Abusing the Law: Fraser v. UCU

BRICUP
British Committee for the Universities of Palestine

"... an impermissible attempt to achieve a political end by litigious means."

Employment Tribunal judgment, 2013

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A copy of this newsletter with links to references can be downloaded from www.bricup.org.uk/FraservUCU.pdf

Editorial introduction

The judgement in the case of Fraser v. UCU was handed down in March this year. UCU member Ronnie Fraser had accused his union of antisemitic harassment, and indeed of institutional antisemitism. Although a ruling by an Employment Tribunal does not constitute a legal precedent, the stakes were high. For the antisemitism that Fraser claimed to have experienced virtually all occurred in the context of the union's debates about Israel, and specifically about boycotting Israel's university institutions. If the Tribunal decision had gone against the union (and then been upheld on appeal) it would have made virtually any future critical discussion on Israel impossible. Indeed the ruling would have had a chilling effect on debate on Israel throughout the union movement. Arguably all discussion of international solidarity issues would have been off the menu for the foreseeable future.

This did not happen. The Employment Tribunal handed down a ruling which is truly remarkable for the scathing nature of its commentary on the complaint alleged against the union. It is found to be deficient in a whole range of ways – attempting to apply a law (the Equality Act 2010) to events that occurred before it came into force, attempting to bring complaints which are 'out of time', proposing bizarre extensions to legal concepts etc. Most fundamentally the Tribunal lambasted the entire complaint as "an impermissible attempt to achieve a political end by litigious means." Read all about it inside.

All this has not been without its costs. A knowledgeable senior lawyer writing in the Jewish Chronicle estimated that the complainant's costs for the 20 day proceedings must be in the region of £500,000. One can only speculate as to where the money came from, so we do, within. The un- humorous side of this is that our union, in financial difficulties already, has been forced into very great expense to defend itself. Although costs are not normally awarded in Employment Tribunal cases, exceptions are possible, and we hope that UCU will energetically strive to get its (our) money back.

Since UCU was formed out of the merger of NATFHE and AUT, the union has been on the receiving end of a series of legal threats, several time associated either with Ronnie Fraser or with his lawyer Anthony Julius. (More detail of this is provided inside.) This sword of Damocles has been repeatedly raised over the union's head, and undoubtedly has had an impact. The union's executive, trustees and administration have repeatedly held back from the energetic application of Congress decisions, to the extent that on one occasion a motion passed by Congress was declared null and void. So the threat of legal retribution has been all too effective, for years. A masterly strategy, one might say.

The decision actually to release the Damocletian sword has changed all that. It has proved to have feet of clay. Its gleaming blade turns out to be made of bendy rubber. In principle its exposure as nothing but a farcical pantomime weapon should liberate discussion and debate in the union from an external constraint. This does not mean liberate it to be antisemitic – the union has strict rules on this which the Tribunal did not fault. But it allows the union acting collectively, rather than a small caucus pursuing other agendas, to decide what to debate, and what decisions to come to; even if they involve Israel and the academic boycott. In the post-Hawking era it is now reasonable to expect academic boycott to become the common sense of our community.

Ronnie Fraser's valiant charge

Jonathan Rosenhead
Chair of BRICUP

Ronnie Fraser's charge at illusionary windmills has come to an ignominious end. Horse and rider (sometimes it is difficult to tell which is which) are in the ditch. How did it come to this?

Fraser and the Academic Friends of Israel

The story is not clear in all its details, as some of it has taken place between consenting adults in private. In this note I will say what is known, and indulge only in reasonable inference about what may have gone on behind the scenes.

Ronnie Fraser is a lecturer at Barnet College, and is or has been a part-time doctoral student at Royal Holloway College, London. He is also a member of the Board of Deputies for British Jews (BoD). As a lecturer he was a member of the trade union NATFHE, which with AUT merged into the University and College Union in 2006. Four years before that, in response to the beginnings of organized UK academic concern about links with Israeli universities, he established a pressure group Academic Friends of Israel (AFI). Under cross examination in the Employment Tribunal case which gave its findings in March 2013, he conceded that AFI is basically himself, his wife, a computer and an address list. It has pumped out as many as 26 bulletins in a single year to those on that list.

AFI has had a presence of varying strengths at UCU annual Congresses since the first one in 2007. (In that year it hosted a lunchtime fringe meeting with lavish quantities of really high quality finger food which I really appreciated, as did a number of my colleagues. However, excluding BRICUPers the number of punters failed to reach double figures.) In some years he was a Barnet College delegate to Congress – he explained at the Tribunal that this had happened (despite UCU's 'anti-Semitism') because no one else had wanted to go.

As a result of Fraser's testimony at the Tribunal we now know that "the Friends of the various Israeli University groups" gave £70,000, via the Fair Play Campaign (set up jointly by the BoD and the Jewish Leadership Council[*]), to fight the academic boycott movement. The largest chunk (£50,000) went to Engage, the organization set up to fight BRICUP. This enabled Engage to appoint staff, and run quite a slick website. (For the record BRICUP has always been run on a shoe-string, and its bank account has never reached £2000.) It seems that some part of this pro-Israel funding did find its way to AFI – though as we will see this is not the end of its sources of funding.

Lawfare

The background to Ronnie Fraser's legal assault on his union consists of a number of pro-Palestinian resolutions passed by UCU congresses from 2007 onwards. Several of them asked members to give thought to boycotting Israel's universities. Others enjoined the union's executive to organise meetings or circulate information about the boycott. One motion in 2011 proposed that the union should henceforth make no use internally of a contentious definition ('the EUMC definition') of antisemitism. All these motions were passed, and with steadily increasing majorities from year to year.

It is time to introduce another key player in this drama, Anthony Julius, Deputy Chair of noted solicitors Mishcon de Reya. Julius is best known to the general public as divorce lawyer for Princess Diana, as well as Heather Mills; but he is also Chairman of the Board of the weekly Jewish Chronicle, and a founder member of Engage. His books include a history of antisemitism in England.

In 2005, Julius acted for 6 AUT members in claiming that a boycott motion briefly passed by that union (but quickly reversed at a recall conference) was *ultra vires* (outside the union's powers as defined by its articles of association). He wrote again in 2007, this time to UCU, and on behalf of 4 unnamed members, to make much the same points to the newly formed union. Julius will turn up again in this story, often hand in hand with Fraser.

There was yet another legal broadside in 2008 when 2 QCs, funded by the Jewish Leadership Council, said that the world would end (I paraphrase slightly) if UCU went any further down the boycott route.

There is no doubt that the UCU leadership, including the Trustees who stood to be bankrupted, were comprehensively spooked by these legal threats. They were extremely cautious in implementing Congress decisions (e.g. allowing branches to discuss boycott, but under no circumstances to hold a vote on it), and in 2009 the UCU President ruled a motion that Congress had passed by a large majority to be

[*] Interestingly the Chief Executive of the Jewish Leadership Council, Jeremy Newmark, was found to have given evidence to the Tribunal "that we have rejected as untrue".

null and void as potentially constituting a legal infringement.

Ronnie Fraser to the fore

In 2007 Ronnie Fraser, on behalf of his branch, proposed a motion to Congress to incorporate the 'EUMC working definition of Antisemitism' into the union's working practices. In the Employment Tribunal proceedings it was revealed that the intention behind this proposal was to make implementing an academic boycott through UCU impossible. He withdrew the motion on the advice of the Board of Deputies and the Jewish Leadership Council, who disagreed with his strategy. They thought a discussion on this topic might reduce their chances of getting another motion, which they thought more important, carried on the following day.

In 2010 Fraser accused a UCU member of antisemitism, invoking UCU's internal complaints procedures. This charge was based on some emails that the member had posted on UCU's internal email Activists List. Fraser's entire case, all ten items of it, was based on specific alleged violations of the EUMC's definition of antisemitism. The complaint was investigated, the member (who was also a member of BRICUP) appeared before an internal tribunal, and all the charges were rejected.

One might have thought that antisemitism was fairly simple to define – along the lines of "prejudice, hatred of, or discrimination against Jews for reasons connected to their Jewish heritage", which is how Wikipedia has it. But the EUMC definition was explicitly constructed to include any criticism of Israel and its policies as potentially antisemitic.

