Conflicts of belief in the workplace: forging a path

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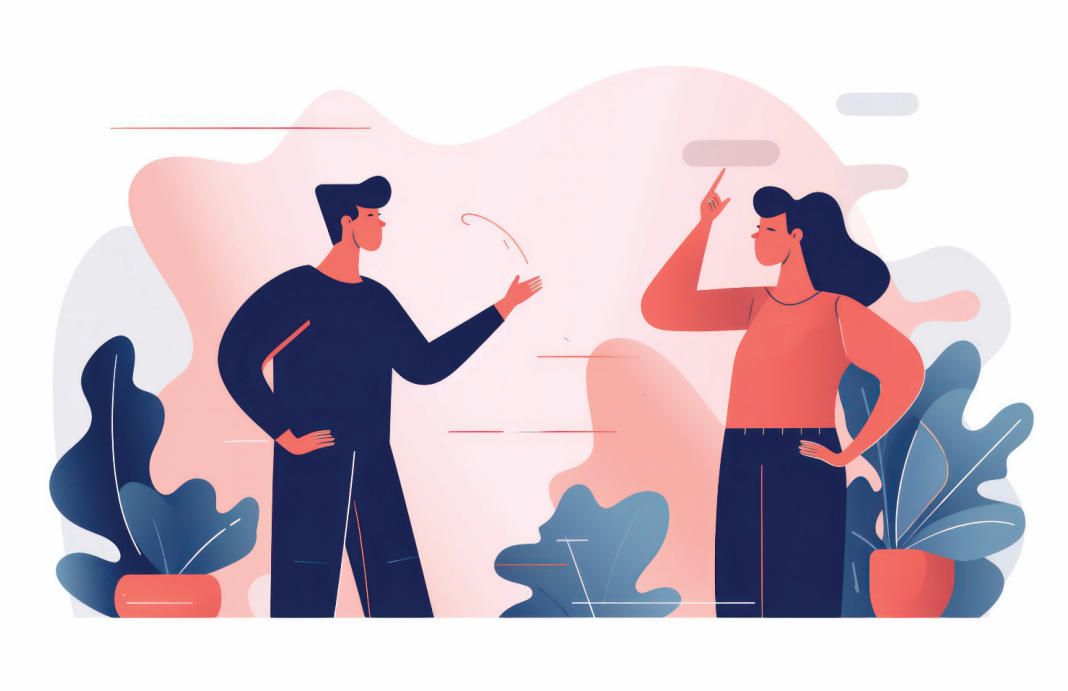
This feature article explores the recent case law around conflicts of beliefs in the workplace and how employers can approach these situations in practice.



Speedread

An organisation's ethos is of high importance both in terms of corporate and employee brand. Some organisations have also stepped into the policy and political area, expressing views on controversial topics. Meanwhile, employees have become used to expressing their own views both at work and on social media, including, sometimes, on internal platforms. This has in turn led to new challenges for employers. What happens when an employee's views are at odds with those of the employer? Can employers restrict employees' speech on social media? How should employers respond where colleagues fundamentally disagree with each other?

It is, in principle, possible for employers to restrict employees' expressions of views. But where those views reflect a religious or other belief protected under the Equality Act 2010 (2010 Act), the scope to do so is far more limited. A number of employment tribunal decisions have highlighted the financial and reputational perils for employers of getting things wrong. Under the 2010 Act, it is unlawful to discriminate on the basis of religion or belief. The leading case is *Grainger plc and others v Nicholson*, which involved a claim by a climate change activist, in which

the Employment Appeal Tribunal (EAT) identified five key criteria to determine whether a belief exists for the purpose of the 2010 Act (*UKEAT/0219/09*).

In *Forstater v CGD Europe and others*, an employment tribunal awarded Maya Forstater over £100,000 in compensation, including for injury to feelings and aggravated damages, after ruling that her employer had discriminated against her because of her gender-critical beliefs (*ET/2200909/2019; UKEAT/0105/20*). This landmark case is a clear warning to employers of the risks of getting it wrong. Following a flurry of cases, and recent guidance from the EAT in *Higgs v Farmor's School*, the path that employers need to follow in order to navigate this tricky territory is beginning to become clearer (*[2023] EAT 89*). In *Higgs*, the EAT set out a number of basic principles that should underpin the approach for employers when assessing the proportionality of any interference with rights to freedom of religion and belief, and of freedom of expression.

