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'Gender critical' beliefs are protected philosophical beliefs (UK)

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Summary

The Employment Appeal Tribunal (EAT) has ruled that 'gender critical' beliefs are protected philosophical beliefs for equality law purposes, while confirming that a belief in 'gender identity' is also a protected characteristic. This means that it is unlawful to discriminate against someone because they do or do not hold either of those beliefs.

Background

The UK's Equality Act 2010 provides that it is unlawful to discriminate against someone because of a protected characteristic. 'Religion or belief' is one of the nine specified 'protected characteristics', which means it is unlawful to discriminate because of someone's belief (or lack of belief). The list of protected characteristics also includes 'sex' and 'gender reassignment'.

A decision of the EAT in 2009 (*Grainger plc – v – Nicholson* [2010] IRLR 4) established the relevant criteria when deciding whether a belief qualifies for protection. The five '*Grainger* criteria' include factors such as that the belief must be genuine, related to a substantial aspect of human life and attain a certain level of cogency, cohesion and importance. The fifth condition is that the belief must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

Facts

Maya Forstater was a consultant for CGD Europe, a not-for-profit think tank which focuses on international development. She was a writer and researcher on sustainable development and worked for CGD from November 2016 until around October 2018, when her contract was not renewed. This was after colleagues claimed that some of her tweets about sex and gender were 'transphobic', 'exclusionary or offensive' and made them feel 'uncomfortable'.

Forstater brought claims in an Employment Tribunal (ET) alleging direct discrimination and harassment because of her 'gender critical' beliefs. The ET held a preliminary hearing to determine whether her beliefs amounted to 'philosophical beliefs' within the meaning of the Equality Act 2010. Establishing a protected philosophical belief was a necessary first step before she could argue that she had been discriminated against because of her views. If Forstater won on this point, she would still have to show that there had been discrimination to win her claim.

Employment Tribunal's decision

The ET found that Forstater's beliefs were not protected philosophical beliefs because they failed the fifth *Grainger* condition, in that they were not worthy of respect in a democratic society.

Forstater's beliefs were broadly that there are only two sexes in humans: male and female. She believed sex correlates to reproductive biology (with each sex producing either ova or sperm if everything is 'working'). Women are adult human females and men are adult human males. It is impossible to change sex, which is determined at conception, but it is possible for someone to identify as of the other sex and change their legal sex by acquiring a gender recognition certificate (GRC). Forstater stated she would in most social situations seek to be polite to trans people and respect their pronouns but would not feel compelled to accept how they identified, particularly when discussing whether it was appropriate for trans women to access female-only spaces and services.

The ET found that Forstater's view was of an 'absolutist' nature and incompatible with human dignity and the fundamental rights of others. It also concluded that her denial that people with a GRC were the sex to which they had transitioned and her belief that change of sex

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was a 'legal fiction' were not beliefs worthy of respect in a democratic society.

The ET went on to consider Forstater's lack of belief in gender identity. A 'gender identity' belief is a belief that everyone has a gender which may be different from their sex at birth and which effectively trumps sex. A person with this belief therefore regards trans men as men and trans women as women. The ET found that Forstater did not have a protected lack of belief, because the *Grainger* criteria also had to be applied to lack of belief. It concluded that her lack of belief in gender identity necessarily involved the view that trans women were men, which failed the fifth *Grainger* condition.

Employment Appeal Tribunal's decision

Forstater appealed to the EAT, which overturned the ET's decision and ruled that her gender critical beliefs were protected philosophical beliefs. The EAT also affirmed that a belief in 'gender identity' was a protected philosophical belief.

The *Grainger* criteria were derived from various decisions on the European Convention on Human Rights (ECHR) in relation to rights to freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). Having reviewed this case law, the EAT's conclusion was that the fifth *Grainger* criterion set a low bar. A philosophical belief would only be excluded from the scope of protection if it was a grave violation of ECHR principles, seeking to destroy those rights. Examples might include a belief in torture or inhuman punishment, and beliefs akin to Nazism or espousing totalitarianism.

The EAT considered that Forstater's beliefs did not get anywhere near to approaching the kind of belief that would fall completely outside protection. The fact that some people would find her beliefs offensive, shocking or disturbing did not mean they fell completely outside the scope of protection given to philosophical beliefs. According to the EAT, it is not for a court to evaluate the merits of any belief and the ET had strayed into doing so. Dogmatic philosophical beliefs, including those with little basis, are as entitled to protection as any others.

