

Gender Identity v Gender Beliefs

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Forstater v CGD Europe and Others

Forstater is a name that has dominated the headlines over the past couple of years, as a key name within the 'gender-critical' movement, bolstered by the likes of J. K. Rowling, Kathleen Stock and Allison Bailey, all of whom have received their fair-share of coverage. People who have been paying attention to Ms Forstater's claim will know that Ms Forstater brought various claims against CGD Europe alleging discrimination because of her protected belief that 'sex is immutable and should not be conflated with gender identity, and that trans women are men'.

Originally, this claim failed to pass the test to be protected as a belief (the 'Grainger' criteria) because it was deemed not to meet the threshold of being 'worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.' This was overturned in June 2021 by the EAT which determined that the belief was protected, and that only beliefs which are "an affront to Convention principles, in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, would be found to be not worthy of respect in a democratic society". As such, the claim was remitted to the ET.

The Claimant brought claims of:

- direct discrimination;
- harassment;
- indirect discrimination (on belief, she also brought a claim of indirect sex discrimination but this was not pursued); and
- victimisation (on belief and sex).

The ET determined that the claims of direct discrimination and victimisation were well founded, albeit these were only in relation to some of the complaints raised by Ms Forstater. Ms Forstater was unsuccessful with her claims of harassment and indirect discrimination, although several of these allegations were untested having succeeded as direct discrimination claims.

A particularly complex and fact-specific discussion on each allegation took place, which is not summarised here. However, the key components dealt with the manifestation of Ms Forstater's beliefs (often in tweets). In expressing her belief, they were, on the whole, deemed by the ET not to be "objectively offensive or unreasonable". Whilst many would disagree with this position, and consider her statements to be highly offensive, they were found not to be intended to cause offence or harassment to others. Part of the reason for this finding was because Ms Forstater was not totalitarian in her approach. For example, whilst with CGD she agreed to ensure that her tweeting became more focused on her work and that she would not leave pamphlets containing gender-critical material on desks. She also stated that in conversation with trans-individuals, she would not deliberately mis-gender them, despite her beliefs.

The ET found therefore that Ms Forstater was subject to less favourable treatment because of her beliefs, and not an unreasonable manifestation of those beliefs.

Mackereth v The Department for Work and Pensions and Advanced Personnel Management Group (UK) Limited

In this case, the EAT determined that a Christian Doctor, Dr Mackereth, was not discriminated against for refusing to use transgender service user's preferred pronouns as this went against his beliefs.

The facts of the case were fairly straightforward. Dr Mackereth was engaged as a health and disabilities assessor, which required him to carry out in person assessments and prepare reports. During his induction training, he explained that due to his beliefs, he would not agree to use the preferred pronouns of transgender service users. Dr Mackereth later confirmed his beliefs that he did not 'believe in' transgenderism as a whole, and specifically:

- he did not believe it was possible for a person to change their sex/gender;
- he did not believe that 'impersonating' the opposite sex may be beneficial for an individual's welfare; and
- he did not believe society should accommodate/encourage these practices.

The ET (in a decision predating the Forstater EAT decision mentioned above) dismissed Dr Mackereth's claims, citing that his belief did not meet the required test as it did not deem these beliefs 'worthy of respect in a democratic society' and that the beliefs 'conflicted with the fundamental rights of others'. As such, his claims on the whole were dismissed.

Unsurprisingly in light of the Forstater EAT decision, the EAT held that the ET had applied the threshold too highly in relation to Dr Mackereth's beliefs not being 'worthy of respect in a democratic society', noting that in a pluralistic society, both minority and majority beliefs should be recognised, even where these may offend others. However, having found Dr Mackereth's overarching belief (or lack of belief in transgenderism) to be protected, the EAT upheld the ET's finding that, despite holding that belief, he was not discriminated against because of it. This decision was largely due to the findings of fact reached by the ET that Dr Mackereth's perception of events was unreliable.

