Managing a clash of rights in the workplace – recent cases and legal consideration

Pheonix v The Open University

Ms Pheonix (C) was a university professor employed by the Open University (R). She had made her gender-critical beliefs known when she set up a research network, which promoted research into sex, gender and sexualities from a gender-critical perspective. Amongst an extensive list of allegations, C's views were compared by a colleague to that of a "racist uncle". She was also labelled on Twitter as transphobic and encouraged not to discuss her research within the department. An open letter, which presented C as anti-trans, was signed by several professors in protest against the work of the gender-critical research network that C had set up, which C said had a significant impact on her professional reputation and mental health. Upholding her complaints of unlawful discrimination, harassment and victimisation, the Employment Tribunal held that C's beliefs were protected 'philosophical beliefs' and she had been entitled to exercise them in the way she did. They found that R had failed to protect C from harm when she received significant backlash from colleagues. They also concluded that R had failed to conclude C's grievance due to fear of "reputational damage" to the university.

Miller v University of Bristol

An Employment Tribunal held that Mr Miller's (C) belief that Zionism is inherently racist, imperialist and colonial was a protected 'philosophical belief' and went on to conclude that C had been unfairly dismissed and directly discriminated against as a result of the manifestation of those beliefs. R summarily dismissed C, citing breaches of various policies, because of comments C made in February 2021, including referring to a "campaign of censorship" against British universities being "directed by the State of Israel" and claiming Jewish students were being used as "political pawns" to the Israeli government. The ET concluded that C's "anti-Zionist beliefs in the February comments had a material impact…" on the decision maker, meaning the reason for dismissal was therefore C's protected belief. However, the ET reduced both C's basic and compensatory awards, finding that his own actions had caused or contributed to the dismissal. The ET also took a different view to subsequent

social media comments that C made after his dismissal, finding there had been no sensible or coherent link to his protected beliefs in those comments (in other words, it could not be considered a manifestation of the belief he relied upon). This resulted in a further reduction to the compensatory award, based on a finding that there was a 30% chance C would have been fairly dismissed within two months of those later comments had he remained employed by R at that time.

What tests are applied to determine if a belief is a protected 'philosophical belief'?

In recent years, there has been extensive judicial consideration of this point, most notably on the subject of gender-critical beliefs. In determining whether a belief is capable of protection, Employment Tribunals are required to apply five criteria (known as the 'Grainger' criteria, from the case in which they were established). In the context of beliefs that have the potential to conflict with the protected rights of others, it is generally the fifth criterion (Grainger Criterion 5) that is the subject of greatest focus, that being whether the belief is:

- capable of being worthy of respect in a democratic society,
- not incompatible with human dignity; and
- not conflicting with the fundamental rights of others.

In the widely reported decision of the EAT in *Forstater v CGD Europe*, it was confirmed that gender-critical beliefs are capable of protection as a 'philosophical belief'.

Under the European Convention on Human Rights (**ECHR**), individuals have rights to freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10) and these rights are central to the holding of, and assertion of, beliefs. These rights are, however, subject to limitations/exceptions, depending on the circumstances.

In Forstater, the EAT concluded that a philosophical belief could only fail to meet Grainger Criterion 5 and be excluded from protection under Articles 9 and 10 ECHR, if the expression of it was 'akin to Nazism or totalitarianism', which is an extremely high bar. The EAT acknowledged the rights of people to hold conflicting beliefs and concluded that "both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society". This demonstrates the wide scope for protection that will apply, even if those views are distressing and objectionable.

When does manifestation of a belief go too far?

In order to be considered a 'manifestation' falling to be protected under Articles 9 and 10 of the ECHR, there must be a sufficiently close and direct nexus to the underlying religion or belief.

In Forstater, the EAT was keen to clarify that its judgment did not mean that those with gender-critical beliefs could "'misgender' trans persons with impunity". The way in which an individual manifests their beliefs must not amount to unlawful discrimination or harassment of another.

However, the difficulty in these cases is often with drawing a distinction between what is considered an action, such as a disciplinary sanction, being taken against an individual because of their belief (which is likely to be direct discrimination and cannot be justified) and action that is taken to restrict or limit an objectionable manifestation of those beliefs.

In another 2023 decision of the EAT in *Higgs v Farmor's School*, whilst acknowledging that there cannot be a 'one size fits all' approach to the assessment of whether the manifestation of a protected belief is objectionable, they did lay down some basic principles to assist parties in the employment context. They include giving consideration to:

- the content, tone and extent of the manifestation;
- the intended audience;
- the extent and nature of the intrusion on others;
- the nature of the employer’s business and the impact of the manifestation on the business;
- whether the employee has expressed clearly that their views are personal, or could they be seen as representing those of the employer;
- whether there is a potential power imbalance, taking account of the nature of the employee’s role and those whose rights are intruded upon;
- the nature of the employer’s business, in particular whether there is an impact on vulnerable service users or clients; and
- whether the sanction issued by the employer is the least intrusive measure open to them.

The provision of guidance by the EAT is to be welcomed. However, the complexity of navigating these types of workplace dispute cannot be underestimated, and developing case law emphasises the need for employers to take great care in the way they respond. Click **here** to review my top tips for employers managing a clash of rights in work.

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