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Legal Update

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United Kingdom: Tribunal finds employee discriminated against because of his protected anti-Zionist beliefs

In brief

An employment tribunal has held that the University of Bristol's decision to dismiss a professor based on comments he shared regarding his protected anti-Zionist beliefs was both an unfair dismissal and unlawful discrimination because of his protected belief.

In this issue

Key takeaways

- Under the Equality Act 2010, individuals are protected from discrimination because of a protected belief. The issue of conflict of beliefs has led to a number of recent cases. Current case law holds that even where beliefs may be viewed as offensive by some people, this does not automatically exclude them from protection.
- Just because beliefs are worthy of protection, does not mean that an employee can share such beliefs and opinions with unfettered impunity in the workplace. There are parameters within which opinions can be voiced and there are limits when it comes to how such opinions are manifested in the workplace. An employer can discipline or dismiss an employee for manifesting a protected belief if the employer's response is both in furtherance of a legitimate aim and not disproportionate.
- While a disciplinary sanction was an appropriate response, the tribunal held that dismissal was disproportionate. Employers should consider all the sanctions at their disposal, and whether there is a lesser, but appropriate, alternative to dismissal.
- Employers should be consistent in policies and decision-making.
- To discuss more about what this case means for you and your business, get in touch with your usual Baker McKenzie contact.

In more detail

Professor Miller was employed by the University as a professor of Political Sociology in September 2018. He was dismissed on 1 October 2021 for gross misconduct. During his academic career of more than twenty years, Professor Miller focused his research and teaching upon state and corporate propaganda, public relations and lobbying. He has been published extensively on a diverse range of topics and his academic work has been both political and controversial. His views and activities in relation to Zionism were well known before he was employed by the University.

Professor Miller believes that Zionism, which he defines as an ideology that asserts that a state for Jewish people ought to be established and maintained in the territory that formerly comprised the British Mandate of Palestine, is inherently racist, imperialist and colonialist. He also considers Zionism to be offensive to human dignity on that basis, and he therefore opposes it. He explained to the Tribunal that by the late 1990s, his beliefs in relation to Zionism were fully formed. Since that time he has believes that "Zionism to be a settler-colonial ethno-nationalist movement that seeks to assert Jewish hegemony and political control over the land of historic Palestine." He also believes Zionism necessarily calls for the displacement and disenfranchisement of non-Jews in favour of Jews, and it is therefore racist and ideologically bound to lead to the practices of apartheid, ethnic cleansing and genocide in pursuit of territorial control and expansion.

Professor Miller was clear in his evidence that his anti-Zionism is not opposition to or antipathy towards Jews or Judaism and when cross examined made clear that he is not and was not supportive or "open to" violence as a means of opposing Zionism.

In March 2019, the University received a complaint from the Community Security Trust (CST) on behalf of two Jewish students regarding the content of a lecture he gave on Islamophobia. In the view of the CST, the complaint raised serious diversity and student welfare issues together with very real concerns about the academic approach of Professor Miller. A further complaint was made by the President of the Bristol Jewish Society, the President of the Union of Jewish Students and a former student of the University. The complaint by the student alleged that Professor Miller had described the foundation of Israel as "by definition a racist endeavour" and was alleged to have contravened the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism.

The University arranged for an external independent investigation by a senior barrister, Ms. McColgan KC, leading to a conclusion that there was no formal case to answer in connection with any of the matters raised.

Professor Miller made further comments in February 2021 which were widely reported in the media, discussed in the House of Commons, and led to a significant volume of correspondence to the University expressing similar levels of concern about the statements, and support for Professor Miller (mainly from academics). There was no formal complaint from any students at that time. The University appointed an emeritus professor under its conduct procedures to investigate Professor Miller's statements in February 2021, and Ms. McColgan KC to investigate separately whether those statements were outside the boundaries of acceptable speech. During the investigation, the University received a letter alleging that the University was liable to an unnamed Jewish student for harassment under the Equality Act.

The barrister concluded once again that there was no formal case to answer, but the emeritus professor found that there may have been breaches of the University's policies and procedures, and after a disciplinary hearing Professor Miller was summarily dismissed on 1 October 2021 for gross misconduct.

Professor Miller posted a series of comments on social media in August 2023, after his employment with the University had come to an end. The Tribunal held that it was likely that, had Professor Miller not already been dismissed, comments such as these would have led to further concern both within and outside the University and it was likely that he would have received a written warning, thus potentially lowering the bar for the type of conduct which could lead to dismissal.