Notably, Dr Mackereth's claims of indirect belief discrimination were not upheld, as the respondents were found to be trying to achieve a legitimate aim of ensuring transgender service users are treated with respect and to provide a service that promoted equal opportunities, which mitigated any indirect discrimination.

Dr Mackereth has indicated that he wishes to appeal the EAT decision.

Higgs v Farmor's School and others

Mrs Higgs was an administrator and work experience manager at Farmor's School. Whilst in that position, she shared several posts on her Facebook page, which could be accessed by anyone. These posts by Mrs Higgs stated that children were being "brainwashed", and that "the LGBT crowd with the assistance of the progressive school systems are destroying the minds of normal children by promoting mental illness". This was noticed by a parent who wrote to the school to note their concern at the offensive nature of the posts. Mrs Higgs was subsequently subject to an investigation and disciplinary process, culminating in her dismissal for gross misconduct.

Mrs Higgs subsequently brought claims for direct discrimination and harassment on the grounds of religion and philosophical belief. The beliefs that she relied upon were: a lack of belief in gender fluidity, a lack of belief that someone could change their biological sex or gender, belief in marriage as a divinely instituted life-long union between one man and one woman, lack of belief in same-sex marriage (she recognised the legalisation of same-sex marriage, but believed this is contrary to biblical teaching), opposition to sex and relationship education for primary school children, a belief that she should publicly witness to biblical truth, and a belief in the literal truth of the bible (and in particular, Genesis).

At the ET, it was accepted that several of the beliefs held by Mrs Higgs were protected. However, it was found that she had not been directly discriminated against or harassed because of them. It was considered that the school had not dismissed her because of her beliefs, but rather because her Facebook posts might reasonably lead people who read them to conclude that she was homophobic and transphobic, which would not qualify for protection. It was also noted that Mrs Higgs made it clear that she would not desist from making such posts in the future.

Subsequently, Mrs Higgs appealed to the EAT. This is yet to be heard, partly because of the recent application by Mrs Higgs' for recusal of a lay member. In this particular instance, this related to Edward Lord. Mx Lord is a vocal advocate on LGBT issues and uses they/them

pronouns. As someone with strong opposing opinions to gender-critical views, which were relevant to this case, the EAT has allowed the application for Mx Lord to be recused because “there was a real ground for doubt in the lay member’s ability to approach this matter with an impartial and entirely open mind”. Although there was no allegation of actual bias on the lay member’s part, perception and risk are enough – not only must justice be done, it must be seen to be done.

Workforce implications

The EAT has repeatedly acknowledged that whilst cases involving issues of gender belief and gender identity impact on matters of wider social concern and debate, its role is not to express views on the merits of any side in that debate. It took the unusual step in Forstater, when confirming that Ms Forstater’s beliefs were protected to stress that its judgment did not mean that those with gender-critical beliefs can “misgender” trans persons with impunity; it did not mean that trans persons do not have protections against discrimination and harassment conferred by the EqA 2010; and it did not mean that employers and service providers will not be able to provide a safe environment for trans persons.

These cases demonstrate the complexity of conflicting belief systems in a pluralistic society. Although Ms Forstater won on some elements of her claim, it should be noted that this does not give a ‘carte-blanche’ to express one’s beliefs. The usual protections do remain in place concerning harassment and other forms of discrimination. Employers face an incredibly difficult balancing act, particularly where their employees and service users or customers have different belief systems. We recommend that employers take a proactive approach to ensure everyone feels comfortable and safe from harassment in the workplace, with clear policies to deal with use of social media and appropriate standards of communication and behaviour.

In light of the wider number of beliefs that will be deemed to fall within the Grainger criteria and be protected, it is likely that the greater focus in the future will be on whether the manifestation of those beliefs is ‘reasonable’ or not – and so clarity over what is acceptable within particular workplaces will be important. A sensitive approach to balancing and respecting differing viewpoints, including making adjustments to accommodate those views will also help to reduce the risk of future conflicts.

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