer the magistrate's conduct to the second disciplinary panel was that the interview had led to negative publicity, involving criticism of the respondents which could bring the judiciary into disrepute. Although "criticism of the respondents" could only refer to the magistrate's criticism of their having reprimanded him, the tribunal found that the second disciplinary proceedings were not motivated by the magistrate having made a complaint, and there was no basis for interfering with that finding. (At paras 55-56).

On the third ground with respect to motive, the Court of Appeal held that it was well- established in *Martin* and *Reynolds v CLFIS (UK) Ltd* ([2015] EWCA Civ 439), that a benign motive for detrimental treatment was no defence to a victimisation claim. Further, there had been no error in the EAT's reasoning in that respect; the EAT had referred to "motivation" - which was not the same as "motive" and thus had not conflated or confused the respondents' motive (At paras 68-70).

Finally, with respect to Article 10 ECHR, P had relied on the proposition laid down by the Court of Appeal in *R (on the application of Ngole) v University of Sheffield* ([2019] EWCA Civ 1127). This he had done to argue that someone who had expressed discriminatory views did not necessarily mean that they would allow those views to affect their professional conduct. However, in the Court of Appeal's view, that was beside the point, because in this case P had publicly stated that his views *would* affect his conduct as a magistrate, meaning that he would be biased in the execution of his judicial duties. The statement also meant that his case was distinguishable from other cases decided by the European Court of Human Rights, and that the tribunal was right to find that the making of it compromised his judicial impartiality such that his removal was a justified and proportionate sanction (At paras 78-83).

In the second case - *Page v NHS Trust Development Authority* – P had been a non-executive director of an NHS and social care trust responsible for delivering mental health services; and the authority was responsible for his appointment. P was also a lay magistrate, sitting in family cases. He was a devout Christian and firmly believed that it was in a child's best interests to be brought up by a mother and a father. When he was reprimanded by the Lord Chief Justice for declining to agree the adoption of a child by a same-sex couple (see above), he spoke to the press about his views on same-sex adoption. The events came to the trust's attention, and it raised with him the connection that might be made between his views in media interviews and his role with the trust, instructing him to alert it about any further media coverage. Following further disciplinary action by the judicial authorities, he was removed as a magistrate. Without prior notice to the trust, he gave a number of media interviews in which he alleged that the magistracy had discriminated against him because of his religious belief. The authority suspended him and decided against renewing his term. This was based on its concern that his actions could damage the trust's ability to serve its LGBT patients, who already had difficulty engaging with the trust's services, and that his actions were likely to negatively affect the confidence of staff, patients and the public in general in the appellant as a local NHS leader. P brought religious discrimination and victimisation claims against the authority under the Equality Act 2010, but the employment tribunal rejected the claims, and the EAT upheld the tribunal's decision.

On appeal to the Court of Appeal, it was held that P had not been discriminated against because of his religious belief. Rather, in the Court's view, the disciplinary action had been taken against him because he had, without prior notice to the trust, given media interviews in which he had expressed views about same-sex adoption and homosexuality which were liable to impact on the trust's ability to engage with gay service-users, and had shown no insight into why that was problematic. The reason for the disciplinary action had not, therefore, been because he was a Christian, or because he believed that it was in a child's best interests to be brought up by a mother and a father.

With respect to Article 9 ECHR, the tribunal had found that, even if the appellant's rights under Article 9 were engaged, any interference with those rights was justified, and in the Court's view, it been entitled to reach that conclusion on justification. The appellant had expressed views about homosexuality that had gone beyond same-sex adoptions and the case had been based specifically on the risk that the fact that a member of the trust's board held the views that the appellant did about homosexuality might deter mentally ill gay people in the trust's catchment area from engaging with its services. That risk related directly to the trust's ability to perform its core healthcare functions. Finally, the appellant's conduct had made it impossible to find a way forward that might have respected both parties' interests (at paras 51 and 59-63)