Current legal landscape

Discrimination on the grounds of a belief is prohibited under the Equality Act 2010 (EqA 2010). This case builds on existing case law as to what may or may not constitute a protected philosophical belief under the EqA 2010 and provides helpful guidance as to where the line may be drawn.

The pivotal decision regarding the protection that beliefs can attract is the case of *Forstater v CGD Europe and others*. This case makes clear that even where beliefs may be viewed as highly offensive and upsetting by some, this does not automatically exclude them from protection. As a reminder, Maya Forstater expressed gender critical views (that biological sex is a real and immutable belief) at work and on social media. The Employment Tribunal found that none of the manifestations of her belief were objectively offensive or unreasonable, meaning that it was not possible for an employer to justify action against her. Consequently, she was awarded compensation of over GBP 100, 000 including aggravated damages.

Forstater drew on the leading authority of *Page v NHS Trust Development Authority and Page v Lord Chancellor and another*, which involved a Christian magistrate who opposed adoption by single parents and same-sex couples. He expressed his opposition both to fellow magistrates and in a BBC interview. As a result, he was removed as a magistrate and also from his position as a non-executive director of an NHS Trust. The Court of Appeal noted a distinction in the case law between cases where the reason for the treatment complained of is the fact that the claimant holds or manifests the protected belief and cases where the reason for the treatment is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter scenario, it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act that is complained of. The case law therefore establishes that (i) an unobjectionable expression of belief is not separable from the belief itself and detrimental treatment on those grounds will therefore be discrimination and (ii) an employer can discipline or dismiss an employee for manifesting a protected belief provided that the employer's action is taken in pursuit of a legitimate aim and it is not disproportionate. In his case, the public expression of his beliefs about same sex and single parent adoption made clear he would not be impartial in considering adoption applications, and therefore this was separable from his belief and his removal was lawful.

Most recently, *Higgs v Farmor School* emphasises the importance of freedom of speech and expression and moreover, that employees do not have a right to not be exposed to beliefs that they personally might find offensive (except extreme beliefs that, for

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example, advocate violence). A respectful expression of views on a topic, even if robust, is unlikely to be unacceptable or amount to harassment of others without more context.

In the 2023 case of *Fahmy v Arts Council England*, robust statements by the Deputy CEO about LGB Alliance, which he described as "a divisive organisation" with a history of "anti-trans-exclusionary activity", in a drop-in session attended by several hundred people did not amount to harassment of Ms. Fahmy on the basis of her belief. The Tribunal was critical of these statements which, given the CEO's seniority, opened the door to others who did subject her to harassment, but his comments of themselves did not reach that standard.

For further information on the recent case law, please see an article written by Monica Kurnatowska for Practical Law here. The key recommendations in this article were recently endorsed in the independent Inclusion at Work Panel's report on inclusion and diversity in the workplace. Please also watch out for our forthcoming report on the recent case of *Omooba v (1) Michael Garrett Associates (2) Leicester Theatre Ltd*.

Tribunal decision

The tribunal held that Professor Miller's anti-Zionist beliefs were protected.

The University argued that Professor Miller's beliefs failed a number of the *Grainger v Nicholson* criteria, but in particular the last one - whether his beliefs were incompatible with human dignity and the fundamental rights of others. Professor Miller's evidence was that he did not oppose Jewish self-determination or the existence of a preponderantly Jewish state. His opposition is to the exclusive realisation of Jewish rights to self-determination within a land that is home to a very substantial non-Jewish population. The tribunal also accepted Professor Miller's position that he is not and was not supportive or "open to" violence as a means of opposing Zionism.

The Tribunal acknowledged that there were very strong opposing beliefs and opinions to those held and expressed by Professor Miller, but based on existing authorities (notably *Higgs* and *Forstater*), it is not within the Tribunal's remit to inquire into the validity of the belief and the fact that a belief may cause offence to some, does not preclude it from protection. However, while his beliefs were worthy of protection, there are still important limits on the extent to which such opinions are manifested in the workplace.

The tribunal found that Professor Miller had been directly discriminated against because of his beliefs when his employment was terminated. It accepted that while the University may have had a legitimate aim in dismissing him (for his breaches of the University's conduct rules and policies) but it had not adequately balanced his human rights and those of others against protecting the University's reputation and best interests. The decision to dismiss had been disproportionate, as lesser disciplinary action could have been taken against Professor Miller to achieve those aims.

