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Gender-critical beliefs are worthy of respect

Forstater v CGD Europe Ltd [2021] UKEAT/0105/20/JOJ;[1] June 10, 2021

Implications for practitioners

The full range of discrimination protection is available to those who are disadvantaged at work or in one of the other contexts covered by the Equality Act 2010 (EA) by reason of their gender-critical beliefs, or by reason of their lack of belief in gender identity. Practitioners need to bear in mind that they are themselves providers of services and must not decline work in this area because of a distaste for the client's views, or because of a fear that their other clients may feel such distaste.

Importantly, *lack* of belief in gender identity theory (also a protected belief) need not itself satisfy the *Grainger* criteria to qualify for protection: those who do not subscribe to gender identity theory will be protected from discrimination whether they do not subscribe out of conviction, ignorance, indifference or bemusement.

Facts

Maya Forstater (MF) was a researcher on sustainable development who worked on a freelance basis for a think tank. When the government started consulting on reform of the Gender Recognition Act 2004 to make it easier to get a gender recognition certificate, MF became engaged in the public debate, particularly on Twitter. Some colleagues took exception to theviews she expressed, which they thought 'transphobic'. When her fixed-term consultancy came to an end, it was not renewed. MF complained to the ET that she had suffered discrimination on grounds of her gender-critical belief.

Employment Tribunal

The ET considered as a preliminary issue whether MF's belief was a protected belief within the meaning of s10 of the EA.

MF's belief was characterised by the ET at para 3 of its judgment as being '*in outline, that sex is immutable, whatever a person's stated gender identity or gender expression*'. The tribunal considered whether the belief met each of the five criteria for a protected belief, drawn from *Grainger plc v Nicholson* [2010] ICR 360, namely:

i) the belief must be genuinely held;

ii) it must be a belief and not an opinion or viewpoint based on the present state of information available;

iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour

iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and

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

The tribunal found without difficulty that the belief met the first three criteria. (The first and third were indeed a foregone conclusion, but it is interesting that CGD did not argue that the belief that humans cannot literally change sex was simply an observationof scientifically incontrovertible fact, and not a 'belief' in the relevant sense at all.)

The judge chewed his pencil a bit over the fourth criterion, holding that MF's belief met it *'on balance'* even though he thought there was significant scientific evidence that it was wrong.

But as to the fifth of these criteria, the judge criticised the 'absolutist' nature of MF's belief and the certainty with which she held it, and observed:

> *She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned.*

The tribunal also found that it was a 'core component' of MF's belief that she would refer to a person by the sex she considered appropriate, even if that violated their dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them.

The tribunal accordingly held that MF's belief was '*incompatible with human dignity and fundamental rights of others*' and was therefore not worthy of respect in a democratic society.

Employment Appeal Tribunal

The EAT held that the tribunal had erred in straying into an evaluation of MF's belief, instead of assessing its conformity with the *Grainger* criteria on its own terms. The correct standard against which a belief was to be judged in considering the fifth *Grainger* criterion was that contained in Article 17 of the European Convention on Human Rights:

1. [2021] IRLR 706

> *only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect ina democratic society.*

The EAT's judgment has been widely mischaracterised as finding that MF's belief fell *only just* outside this category, so it is worth emphasising that the EAT noted at para 113 that her belief was widely shared, including amongst respected academics; and at para 111:

> *Most fundamentally, the Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of art 17. That is reason enough on its own to find that Grainger V is satisfied.*
> [emphasis supplied]

The EAT held that the tribunal had erred in concluding that MF's belief meant that she would always 'misgender' trans people irrespective of the circumstances: it was clear from the tribunal's other findings of fact that her position was more nuanced than that.

Finally, the ET had also erred in approaching MF's lack of 'gender identity belief' on the basis that the lack of belief must independently meet the *Grainger* criteria. If the positive belief which she lacked was '*Grainger* compliant', it followed that her lack of that belief would be protected. The EAT's judgment was not appealed.

Comment

The judgment of the EAT in *Forstater* provides a salutary corrective to widespread myths about the implications of EA protection from discrimination on grounds of gender reassignment, and what behaviour (or even beliefs) can properly be deemed 'transphobic'. But those myths remain widely believed and it seems likely that there will be a great deal more litigation raising related issues. Questions for the future will include the extent to which employees are entitled to require their colleagues to use their pronouns of choice and related questions about the freedom of speech and belief of colleagues subject to those demands; the risks for employers and service providers in making their existing single-sex facilities mixed-sex by allowing users to choose whichever facilities they feel most comfortable using; ticklish questions about the limits of acceptable manifestation of gender critical beliefs in or outside of the workplace; refusal of services to those with gender-critical views; and much more besides.

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