Following *Forstater* and *Higgs*, several broad propositions emerge that employers should consider as guiding principles in conflict of beliefs situations. These include: the starting point is of freedom of expression; there is no right not to be offended by someone's opinions; determining whether something is objectionable will be context specific; employers must not make assumptions about an employee's views or about what an individual might do; employers looking to avoid claims and to rely on the reasonable steps defence against claims under the 2010 Act will need to have made clear in policies and regular training that all beliefs are treated equally; senior individuals need to be even-handed in their leadership; care is needed in handling complaints by third parties and the employer must consider them independently; employers should be watchful of the possible risk that the activities of affinity groups can potentially create a hostile work environment for others.

The article sets out four hypothetical scenarios in which an employer may need to apply these principles in practice.

An organisation's ethos is of high importance both in terms of corporate and employee brand. Its ethos may encompass a number of different things: dedication, accountability, collaboration, integrity, expectations in terms of behaviour, and its values on diversity, equity and inclusion. Some organisations have also stepped into the policy and political area, expressing views on topics such as Brexit, climate change, the war in Ukraine, and US constitutional protection of abortion rights.

Meanwhile, employees have become used to expressing their own views both at work and on social media, including, sometimes, on internal platforms. This has in turn led to new challenges for employers. What happens when an employee's views are at odds with those of the employer? Can employers restrict employees' speech on social media? How should employers respond where colleagues fundamentally disagree with each other?

This article looks at the recent case law in this tricky area, the ways in which employers can interpret that case law and practical ways in which they can seek to chart a course through conflicts of beliefs among their employees.

THE CURRENT LANDSCAPE

It is, in principle, possible for employers to restrict employees' expressions of views. But where those views reflect a religious or other belief protected under the Equality Act 2010 (2010 Act), the scope to do so is far more limited. A number of employment tribunal decisions have highlighted the financial and reputational perils for employers of getting things wrong.

In June 2023, an employment tribunal awarded Ms Maya Forstater over £100,000 in compensation, including for injury to feelings and aggravated damages (*Forstater v CGD Europe and others ET/2200909/2019*). The award followed its earlier ruling that her employer, CGD Europe, had discriminated against her because of her gender-critical beliefs (*Forstater v CGD Europe and others UKEAT/0105/20; see News brief "Protection of gender-critical beliefs: balancing inclusivity"*).

This landmark case is a clear warning to employers of the risks of getting it wrong. Following a flurry of cases, and recent guidance from the Employment Appeal Tribunal (EAT) in *Higgs v Farmor's School*, the path that employers need to follow in order to navigate this tricky territory is beginning to become clearer (*[2023] EAT 89; www.practicallaw.com/w-040-1809*).

WHEN IS A BELIEF PROTECTED

Under the 2010 Act, it is unlawful to discriminate on the basis of religion or belief. For this purpose:

- Religion means any religion, and a reference to religion includes a reference to a lack of religion.
- Belief means any religious or philosophical belief, and a reference to belief includes a reference to any lack of belief.

While religion is not further defined, it is generally understood to cover all of the mainstream religions. Tribunals will also have regard to the case law of the European Court of Human Rights (ECtHR), which has recognised a range of other collective religions such as Scientology and Druidism.

The term religious belief is also interpreted in line with ECtHR case law and recognises that, within a religion such as Islam or Christianity, there may be a range of different beliefs that are not necessarily shared by all, or even most, followers of the religion.

Greater uncertainty arises in respect of philosophical beliefs, particularly those involving political or similar beliefs. The leading case is *Grainger plc and others v Nicholson*, which involved a claim by a climate change activist (*UKEAT/0219/09; see News brief "Discrimination in the workplace: the philosophy of climate change"*). The EAT noted that this was relatively uncharted territory and drew on ECtHR case law to identify five key criteria for a belief to exist:

- The belief must be genuinely held. While it is not the tribunal's function to assess the validity of a belief by some objective standard, evidence, including cross-examination, may be needed to establish that the belief is genuine.
- It must be a belief, not an opinion or viewpoint based on the present state of information available.
- It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- It must attain a certain level of cogency, seriousness, cohesion and importance.
- It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The EAT rejected the suggestion that a belief must be shared by others, part of a system of belief or a "fully fledged system of thought". It also noted that while a belief can be based on science, it does not need to be. The EAT accepted that Mr Nicholson's belief relating to climate change and the urgent need to cut carbon emissions was not merely an opinion but a philosophical belief. His evidence was that it permeated the choices he makes in terms of transport, food and drink, choice of home, waste disposal and other daily choices in the way he lives.

