HUMAN RIGHTS

The formula for justifying dismissal and discipline for diversity-critical speech

Dr Steve Foster*

Introduction

Problems arise where an employee's religious or philosophical views conflict with a public or contractual duty to uphold equality or diversity,[1] also identifying various personal and philosophical views.[2] This conflict can never justify discrimination by that individual, and in *McClintock* v *Department of Constitutional Affairs*,[3] it was established that an employer was fully justified in insisting that all magistrates apply the law of the land, without exception based on moral or principled objection.[4] Thus, in that case it was held that a Christian magistrate who had objected to carrying out his duty to place children with same-sex couples had not been discriminated against on the basis of his philosophical views. Similar principles apply where the individual's views (speech) on equality and diversity are regarded as inconsistent with the holding of that position, as illustrated in *Page v Lord Chancellor,*[5] and *Page v National Health Service*,[6] concerning an individual's views on homosexuality and their consistency with his posts of, respectively, lay magistrate and non-executive director of the NHS.

However, two recent decisions, one of the Employment Appeal Tribunal and another of an Employment Tribunal, show that the distinction between penalising an individual for their genuine beliefs and disciplining for another reason, such as evidence of discrimination or the impact of the claimant's speech, is often difficult to apply in practice. The decision in *Higgs v Farmors School*,[7] below, seems to establish that employees should not be penalised for holding and manifesting protected beliefs unless the measures taken against them are legitimate and necessary and proportionate in the circumstances. This is to ensure that the employee's rights to free speech and religion and belief, are weighed appropriately with the need to secure equality and diversity and the rights of others. On the other hand, the decision of the Employment Tribunal in *Randall v Trent College,*[8] and indeed the decisions of the Court of Appeal in *Page*, accept that in some cases the real reason for the disciplinary action is not sufficiently related to protected beliefs, but rather to the manner or circumstanced in which those views were expressed.

Thus, courts and tribunals must decide what the real reason was for the employee's dismissal or discipline – was this relate to the employee's religion or belief, or was it for some other substantial reason, such as to prevent discrimination or to resolve a diversity dispute from escalating? Once that issue has been resolved, the court or tribunal will then need to consider the ultimate question: has the employee, in all the circumstances, been unfairly treated by the employer for manifesting their religion and belief? This will require the judge to assess a number of factors, such as the nature of employment, the content of the employee's speech and actions, and the impact of those words or actions on the contract of employment and diversity and equality

* Associate Professor in Law, Coventry University

[1] See Steve Foster, 'Free Speech, Equality and Diversity: the legitimacy of protecting content-based expression under the ECHR and domestic law' (2023) 28 (3) *Communications Law* 102.

[2] See, recently, Oscar Davies, 'Gender Critical Cases: making bad law' (2024) 174 (8068) NLJ 8; and Maya Forstater and 'Gender-Critical Cases: sex matters' (2024) 174 (8075) NLJ 10.

[3] [2008] IRLR 29.

[4] *McClintock* v *Department of Constitutional Affairs* [2008] I.R.L.R. 29, at [62]. See also *London Borough of Ealing v Ladele* [2010] 1 WLR 995, where a registrar, had refused to participate in civil partnerships. See also, *Ladele and McFarlane v United Kingdom*, Application Nos 51671/10 and 36516/10, Decision of the European Court, September 1, 2011.

[5] [2021] EWCA Civ 254.

[6] [2021] EWCA Civ 255.

[7] [2023] ICR 1072.

[8] [2023] 2 WLUK 493.

Establishing the reason for dismissal or discipline: the decisions in *Higgs v Farmor Schools* and *Randall v Trent College*

These cases consider whether the employee's critical diversity speech or actions leading to dismissal or discipline constituted religion and belief under the Equality Act 2000, or come within the right to religion, thought and conscience under Article 9 of the European Convention on Human Rights. This, therefore, is the threshold question as to whether the Act or ECHR rights are engaged, thus providing enhanced protection to the employee.[9]

Facts and decision in Higgs

Higgs was employed by the school as a pastoral administrator and work experience manager. She was dismissed for gross misconduct after the school received an external complaint about Facebook posts that she had made, criticising the nature of sex education in schools and, in particular, the teaching of 'gender fluidity'. The school considered that someone reading the posts might conclude that she not only felt strongly that gender fluidity should not be taught in schools, but was also hostile towards the LBGTQ+ community, and Tran's people in particular. Higgs brought claims of direct discrimination and harassment on the ground of her protected beliefs under the Equality Act 2010, including her lack of belief in gender fluidity and that a person can change their biological sex. An employment tribunal dismissed her claims, finding that while those beliefs were protected under the 2010 Act, she had been dismissed not because of her beliefs, but because of the school's concern that she would be perceived as holding homophobic and transphobic views.

