Forstater: effective protections for gender critical beliefs at work

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Maya Forstater has succeeded in her claim that she was discriminated against because of her gender critical beliefs. The tribunal rejected the respondents' argument that the reason for her treatment was not her beliefs, but that she had manifested them in an objectively unreasonable away. None of her communications were objectively unreasonable and, for the most part, were simply statements of her protected beliefs.

Gender critical beliefs

Last year, the EAT in *Forstater* ruled that gender critical beliefs – that biological sex is dimorphic, important, immutable and distinct from gender identity – met the *Grainger* test for a philosophical belief. This overturned the earlier employment tribunal decision that the belief did not meet the fifth *Grainger* criterion of being worthy of respect in a democratic society. The EAT ruled that a belief would have to be akin to Nazism or totalitarianism, or espouse violence and hatred in the gravest of forms, to fail the fifth *Grainger* criterion. Ms Forstater's gender critical beliefs clearly did not fall into this category because they were widely shared in society, adopted a definition of sex that was in accordance with the law and did not seek to destroy the rights of trans persons.

Tribunal claims

Having succeeded in showing that her beliefs were protected, *Forstater* returned to the employment tribunal to consider the substantive claims of direct and indirect discrimination, victimisation and harassment. The tribunal's judgment was handed down on 6 July.

Ms Forstater is a researcher and campaigner with an active social media presence. She was a visiting fellow at CGD Europe, a not-for-profit think tank. She entered into debates on Twitter, expressing her gender critical views. In one twitter exchange she described Pips Bunce, a prominent male, gender-fluid individual with they/them pronouns, as a 'part time cross dresser' and a 'man in heels'. Forstater said it was wrong for Bunce to have accepted an award intended for females.

Ms Forstater left a gender critical campaign booklet in the CGD office entitled 'Female rights are under attack'. This criticised proposed changes to the GRA, to bring in 'Self Sex-ID', making it easier for transgender people to change their birth certificate to the opposite sex. It argued that Self Sex-ID would destroy the legal definition of 'females' and 'women' and thus the legal rights of women, who were defined as such by reference to biology and not identity, leading to the end of female-only spaces. She also retweeted a campaign video which argued that gender Self Sex-ID put women and girls at risk.

Some of her colleagues complained that they found her conduct offensive. Following an investigation, her fellowship was not renewed.

Direct discrimination

Ms Forstater claimed that the decision not to renew her fellowship and a separate decision not to offer her an employment contract amounted to direct discrimination on the ground of her gender critical beliefs. She also claimed that the decision to subject her to an investigation for expressing her beliefs and denying her the opportunity to explain or defend herself was similarly directly discriminatory.

'[were] the tweets a manifestation of her belief to which objection could reasonably be taken (Page) or an inappropriate manner of manifesting her belief (Wasteney)?'

The employment tribunal found CGD's decisions not to renew her fellowship and not to offer her an employment contract constituted less favourable treatment. It then went on to consider the reason for the treatment. It noted that EAT case law draws a distinction between cases where:

- the reason for the treatment is the fact that the claimant holds and/or manifests a protected belief; and
- treatment where a claimant manifested a belief in an objectionable way. In the latter cases, it is the objectionable manifestation of the belief, and not the belief itself, that is treated as the reason for the act complained of and direct discrimination is not made out.

For the purposes of this case, the employment tribunal considered the relevant distinction to be between:

- the holding and/or manifestation of the protected belief in a way to which objection could not justifiably be taken; and
- the manifestation of the belief in a way to which objection could justifiably be taken.

The employment tribunal found that Ms Forstater's tweets were a substantial part of the reason why she was not offered an employment contract. The question was therefore whether the tweets were a manifestation of her belief to which objection could reasonably be taken (*Page*) or, alternatively, an inappropriate manner of manifesting her belief (*Wasteney*). It reminded itself that it would be an error to treat a mere statement of Ms Forstater's protected belief as inherently unreasonable or inappropriate. As the EAT observed in *Forstater* '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' (para 283, p.70).

The employment tribunal considered that the tweet about Pips Bunce read as an uncomplimentary and dismissive observation about them, was intended to be provocative and that Ms Forstater's point could have been made in more moderate terms. However, the majority considered it was not an objectionable or inappropriate manifestation of her belief, given the context of a debate on a matter of public interest; the fact that Bunce had publicly identified themselves as gender fluid, dressing sometimes as a woman and sometimes as a man; and had accepted a women's award. The minority considered the tweet to be objectively inappropriate. However, the employment tribunal unanimously agreed that this would not justify detrimental action by an employer, and did not do so on the facts of this case.