Protected beliefs

Following *Grainger*, a range of beliefs have been examined against these criteria and different beliefs have been found to have the benefit of protection, while others have not met the test (*see box "Case law on protected beliefs"*). Many of these cases are fact specific and are first instance, therefore, it is important to note that any future case would be considered on its own facts.

For example, not every vegan will be protected, as was illustrated by the recent decision in *Owen v Willow Tower Opco 1 Ltd* and, equally, a vegetarian could, in principle, still succeed in showing that their own belief is protected (*ET/2400073/2022; www.practicallaw.com/w-040-1823*).

While in *Grainger* and the ethical veganism cases, the claimants' beliefs clearly affected multiple aspects of the way that they lived their lives, the EAT in *Grainger* stated that a belief does not have to be so all encompassing as to dominate every aspect of a claimant's life in order to qualify for protection.

Further, while a certain degree of cogency is required, the tribunals will not undertake a forensic examination of the basis for the belief or require that it have a scientific or objective basis. Cases will also be highly fact-specific: not every vegan or individual with a concern about climate change will be able to establish on the facts that they have a belief that is capable of protection.

Political beliefs

The Employment Equality (Religion or Belief) Regulations 2003 (*SI 2003/1660*) that predated the 2010 Act required that a belief must be "similar" to a religious belief in order to qualify for protection. As a result, a number of cases found that political beliefs, such as membership of the British National Party, were not protected. The requirement that a belief be "similar" was subsequently removed and increased the scope for political beliefs to be protected.

In *Grainger*, the EAT noted that membership of a political party is not of itself protected, but a political philosophy might be. This has subsequently been followed by employment tribunals in cases such as *Olivier v Department for Work & Pensions* and *GMB v Henderson* which upheld beliefs based on democratic socialism (*ET/1701407/2013; UKEAT/0073/14*).

In *McEleney v Ministry of Defence*, an employment tribunal found that a belief in Scottish independence was protected and, in *Embery v Fire Brigades Union*, an individual who campaigned in favour of Brexit was found to have a deep-seated belief in national independence (*ET/4105347/2017; ET/2203219/2019*).

Gender-critical beliefs

Since *Grainger*, particular controversy has arisen in respect of gender-critical beliefs: essentially, a belief that sex is biological and immutable. The leading case is *Forstater*. At first instance, an employment tribunal held that Ms Forstater's gender-critical belief was not protected, on the basis that it did not meet the fifth requirement in *Grainger* that a belief be worthy of respect in a democratic society. This decision was overturned by the EAT, which held that only beliefs akin to Nazism or totalitarianism, or which espouse violence and hatred in the gravest of forms, would fail the test of being worthy of respect. Ms Forstater's beliefs were clearly not close to that category. The EAT noted that Ms Forstater's beliefs were widely shared in society, reflected the common law and did not seek to destroy the rights of transgender people.

The EAT also held that the tribunal had been wrong to reject Ms Forstater's alternative formulation of her case on belief, that belief in gender identity is a protected belief, and which CGD Europe did not challenge, and that lack of belief in gender identity is therefore also protected. This means that in a workplace with people of gender-critical beliefs as well as people who believe that trans women are women, both groups are protected. Employers need to avoid discriminating between these two groups and also ensure that their staff do not discriminate against or harass members of either group.

Following *Forstater*, an employment tribunal went further in *Bailey v Stonewall and others*, a case brought by a black lesbian barrister against her chambers and Stonewall (*ET/2202172/2020; www.practicallaw.com/w-036-6572*). The tribunal found that protection extended not only to her belief in biological sex rather than gender identity but also to her belief that "gender theory" is detrimental to women in a range of ways, including denying them the right to female-only spaces and labelling lesbians as bigoted for only being same-sex attracted.

DISCRIMINATION AND BELIEF IN PRACTICE

The 2010 Act identifies four types of discrimination on the basis of religion and belief:

- Direct discrimination, where an individual is treated less favourably because of their religion or belief.
- Indirect discrimination, where a provision, criterion or practice puts those of a particular religion or belief at a particular disadvantage and is not objectively justified.
- Harassment, where unwanted conduct related to religion or belief has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- Victimisation.

Although a number of recent cases have involved gender-critical beliefs, the same principles apply to other beliefs, including belief in climate change, veganism and also controversial topics such as Brexit, to the extent that the belief meets the threshold for protection.

Direct and indirect discrimination

Most of the cases have focused on direct and indirect discrimination. Many of the early cases related to issues such as Sunday working, dress codes, time off for religious festivals, or job duties that conflict with the belief. The leading case of *Ladele v London Borough of Islington* established that such cases are squarely in the territory of indirect discrimination with the ability for the employer to show objective justification provided that there is a clear business need and that the employer has acted proportionately (*[2009] EWCA Civ 1357*).