Turning to the direct discrimination claim, it was held that the essential question was whether the act complained of was done because of the protected characteristic. Thus, it was necessary to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief, case law recognised a distinction between cases: (a) where the reason was the fact that the claimant held and/or manifested the protected belief, and (b) where the reason was that the claimant had manifested that belief in some particular way to which objection could justifiably have been taken. In the latter case, it was the objectionable manifestation of the belief, and not the belief itself, which was treated as the reason for the act complained of (*Chondol v Liverpool City Council* [2009] 2 WLUK 266, *Grace v Places For Children* [2013] 11 WLUK 78, and *Wasteney v East London NHS Foundation*

Trust [2016] 4 WLUK 120). The tribunal had applied that distinction, and the authority had taken disciplinary action against the appellant not because he was a Christian or because of his belief that it was always in a child's best interests to be brought up by a mother and a father. Rather it was because he had expressed the latter belief in the national media in circumstances which justified the action that was taken. Thus, there had been no error of law in the tribunal's decision on direct discrimination (at paras 68-69, 72, 74, 80).

The Court also rejected indirect discrimination claim, noting that the tribunal had rejected the claim on the ground that, even if there had been a provision, criterion or practice that put Christians at a group disadvantage, it had been justified for the reasons given in relation to Article 9. As the appellant had not challenged the tribunal's finding on justification, it was difficult to see how the tribunal's conclusion on justification in relation to Article 9 would not read over to the indirect discrimination claim (at paras 82, 87, 89). Similarly, the victimisation claim failed. The tribunal had found that the reasons for the disciplinary action taken against the appellant were that he had, without prior notice to the trust, given media interviews in which he had expressed views about same-sex adoption and homosexuality more generally. Those reasons in the trust's view were liable to impact on its ability to engage with gay service-users, and further that he had shown no insight into why that was problematic. Those reasons, in the Court's view, had nothing to do with what he had said about having been discriminated against as a magistrate and thus the victimisation claim failed (at paras 92-94).

Commenting on the implications of the decision, the Court noted that the **c**ourts had shown themselves astute to protect the freedom of Christians to manifest their beliefs in relation to matters of traditional Christian teaching. However, the freedom to express religious or any other beliefs was not unlimited, and there were circumstances in which it was right to expect Christians who worked for an institution, especially if they held a high-profile position, to accept some limitations on how they expressed in public their beliefs on matters of particular sensitivity. Whether such limitations were justified in a particular case and struck a fair balance between the rights of the individual and the legitimate interests of the institution for which they worked, could only be judged by a careful assessment of all the circumstances of the case. In the present case, the tribunal had been entitled to conclude that the authority had not acted unlawfully (at paras 100-101).

Analysis

Both decisions in *Page* appear to adopt the traditional judicial approach in not accommodating individual religious views when enforcing equality and diversion policies, although they provided the Court with an opportunity to review the previous case law

When free speech conflicts with another's right not to be subject to discrimination, the law and the courts are faced with the dilemma of reconciling those two rights. This raises difficulties in deciding whether speech that is potentially discriminatory should qualify as protected speech and whether any protection should be overridden by a more compelling need to offer equality and diversity. This dilemma is magnified when the speaker holds employment or office and is bound by their, or their employer's, duty to uphold such equality and diversity. As a consequence, cases such as the present not only engage debate about the scope and protection of free speech in a democratic society, but also the rights of employees and office holders to express themselves without fear of dismissal or other sanction.

With respect to the issue of free speech, until recently, the courts have given preference to equality policies at the expense of individual speech and beliefs, largely ignoring free (religious) speech rights: (*McClintock v Department of Constitutional Affairs* [2008] IRLR 29; *London Borough of Ealing v Ladele* [2010] 1 WLR 995 and *Ladele v United Kingdom*, Application No.51671/10 (2013) 57 EHRR 8; *McFarlane v Relate Avon Ltd [*2010] IRLR 872 and *McFarlane v United Kingdom*, Application No. 36516/10) (2013) 57 EHRR 8.