The following year Congress passed by a large majority a motion that the EUMC Working Definition of Antisemitism should not be used within UCU. The argument was not that antisemitism was to be ignored (indeed as a form of racism any instances should be severely dealt with by the union) but that the EUMC definition conflates anti-semitism with criticism of Israel.

According to Fraser (at the Tribunal) it was this decision that provoked him into his legal action. In 2011 Julius wrote to UCU on Fraser's behalf alleging antisemitic harassment by UCU of his client. At last in 2012 Fraser finally, and disastrously, decided to take his case to the Employment Tribunal. The rest is (legal) history.

A question remains – 20 days of Tribunal hearings, being represented by one of the highest profile lawyers in the country. Even the UCU with its 120 thousand members has found it a heavy financial burden. How did Fraser afford it? Only a limited number of answers are possible. He is independently wealthy? Julius is acting *pro bono*? In fact the answer seems to be more obvious. Here is Amir Sagie, Director of the Civil Society Affairs Department, Israeli Ministry of Foreign Affairs, speaking in Johannesburg in February to a Zionist audience: "For us to challenge BDS initiatives we need to understand the legal environment. Over the last six months Israel has taken on two (court) cases in partnership with UK Jewry. We are trying wherever possible to challenge BDS morally and legally."

So there we have it: a story of communal organisations and a foreign state conspiring to manipulate and control an autonomous UK academic trade union. Not plucky little Ronnie Fraser up against the UCU goliath. In this case it is, rather, UCU in the role of David, and for once taking unerring aim with its sling-shot.

The reckoning

The fallout has been dramatic and is still continuing. Part of it is being fought out on the Engage website where David Hirsh (one of Fraser's witnesses) has written an interminable piece in effect saying that of course UCU was indeed guilty of antisemitism, and that the only explanation for the Tribunal decision is that its members live in Britain's pervasive antisemitic culture and are tarred with the same brush Read a condensed version.. Almost no onrush of reflective stock-taking has occurred among Engageniks. The general tendency is to re-fight the battle that has just been fought and lost in the courts and to accuse the referee of committing a foul (or at least of looking the other way while one was being committed). The exception is a hardcore who in effect say, "I told you so – Britain is rotten to the core with antisemitism. Pogroms are round the corner, so best emigrate to Israel now".

To the amazement of almost everyone the Jewish Chronicle published a piece by Simon Rocker which was balanced and un-spun. He reported a QC active in Jewish affairs as saying "This enormous but legally flawed lawsuit was an act of epic folly by all concerned which will negatively impact our community for a long time to come. You only bring such showcase litigation if you are certain to win." Notable also was Rocker's inability to raise a comment from Fraser's advocate Anthony Julius –chair of the Board of the very same JC.

The reverberations throughout the Jewish communal leadership seem set to continue. Perhaps Julius should consider his position, or maybe one should say, consider some of his many positions. So too should those, apparently wealthy individuals in the Jewish community as well as the state of Israel, who funded this misbegotten adventure. There is some evidence that they may try and regroup round the idea of establishing and promoting a viable definition of antisemitism that could give them some legal plausibility. But these are early days.

Mike Cushman in a piece which follows makes the telling point that these tireless, blinkered warriors keep thinking that the boycott of Israeli institutions is about the Jews, whereas for BRICUP and the many thousands round the world who practice boycott it is about the Palestinians. This leaves Engage, Fraser, Julius and too many of the Jewish community's leadership tilting at frightening but phantasmagorical windmills of their own imagining.

Call For Academic And Cultural Boycott Of Israel

Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI) | 6 July 2004

Whereas Israel's colonial oppression of the Palestinian people, which is based on Zionist ideology, comprises the following:

Denial of its responsibility for the Nakba -- in particular the waves of ethnic cleansing and dispossession that created the Palestinian refugee problem -- and therefore refusal to accept the inalienable rights of the refugees and displaced stipulated in and protected by international law;

Military occupation and colonization of the West Bank (including East Jerusalem) and Gaza since 1967, in violation of international law and UN resolutions;

The entrenched system of racial discrimination and segregation against the Palestinian citizens of Israel, which resembles the defunct apartheid system in South Africa;

Since Israeli academic institutions (mostly state controlled) and the vast majority of Israeli intellectuals and academics have either contributed directly to maintaining, defending or otherwise justifying the above forms of oppression, or have been complicit in them through their silence,

Given that all forms of international intervention have until now failed to force Israel to comply with international law or to end its repression of the Palestinians, which has manifested itself in many forms, including siege, indiscriminate killing, wanton destruction and the racist colonial wall,

In view of the fact that people of conscience in the international community of scholars and intellectuals have historically shouldered the moral responsibility to fight injustice, as exemplified in their struggle to abolish apartheid in South Africa through diverse forms of boycott,

Recognizing that the growing international boycott movement against Israel has expressed the need for a Palestinian frame of reference outlining guiding principles.

In the spirit of international solidarity, moral consistency and resistance to injustice and oppression,
We, Palestinian academics and intellectuals, call upon our colleagues in the international community to ***comprehensively and consistently boycott all Israeli academic and cultural institutions*** as a contribution to the struggle to end Israel's occupation, colonization and system of apartheid, by applying the following:

Refrain from participation in any form of academic and cultural cooperation, collaboration or joint projects with Israeli institutions;

Advocate a comprehensive boycott of Israeli institutions at the national and international levels, including suspension of all forms of funding and subsidies to these institutions;

Promote divestment and disinvestment from Israel by international academic institutions;

Work toward the condemnation of Israeli policies by pressing for resolutions to be adopted by academic, professional and cultural associations and organizations;

Support Palestinian academic and cultural institutions directly without requiring them to partner with Israeli counterparts as an explicit or implicit condition for such support.

Endorsed by:

Palestinian Federation of Unions of University Professors and Employees; Palestinian General Federation of Trade Unions; Palestinian NGO Network, West Bank; Teachers' Federation; Palestinian Writers' Federation; Palestinian League of Artists; Palestinian Journalists' Federation; General Union of Palestinian Women; Palestinian Lawyers' Association; and tens of other Palestinian federations, associations, and civil society organizations.

PACBI, P.O. Box 1701, Ramallah, Palestine.

A legal analysis of the employment tribunal's judgment

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Fraser v. *UCU*, decided by an Employment Tribunal on 22 March 2013 (view online),, was an "enormous piece of litigation in which [Mr. Fraser] charge[d] [UCU] with 'institutional anti-Semitism' which, he [said], constitute[d] harassment of him as a Jew" (para. 3), and which (if proved) would be prohibited by the Equality Act 2010. What follows is a legal analysis of (I) the relevant "protected characteristic" under the Act (race or religion or "attachment to Israel"), (II) Mr. Fraser's decision to claim harassment rather than direct or indirect discrimination, (III) the Tribunal's reasoning in dismissing all ten of his claims of harassment, and (IV) the abusive nature of the litigation and the implications of the Tribunal's judgment for similar litigation in future.

I. Protected characteristics

A claim under the Equality Act 2010 must generally be based on one or more of the nine "protected characteristics" listed in s. 4: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. But being a member of a minority defined by a "protected characteristic" is not enough. The claimant must also show "direct discrimination" under s. 13 (he was treated less favourably than others "because of a protected characteristic"), "indirect discrimination" under s. 19 (a neutral practice applied to all puts "persons with whom [he] shares [a] protected characteristic at a particular disadvantage compared with [others]" and cannot be justified), or "harassment" under s. 26 ("unwanted conduct related to a ... protected characteristic" which violates his dignity or creates a hostile environment for him).

Mr. Fraser relied on the protected characteristics of race (Jewish) and religion (Jewish) (para. 11). His lawyer argued that these characteristics should be interpreted as including "an attachment to Israel" as "an aspect of the protected characteristic[s]" (para. 18). The Tribunal found no authority for the proposition that legal protection also attaches to "a particular affinity or sentiment not inherent in a protected characteristic but said to be commonly held by members of a protected group" (para. 18). Therefore, "a belief in the Zionist project or an attachment to Israel ... cannot amount to a protected characteristic" (para. 150). This conclusion is clearly correct. An individual's political opinions are completely independent of, and not determined by, their race or religion. Not all Jewish people hold Zionist beliefs, and many people who hold Zionist beliefs are Christian or of other faiths.