Ms Ladele was a Christian registrar who wished to be excused from the requirement to perform civil partnerships for same-sex couples. She argued that the requirement placed some Christians, including her, at a particular disadvantage. The employer successfully argued that the requirement to perform civil partnerships was objectively justified. The employer clearly had a legitimate aim and, in practice, it could not accommodate her request to be excused. Following the Court of Appeal's decision, Ms Ladele pursued her case to the ECtHR where she was unsuccessful (*[2013] ECHR 37*).

The distinction between direct or indirect discrimination is more challenging where the case involves complaints about comments on social media or statements at work. The leading authority is *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 (*[2021] EWCA Civ 255; [2021] EWCA Civ 254*). 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 an unobjectionable expression of belief is not separable from the belief itself. Detrimental treatment on those grounds will therefore be discrimination. This decision was applied in *Forstater*. Ms Forstater's claim related to a decision not to take her on as an employee and the non-renewal of her fixed term as a visiting fellow, following her comments made internally and on social media about trans issues and women's rights. These included:

- Drawing an analogy between someone who is white identifying as black and someone born male identifying as a woman.
- Referring to those born male who self-identify as female as having “a feeling in their head”.
- Referring to the risks for women and girls if men can self-identify as women.
- Mocking those who do not share her belief by expressing surprise that “smart people” can say that they believe that male people can be women.

The employment tribunal found that, while some people might find her comments offensive, none of them were objectionable and they did little more than assert her gender-critical belief. Arguably, her most controversial statement was the use of the term “part-time cross-dresser” to refer to a public figure known to be gender fluid who dresses sometimes as a woman and sometimes as a man. The tribunal described this as uncomplimentary, dismissive and intended to be provocative but ultimately, the majority concluded that it did not amount to an objectionable or inappropriate manifestation of Ms Forstater’s belief, in the context of a debate on a matter of public interest (that is, this person’s inclusion in a list of top women in business). The tribunal was therefore satisfied that the non-renewal of her contract was directly discriminatory.

Following on from *Forstater*

While *Forstater* was a helpful decision, it left open what the position would be in another organisation. For example, what if the employer did not have the culture of open debate that existed in CGD Europe? Could an employer issue policies that restrict its employees’ freedom to make controversial statements? It is clear that an employer cannot favour one belief over another, but what would be the position if it applied restrictions in an even-handed manner?

The issue has now also been examined by the EAT in *Higgs*. Mrs Higgs is a Christian who was employed in a secondary school as an administrator and work experience manager. She was dismissed for comments made on her personal Facebook page about materials being used in primary school relating to gay marriage and trans issues as part of relationships education. Specifically, she expressed concern that “children will be taught that all relationships are equally valid and ‘normal’, so that same sex marriage is exactly the same as traditional marriage, and that gender is a matter of choice, not biology, so that it’s up to them what sex they are” and that “expressing and teaching fundamental Christian beliefs, relating to the creation of men and women and marriage will in practice become forbidden, because they conflict with the new morality and are seen as indoctrination into unacceptable religious bigotry”.

This led to a complaint by a parent that Mrs Higgs had been posting homophobic and prejudiced views against the LGBT community on Facebook and that she might exert influence over vulnerable pupils who may end up in isolation for whatever reason. Following an investigation, Mrs Higgs was dismissed.

Having lost her claim in the employment tribunal, Mrs Higgs appealed to the EAT. The EAT also heard from an intervenor, the Archbishop’s Council of the Church of England, which is a charity with a mission to promote, aid and further the work and mission of the Church of England, ensure freedom of religion or belief, protect the free practice of all faiths and seek to engender social cohesion.

The intervenor expressed a neutral position on the case but made representations about the appropriate test to be applied. It expressed concerns that uncertainty as to when “objection could justifiably be taken” could have a potentially chilling effect on free speech. The intervenor argued that, following the case law of the ECtHR and *Bank Mellat v HM Treasury (No 2)*, a strict proportionality assessment is required and is to be applied with the need to encourage pluralism, tolerance and dialogue firmly in mind (*[2013] UKSC 39*).