Higgs then appealed to the Employment Appeal Tribunal, who upheld the appeal and remitted the case back to the tribunal to decide on the proportionality of the dismissal in the circumstances. The Appeal Tribunal noted first that under ss.2 and 3 of the Human Rights Act 1998, the tribunal was required to determine any claim under the 2010 Act in accordance with the rights conferred by the European Convention on Human Rights (and given effect to by virtue of the 1998 Act). In this case that included the claimant's rights under Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the Convention.[10] Thus, the tribunal should have determined whether the employee's actions amounted to a manifestation of a belief protected by the 2010 Act and the Convention, and this involved asking whether there was a sufficiently close and direct nexus between her conduct and her beliefs.[11]

In the Appeal Tribunal's view, if there had been a restriction on manifestation of belief or freedom of expression, that restriction would have to be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society, as outlined in the qualifying words in Articles 9(2) and 10(2) of the Convention. In other words, that the interference was prescribed by law, and necessary in a democratic society for the purpose of achieving a legitimate aim (in this case the protection of the rights of others).[12] Further, in assessing the necessity of the measure, a proportionality assessment would be required. Importantly, in establishing the reason why the relevant decision-maker acted as they did for the purpose of a direct discrimination claim under the 2010 Act, it will not be possible to rely on a distinction between an objectionable manifestation of a belief and the holding or manifestation of the belief itself, if the action taken by the employer was not a proportionate means of achieving a legitimate aim. If, on the other hand, the action or response *can* be justified, and is found to be by reason of the objectionable manner of the manifestation, the tribunal can permissibly find that the reason why the respondent acted did not involve the belief but only its objectionable manifestation.[13]

[9] However, a dismissal might still be held unfair by a tribunal where those rights are not engaged: because the grounds for dismissal are inadequate, or where there has been a procedural breach by the employer: Employment Rights Act 1995.
[10] *Higgs v Farmor's School* [2023] EAT 89 [35].
[11] *Higgs v Farmor's School* [2023] EAT 89 [41].
[12] *Higgs v Farmor's School* [2023] EAT 89 [41-42].
[13] *Higgs v Farmor's School* [2023] EAT 89 [57-58].

Applying those principles to the present case, the Appeal Tribunal concluded that the tribunal's findings on the reasons for the school's actions did not follow the above, correct, approach. Rather, the tribunal had found that the school's reason for disciplining and dismissing him was not because of, or related to, his actual beliefs, but because of the concern that her posts might be seen as evidence that she held other beliefs, which might be described as 'homophobic' or 'transphobic'.[14] Thus, the difficulty with the tribunal's analysis was that it did not engage with the question whether this was, nonetheless, because of, or related to, his manifestation of her beliefs.[15] In answering that question, the school's views or concerns were not relevant; the tribunal needed, first, to consider whether there was a sufficiently close or direct nexus between her protected beliefs and her posts.

Further, to the extent that the tribunal addressed that question, it was apparent that it did so through the prism of the school's view of her posts. Those views were relevant when determining whether there had in fact been any interference with her right to manifest her beliefs and to freedom of expression, in other words whether its treatment of her was because of, or related to, her exercise of those rights. However, those views could not determine the prior question: whether there was a sufficiently close or direct link between her posts and her beliefs such as to mean that those posts were to be viewed as a manifestation of her beliefs.[16] If they were, then the tribunal needed to determine the 'reason why' question by asking itself whether this was because of, or related to, that manifestation of belief - prohibited under the 2010 Act - or whether it was in fact because she had manifested her belief in a way to which objection could justifiably be taken.[17] However, in order to determine whether or not the manifestation can properly be said to be 'objectionable', it was necessary to carry out a proportionality assessment: keeping in mind the need to interpret the 2010 Act consistently with the relevant Convention rights. Thus, at that stage, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under Articles 9(2) or 10(2).[18]

The Appeal Tribunal thus allowed the appeal, but as this was not a case where only one outcome (on proportionality) was possible, the matter was remitted back to the tribunal for determination. Such remittal was on the basis that it has already been established that the Facebook posts in issue had a sufficiently close or direct nexus with the employee's beliefs, such as to amount to a manifestation of those beliefs.[19] On the other hand, it will be for the tribunal on the now to determine, recognising the essential nature of her rights to freedom of belief and freedom of expression, the following questions: first, whether the measures adopted by the school were prescribed by law; and, if so, secondly whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others.[20]