"Political opinion" is a protected characteristic in Northern Ireland, but not yet in Great Britain. (This might change, at least for employees, or at least in relation to dismissal, depending on how the UK Government complies with *Redfearn* v. *UK*, European Court of Human Rights, 6 Nov. 2012, in which an employee was dismissed for being a BNP city councillor.) Mr. Fraser's lawyer could have argued that Zionism is a "belief", which s. 10(2) defines as "any religious or philosophical belief". In *Grainger plc* v. *Nicholson* (3 Nov. 2009), the Employment Appeal Tribunal held that "a belief in man-made climate change" qualifies as a "philosophical belief", and suggested that a belief in pacifism, vegetarianism, Socialism, Marxism, Communism or free-market Capitalism might also qualify. However, having Zionism recognised as a "belief" would have made no difference, because Mr. Fraser could not demonstrate that he had suffered direct or indirect discrimination, or harassment, because of his Zionist beliefs, any more than because he is ethnically and religiously Jewish.

II. Direct or indirect discrimination

Mr. Fraser did not claim direct discrimination, because he could not show that UCU had treated him less favourably than other UCU members because he is Jewish. All members attending Congress were exposed to the same debates about the same motions on Israel-Palestine. Nor did Mr. Fraser claim indirect discrimination (para. 18). Even if the Tribunal had found that UCU's allowing debates on motions critical of the Government of Israel put Jewish members "at a particular disadvantage" when compared with non-Jewish members (because Jewish members were disproportionately likely to find them upsetting), UCU could easily have justified its allowing the debates as "a proportionate means of achieving a legitimate aim", ie, promoting freedom of expression and democracy within UCU.

III. Harassment

Instead of claiming direct or indirect discrimination, Mr. Fraser made ten complaints of racial and religious harassment under ss. 26 and 57(3) of the Equality Act 2010. He asked the Tribunal to find that UCU had engaged in "unwanted conduct" that was "related to" his

being Jewish, and which had the effect of "violating [his] dignity" or "creating [a] … hostile … environment" for him. The Tribunal rejected nine of his ten complaints as "wholly unfounded". Complaint (5) was arguable but "clearly unsustainable" on closer scrutiny, as well as "hopelessly out of time" (para. 177).

The Tribunal identified six criteria which each complaint of harassment had to satisfy. Most complaints did not satisfy the first criterion, let alone all six, and the Tribunal did not discuss all six criteria in detail for each complaint. Section 26(1) of the Equality Act 2010 provides:

"A person [a trade union like UCU and its employees or agents, but not its members who are not employees or agents] harasses another [a member of the trade union like Mr. Fraser] if—

(a) [UCU] engages in unwanted conduct related to [race or religion], and

(b) the conduct has the purpose or effect of—

(i) violating [Mr. Fraser's] dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for [Mr. Fraser]."

The six criteria can be found in s. 26(1) of the Equality Act 2010, and ss. 3(1) and 12(4) of the Human Rights Act 1998:

A. Mr. Fraser must have been subjected to "unwanted conduct".

B. The unwanted conduct must have been "by UCU" or its employees or agents, not by non-employee/agent members of UCU.

C. The unwanted conduct must have "related to" Mr. Fraser's race or religion.

D. The unwanted conduct must have had the effect (Mr. Fraser did not claim that it had the purpose) of "violating [his] dignity" or "creating [a] … hostile … environment for [him]".

E. There must be a sufficient connection between the unwanted conduct and Mr. Fraser.

F. Treating the unwanted conduct as harassment must not be a disproportionate restriction on freedom of expression, a human right to which the Employment Tribunal "must have particular regard".

A. "Unwanted conduct"

The Tribunal interpreted "unwanted conduct" as meaning that the claimant was not "a willing participant", and that the conduct was "of a sort to which a reasonable objection can be raised" (para. 37), ie, "the claimant ... must have a sustainable ground for feeling aggrieved about the conduct" (para. 152). The Tribunal might have used its reasoning with regard to the effect of Congress resolutions on Mr. Fraser (para. 156) to find that he was indeed a "willing participant", who thrust himself into a political debate (emphasis added):

"[Mr. Fraser] is a campaigner. **He chooses to engage in the politics of the union** in support of Israel and in opposition to activists for the Palestinian cause. When a rugby player takes the field he must accept his fair share of minor injuries ... Similarly, a political activist accepts the risk of being offended or hurt on occasions by things said or done by his opponents (who themselves take on a corresponding risk). These activities are not for everyone. **Given his election to engage in, and persist with, a political debate** which by its nature is bound to excite strong emotions, it would, we think, require special circumstances to justify a finding that such involvement had resulted in harassment."

But, instead of finding that Mr. Fraser was a "willing participant", the Tribunal dismissed most of his complaints as not relating to conduct "to which a reasonable objection can be raised". With regard to Congress resolutions in relation to Israel, UCU's behaviour ("act[ing] constitutionally in managing the debates and implementing resolutions") "was unobjectionable". Mr. Fraser "cannot base a legal claim" on his preference that UCU "behave unconstitutionally by subverting the authority of Congress and the union's democratic processes" (para. 152). Also "unobjectionable" were UCU's response to the report of the All Party Parliamentary Inquiry into Anti-Semitism (para. 157), management of the Activists List (para. 160), response to Professor Weisskirchen (para. 161), reaction to the resignations of some Jewish members (para. 163), and management of debates (para. 165).

B. Unwanted conduct "by UCU" (or its employees/agents), not by non-employee/agent members of UCU

The Tribunal rejected as "not ... known to our law" the concept of "institutional responsibility" for harassment of one union member by other members (none of whom are employees of the union), which Mr. Fraser's lawyer had proposed (para. 22). Section 40 of the Equality Act 2010 makes employers liable to their employees for third-party (non-employee) harassment in defined circumstances (the UK Government plans to repeal it), but it does not apply as between a trade union and its non-

employee/agent members. UCU is vicariously liable only for harassment of its non-employee members (like Mr. Fraser) which results from acts of its employees and agents, not "from the conduct of fellow-members ... or from motions passed by Congress" (paras 151, 152, 165, 166).

C. Unwanted conduct "related to" race or religion

The Tribunal gave this criterion a very generous interpretation, rejecting an argument of UCU's lawyers by finding that "a practice of repeatedly criticising the actions and policies of the United States could certainly be seen as 'related to' race", and that "repeated criticism of any religious institution [such as the Roman Catholic Church] could be seen as 'related to' the [institution's] religion" (paras. 34-35). Despite this generous interpretation, the Tribunal ruled that UCU's "constitutional behaviour [in relation to Congress resolutions] was not connected in any way whatsoever with [Mr. Fraser's] Jewishness" (para. 153). The same was true of UCU's handling of the vote to reject the EUMC Working Definition (para. 166).

D. Unwanted conduct with effect of "violating dignity" or "creating a hostile environment"

The Tribunal stressed that it "must not cheapen the significance of [the] words [dignity, intimidating, hostile, degrading, humiliating or offensive]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment" (para. 38). "No doubt [Mr. Fraser] found some of the [Congress] motions and some things said in the course of debates upsetting, but to say that they violated his dignity or created for him an adverse environment ... is to overstate his case hugely" (para. 155). As for UCU's response to the Parliamentary Inquiry's report, "[t]he idea that [it] violated his dignity is absurd" (para. 158).

E. Sufficient connection between unwanted conduct and Mr. Fraser

The Tribunal agreed with UCU's lawyers that "[t]here must be a sufficient nexus ... between the conduct and the individual who claims to have been harassed. ... While the conduct need not be aimed at a claimant, the further he stands from it, the less likely the Tribunal is to find [a harassing effect]" (para. 42). Two matters related to the Activists List were "much too remote from [Mr. Fraser]" (para. 160).