The EAT overturned the tribunal's decision. It noted that the tribunal had not engaged with the question of whether the dismissal was because of, or related to, Mrs Higgs' manifestation of her beliefs. It said that in answering that question, the views or concerns of the employer were not relevant. The tribunal needed to consider whether there was a sufficiently close or direct nexus between Mrs Higgs' protected beliefs and her social media posts. If that had been considered, the tribunal would have concluded that there was a close or direct nexus between her Facebook posts and her protected beliefs. Because the tribunal had bypassed that issue, it had failed to carry out the necessary balancing act to determine whether the employer's actions were because of the belief or because of an objectionable manifestation of that belief. The case was therefore remitted back to the tribunal.

In an authoritative judgment that was broadly supportive of the approach advocated by the intervenor, the EAT set out a number of basic principles that should underpin the approach to assessing the proportionality of any interference with the rights to freedom of religion and belief and of freedom of expression (*see box "The Higgs test"*).

PRINCIPLES FOR EMPLOYERS

Following *Page*, *Forstater* and *Higgs*, several broad propositions emerge that employers should consider as guiding principles in conflict of beliefs situations.

Freedom of expression

Forstater and *Higgs* reinforce the importance of freedom of speech and expression. The starting point is therefore that employers should not generally restrict the free expression of beliefs, unless the expression is objectionable, which is a high threshold. Much of the commentary that followed *Forstater* suggested that the outcome might have been different if CGD Europe had had a more robust policy, and that employers could still restrict their employees' speech. *Higgs* drew on the ECtHR case law and makes it clear that this is not the case.

No right not to be offended

The fact that some people may be offended by a statement does not make it objectionable. There is no right not to be offended and some robust debate and language is to be expected. That is particularly the case on social media but also, to a degree, in the workplace. The prime example is Ms Forstater's reference to a "part-time cross-dresser", which was found not to be objectionable in the context in which it was made.

This principle works both ways. In the recent 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 (*ET/6000042/2022*). 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.

Context is everything

Determining whether something is objectionable will be context specific. The proportionality test laid out in *Higgs* is helpful here. Relevant factors will include what was actually said, who is involved, including their seniority, what the individual understood about the audience for their comments, and the nature of the business or the specific role including whether it involves vulnerable service users.

In addition, employers need to think about the employee's right to privacy where the beliefs in question are expressed on personal social media outside of the work environment (*see box "Right to privacy and data protection"*).

Avoid assumptions

Employers must not make assumptions about an employee's views or about what an individual might do. This is illustrated by earlier cases such as *R (Ngole) v University of Sheffield, Walters v Active Learning Trust Ltd* and *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd*, which were all cases relating to views on homosexuality stemming from religious beliefs, rather than gender-critical beliefs (*[2019] EWCA Civ 1127; ET/3324619/2019; ET/330656/14*).

These cases confirmed that it cannot be assumed without evidence that individuals are homophobic or that they will treat homosexual people differently in the workplace. The ECtHR took a similar approach in *Redfearn v UK*, which involved a bus driver who was dismissed when he became a councillor representing the British National Party (*[2012] ECHR 1878*). The employee in that case, Mr Redfearn, had an unblemished work record and there was no evidence to suggest that he would behave inappropriately to ethnic minority customers.

Importance of policies and training

Employers looking to avoid claims and to rely on the reasonable steps defence against claims under the 2010 Act will need to have made clear in policies and regular training that all beliefs are treated equally and senior leadership must have acted accordingly. This may not be straightforward. In *Fahmy*, it was noted that the employer in question, the Arts Council, had struggled to find appropriate neutral training. Training may also need to address the importance of treating customers equally regardless of their protected beliefs or other protected characteristics.

Even-handed leadership

Senior individuals need to be even-handed. In the face of controversy, it is not uncommon for employers to make statements that are supportive of a particular group. For example, in *Fahmy*, the Deputy CEO issued a statement saying that: "The well-being of everyone that works here in the Arts Council is our number one priority, and it always will be. This includes all our LGBTQIA+ colleagues. On behalf of EB, I particularly want to express my personal solidarity with our trans and non-binary colleagues.…".

Crucially, he did not make clear that the views of gender-critical employees were also to be respected. Although his statements were not of themselves harassment, the tribunal noted that they opened the door to other colleagues who did then harass Ms Fahmy. An employer would find it very difficult to rely on the reasonable steps defence in these circumstances.

Handle complaints with care

Care will also be needed in handling complaints by third parties; the employer must consider them independently and, as noted above, without making assumptions about what the employee might do. Where there are concerns about an employee's conduct on social media or internally, employers will need to conduct a careful balancing exercise and it may, in some circumstances, be more appropriate to resolve the matter by dialogue. Third parties also need to operate with care; one of the points that will be considered by the EAT in the appeal of *Bailey* is the potential liability of third parties for inducing a breach of the 2010 Act (*see box "Appeals and next steps"*).

