

Gender-critical belief is a protected characteristic

Case Report: *Forstater v CGD Europe* (EAT) June 2021

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Over the years, beliefs relating to ethical veganism, anti-fox hunting, climate and the environment have all received the stamp of approval as being capable of protection under the Equality Act. They fit into the category of religion or belief, which includes “philosophical belief” under the discrimination laws, and are capable of protection in the same way as gender, race, sexual orientation and all other protected characteristics. Following the EAT’s decision in *Forstater v CGD Europe*, the latest additions to that category are the “gender-critical” beliefs.

Gender-critical views

Gender-critical beliefs include the belief that sex is immutable: women are adult females and trans-women are men. It is critical, according to this view, that sex and identity are not conflated. While these statements may set alarm bells ringing, they are widely held among respected academics and even some transgender people.

The facts in the Forstater case

Ms Forstater engaged in social media debates, particularly in relation to a government consultation on reforms to the Gender Recognition Act. Colleagues saw many of her social media posts and raised concerns to their employer. As a result, Ms Forstater was not offered further consultancy work, and she subsequently brought proceedings for discrimination. The key question for the employment tribunal (and reviewed on appeal by the EAT) was whether gender-critical beliefs are within the scope of philosophical beliefs in order to be classified as protected characteristics.

The Grainger test for philosophical belief

To qualify as a philosophical belief, a belief must pass the five-stage test, which was first articulated in the *Grainger v Nicholson* case. It must:

1. be genuinely held
2. be a belief, not an opinion or viewpoint, based on the present state of information available
3. relate to a weighty and substantial aspect of human life and behaviour
4. attain a certain level of cogency, seriousness, cohesion and importance

5. be worthy of respect in a democratic society, be not incompatible with human dignity and not in conflict with the fundamental rights of others.

Applying Grainger in the tribunals

In the employment tribunal, Ms Forstater was unsuccessful, as it ruled that her belief was not protected as it fell at the fifth hurdle: whether the belief is worthy of protection in a democratic society. On appeal, the EAT disagreed, instead finding that the fifth test in Grainger was a very high bar, in that the belief would need to be akin to Nazism or totalitarianism, and in conflict with the rights of others. Gender-critical beliefs did not reach this threshold.

Why is the threshold so high?

Where the human rights of others are relevant, public bodies such as employment tribunals are required by law to make decisions in a manner compatible with the UK's Human Rights Act 1988, which incorporates the European Convention of Human Rights. In this case, particular reference was made to Article 10 (Freedom of expression) and Article 17 (Prohibition of abuse of rights). In cases where there are competing rights, Article 17 will be triggered only where the competing rights are to be extinguished.

In this case, Forstater was not arguing that transgender people do not have rights; instead she was taking a view on the gender v sex debate. She believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender". In the EAT's view, that is not a statement of a belief that seeks to destroy the rights of transgender persons.

Are mis-gendering and transphobia discriminatory?

Potentially. Transgender persons are still protected under discrimination laws. Mis-gendering can amount to harassment if all the legal elements are present.

Take-away for employers

So how do employers protect themselves in this pluralist world where it is highly likely that employees will have a range of passionately held views, frequently conflicting?

This is not the first time, nor will it be the last, that this question has arisen; experience with balancing the rights of workers with certain religious beliefs against the rights of lesbian and gay workers has long been a challenge for employers. What is clear from the *Forstater* case is that managing the conflict by not hiring or firing individuals with difficult views is a high-risk approach.

While a Dignity at Work policy cannot mandate which beliefs are acceptable, it can set out the ground rules for how views are expressed in the workplace, particularly where they are likely to conflict with other beliefs. Don't be afraid to acknowledge that this can be sensitive, and will require employees to think ahead about how the manifestation of their beliefs may land with other employees holding different views. Social media policies should also be revisited to review what is said about comments made online or otherwise outside of the working environment.

Even the best drafted policy will have limited effect if it sits on a shelf on the intranet. It needs to be brought to life with training that embeds the message that there are limits to how beliefs are manifested in the workplace. Dignity at Work training with nuanced examples, which allows participants to debate, challenge and hear alternative views, can be both powerful and effective.

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