F. Treating the unwanted conduct as harassment must not restrict freedom of expression disproportionately

When it interpreted s. 26 of the Equality Act 2010 on harassment, the Tribunal was required by ss. 3 and 12 of the Human Rights Act 1998 to have "particular regard to the importance of the ... right to freedom of expression [Article 10 of the European Convention on Human Rights]", and to avoid an interpretation that would be incompatible with that right (paras 43 and 44). The Tribunal cited the opinions of Lord Lester QC that "[UCU] and its members are fully entitled to exercise their right to freedom of expression ... by considering the pros and cons of the proposed boycott and ... to pass and publish resolutions criticising the policies of the Israeli government" (para. 6), and of Michael Beloff QC and Pushpinder Saini QC that "given 'the importance of political freedom of expression', a complaint of harassment based merely on the union permitting the [boycott] motion to be debated would not succeed" (para. 10).

The Tribunal also quoted from the decision dismissing charges against members of Scottish Palestine Solidarity Campaign: "[I]f persons on a public march designed to protest against ... alleged crimes committed by a State and its army are afraid to name that State for fear of being charged with racially aggravated behaviour, it would render worthless their Article 10(1) rights. ... [T]heir placards would have to read, ... 'Boycott an unspecified State in the Middle East' ..." (para. 47). And the Tribunal noted that "pluralism requires members of society to tolerate ... views which they believe to be false and wrong. This can be difficult for people to understand, especially if the subject is an important one and they are so convinced of the rightness of their views that they believe that any different view can only be the result of prejudice" (para 48).

Applying these principles to the Congress resolutions, the Tribunal concluded that Mr. Fraser's position was analogous to that of a rugby player (see III.A. above), and that "freedom of expression must be understood to extend to ... ideas generally, including those which offend, shock or disturb society at large or specific sections of it. ... [T]he narrow interests of [Mr.

Fraser] must give way to the wider public interest in ensuring that freedom of expression is safeguarded" (para. 156). The Tribunal also noted the stark implication of complaint (2): UCU "could not lawfully defend themselves by answering the critical comments of the Parliamentary [Inquiry] for fear of harassing [Mr. Fraser]" (para. 159). Underlying his case was "a worrying disregard for pluralism, tolerance and freedom of expression" (para. 179).

IV. Was this case an abuse of the Equality Act 2010 and the Employment Tribunal?

Mr. Fraser's only legitimate grievance concerned UCU's failure to revoke (the day before a 5 Dec. 2009 conference) an invitation to a South African speaker who had been found by the South African Human Rights Commission to have engaged in anti-Jewish hate speech (para. 162). Although this was objectionable and therefore "unwanted conduct", it was not "on grounds of" race or religion (the formulation under pre-2010 legislation). "[A] guest of [UCU] accused in like circumstances at the eleventh hour of hate speech allegedly directed at some other racial or religious group ... would have been treated exactly as [the South African speaker] was" (para. 170). In any case, complaint (5) was submitted almost 18 months late.

As for the merits of the case as a whole, the Tribunal left no doubt: "Lessons should be learned from this sorry saga. We greatly regret that the case was ever brought. At heart, it represents an impermissible attempt to achieve a political end by litigious means. It would be very unfortunate if an exercise of this sort were ever repeated" (para. 178). "The Employment Tribunals are a hard-pressed public service and it is not right that their limited resources should be squandered as they have been in this case. Nor ... should [UCU] have been put to the trouble and expense of defending proceedings of this order or anything like it." Anyone familiar with the facts and with EU and UK anti-discrimination law had cause to wonder, before the hearing, why Mr. Fraser's lawyers thought his case had a chance of success. If his complaints had been upheld, he would have established the principle

that a trade union, university or other person subject to the Equality Act 2010 may not permit a political debate involving criticism of, or proposed sanctions against, a state and its institutions, to avoid upsetting any of its members, staff or students who, because of their ethnicity or religion, are disproportionately likely to identify with that state.

Article 10 of the European Convention on Human Rights protects the right to hold such a debate, as long as the participants do not use language that is likely to stir up racial or religious hatred, and as long as the debate is not forced on unwilling participants (eg, a Jewish employee of UCU who had made it clear to his co-workers that he did not wish to discuss Israel-Palestine).

Supporters of the Government of Israel's policies have been abusing legal prohibitions of anti-Jewish harassment and incitement to anti-Jewish hatred, in an attempt to silence defenders of Palestinian human rights. Let us hope that the Employment Tribunal's strong reprimand in *Fraser* v. *UCU* will discourage future abuse of UK courts, and inspire courts in other countries to respond in the same robust way.

Useful websites for further information

- [Palestinian] Boycott National Committee (BNC) www.bdsmovement.net
- Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI) www.pacbi.org
- BRICUP www.bricup.org.uk
- Boycott Israel Network (BIN) www.boycottisraelnetwork.net
- Who Profits www.whoprofits.org
- Alternative Information Centre www.alternativenews.org/english

Debating BDS: Fraser v. UCU

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On March 22nd, 2013 the Employment Tribunal rendered judgment in the case of Fraser v University & College Union. Ruling in favour of UCU, the Tribunal's judgment brought immense relief to UCU members, BDS (Boycott, Divestment, Sanctions) activists, and others who were anxious about the potential repercussions that a negative outcome might have for freedom of political expression, particularly in the context of union activism, anti-racism and human rights.

The ruling is an interesting read in its effort to come to grips with the spirit and letter of the 2010 Equalities Act legislation. The case is also significant as one among many different attempts to contest BDS through the courts in a variety of jurisdictions including France and the UK. The causes of actions have been different, although they have all been focused on BDS supporters and activists. The as-of-yet unsuccessful prosecutions of BDS activists in France have variously attempted to criminalise activists who were calling for the boycott of Israeli goods on the basis that they were guilty of "inciting discrimination and racial hatred." Fraser v. UCU had the overarching objective of attempting to shut down debate of BDS. Despite their differences, the underlying rationale is a shared one: political criticism of the State of Israel and political action that supports BDS are viewed as anti-Semitic – either inherently so or in particular instances.

This is why the ruling, a wholesale dismissal of Mr. Fraser's claims against the UCU, is incredibly important for those who have heeded the call from Palestinian civil society to engage in BDS.

To begin with, the discussion of the Equalities Act 2010 provisions is illuminating, particularly for those who are not aware of how the Act has altered legal conceptualisations of harassment. Mr. Fraser alleged that UCU was liable for harassment on the basis of his protected characteristics of race (Jewish) and religion or belief (Jewish). (The variegated discursive casting of Jews as a 'race', a 'nation' and a 'peoples' throughout 19th and 20th century legal judgments is in itself far from straightforward[†]. Significantly, the Employment Tribunal finds that Zionist political beliefs do not constitute a protected characteristic. While the claimant did not make any such claim, the Judge notes that Mr. Julius, counsel for the claimant, argued:

"[Mr. Fraser] has a strong attachment to Israel. This attachment is a non-contingent and rationally intelligible aspect of his Jewish identity. It is an aspect, that is, of his race and/or religion or belief…

The fact that not all Jewish people have the same views does not prevent it from being an aspect of the protected characteristic. A significant proportion of Jewish people have an attachment to Israel which is an aspect of their self-understanding as Jews, or Jewish identity." (para 18)

Counsel argued that the claimant's identity as Jewish is inseparable from his attachment to Israel. The Judge notes however, that no authority was provided for or against the proposition that "statutory protection attaches not only to any protected characteristic per se but also to a particular affinity or sentiment not inherent in a protected characteristic but said to be commonly held by members of a protected group" (para 18). We get a glimmer here of the elision that is consistently made by supporters of Israeli policies who brandish accusations of anti-semitism against critics of Israel: because Mr. Fraser's identity as a Jew is imbricated with a strong attachment to Israel, to criticise Israel is to criticise his Jewishness. This ruling is to be praised for dispassionately detaching Zionist political beliefs from Jewishness as a protected characteristic under human rights legislation. This is not to say, of course, that criticism of political Zionism or Israel never amounts to anti-Semitism. But in this particular case, each of the 10 discrete complaints that were made to prove the charge of harassment was dismissed.

A further point, not elaborated here but significant in my view, is the Tribunal's rejection of Mr. Julius' attempt to extend vicarious liability for harassment to unions, something which does not legally apply to unincorporated associations but to employers. This argument strikes me as deeply anti-union. While unions often seem, unfortunately, mired in their own baroque administrative mechanisms, arguing that unions whose practices are embedded in a history of collective action ought to be treated as a legal analogue to employers is in many ways, quite simply repugnant.