The need for balance

Employers should also be watchful of the possible risk that the activities of affinity groups can potentially create a hostile work environment for others. It may be appropriate to consult affinity groups on policies relating to their members but, in doing so, the employer cannot abdicate its responsibility to consider independently the interests and needs of all protected groups.

They should also be cautious about their own engagement with third-party organisations and pressure groups, including their involvement in training and speaking engagements.

That is not to say that an employer should never invite a thought-provoking or controversial speaker, even if their views could be offensive to some. Indeed, it is clear from *Forstater* and *Fahmy* that some robust discussion and debate may not of itself amount to harassment unless it is expressed in an objectionable way. But *Fahmy* also warns of the dangers of opening the door to harassment by others, and this will be a particular risk if training and inclusion and diversity events are one-sided, endorsed by leadership and are not balanced.

DIFFICULT ISSUES IN PRACTICE

Applying these propositions in practice is not necessarily straightforward. These are four hypothetical scenarios in which an employer may need to apply the above principles in practice.

Requirement to agree with beliefs

Generally, an employer is not able to impose a requirement on employees that they must agree with its beliefs and ethos. In principle, employees do not have to share the employer's ethos and therefore, for example, a manufacturer of meat products could not refuse to employ a vegan employee. This does not mean that there is absolute freedom for the employee. They could, for example, advocate internally for the business to move into plant-based products but if the employer decides not to, the employee must abide by that decision. Typically, employees are not inclined to join and then seek to change an organisation whose ethos is at odds with their own values, but this may be a growing problem for larger employers.

Requirement to undertake certain duties

What if a climate change activist refuses to undertake air travel as part of their role? Or a vegan researcher refuses to work on a new drug containing animal products? Can a pacifist expect to be excused from working for an arms manufacturer client? The general proposition is that employers can expect employees to carry the duties of the role. However, if the employee can show that they have a protected belief and that the duty puts those of that belief at a particular disadvantage, then the onus will be on the employer to objectively justify the requirement and to act reasonably and proportionately, including by seeking alternative solutions.

In an early case, the European Commission on Human Rights took the robust view that an employee's right to freedom of conscience, thought and religion under Article 9 of the European Convention on Human Rights (Article 9) was not breached by the requirement to work on Sundays, and noted that if an employee's work is in conflict with their beliefs, they are always free to resign (*Stedman v UK [1997] 23 EHRR CD 168*).

For a while, the orthodox view was that Article 9 rights were not breached where someone had chosen to work or study in an organisation "which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience". However, as the ECtHR caselaw has evolved, this hard line no longer applies.

In *Eweida and Others v United Kingdom*, the ECtHR noted that the option for the employee to change roles does not of itself negate the interference with the right to freedom of religion, and the better approach is to weigh that possibility in the balance as part of a broader proportionality analysis (*[2013] ECHR 37; www.practicallaw.com/0-524-3687*). In *Ladele*, for example, it was not realistically possible for the employer to excuse the claimant from performing civil partnerships. Similarly, in *Mackereth v Department of Work and Pensions & Advanced Personnel Management Group (UK) Limited*, the Department of Work and Pensions' insistence that a Christian doctor use the preferred pronouns of transgender service users was not

discrimination, because no compromise could be found that would avoid him dealing with transgender people (*[2022] EAT 99; www.practicallaw.com/w-036-6571*).

Each case will therefore be fact-specific, taking into account the nature of the role, the size of the employer and the options open to it. In appropriate cases, this may also involve consideration of the employer's own obligations not to treat service users and customers less favourably; for example, by refusing service or providing a lower quality of service on the basis of their beliefs or other protected characteristics.

In the example of an employee with a protected belief in climate change who advocates for a reduction in air travel, the employer will therefore need to assess how essential the air travel is, what alternative options there are, and whether there is a possible compromise. For an ethical vegan research employee who wishes to avoid animal-derived products, the employer will need to consider how easily the researcher can be redeployed to another role. Where an employee is a pacifist, is the employer able to easily allocate an alternative employee to work with the arms client without affecting the service level, and would the employer still be able to keep that employee fully busy?

Ability to restrict personal social media

An employer has only very limited scope to be able to restrict what an employee says on their personal social media. Employers should ensure that their social media policies are clear but *Higgs* emphasises that the scope to restrict freedom of expression is, in reality, limited. Where policies seek to impose restrictions, the employer must consider proportionality and whether a more limited restriction is sufficient. It would often be enough to require that individuals do not name the employer on their personal account and make clear that the views they express are not those of the employer. There may be unusual cases where the role is not realistically compatible with views stated on social media. But that will be rare and specific to the role and the facts.