However, in *R (Ngole) v University of Sheffield* ([219] EWCA Civ 1127), the Court of Appeal decided that a university had acted unlawfully in deciding to expel a devout Christian student from a post-

graduate course after he posted comments on social media expressing his orthodox religious views about same-sex marriage and homosexuality. In that case, the Court decided that the University's decision was both procedurally incorrect and disproportionate to the student's Convention rights of free speech and religion. The Court concluded that the university's approach to the sanction was disproportionate because the views expressed were the appellant's religious and moral views, based on the Bible, and he had not been shown to have acted in a discriminatory fashion (and had stated that he would never do so). As there was no evidence that any service user had read the postings, or of any damage to the reputation of the profession, the conclusion that he needed to be removed from the course had not been demonstrated to be the least intrusive approach that could have been taken.

The decision in *Ngole* reopened the debate concerning the extent to which religious and personal views challenging equality and diversity can be voiced (particularly by those who owe a contractual or legal duty to promote equality and diversity). However, as we can see above, the Court of Appeal was able to distinguish *Ngole*, because in the present case P had made it perfectly clear that he would treat homosexuals differently when carrying out his public and contractual duties. It is clear, therefore, that cases such as *Ngole* and the present case are decided in the context of the responsibilities owed by employees or budding employees towards upholding principles of equality and diversity. Thus, unlike purely private citizens who wish to express their views on matters such as homosexuality or transsexuality (*R (Harry Miller) v The College of Policing and Another* [2020] EWHC 225 (Admin)), these cases are viewed differently as the individual has both a contractual and/or public duty to support the state and their employers in promoting equality and diversity.

Notwithstanding this, these cases do affect free speech and the right to hold and express religious and other views, and the law and judges must seek some compromise in order to accommodate the (religious) free speech rights of the speaker. Although the decision in *Ngole* is not direct authority on the extent to which the law allows such views to be expressed, some of the points made by the Court of Appeal on proportionality (of both the language used to express the view and the penalty imposed by the university) may have significance to a wider debate on free speech. Certainly, the recent EAT decision in *Forstater v CGD Europe* **(**[2021] 6 WLUK 104) suggests that such views do engage Article 9 and 10 Convention rights. In that case the EAT held that an employment tribunal had erred in holding that a "gender-critical" belief that sex was biologically immutable, and that sex rather than gender identity was fundamentally important, was not a "philosophical belief" protected under s.10(2) of the Equality Act 2010. In that respect the doubt expressed by the Court of Appeal in this case that the reason for dismissal was not to do with P's Convention rights, may have to be revisited, even if the sanction can be justified as proportionate on the facts.

With respect to employment law, *Page* adds to the growing jurisprudence on free speech and discrimination at work. Employers are left with a precarious balancing act. Employees have an absolute freedom to hold any belief or religion under Article 9. In this regard, employers should not discriminate purely on the basis of religions or beliefs held by applicants or employees (except in the very limited exceptions permitted in Schedule 9 of the Equality Act 2010).

However, the right to *manifest* religion or belief is subject to the limitations in Article 9(2), and the freedom of expression is subject to similar limitations in Article 10(2). Manifestation of belief may include stating those beliefs but also acting in a certain way based upon those beliefs. In *Page*, the office holder manifested his belief not only by expressing his beliefs, but also indicating he would act upon those beliefs in the way he performed his work roles. This had the potential to impact negatively on the employer's business and its relationship with its clients. In addition, and significantly, this particular manifestation of his beliefs would discriminate against those falling within other protected characteristics. Thus, in *Page,* the freedom of the employee to manifest his religious beliefs was lawfully curtailed by the employer in balancing the rights of the employee with the rights of others (the business and its clients) since the manifestation would itself lead to discriminatory conduct. In this regard, *Page* adds to existing authority (such as *Ladele, McFarlane,* above, and *Trayhorn v Secretary of State for Justice (*[2018] IRLR 502) that suggests an employer may take action against an employee where the employee's belief-based conduct discriminates against clients. Indeed, failure to take action

against such discriminatory belief-based conduct has the potential to give rise to claims by such clients against the business for discrimination in the provision of services under Part 3 of the Equality Act 2010. In addition, where the employer is a public authority, it is also under a duty to promote equality and so failure to act may breach its statutory duties (under Part 11 of the Equality Act 2010).