Professor Miller had also been unfairly dismissed. However, the tribunal concluded that what Professor Miller said and wrote about students at the University's student societies contributed to and played a material part in his dismissal. In particular, the Tribunal found that it was not appropriate for professors to publicly aim aggressive discourse at students or student groups. As a result of this, the losses attributable to the unfair dismissal element of the claim were reduced by 50%. The Tribunal's position here is perhaps unsurprising given the power imbalance between students and professors in an academic setting and the direct and aggressive nature of the comments.

The Tribunal also referred to the comments that Professor Miller posted on social media in August 2023, after this dismissal. As a result of nature of these comments, the Tribunal further found that, had Professor Miller remained employed at the University at the time the comments were made, there is a 30% chance that he would have been dismissed shortly after. The Tribunal found that tweets were of a "different order" to the comments made in February 2021 and that there was not a sensible nor coherent link to his protected belief. This finding of contributory conduct will also impact the compensation he might be awarded for bringing a successful unfair dismissal claim.

What to take away

- **Employers need to tread carefully:** just because opinions cause offense doesn't mean that employers can ban the expression of such beliefs in the workplace: It can be very difficult to assess the point at which a comment crosses the line. This has been particularly acute in recent geo-political events such as the Israel/Hamas war when viewpoints are deeply entrenched. Leading authorities mentioned above remain valid and just because an opinion or viewpoint may cause offence, be upsetting or cause significant distress to many who read or heard them, doesn't mean that employers are able to ban the expression of such beliefs. Employees do not have a right to not be exposed to beliefs that they personally might find offensive and the bar remains high for genuinely-held beliefs not to be considered worthy of respect in a democratic society.

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- **Context is important:** This case relates to an academic context where the threshold and existence of free speech may be particularly prioritised and likely promoted, but also highlights some helpful takeaways for employers. For example, this context may well apply to other professions where such openness is actively encouraged as it is intrinsic to the success of the organisation e.g., journalist and media outlets and think tanks. In addition, a lot of emphasis was placed on Professor Miller's freedom of speech. This is perhaps understandable in an academic environment, where sharing and debating ideas is inherent to the role. Whilst the tribunal noted the 'chilling' effect the dismissal of Professor Miller may have on academics more generally, there may be a different emphasis in other professions. This will depend in part on the overall attitude to open discussion of beliefs and it is important to remember the importance of balance, and that employers should not favour one view over another.
- **Proportionality is key:** The tribunal held that whilst a disciplinary sanction was an appropriate response, dismissal was too severe. Employers should not select dismissal as a default option, and instead consider whether less severe sanctions are appropriate, when addressing potential misconduct issues. Failing to do so may increase the likelihood of potential discrimination risks. Whilst this is helpful practical advice, it is worth noting that the University did consider whether alternative sanctions would be appropriate and came to the conclusion that a lesser sanction would not have been suitable, yet their action was still found to be discriminatory.
- **Consistency is crucial:** The tribunal made reference to the fact that previous comments made by both Professor Miller and other academics did not attract the same censure, even though they potentially impacted both the University's reputation and the human rights of others. Had the University applied its policies consistently, it may have had a better chance of justifying the outcome. The lack of consistency left the University open to criticism that its decision making was influenced by external factors e.g., the media frenzy surrounding Professor Miller's behaviour, rather than just the strict facts. It is a reminder that policies and decision making must be consistent, and that while external pressures may sometimes be relevant, employers should avoid a knee jerk reaction to criticism and unwelcome publicity.
- **Employers should be mindful of findings made as part of internal disciplinary processes:** Both reports commissioned for the disciplinary investigations found that Professor Miller's comments did not amount to discrimination or antisemitism, so the University could not argue that the reason for dismissal was the risk of further discriminatory conduct. Whilst there is often understandable hesitation around labelling a particular act or comment as discriminatory, a lack of definitive decision making will make it harder to justify action taken later down the line.
- **Blurred lines:** This case also demonstrates the difficulty when it comes to confronting polarising views in the workplace. Remaining silent on a topic can potentially avoid misinterpretation, but is open to accusations of inconsistency if the organisation has previously made statements on controversial issues. This case in particular highlights the conflation of certain terms leading to Zionism and Judaism being seen as one and the same and therefore any criticism of the Israeli state or being pro-Palestine being seen as an attack on the Jewish faith. The balance to get it right is a difficult one, where freedom of speech needs to be safeguarded without giving way to hate speech. Whilst employers will need to ensure even handedness when grappling with such subject atter, typically the expectation is that dialogue is respectful and employers should ensure that they have a form of respect at work / respectful communications policy that sets out the expected standards of behaviour.

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