Page and *Ngole* provide a useful contrast. The court service in *Page* was entitled to conclude that Mr Page's public statements about same-sex and single parent adoption undermined his duty of impartiality as a magistrate. He had an obligation to consider all potential adopters impartially and his statements would undermine that in their eyes and the eyes of the public.

On the other hand, in *Ngole*, Mr Ngole's views expressed on social media that gay marriage and homosexuality were sinful did not justify his removal from a social work course. The court noted that this was a statement of Mr Ngole's theological belief, but that there was no evidence that he would treat service users differently. Although it was a judicial review claim rather than a claim under the 2010 Act in a tribunal, *Ngole* is a good illustration of how such cases are likely to be approached.

The position is also likely to be different on social media platforms such as LinkedIn, at least where this is used for business purposes and where the employer is identified. In this situation, there is more scope for the employer to restrict what the employee posts and shares. The employer must still be even-handed; it will be difficult to restrict posts on certain topics unless the same approach is taken to all controversial or potentially offensive issues. This will be challenging in practice given the difficulty in defining what is controversial. Statements that seem obviously correct to one person may be highly offensive to another.

Managing colleague conflicts

Setting aside a case like *Mackereth* dealing with vulnerable service users, there is not yet any specific guidance from case law on how to approach a discussion between say, a gender-critical employee and either a trans activist or a transgender employee in the workplace, or between a homosexual employee and someone whose religious belief includes a belief that homosexuality is wrong.

By analogy with cases such as *Forstater* and *Fahmy*, gender-critical and religious employees are entitled to participate openly in general debate in the workplace on those subjects. The proportionality test in *Higgs*, with its emphasis on the tone and words

used, the role, seniority and context is also likely to be helpful. It would be naive to think that discussion of controversial topics could be banned, but they must be respectful.

Although harassment under the 2010 Act does not necessarily require intent, the intentions of those involved are likely to be relevant. An employee who deliberately initiates such discussions with the intention of causing distress to a transgender colleague would be guilty of harassment. Similarly referring to a gender-critical colleague as a bigot or using offensive terminology to describe them will also likely be harassment.

On the other hand, if the lunch conversation turns to a controversial topic, employees cannot be expected to self-censor, provided that they speak respectfully. Employers may find this issue arises more frequently with the growth in use of internal social media, and therefore guidance on respectful discussion is essential. It is sometimes said that a modern workplace should encourage staff to bring their whole self to work. There are good intentions behind this concept, but the emphasis should be on a person's "professional self".

An employee is also entitled to express their views directly to, say, a transgender colleague, at least when asked, provided that they do so respectfully. This was the case in *Mbuyi* where an evangelical Christian expressed negative views about homosexuality in answer to a question from a lesbian colleague. So, for instance, if a trans woman asks a colleague, "Am I a woman?", the colleague can politely say "no". The colleague can also raise a legitimate objection to the transgender employee using the female toilets and expect the employer to make appropriate accommodation that respects the needs of women, and religious and ethnic minorities, as well as the transgender colleague. But a refusal to use their preferred name or pronouns would almost certainly be harassment, as would seeking out an individual in order to make hostile comments.

A clear Respect at Work policy should emphasise the importance of respectful language and, crucially, must be applied equally to all protected characteristics including belief. But the phrase "respectful" should not be made to do too much work here: gender-critical employees cannot be required to use language that signals assent to beliefs that they do not hold. For example, an employee should not be pressured to declare their pronouns, and a gender-critical person is entitled to object to being called cisgender, if they do not accept that term.

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Case law on protected beliefs

A range of beliefs have been examined against the criteria set out in *Grainger plc and others v Nicholson (UKEAT/0219/09)*. Many of these cases are fact specific and are first instance, therefore, it is important to note that any future case would be considered on its own facts.