[†] See Didi Herman's An Unfortunate Coincidence: Jews, Jewishness and English Law for a novel and rich analysis of this phenomenon.

Environment

The Equalities Act 2010 imparts a very different approach to harassment than previous legislation (para 32).1 There is a shift from ground to atmosphere‡. Whereas the pre-2010 Act "required that the treatment complained of should be 'on grounds of' the relevant protected characteristic" the 2010 Equalities Act instead posits a "related to" test; what is required is not a "causative nexus between the protected characteristic and the conduct" alleged to have constituted harassment, but instead, an "associative connection" (para 32). This associative connection is somewhat looser, and to establish harassment the court or tribunal will examine a range of acts that often fall outside traditional understandings of how discrimination and harassment occur.

As the Tribunal notes, legislation that protects from harassment is meant to "create an important jurisdiction" (para 38). The experiences and knowledge of the claimant matter in this jurisdiction: the subjective element of s. 40(2)(a) of the Equalities Act enables the claimant to speak (dicta) his perception and relay her experiences to the law (juris), as it were, and this must be taken into account by the Tribunal. This jurisdiction is also constituted by environment, which evokes something rather different than the tangible metaphor of grounds, the causal link that used to be required to get from A (actions of the respondent) to B (the harm suffered by the claimant). This seems an apt approach , for identifying and remedying the slippery, common sense, amorphous, yet systemic and brutalising nature of sexism, racism and anti-Semitism (in other jurisdictions, it involves adopting a contextualised approach to judgment, an approach developed by and advocated for by many feminist legal scholars over the past several decades).

This environment that the Tribunal attempts forensically to take into account is one in which utterances, attitudes, and acts that are often cast outside of the law's jurisdiction make an appearance. The Tribunal takes note of the "emotional energy" which the conflict has generated (para 50); can find no evidence of an "atmosphere of intimidation" alleged by the claimant (para 132); acknowledges the whispers and half-heard comments that a microphone will not pick up at a meeting (para 133); and notes with disdain the witnesses who "played to the gallery" rather than keeping their comments and gaze focused on the concrete questions they were being asked by counsel (para 148). Perhaps in an unconscious adaptation of the Good Jew/Bad Jew issue raised by the Claimant, which, while not mentioned, echoes the dichotomy between Good Muslim/Bad Muslim (although with much less success or analytical clarity it would seem), the Tribunal distinguishes between Good Witness/ Bad Witness, the latter category of persons (most of the witnesses for the Claimants, rather than the Respondent) "ventilating their opinions;" and taking up precious air/time and resources. (para 149)

This ruling is welcome at a time when proponents and supporters of BDS seem to come under fairly regular attack. Within Israel itself the Boycott Law has made support of BDS a potentially actionable civil wrong. Lawyers from Adalah challenged the Boycott Law that was passed by the Knesset in July 2011 in proceedings at the Israeli Supreme Court, this past December. The Boycott Law penalises individuals, companies and institutions who support the Palestinian call for BDS. The Law Preventing Harm to the State of Israel by Means of Boycott (the "Boycott Law") defines a boycott against the State of Israel as "deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage."

The law essentially makes the support of boycotts against the state of Israel a civil wrong, actionable in tort law. The use of law to criminalise BDS activities, or to hold individuals civilly liable for supporting BDS, or indeed, to claim that debate or discussion of BDS is a legal wrong, is not only a matter of freedom of expression, but constitutes, in the words of the Tribunal, an "impermissible attempt to achieve a political end by litigious means." While achieving political ends through the law is a strategy employed by many, these attempts to use law as a tactic of suppression (of political activism and debate) must be resisted in the strongest of terms.

Political expression and freedom

The Tribunal upholds the values of tolerance and pluralism in defining the contours of freedom of expression. This means that for freedom of expression to be meaningful, the right of people to voice views that will conflict with others must be protected. For critical legal scholars and others, the words "pluralism" and "tolerance" imme-

‡ On a different but related note, see Philippopoulos-Mihalopoulos, A (2012) 'Atmospheres of law: Senses, affects, lawscapes', *Emotion, Space and Society* for interesting new work on atmospherics and law.

diately bring to mind a rich field of critique that points to the ways in which these very values work to produce cultural and racial homogeneity (and thus exclusion) in nation-state forms, among others obstacles to full and robust democratic practices. In the specific context of union activities, however, perhaps these 'basic minimums' are to be welcomed; they are certainly absent when it comes to the protection of freedom of expression in the public contexts of Asian Muslims) who were prosecuted for violent disorder while exercising their freedom of political demonstrations. One need only think about the 78 protestors (a vast majority of them British expression against the Israeli bombardment of Gaza in 2008/2009. Many received prison sentences. The criminalisation of those who take to the streets to express their political views diminishes the value of the right to freedom of expression, narrows the range of forms that expression may take, and arguably impoverishes the scope of political debate. At least in the context of union activism and debate, the Employment Tribunal has preserved the right of advocates and opponents of BDS to engage in full and robust debate over an increasingly powerful and widespread strategy to support Palestinian civil society in their struggle to end the Israeli occupation.

It's about the Palestinians, stupid.

Mike Cushman
Secretary, LSE UCU Branch
(personal capacity)

To no one's surprise a Zionist claque has swiftly assembled to denounce the findings of the *Fraser v. UCU Employment Tribunal*. It would appear that according to these voices the only business at the next meeting of UCU's national executive will not be fighting the massive cuts in UK higher and further education but debating when and in what format to reissue ***The Protocols of the Elders of Zion***.

Hysterical rubbish, of course but we have to explore why the reaction is so unbalanced. Fraser and his legal advisors chose the legal terrain and the scope of their action, not UCU. They chose their schedule of witnesses who declaimed and dissembled but failed to address the matters that Fraser wished the tribunal to consider.

Anthony White, counsel for UCU, demolished their testimony but was only able to do so with such effectiveness because they were such poor witnesses. Ever since the tribunal, Fraser's self-proclaimed friends have been picking over 50 pages of closely argued legal findings trying to claim they are simultaneously technically narrow and the most wide-ranging antisemitic text of recent years.

Hirsh and Susskind *et al* fail to grasp at least two very basic points. They solipsistically believe it is all about the Jews; they cannot understand or believe that it is about the Palestinians.

For the vast majority of those active in support of Palestinian rights it was the oppression of Palestinians that led them to activity. They only started to consider Zionism as an ideology when they started to enquire why Israel was behaving so badly and so criminally. At that point they encountered the Zionist justification for occupation and oppression and took a stance of either deploring the degradation of a potentially positive movement or took a more radical stance of identifying Zionist ideology, in itself, at the heart of the problem.

The absence of the Palestinians even as objects, let alone actors, in the Zionist exclusionary Jewish narrative tells us all we need to know about why being anti-Zionist is radically different from being an anti-Semite. Anti-Zionism is a stance against a pernicious anti-Palestinian racism. Zionism is anideology that allows Israel to behave as it does while simultaneously believing that Israel conforms to the norms of liberal, law-based democracy.

Secondly, they continually ask, 'why only boycott Israel?' The Palestinian call for BDS is the only extant call for boycott by a significant national liberation movement. Other movements and peoples call for different forms of support each of which must be considered on its merits.

Israel's crimes are not measured on a Richter scale of oppression against those of China or Burma or Zimbabwe and only be the subject of campaigns when they reach the hotly contested pinnacle at the top of the Premiership of abuse. That the crimes are profound and continuing is a sufficient justification.

Other regimes are the subject of regular denunciation and sanction by western governments, Israel is singled out not by our opposition but by the condoning of its actions by the USA; its massive military and civil aid; and its systematic cover at the Security Council. Similarly the EU treats Israel, in defiance of geography, as a surrogate, if displaced, part of Europe and grants the privileges of association without requiring the fulfilment of Council of Europe human rights standards.

None of this is to deny the possibility, and occasional reality, of support for Palestinian rights being motivated by malice towards Jews. We have a duty to criticise and condemn such behaviour when we see it and the Palestinian rights movement is, in general, self-aware and self critical on this. Fraser and his team were unable to discover any such motivation behind the actions of UCU officers and activists and are now reduced to asserting that its absence can only be the result of a wider collaboration to conceal it. Such concealment is beyond the limited ability of UCU, PSC, BRICUP, the Employment Tribunal Service or other presumed conspirators. Its absence is just that, an absence.