As regards the other tweets, the employment tribunal unanimously considered that these were simply statements of Ms Forstater's protected beliefs and thus were protected. To characterise them as manifestations of the belief to which objection could reasonably be taken would be to hold that the belief itself was not worthy of protection, which the EAT had decided was not the case. Similarly, the campaign booklet was an expression of the core belief and neither the booklet nor the video were an objectively offensive or unreasonable expression of that belief. The employment tribunal therefore upheld the direct discrimination claim as regards the decision not to offer Ms Forstater an employment contract.

The tribunal noted that Ms Forstater had offered to stop tweeting about sex and gender, but this was not determinative of its findings because the threshold for objective offensiveness of her tweets 'had not been reached', or if it had, did not justify the actions against her (para 295).

Its findings on whether the tweets and other materials were an objectively offensive or unreasonable manifestation of her belief applied to the other direct discrimination claims. The employment tribunal therefore upheld her claim that the decision not to renew her fellowship was directly discriminatory.

Turning to Ms Forstater's complaints about being subjected to an investigation and being denied the opportunity to explain or defend herself, the employment tribunal found that the purpose of the report was to obtain management guidance and not to conduct a disciplinary investigation. It accepted that CGD sought advice because of 'the tricky territory they found themselves in' (para 302.2, p.75) and not because of the belief. This arose out of the need to deal with complaints that had been made, as distinct from the belief itself or her expression of it. The failure to involve Ms Forstater in the investigation until a draft report was received was due to ambiguity in an email. There was no intention to exclude her from commenting and so this did not occur because of her belief.

Harassment

Having refused the direct discrimination claim on the investigation and reports, the employment tribunal then concluded that they also did not amount to harassment. It concluded that the investigation and failure to involve

'offensiveness will not of itself remove protection from a protected belief'

Forstater amounted to unwanted conduct, and the investigation and reports were commissioned for a reason related to her belief. But the failure to involve her at an earlier stage was not for the purpose of harassing her and this was also not its effect: it was not Forstater's perception that the investigation and report had that effect and, in any event, it would not have been reasonable for her to have that perception.

As the complaints about the failure to offer the employment contract and failure to renew the visiting fellowship had succeeded as direct discrimination, they did not arise as harassment claims as the direct discrimination and harassment claims are mutually exclusive.

Indirect discrimination

Similarly, the indirect discrimination claim for failing to offer the employment contract and failing to renew the visiting fellowship did not arise because the direct discrimination claim had succeeded. The indirect discrimination claims on the investigation and reports also did not arise as the employment tribunal had decided that those actions were not taken because of the manifestation of the belief.

Victimisation

Ms Forstater pleaded two detriments arising from protected acts. The first detriment was the withdrawal of an offer to continue working as a consultant. The employment tribunal found that the email which formed the basis of the claim was ambiguous, and on balance the offer was not withdrawn; it was Ms Forstater who had brought the relationship to an end by interpreting it as she had. This detriment did not therefore occur and the claim failed.

The second detriment was the removal of her profile from CGD's website. CGD was unable to give an adequate explanation for this, and had pleaded an explanation that it later admitted was incorrect. This, together with the timing of the removal, caused the employment tribunal to conclude that it was because she had co-operated with *The Sunday Times*, which was writing an article on her case, which was a protected act. This victimisation claim therefore succeeded.

What next?

Remedies will be dealt with at a further hearing. In the meantime, it remains to be seen whether CGD will appeal.

Practice points

- A bare statement of a protected belief is protected, even if that belief is offensive to some. Offensiveness will not of itself remove protection from a protected belief.
- Policies or practices that place limits on an individual's non-work social media content are not an answer (and may constitute an indirectly discriminatory PCP).
- An individual's right to untrammelled free speech may be restrained if necessary for the performance of a role, in limited and specific circumstances. A particular justification for this will be required on a case-by-case (role-by-role) basis and its availability to an employer should not be assumed. Specific legal advice should be taken and should be clearly explained to staff.

KEY:

Forstater	*Forstater v CGD Europe* ET 2200909/2019; UKEAT/0105/20/JOJ
Grainger	*Grainger v Nicholson* UKEAT/0219/09
Page	*Page v NHS Trust Development Authority* [2021] EWCA Civ 255
Wasteney	*Wasteney v East London NHS Foundation Trust* UKEAT/0157/15/LA