Belief	Protected or not	Case
Ethical veganism	Protected	*Casamitjana Costa v League Against Cruel Sports ET/3331129/18; see News brief "Veganism as a protected belief: the upshot for employers", www.practicallaw.com/w-023-7749*
Vegetarianism	Not protected	*Conisbee v Crossley Farms Ltd and others ET/3335357/18; www.practicallaw.com/w-022-5067*
Belief in the abhorrence of paedophilia and the sexual abuse of children and of domestic violence towards women	Protected	*A v B Ltd and others ET/1401859/2015*
Belief in public service and the importance of engendering community service for the common good	Protected	*Maistry v BBC ET/1313142/2010*
Stoicism	Protected	*Jackson v Lidl Great Britain Ltd ET/2302259/19*
Belief that lying is wrong	Protected	*Hawkins v Universal Utilities Ltd t/a Unicom ET/2501234/12*
Belief in copyright over own creative works	Not protected	*Gray v Mulberry Company (Design) Ltd [2019] EWCA Civ 1720; www.practicallaw.com/w-022-9543*
Spiritualism	Protected	*Greater Manchester Police Authority v Power UKEAT/0434/09*

The *Higgs* test

The Employment Appeal Tribunal (EAT) in *Higgs v Farmor's School* set out principles for assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression (*[2023] EAT 89; www.practicallaw.com/w-040-1809*):

- The freedom to manifest belief, religious or otherwise, and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend. The EAT said that this is foundational.
- Those rights are qualified and may be limited to the extent necessary for the protection of the rights and freedoms of others. Where a limitation or restriction is objectively justified, given the manner of the manifestation or expression, this will be regarded as action taken by reason of the objectionable manner of the manifestation or expression, rather than exercise of the right itself.
- Whether a limitation or restriction is objectively justified will always be context specific.
- It will always be necessary to ask whether:
    - the objective of the measure is sufficiently important to justify the limitation of a protected right;
    - the measure is rationally connected to the objective;

- a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
- balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

- In answering these questions in the employment context, regard should be had to:
  - the content of the manifestation;
  - the tone used;
  - the extent of the manifestation;
  - the worker's understanding of the likely audience;
  - the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business;
  - whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk to the employer;
  - whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded on;
  - the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; and
  - whether the limitation imposed is the least intrusive measure open to the employer.

Right to privacy and data protection

Where an employee expresses their beliefs on social media, employers need to consider the right to privacy under Article 8 of the European Convention on Human Rights (Article 8). The first instance decision in *Webb v London Underground*, while not a belief case, provides useful insight into how tribunals grapple with Article 8 in this context (*ET/3306438/2021*).

Ms Webb was dismissed for comments about the Black Lives Matter movement posted on her private Facebook page. Her Facebook page named her employer, and many of her Facebook friends were colleagues. Ms Webb was dismissed and claimed unfair dismissal and race discrimination. The tribunal considered that it was reasonable for the employer to rely on the content of private Facebook posts. Although it was a private Facebook page, the tribunal attributed weight to the fact that London Underground's social media policy explicitly warned that private posts were at risk of wider circulation and that disciplinary action could result if posts were inconsistent with the social media policy.

Referring to an earlier first instance decision of *Crisp v Apple Retail Ltd*, the tribunal concluded that Ms Webb could have no reasonable expectation of privacy and that Article 8 was not engaged (*ET/1500258/11*). This is somewhat at odds with the Article 29 Working Party Opinion 2/2017 on data processing at work, which clearly identified the limits to the lawfulness of an employer accessing an employee's publicly available social media profile (the opinion). The Working Party was the predecessor to the European Data Protection Board and, when the opinion was published, the UK Information Commissioner's Office was part of it.

Although not binding on other tribunals, *Webb* highlights that, if social media policies are clear that inappropriate posts could lead to disciplinary action, an employment tribunal is likely to decide that there has been no interference with Article 8.

However, employers will still need to comply with the retained EU law version of the General Data Protection Regulation (*679/2016/EU*) (UK GDPR) and the Data Protection Act 2018 (DPA 2018) when reviewing social media content. Personal data revealing political opinions, or religious or philosophical beliefs, are special category data under the UK GDPR and can only be processed by employers in a limited number of circumstances under the DPA 2018. Given the position of the opinion, employers should carry out a data protection impact assessment, demonstrating a valid ground for processing the data and measures to mitigate the privacy impact on the employee.

Appeals and next steps

As at the time of writing, *Higgs v Farmor's School* is due to return to the employment tribunal to be decided on the basis of the test that was set out by the Employment Appeal Tribunal (EAT) *([2023] EAT 89; www.practicallaw.com/w-040-1809*). *Bailey v Stonewall and others* is also being appealed to the EAT (*ET/2202172/2020; www.practicallaw.com/w-036-6572*).

There are also more cases to follow, including *Meade v Westminster City Council and Social Work England*, which is a case against a regulator. Further developments in this fast-growing area of the law are therefore expected.

Conflicts of belief in the workplace forging a path (PDF Version)

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