Why UCU was right to dump the EUMC working definition of antisemitism

Sue Blackwell
Ex-member of UCU National Executive

One of the recurring elements in the Fraser v. UCU case was that of the EUMC "Working Definition of antisemitism". For having passed Motion 70 at its 2011 Congress, distancing the union from this definition, UCU was accused by Fraser of "attempting to legislate antisemitism out of existence". What is the definition really all about, and why did the National Executive bring a motion to Congress rejecting it?

The European Monitoring Centre on Racism and Xenophobia (EUMC) was a statutory body of the EU. Its official remit was to "collect, record and analyse information and data, including data resulting from scientific research communicated to it by research centres, Member States, Community institutions, international organizations ... and non-governmental organizations". As we will see, certain "international organizations" proved to be particularly enthusiastic in communicating their views to the EUMC and influencing its "Working Definition of antisemitism", which it produced in 2004.

The document is in fact not so much a definition as a list of examples. Some of them are uncontroversial, but a number of them muddy the waters between hatred of Jews and opposition to Zionism. For instance, "claiming that the existence of a State of Israel is a racist endeavor" and "Drawing comparisons of contemporary Israeli policy to that of the Nazis" are given as examples of antisemitism.

The Definition has no official status, but this has not stopped it from taking on a life of its own. It has been adopted by the OSCE and the US State Department. In the UK, an All-Party Parliamentary Enquiry into Antisemitism endorsed it uncritically, recommending in its report "that the EUMC Working Definition of antisemitism is adopted and promoted by the Government and law enforcement agencies". The National Union of Students likewise endorsed it uncritically.

This has implications for freedom of expression on university campuses. In January 2010, Denis MacShane MP, who had chaired the All-Party Parliamentary Inquiry, attempted to have Palestinian academic Azzam Tamimi banned from speaking at Birmingham University, calling him "a notorious Jew-hater and supporter of terrorist attacks" based on his statements about Israel. Thankfully the VC stood up for free speech and refused to cave in to pressure. I attended Tamimi's speech and didn't hear a single antisemitic word in it.

In May the same year Birmingham University Guild of Students considered a motion mandating the President to reject an external speaker "if they have a history of Anti-Semitic language in line with the EUMC definition". (In the end this clause was not passed, but the definition itself was adopted in principle).

It is no coincidence that the definition is being used in this way: this was always the intention of the organisations involved in drafting it. These include the European Jewish Congress and the American Jewish Committee, which are both self-confessed lobby groups for Israel. One of the EJC's recent statements "reiterates that the city of Jerusalem should remain unique, indivisible and unified": This is in conflict with numerous UN Security Council Resolutions according to which East Jerusalem is illegally occupied. In March 2010 the EJC expressed its "deep disappointment" that the European Parliament had endorsed the Goldstone Report on human rights violations during the Gaza conflict, despite the "intensive lobbying efforts" led by its President, who had travelled to Israel the previous week "to meet with foreign minister Avigdor Lieberman".

The American Jewish Committee's specialist on antisemitism and extremism is attorney Kenneth Stern, who is the main author of the EUMC definition. Stern is deeply concerned about what he calls "politically-based antisemitism, otherwise known in recent years as anti-Zionism, which treats Israel as the classic Jew. Whereas the Jew is disqualified by antisemitism from equal membership in the social compact, antisemites seek to disqualify Israel from equal membership in the community of nations." In other words, according to Stern, if you advocate a boycott of Israel you are an antisemite.

So, despite its name, the EUMC definition did not originate in the EU but from a pro-Israel lobby group in the USA. You can see the evidence of this in the American spellings in the document as well as its contents. The definition is a piece of propaganda, of no use as a guide to identifying and opposing real antisemitism, but ideal for those people who wish to blur the boundaries between antisemitism and anti-Zionism.

The EUMC was replaced in 2007 by the European Union Agency for Fundamental Rights (FRA). The FRA has stated that feedback on the document "drew attention to a number of issues";

that they "are not aware of any public authority in the EU that applies it", and that they have "no plans for any further development" of it. The FRA's latest publication on antisemitism does not even mention the "Working Definition". In other words, the EUMC's successor organisation has dumped the document because it is not fit for purpose.

Some speakers in the debate at UCU Congress complained that the NEC had not proposed an alternative definition of antisemitism to replace the EUMC one. Whether there is a need for *any* definition is debatable (we don't seem to need definitions of Islamophobia or homophobia in order to recognise them); but if there is, it is hard to improve upon Brian Klug's "good, simple working definition of antisemitism: hostility towards Jews as Jews".

Other speakers in the debate referred to the definition being "misused" to prevent free speech. The motion's proposers argued that, on the contrary, it has been used for exactly the purpose it was designed for! As Richard Kuper of Jews for Justice for Palestinians, puts it:

"The strong fight-back by Israel and its supporters against the country's deteriorating public image has been sometimes crude, sometimes carefully pitched. The dissemination of a draft 'working definition' of antisemitism by the European Monitoring Centre on Racism and Xenophobia (EUMC) in 2005 has proven particularly effective. Inadequate as a definition and never formally adopted, it is not up for discussion by those who could change it. Yet it is increasingly presented today as *the* definition of antisemitism. It cannot bear this weight."

These arguments were sufficient to persuade UCU Congress 2011 to vote by an overwhelming majority to distance the union from the EUMC definition. Incidentally, most of the speakers for the motion were of Jewish origin. All of this proved too much for Ronnie Fraser, who back in 2007 had tried to bring a motion to UCU's inaugural Congress specifically *adopting* the EUMC definition, but had withdrawn the motion at the last minute for reasons that were not understood at the time. What had really happened in 2007 became apparent in the Employment Tribunal proceedings, when Jeremy Newmark of the Jewish Leadership Council was cross-examined by UCU's Counsel, Antony White QC:

JN: Ronnie had a strategy he would propose. He would commit the UCU to a certain set of definitions around antisemitism and even if they passed the boycott they would be unable to implement it as it would go against their earlier antisemitism motion. We felt this was a misguided strategy and advised him to withdraw that motion.

AW: So his resolution was to make it impossible to have a boycott without it being antisemitic?

JN: Yes, to create an environment in which it would be impossible to implement a boycott without it being antisemitic.

AW: Was the definition the EUMC definition?

JN: Yes, I think the EUMC [definition] would very clearly contradict the boycott resolution.

I rest my case, m'lud.

Jewish = Zionist: a racist equation

Les Levidow
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The campaign for Boycott, Divestment and Sanctions (BDS) against Israel has been mis-labelled as antisemitism, as a global tactic to deter such solidarity with the Palestinian struggle. This pervasive denigration was central to the recent Zionist litigation against the UCU. According to the complainant, Jews' attachment to Israel is a 'protected characteristic' under the Equality Act 2010; resolutions and speeches supporting the academic boycott of Israel generated an 'atmosphere of intimidation' harassing the complainant as a Jew and thus constituting 'institutional antisemitism'. According to the Employment Tribunal, however, these claims had no basis in law or evidence: 'a belief in the Zionist project or an attachment to Israel ... cannot amount to a protected characteristic' (see articles by Brenna Bhandar and Robert Wintemute in this booklet). This judicial defeat has provoked furious public disagreements among leading UK Zionists about whether or how they should continue accusations of antisemitism – now perhaps even against the Tribunal!

In recent years such accusations have become an ever-weaker deterrent to Palestine solidarity activity. But some individuals and organisations may still feel confused or intimidated. So the issue needs to be addressed in general, beyond the Tribunal's specific concerns.

A simple response is two-fold: Of course support for Palestine sometimes has been a means to promote antisemitic views, e.g. by blaming 'Jewish' characteristics or a global 'Jewish conspiracy' for the Palestinians' oppression. Such individuals have been publicly criticised by activists and expelled by Palestine solidarity organisations.

Yet Zionist accusations cite antisemitic examples to make general claims about Palestine solidarity and BDS. They frequently go further and label any attack on Israel as an attack on Jews per se.

