PHILOSOPHICAL BELIEF

Philosophical belief: Managing opposing beliefs in the workplace – what employers need to know

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Forstater v CGD Europe [2021] is the latest in a line of cases considering the conflict between the rights of trans people and of those who hold gender-critical beliefs, whether for religious reasons or otherwise.

In *Higgs v Farmor's School* [2020], for example, a Christian employee's lack of belief in gender fluidity and that someone could change their sex or gender was protected. However, in *Mackereth v Department for Work and Pensions* [2019], the belief that God created only men and women was not. It can be hard for employers to understand how to apply existing tribunal case law examples. Given the strong views held on the topic and many employers' desire to discuss inclusion, equality and diversity openly, organisations will need to understand the decision's effects and what it means for them in practice.

The case

Maya Forstater worked for CGD Europe, a non-profit think tank, as a visiting fellow and carried out consultancy work on specific projects. She believes that biological sex is real, important, immutable and not the same as a person's gender identity. She does not accept that a trans woman is a woman, or that a trans man is a man. She does not consider her views incompatible with protecting the human rights of trans people and would usually seek to respect their choice of pronouns.

In 2018, she began to tweet about proposed reforms to the UK's Gender Recognition Act. Some colleagues at the US Center for Global Development (to which CGD Europe is closely affiliated and which became the second respondent to her eventual tribunal claim) suggested that her tweets were transphobic and made them feel uncomfortable. After an investigation, Ms Forstater's consultancy contract was not renewed.

She brought claims in the employment tribunal, among them a claim for direct discrimination because of her philosophical belief that biological sex is real and immutable, or alternatively because she had a lack of belief in gender identity theory. She also claimed harassment related to that belief.

At a preliminary hearing, the employment tribunal held that her belief was not a protected belief under s10 of the Equality Act 2010. The employment judge held that her belief fulfilled the first four of the five criteria set out in the leading case of *Grainger v Nicholson* [2009]: it was genuinely held, was not merely an opinion or viewpoint, concerned a weighty and substantial aspect of human behaviour, and attained a sufficient level of cogency, seriousness, cohesion and importance. However, he held that it did not meet the fifth test ('Grainger V') – the requirement that a belief be 'worthy of respect in a democratic society'. The judge considered that Ms Forstater's belief did not meet that criterion because it was 'absolutist in nature' and because he found that she would:

> *… refer to a person by the sex she considered to be appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment.*

On that basis, the tribunal concluded that her belief would harm the rights of others and could cause harassment to trans people by insisting that they had not changed sex.

Employment Appeal Tribunal (EAT) decision

The EAT heard arguments not only from Ms Forstater and CGD Europe but also from the Equality and Human Rights Commission and Index on Censorship (which were granted permission to intervene in the case given the principles at stake).

The EAT noted that freedom of expression is one of the essential foundations of a democratic society and it is not for a court to determine the validity of a belief. The role of the courts, and of the state, is to remain neutral between opposing beliefs and ensure that those who hold those beliefs tolerate one another. Section 10 of the Equality Act must be read and understood in accordance with Arts 9 and 10 of the European Convention of Human Rights (ECHR), which attach high importance to diversity of thought, belief and expression and their role in a liberal democracy.

The EAT said that a belief need only meet a modest threshold requirement to be protected under Art 9 of the ECHR. Article 17 of the ECHR prohibits any activity aimed at the destruction of others' rights and freedoms. However, following the European Court of Justice case of *Lilliendahl v Iceland* [2020], only the most extreme forms of hate speech fall into this category. Applying these principles, only beliefs caught by Art 17 would not fulfil Grainger V. Beliefs which are shocking, offensive or even disturbing can still be protected. On that basis, the EAT held that Ms Forstater's belief that sex is immutable and that biological sex is real is protected under the Equality Act 2010.

The EAT considered that the focus of a preliminary hearing to decide whether a belief is protected should be on whether the belief, in itself, satisfies the *Grainger* criteria in general. Manifestation may be relevant to the criteria (for example, if someone manifests a belief inconsistently, that may be relevant to its cogency and cohesion). However, the tribunal should not otherwise focus on the specific ways in which the employee manifests their belief at this stage. Only after it has decided that an employee's belief is protected should a tribunal carry out a balancing exercise between competing rights.

Implications of the decision

The EAT was at pains to distance this decision from the underlying debate about transgender rights and focused instead on the principles of freedom of speech. The judgment is not about denying protection to trans people but about whether Ms Forstater's belief was protected under the Equality Act.

Only truly extreme beliefs (the EAT gave the examples of beliefs in totalitarianism or Nazism or espousing violence and hatred in the gravest forms) are not worthy of respect in a democratic society. The EAT was clear that Ms Forstater's belief is not close to that threshold, being widely shared, consistent with English law on sex and gender, and not necessarily interfering with the rights of trans people. Effectively, it recognised that while her view that biological sex cannot change may be upsetting to some people, that does not mean it is unlawful. The threshold for protection may be low but the manifestation of a belief may nevertheless amount to unlawful harassment of others who have a protected characteristic. This is important for employers considering how to handle questions of trans rights in the workplace and how to deal more generally with employees expressing philosophical beliefs.

Individuals are entitled not to be discriminated against because of gender-critical beliefs such as those held by Ms Forstater. The decision gives those who hold such beliefs the same legal protection as those who hold religious beliefs or other protected philosophical beliefs such as environmental beliefs or ethical veganism, to take two examples from case law. In turn, the Equality Act gives the same protection to those who hold qualifying religious or philosophical beliefs as it does to individuals who face other kinds of discrimination, for example because of their sex, sexual orientation or being transgender.