Neither freedom of expression, nor freedom of religion are absolute rights. Both may be limited in accordance with law and for the protection of the rights of others (Article 9(2) and Article 10(2)). In the employment arena, there may be various competing rights: the employer and the employee; between different employees; between employer and client; or between employee and client. Employers and employees have freedom to think and believe whatever they choose. Manifestation of belief may, and sometimes should, be restricted when protecting the rights of others. Simply stating your beliefs, without more, might not be subject to sanction. This would recognise and uphold Article 9 and Article 10. However, where the expression goes beyond a mere statement of belief, and impacts negatively on the business, or other employees, or clients, the employer may, and indeed sometimes should, be able to sanction employees for such conduct. While the parameters of freedom of expression in the employment context remain fact dependent, *Page* provides further support for employers in sanctioning employees whose belief-based conduct at work discriminates against clients.

What remains more problematic, is where belief-based discriminatory views are expressed by an employee (whether at work or outside work), but without impacting on the manner of performance of the job role. The expression of belief here may still impact on the business, by deterring clients, or on fellow employees, who may claim harassment. In *Page,* the employee was a senior figure of the employer and so public statements were more likely to impact negatively on the business and its clients. In *Wasteney v East London NHS Foundation Trust* ([2016] ICR 643) the Employment Appeal Tribunal upheld a disciplinary sanction against a Christian employee for inappropriately trying to impose her Christian beliefs on a junior Muslim employee. This went beyond a mere statement of her religious beliefs. Employers are under a common law duty of care to their employees which includes protection against other workers (*Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57) and which extends to their mental health (*Barber v Somerset CC* [2004] ICR 457). In addition, employers or employees who state discriminatory views themselves may face potential harassment claims under s.26 of the Equality Act 2010, whilst employers may face statutory vicarious liability under s.109 for expressions of such views by their staff. Employers may seek to address such issues by the inclusion of equality opportunity policies. The balancing act between freedom of expression and non-discrimination, however, is less obvious here. Whether simply stating a view is capable of amounting to harassment of another, may be fact dependent.

In addition to verbal expressions of belief, there are parallel debates on freedom of religion and expression through religious dress and appearance, and the imposition of dress codes at work. At EU level, a more secular approach appears to be finding favour with the Court of Justice seemingly permitting employers to adopt a policy of neutrality, subject to some provisos (most recently Joined Cases C-804/18 and C-341/19 *IX v WABE e.V; MH Müller Handels GmbH v MJ* (15 July 2021)). There have been numerous criticisms of and counter-arguments to this approach, including the suggestion that a diversity of beliefs within an organisation may achieve the same aim as neutrality of beliefs, in attracting a broad custom base, which would also allow for maintaining Convention rights under Articles 9 and 10. The United Kingdom has traditionally followed a more inclusive, multi-cultural approach to many EU countries, with the UK approach supported by more recent judgments of the European Court of Human Rights. There is no sign, as yet, of a similar approach of employers adopting a policy of neutrality in relation to verbal expressions of belief, or at least such cases are not coming before the domestic courts. A ban on any discussion of religion or belief at work in the interest of neutrality would raise further issues for consideration.

As confirmed in *Page*, however, an individual's freedom of expression, whether that expression occurs in or outside of the workplace, may be subject to some limits in the context of work. Employers will need to continue to seek to balance the freedom of expression for its employees to express belief-based views, including discriminatory views, with their own interests, and those of its clients, as well as other

employees. Such cases will remain fact dependent. The tipping point would include where such expression itself amounts to unlawful conduct. While in *Page,* the expression fell the wrong side of the balance, as seen in other cases, such as *Forstater,* the search continues for employers and courts alike, to establish the precise point of that fulcrum.

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