This assumption that 'Jewish = Zionist' is contradicted by political realities: Jews have become increasingly divided by the Palestine issue, while Jewish Zionists are far out-numbered by Christian ones. Moreover, the making all Jews more vulnerable to blame for Israel's actions, and by casting doubt on whether Jews truly belong wherever they happen to live.

equation 'Jewish = Zionist' is racist in three ways: by stereotyping Jews as supposedly sharing common views and loyalties, by Indeed, mid-19th century Christian Zionists initiated the idea that all Jews belong in Palestine. Rationales combined the religious, racist and imperial: Jewish immigration to the Holy Land would bring about the Second Coming of Christ; Jews could be more easily excluded from Europe; and Jews could be instrumentalised as colonial settlers loyal to their Western sponsors. For such reasons, Zionism was strongly opposed by nearly all Jews until the Nazi Holocaust. Afterwards so many refugees fled to Palestine when they could not surmount immigration barriers erected by the USA and Europe – thanks to convergent lobbying by domestic antisemites and Zionist organisations.

Such convergent interests have a long, sordid history. Early Zionism found crucial sponsors in Christian antisemites and adopted their antisemitic stereotypes (especially of Eastern European Jews); the latter were contrasted with Jews becoming heroic settlers on the European colonial model. Zionism has depended on European antisemitism as an incentive for Jewish emigration to Palestine, and has counselled fatalism towards antisemitism rather than resistance or alliances with anti-racist forces.

Even worse, Zionist institutions sometimes have colluded with antisemites as partners in racism and crime. When Jewish organisations worldwide organised a boycott against the new Nazi regime in 1933, it undermined the boycott through a deal with the World Zionist Organisation, whereby some wealthy Jews and their wealth would be transported to Palestine. For several decades Israel has welcomed support from antisemitic politicians, e.g. in the US and Eastern Europe, while ignoring their racist views.

In all those ways, Zionism and antisemitism have been racist political twins; so Zionist accusations of antisemitism should be turned against the accuser.

To learn more about these issues, see the briefing document, 'Zionism and Antisemitism: racist political twins' by Jews for Boycotting Israeli Goods (J-BIG).

Three moves to defeat: a Zionist game plan that has unravelled in the trade union movement.

Tom Hickey
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and UCU National Executive member
(personal capacity)

The judgement in the Fraser case at the recent Employment Tribunal is a devastating defeat for those committed to defending Israel and the Zionist project against the worldwide move to isolate the Israeli state for its treatment of the Palestinians. It will not simply have consequences in England and Wales, and in the UK more widely, but will resonate internationally. For those at the heart of the BDS movement, pushing for an isolation of Israel in trade unions, and for a boycott of Israeli products, of performers and artists who represent the state, and of Israeli academic institutions, or events funded in collaboration with Israeli institutions, it is both an encouragement and an aid.

The struggle in trade unions (and indeed in local authorities, in cooperative societies, in shareholder meetings, in boards of school governors, etc.) is always primarily about the struggle of the Palestinians and led by the Palestinians, and how best to mount effective solidarity with that struggle. It is not primarily about Israelis and their motivations, or about the feelings of anger or hurt or victimisation felt by sympathisers with, or apologists for, Israel. Nevertheless, it remains the case that the accusation of anti-semitism is sometimes an obstacle still to the adoption of anti-Israel policy, and was even more of an obstacle in the recent past, and still today in parts of the Americas and of Europe.**(§)**

The deployment of the 'antisemitism' card is an obstacle for three reasons: it is potentially intimidatory, at a personal level, of those involved in proposing the isolation of Israel; it all but guarantees that trade unions, or other organisations, that adopt a BDS position will be subjected to virulent opprobrium in the mass media; and it opens, theoretically at least, the possibility of legal action for discrimination in some countries.

First, it is deeply offensive to those arguing for BDS to be so labelled. In most cases, those active in this movement come to it not because of a primary interest in the Middle East but through anti-racism, and the recognition that the treatment of the Palestinians is amongst the worst of examples of systematic prejudice and discrimination today. That fact, together with the strategic importance of the region, is what makes this issue the key moral and political issue of the c.21st. Some amongst those activists have come to their political understanding of the world through opposition to contemporary fascism and racism in their own countries, and through an historical study of Nazism and the Judeocide of the Nazi state in Germany and throughout occupied Europe. Hence to be labelled as an antisemite for defending the Palestinians against persecution is deeply offensive. This is well known by the defenders of Israel, and has been persistently deployed as one of their key tactics.

The second reason is institutional. The effectiveness of this individually focussed attempt at moral blackmail by Israel's apologists has been a declining asset for the last two decades. The logical fallacy of conflating Zionism and Jewishness has long been identified and elaborated by political analysts; and its historical inaccuracy has, more recently, become more widely appreciated as political and cultural historians have revealed the political complexity of European Jewish communities (particularly those in Eastern Europe) in c.19th and early c.20th, and the divisions of ambition and orientation between assimilationists, the Bund, socialist movements, and the very small support for Jewish nationalism (the Zionist movement) before Nazism.

This waning of the effectiveness of 'antisemitism' as a weapon in the Zionist armoury turned

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§ In Europe, German and French history in relation to antisemitism, and the enduring cultural memory of the consequences of events, in the c.19th and c.20th before the Nazi regime as well as under it in Germany, and in the c.19th and c.20th before the German occupation of France as well as during it, have made a boycott of Israel a highly charged issue, however manifestly horrendous are Israel's war crimes and its discrimination against the Palestinians. This because, in both cases, atonement for past wrongs has been a practice collapsed into reparations payments and diplomatic support, and diplomatic support and cultural identification, respectively. Underpinning such a false association is, of course, the confusion and conflation of the cultural identity of Jewishness and the political project of Zionism. In the case of the United States, and some of its allies in that hemisphere, the obstacle has rather been the persistence of the ideological perception of Israel that was created during the high point of Israel's role for the US as its imperial policeman in the Middle East.

defenders of Israel towards institutional intimidation. This took a variety of forms. First was the attempt to tie up institutions in protracted negotiations with the Board of Deputies, with the Israeli Embassy, with parliamentary inquiries, and with protracted and proliferating meetings, should any institution threaten to condemn Israel for its crimes, or to contemplate supporting BDS. Then there was the attempt to intimidate through an orchestrated condemnation of critical institutions and organisations in the national and international media using prominent figures from journalism or the culture industries or the academy who were sympathetic to Israel, and from Israel-supporting politicians or national governments.**(**)** Finally, the institutional approach turned to those trade unions and civil society organisations that themselves remained sympathetic to Israel in order to create the impression that BDS was an unpopular and minority position inside the labour movement and movements for social justice.**(††)**

In the case of the UK, all of these tactics have been used extensively against the University and Colleges Union (UCU). It is to their credit that the officials of the union, and the elected leadership, met and politely responded to all such interventions but resolutely defended the union's independence, and the right of its Congress to debate all matters that delegates thought appropriate, and to determine the union's policy on all matters, within the law.

It was in response to the failure, in the end, of the institutional strategy that led to the recent desperate appeal to the law by Israel's supporters. The law had constituted a potential third obstacle for the BDS movement in some countries. In the UK, for example, legal advice that the imposition of a boycott (i.e. the implementation of a boycott) might be deemed unlawful under one or other aspects of civil or criminal law caused the Chair of the UCU Congress meeting which finally adopted a pro-BDS position, on the advice of the union's Strategy and Finance Committee, to read a prepared statement to the effect that the policy could not be enforced on members.**(‡‡)** In effect, this disclaimer was of no significance. The UCU, as the union for lecturers in the UK's Further Education and Higher Education sectors, was never in a position to instruct its members to boycott Israeli institutions any more than it could have imposed a boycott of Top Shop (because of its sourcing policy) or Starbucks or McDonald's or Amazon (because of their labour relations, wage structure, or any tax avoidance measures in which they might be engaged).

The exercise was rather to achieve the important issue of clear policy in favour of BDS (which was supported in that final vote by perhaps 80% or more of Congress delegates after some four years of debate and discussion in branches and regional committees, as well as at Congress), and thus a de facto encouragement to all members to reflect carefully in any association with Israeli institutions on whether it was politically or morally appropriate for them to continue that association. That had been achieved, and the attempted legal intervention to block the democratic process had, if anything, a counter-productive effect. The UCU was formally, and firmly, in favour of a generalised policy of BDS, including the academic boycott of Israeli educational institutions.