Difficult situations arise when one employee's beliefs conflict with the rights of another, and there are many examples in previous cases of employers struggling to deal with these fairly.

Lessons for employers and in-house lawyers

As the EAT acknowledged, the case has generated strong feelings which are:

> *… reflective of the debate in wider society about the rights of trans persons, which is often conducted in hyperbolic and intransigent terms.*

Any employer wondering how to manage the issue if it arises in their workplace will be watching closely for guidance on how to handle employee conflict fairly and lawfully, while respecting the rights of all involved.

It's not what you believe but how you express it

Lost in some of the media commentary on the case was that the EAT did not decide whether Ms Forstater was discriminated against because of her (now protected) beliefs. The case will return to the employment tribunal to consider whether the non-renewal of

her contract was because of her belief or the way in which she manifested that belief, and if it was, whether the discrimination was justified.

What is and what is not a lawful manifestation of a belief will depend on the facts before any tribunal. While there is no right not to be offended, employees are entitled to be protected from harassment, so the tribunal will be expected to examine how an individual manifests their belief in the workplace.

The decision does not mean, for example, that those with gender-critical beliefs can misgender trans people with impunity. Intentionally failing to use someone's preferred pronouns (or referring to them by a different gender to the one they are living in) is likely to be harassment, albeit this will depend on all the circumstances, including the reason for the misgendering.

In this case, the tribunal found that Ms Forstater would normally use someone's preferred pronouns and would not gratuitously refuse to do so. However, she would refer to biological sex if she considered it relevant to do so (for example, in a discussion about a trans woman being in what she considered to be a women's space). What exactly that means in practice will no doubt be examined when the case returns to the tribunal. In general, though, there are likely to be limited circumstances in which it would be appropriate knowingly to use the wrong pronouns in the workplace.

Respect at work is crucial

When an employer applies its policies neutrally but these cause a particular disadvantage to some groups because of their beliefs, this could amount to indirect discrimination. The employer then needs to consider whether it can objectively justify the policy or should change it or allow exceptions.

Policies, including disciplinary policies or staff codes of conduct, should reflect the importance of respect at work. The EAT's decision noted that individuals can hold beliefs with which others may disagree, or even find upsetting, but that does not mean they are unlawful. All employees, whatever their views or protected characteristics, are expected to be civil to each other and not to allow their personal beliefs to affect working relationships.

Many employers now encourage all employees to state their preferred pronouns, for example in their email signatures. While those who wish to do so should be able to, no one should be compelled to do this or singled out or made to feel uncomfortable for not listing their own. There may be various reasons behind their decision: those with gender-critical beliefs may decline, but not all trans and non-binary people are themselves comfortable with such an expectation.

Trans people are protected from discrimination and harassment…

Employers must provide a safe environment for trans people and they continue to risk liability under s109(4) of the Equality Act for any acts against trans people committed in the course of employment. Although there is scope for debate as to whether the definition of gender reassignment in the Act covers all trans people, they may be able to rely on other protected characteristics to seek redress (such as perceived sex discrimination).

… But those with gender-critical beliefs are also protected

The same right to be protected from discrimination and harassment applies to those with gender-critical beliefs. Just as an employer will not wish to create an atmosphere which prioritises one religion over others, so it is with gender-critical beliefs. However, as with all religions and beliefs, it can be legitimate for an employer to restrict how employees express those beliefs. The EAT was clear that there is no right not to be offended, and that the tribunals' role is not to decide which side is right, or holds the more acceptable views, but to ensure that those with different views tolerate each other. For example, name-calling (such as calling a gender-critical employee a 'terf' or 'bigot') could amount to harassment and should be taken as seriously as verbal abuse against a trans person or other employee.

A practical issue which can arise in the workplace is the provision of single-sex or mixed-gender toilet and changing facilities. All employees should be able to respond with their polite views, for example to a consultation on their provision, without being accused of harassment.

It may be a good moment to review your social media policy

Employment case law is full of examples of the consequences of employees' social media postings and, indeed, Ms Forstater's beliefs came to the attention of CGD Europe only when colleagues saw and reported her tweets. If an employer's policy takes a particular approach to what employees can and cannot say, then that approach should apply also to gender-critical beliefs. For example, if employees are permitted to tweet in favour of self-identification reforms to gender recognition, others should be equally entitled to post their concerns about those reforms without disciplinary action – provided that both viewpoints are expressed respectfully and without abusing others.

Wider impact

The EAT decision does not just affect employers and employees. The Equality Act's definition of employee is wider than that in the Employment Rights Act 1996, encompassing workers, contract and agency workers and job applicants.

Organisations will also need to consider the impact of the ruling on their relationships with customers, clients and the general public, since the Act also applies to service providers and public authorities. Trade unions, universities and other educational bodies, and landlords and other service providers, as well as employers, should ensure that any previous stance they have taken in diversity training or in their statements or actions does not give rise to potential discrimination based on gender-critical beliefs.

Cases Referenced

- Forstater v CGD Europe & ors [2021] UKEAT/0105/20/JOJ
- Grainger plc & ors v Nicholson [2009] UKEAT 0219/09/0311
- Higgs v Farmor's School [2020] ET/1401264/2019
- Lilliendahl v Iceland [2020] EUECJ Case no 29297/18
- Mackereth v Department for Work and Pensions & anor [2019] ET/1304602/18

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