The EAT said that the ET had also been wrong to consider that the fact that a trans woman held a GRC meant that Forstater could not under any circumstances refer to her as a man. A GRC entitled the holder to recognition of the acquired gender for certain legal purposes, subject to certain exceptions. Referring to a trans person by a previous gender might amount to harassment under the Equality Act 2010. Whether or not it does is a fact-sensitive question depending upon the perception of the trans person, all the other circumstances and whether it is reasonable for the conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The EAT went on to disagree with the ET's finding that a lack of philosophical belief necessarily meant holding a positive view opposed to the belief in question. A lack of belief was merely an absence of belief and might arise from having no view on the subject at all. That lack of belief was protected irrespective of whether the *Grainger* criteria could be applied to it, and the EAT found it difficult to see how the criteria could be applied to a complete absence of belief. It concluded that a belief in 'gender identity' is a protected philosophical belief, as is a lack of belief in it.

When considering whether gender critical beliefs were 'worthy of respect in a democratic society', the EAT said two other factors were relevant. Firstly, the fact that gender critical views were widely shared suggested they should be considered carefully and not be condemned out of hand. Secondly, the belief that sex is immutable and binary was in fact the current position under UK law.

Commentary

The ET and EAT hearings were on the preliminary issue of whether Forstater's beliefs met the threshold to qualify as protected beliefs and therefore whether she could bring a discrimination claim on grounds of belief at all. The EAT's decision is not a finding that she was discriminated against and is not the end of the proceedings. The claim will now be remitted for an ET to consider whether Forstater was discriminated against or harassed because of her beliefs (or lack of them).

The EAT emphasised that its decision was not expressing any views on the merits of the transgender debate. It does not mean that trans people can be misgendered with impunity or are otherwise losing protection against discrimination.

As a result of this decision, gender critical views and a belief in gender identity are both protected philosophical beliefs. Gender reassignment and sex are also protected characteristics. As such, anyone sharing these protected characteristics has legal protection from unlawful discrimination and harassment.

Harassment includes conduct which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for someone else. When considering whether something has an effect, the perception of the complainant, the other circumstances and whether it is reasonable for the conduct to have that effect are taken into account.

Employers should ensure that people are not bullied, harassed or stigmatised for their beliefs, their sex or the fact that they are transgender. Because conflicting beliefs are protected, employers should be careful not to allow workers to be offensive to others, nor to allow people to be bullied because their views are unpopular, if

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they have a good reason for expressing them and they do so respectfully.
Examples of harassment in this context might include:
- Intentionally misgendering transgender people or 'deadnaming' them by using an incorrect name.
- Calling women 'TERF', which stands for 'Trans-Exclusionary Radical Feminist', and is used as a slur against those with gender critical views, sometimes accompanied by threats of violence or abuse.
- Abusing, insulting or joking about transgender people or those with gender identity or gender critical views.

Employers should also be aware of the risks of indirect discrimination. This occurs if an employer applies a provision, criterion or practice to everyone, but which puts anyone sharing a philosophical belief at a particular disadvantage and is not a proportionate means of achieving a legitimate aim. For example, having a compulsory 'pronoun' policy forcing all staff to specify pronouns would disadvantage those who did not share gender identity beliefs. Such a practice has the legitimate aim of seeking to create an inclusive environment for transgender and non-binary people, but a compulsory policy is unlikely to be a proportionate way of achieving it (although a genuinely voluntary one might be). Decisions about whether an aim is legitimate and whether conduct is proportionate are very fact-sensitive and will involve balancing rights.
Although this decision was about gender critical views, it has broader implications by confirming the low threshold that must be met for a belief to meet the fifth *Grainger* criterion. Provided a belief is genuine, meets a basic level of cogency and coherence, is about something substantial and is not totalitarian, it is likely to be a protected philosophical belief. Rather than focusing on this test, employers should concentrate more on whether something said or done could reasonably be seen to create an intimidating, degrading or offensive environment for others.

Comments from other jurisdictions:

Austria (Jana Eichmeyer and Franziska Egger, E+H Eisenberger + Herzog Rechtsanwalts GmbH):
The prohibition of discrimination for 'world view' at the work place was implemented in Section 16 *et seq.* of the Austrian Equal Treatment Act. In Austria, gender-critical beliefs, such as the one the British EAT had to deal with, could be understood as a matter of 'world view'. However, there is a lack of national case law in this regard. Further, it is not completely clear what can be subsumed under the term 'world view'. According to the Austrian Supreme Court, the term 'world view' is closely related to the term 'religion' but also serves as a collective identification for other personal beliefs regarding life and of the world as a whole, as well as for the interpretation of the personal and communal standpoint for the individual understanding of life. However, world views are not scientific systems but interpretations in the form of personal convictions of the basic structure, modality, and function of the world as a whole. Specific beliefs that concern only partial areas of life, however, are not understood as 'world view'. For example, the Austrian Supreme Court has ruled that individual opinions on the Austrian asylum law do *not* count as 'world view'. Furthermore, it is unclear whether specific political beliefs also count as 'world view'. According to the prevailing sentiment, however, general political views are included in this term.
Based on the vague definition of the term 'world view', it might be possible that gender-critical beliefs would also be protected in Austria because they are of a general nature and do not only cover partial areas of life. There is a current debate as to whether a conviction concerning vaccination against Covid-19 is protected by the Equal Treatment Act. In our view, the decision to be vaccinated or not cannot be included under the term 'world view' because it only concerns a partial area and can be compared with the decision of the Austrian Supreme Court concerning the asylum law. However, if opponents of vaccinations will always be discriminated against in working life while vaccinated persons are preferred, this might lead to a shift in jurisprudence or a new law to protect opponents of vaccination. Since there is presently no case law in Austria addressing this issue, it remains to be seen how disadvantages/restrictions for unvaccinated people will be qualified in the future.