It was in the face of this unhappy outcome for Israel's friends, compounded by the decision of Congress not to use the EUMC-recommended definition of anti-semitism, that caused one member, with the support of some pro-Zionist organisations and individuals (though against the

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** In the UK, this orchestration was conducted by a variety of organisations funded for the purpose from a variety of sources, and a specific coordinating centre was established.

†† In this, the appeal of Israel's supporters to trade unions in the US and in Germany was, and remains, central. The aim is to bring pressure to bear on pro-BDS trade unions, and to seek to isolate them in international organisations and their conferences, and to block any proposals for international support for BDS.

‡‡ The UCU had over a number of years reflected at its Congresses on the issue of an academic boycott of Israeli educational institutions. Its protracted deliberations, which involved the provision of information for branch discussions, considerations of a variety of possible policies, etc., were designed to ensure that all members were fully aware of the issues, and of the implications of the adoption of a pro-boycott position, before any final decision would be determined. It was a strategy designed to debate the issue in branches prior to a debate at Congress, rather than the alternative of adopting policy at Congress and subsequently persuading members and branches of its value. Finally, at its 2009 Congress, the UCU declared itself to be in support not just of an academic boycott of Israeli educational institutions but of a generalised BDS position in relation to all contact and trade with Israel, including academic exchanges and collaborations if these involved Israeli institutions (as opposed to collaboration with individual Israeli scholars).

better judgment of others, especially some lawyers) to charge the union with institutional racism, and to seek redress through an IndustrialTribunal**.(§§)** The decision to refer the matter to and Industrial Tribunal rather than another legal arena already indicated some anxiety and insecurity but what must now have become an insupportable frustration clearly got the better of strategic thinking, and the case was hung on the offence to the feelings of the member as a result of the hostile atmosphere created by repeated criticism of Israel at UCU Congresses.

As will have already been documented in other parts of this Newsletter, that claim depended for its legal strength on the claim that identification with Israel was a 'protected characteristic' of Jewishness under the relevant section of the relevant law, and that, therefore, criticism of Israel constituted an attack on that characteristic, and thus was a version of institutional racism.**(***)** In dismissing the case on all counts, the Tribunal specifically complemented the UCU for its sensitive handling of the debates, criticised the plaintiff and his legal advisors for attempting to achieve a political outcome via an inappropriate (and expensive) use of the courts, and rejected the core of the case (that identification with Israel was a protected characteristic of Jewishness under the Act) as being without substance. In other words, the Tribunal found that the conflation of criticism of Israel or of Zionism with antisemitism was without legal merit.

This outcome could not have been more damaging for Israel's apologists. The judgment makes no claims for the merits of the substantive issues (pro or anti Israeli policy, or pro or anti the Zionist project) but removes the legitimacy of any possibility of a legal challenge to BDS on the grounds that it is, *eo ipso*, antisemitic. It is hard now to see down what legal route Israel's supporters could go. It is to be hoped that they will mount an appeal against this decision, so that the appeal court judges can inscribe this judgment in case law, but given the bruising outcome of the Tribunal and the exhaustiveness of the judgment it is likely that zealots will be held in check by more conservative legal counsel.

They may seek a political intervention that defines Jewishness. This could not, however, be achieved through mobilisation of friends and supporters in the Government to pass an Order in Council (thus avoiding Parliament, and avoiding a public debate that would be deeply damaging for their cause) but would require an Act of Parliament in order to overturn a legal judgment. This would be such a highly fraught, excessive, particularist, and thus risky route that it would be unlikely to be embarked upon, much less its destination achieved.

Where then does it leave trade unions, and, in particular, trade unionists who think it now appropriate to pursue the BDS route to helping the Palestinians find a solution to the problems of discrimination, dispossession, exclusion, and the extirpation of their culture? There are three opportunities created by this judgment.

First is the opportunity to raise, or to raise again, the issue of BDS in every union that has not yet adopted the policy, and to do it now in circumstances in which the Tribunal's judgment can be used in response to any rhetorical accusation of anti-semitism. Equally, it is now possible to raise again, with the benefit of this judgment's reflection, the issue of the appropriateness of commercial transactions with Israeli firms (i.e. whether it is at all appropriate to conduct normal commercial transactions with Israeli companies that are, by their very nature (as Israeli companies), complicit in the illegal occupation of the West Bank, the illegal denial to the Palestinians of their right in international law to return to their homes, and the discriminatory treatment of Palestinian citizens of Israel under Israeli law). This is something that trade unions can do with the employers of their members whether the operation is a local Town Hall or municipal service, a school or college or university, a retail or manufacturing company, or a transport or other service.

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§§ The delegates at the UCU Congress rejected this definition because it conflated both criticism of Israel and criticism of Zionism with antisemitism, and thus was a covert mechanism for closing down legitimate political debate through such conflation.

*** This was not just an issue for the UCU, or an issue that was exclusive to the Israel-Palestine debate. Had the Tribunal found in favour of the plaintiff, the consequences would have been felt by all trade unions in the UK. Other organisations or institutions would equally have had to consider their policies in relation to that judgment. It would have affected any other policy issue in which a member could claim that his or her feelings of hurt had been stimulated by a criticism or disparagement of what could be claimed to be a 'protected characteristic'. The range of such issues could be immense, and all contentious policy would have been potentially open to such a challenge from any member who wished to reinvent herself as a damaged litigant, whose claimed feelings of hurt might have been honestly reported (as in this case), however inappropriately pursued, or conveniently and unscrupulously confected.

Second, it provides an opportunity, in those unions that have adopted pro-Palestinian positions on human rights and international law but have restricted these to the occupied territories, to raise the issue of whether such a limitation is appropriate. To limit the boycott to those goods or activities produced illegally in the Israeli illegal settlements in the West Bank is not to address the other key issues at the heart of the BDS movement – the right of those in the Palestinian diaspora to return to the homes out of which they were driven in 1948 or 1967 or thereafter, and the right of Palestinians inside Israel's 1948 borders not to suffer ethnic discrimination in health, education, access to jobs and freedom of movement. The achievement of a policy in favour of a boycott of illegal products or services from the West Bank alone is a positive step but it runs the risk of not addressing the core problem of the area - the problem of Israel, the exclusiveness of its citizenship criteria, and the consequent insecurity that drives it to continual expansion geographically. This is the problem that is at the heart of the illegal occupation and its persistence. This is the problem that is not addressed by a narrow boycott of illegal products from the West Bank alone.

Third, it is an opportunity for those in trade unions, or other organisations, that have formally adopted policy in favour of BDS to find new and innovative ways to implement those policies, to find ways in which the argument can be renewed in every part of an organisation, and for colleagues and fellow workers to be persuaded to carry the policy through in the practices of their working lives.

Not least important in all of this, and in explaining clearly the implications of this judgment to colleagues and to fellow trade unionists and others, is the avoidance of any triumphalism. It is the case that this judgment has confirmed what anti-racist and anti-imperialist activists in the trade unions and elsewhere have always known. It is also the case that the individual who took his trade union to court, at immense expense to the union, and with disruptive effect, was ill-judged in so doing, and was certainly ill-advised by his counsel. He was mistaken to resort to the courts in frustration at not being able to win a political argument in his union. He is not to be pilloried for this mistake, however. He had a legal right to do this, however mistaken his decision, and that right needs to be respected just as his union, the UCU, respected his right in successive Congresses and in his branch to argue against BDS and against policies critical of Israel.

Though there are many of us who believe with good reason that the Zionist project to construct and maintain a confessional state exclusively for Jews is inherently racist and exclusory, and bound to be expansionist, that does not mean that in Britain or anywhere else that Zionism is precisely like other forms of racism for which a 'no platform' policy should apply. In the cases of Zionism, of Israel, and of Israel's supporters, there are still debates to be conducted, and it is in the interests of the struggle for Palestine that they are conducted with openness as much as with vigour. The objective in the UCU is certainly to persuade our adversaries, not to belittle or to disparage them.