Germany (Pia Schweers, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the European anti-discrimination directives have been implemented by the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). As with the UK's Equality Act 2010, the AGG provides several 'protected characteristics'. Thus, Section 1 AGG stipulates: "The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation". This means: The AGG also includes the characteristics 'religion and belief', in implementation of the European directives. However, this is where the difference between German and UK law lies, which is why the case would probably have been decided differently in Germany.
The characteristic 'belief' is interpreted more restrictively in Germany than in the UK and is understood in a closer context to the characteristic 'religion'. The term used for 'belief' in Germany is '*Weltanschauung*'. According to the German case law of the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), '*Weltanschauung*', like religion, would deal with a person's certainty about certain statements about the world as a whole and about the origin and goal of human life. Unlike religion, however, it would not refer to transcendence, but to intramundane circumstances. From the level of significance, however, the '*Weltanschauung*' should be comparable to religion. For example, a politi-

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cal view is not a '*Weltanschauung*' within the meaning of the AGG, according to the BAG. Based on this, in order to be protected by the AGG, the person concerned must therefore hold a belief comparable to a religion.
In order to find out whether the belief is protected by the AGG, there are unfortunately no fixed criteria in Germany such as the 'Grainger criteria'. However, since the characteristic '*Weltanschauung*' is to be interpreted more restrictively than the characteristic 'belief' in the UK according to the established case law in the German legal system, Maya Forstater's beliefs would most likely not be protected by the AGG in Germany.

The Netherlands (Peter Vas Nunes): The author of this case report gives an interesting example of a policy that might discriminate on the basis of gender reassignment. The example is of a company that prohibits the use of gender-neutral pronouns in written communications. In other words, employees in this company must write 'he/him' and 'she/her'. They may not write 'them/their' when referring to a male or female person. Let us suppose that a gender-reassigned employee violates this policy (to which I will refer below as 'policy A'), as a consequence of which his/her/their/one's temporary contract is not renewed. The author suggests that this non-renewal constitutes *indirect* discrimination, as the policy 'would disadvantage those who did not share gender identity beliefs'. I expect that a court would agree that this policy does not discriminate directly, given that it can have an impact on all employees, not merely those who have reassigned their gender. I can imagine that not only gender-reassignees but also many 'regular' employees may feel disadvantaged. However, I wonder whether one might perhaps be able to argue that the policy treats gender-reasignees less favourably than others *on the basis of their reassignment*, i.e. that it discriminates directly, because it hurts them far more than it might hurt their 'regular' colleagues. Can it be argued that not using gender-specific pronouns is a character-trait so closely linked to being transgender that a prohibition to use such pronouns is effectively a prohibition to being a gender-reassigned employee of this company?
The corollary of the example given by this author is a company that obligates its staff to use exclusively gender-neutral pronouns. Given that gender-critical beliefs are protected philosophical beliefs, such a policy ('policy B') discriminates indirectly against people such as Ms Forstater.
If one accepts that policy A discriminates, then surely it must be equally accepted that policy B does so. Yet I am unsure whether a Dutch court would follow such logic. It might find non-renewal of an employment contract for refusing to comply with policy B 'seriously culpable', but I somehow doubt whether it would hold the employer to have discriminated.
This journal is not for debates on civil procedure. However, I note again and again that the English procedures frequently lead to lengthier litigation than the Dutch procedures would. In this case, the ET pronounced uniquely on the question of whether Ms Forstater's views qualify as a 'philosophical belief'. The ET did not – and perhaps could not? – rule on the question of whether, if the answer to the first question was affirmative, the employer discriminated. As a result, the EAT could also rule on the first question only, and the case is now, presumably, back in the ET. A Dutch court would most likely have ruled in one of the following ways: (1) Ms Forstater's views qualify as a philosophical belief and her employer discriminated on the basis of gender reassignment; or (2) her views are not philosophical and there is no discrimination; or (3) her views are philosophical but there is no discrimination; or (4) the employer has disadvantaged her on the basis of gender-reassignment but her views are not philosophical. In the event of an appeal to the higher court, it would in all four cases assess both questions. Admittedly, this entails the risk in scenarios 3 and 4 that one of the two questions is addressed in one instance only. The idea is that this disadvantage is outweighed by procedural efficiency and, hence, speed.

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