The Appeal Tribunal then proceeded to lay down guidelines for the tribunals in case such as this, recognising that a danger arises from any attempt to lay down clear rules. Nevertheless, it set out the following basic principles that will underpin the approach in assessing the proportionality of any interference with rights to freedom of religion and belief and freedom of expression. First, the foundational nature of the Convention rights must be recognised; the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.[21] Second, those rights are qualified and manifestation of belief, and free expression will not be protected where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others.[22] Further, where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not,

[14] *Higgs v Farmor's School* [2023] EAT 89 [81].
[15] *Higgs v Farmor's School* [2023] EAT 89 [82].
[16] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[17] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[18] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[19] *Higgs v Farmor's School* [2023] EAT 89 [91].
[20] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[21] *Higgs v Farmor's School* [2023] EAT 89 [94]. See *Handyside v United Kingdom* (1976) 1 EHRR 737.
[22] *Higgs v Farmor's School* [2023] EAT 89 [ibid].

properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.[23]

Third, whether a limitation or restriction is objectively justified will always be context-specific. Although the fact that the issue arises within a relationship of employment will be relevant, different considerations will inevitably arise, depending on the nature of that employment.[24] Fourth, it will always be necessary to ask: (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.[25]

Finally, in answering those questions within the context of a relationship of employment, regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.[26]

Thus, as the Appeal Tribunal has already established the nexus between her speech and the protected rights under the Act and the Convention, the tribunal must make a decision as to the proportionality of the employee's treatment of the employee, taking into consideration all the factors outlined in the Appeal Tribunal's guidance.

Facts and decision in Randall v Trent College Ltd

In this case, the claimant, a former school chaplain, claimed harassment, direct discrimination, victimisation and unfair dismissal against the respondent school, an Anglican foundation co-educational, independent day school, when he had been dismissed for airing his views on LGBT rights. The claimant's views were based on his belief that marriage should only be between men and women, that sexual activity outside of marriage was morally problematic, and that a person could not change their gender or sex. Under the Education (Independent School Standards) Regulations 2014, the school was required to actively promote the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs. Further, failure to comply with the Regulations could result in regulatory or enforcement action against the school.

In 2016, the claimant had embarked on a series of sermons delivered to pupils aged 11 to 18 years old focusing on gender equality, gay marriage and LGBT+ rights, which had prompted numerous complaints from staff, students and parents. The claimant was spoken to by the school's designated safeguarding lead. He explained that LGBT+ pupils were statistically far more vulnerable to suicide, self-harm and emotional distress than the rest of the community, that the message from his sermon, irrespective of his intended meaning, had been that it was wrong to be gay, and that the message had caused harm by increasing vulnerability of the school's LGBT+ pupils. In 2018, the school adopted an Ofsted and Department for Education recognised best practice programme called Educate and Celebrate, which had the aim of taking a whole-school approach to tackling homophobic, biphobic and

[23] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[24] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[25] *Higgs v Farmor's School* [2023] EAT 89 [ibid].
[26] *Higgs v Farmor's School* [2023] EAT 89 [ibid].

transphobic bullying and ingrained attitudes. The claimant considered that much of the programme was contrary to Christian teaching, and in 2019, he delivered sermons to 11 to 17 year-olds, conveying the message that it was wrong to be LGBT+ and that religious belief allowed people to discriminate. The school received a significant number of complaints and a disciplinary process resulted in the claimant being summarily dismissed.[27] He issued his first employment tribunal claim, but because of the COVID-19 pandemic, the school suffered financial difficulties and in 2020 made several staff members redundant, including the claimant. The claimant then issued a second employment tribunal claim.

Dealing with the claim of direct discrimination and the reason for dismissal, the tribunal noted that after the 2016 sermon, the claimant had been well aware that the topics of orthodox Christian beliefs on marriage concerning sex, sexual orientation and gender identity were not appropriate topics for chapel sermons. Thus, dealing with those issues in chapel risked not only causing upset to pupils and staff but also real distress and the risk of psychological harm to vulnerable LGBT+ students who were coming to terms with their sexual identity.

In the tribunal's view, his contract of employment and job description did not give him free rein in the chapel or override his, and the school's, duty to protect pupils from harm. Further, many of the terms used in the 2019 sermon had been pejorative. The claimant had used inflammatory language and rhetoric that went way beyond the teaching of a particular perspective and amounted to an intent to persuade pupils to agree with his views. That, in the tribunal's view, fell outside the permissibility of faith teachings within the Regulations and ignored the obligations to ensure pupils understood issues and encouraged respect for all people, having particular regard for those with protected characteristics. Further, the claimant held a position of trust and had abused that position by delivering the sermons armed with the knowledge of the potential for harm, as well as ambushing the school by not allowing it to facilitate debate on the topic in an appropriate environment. Accordingly, it was not the claimant's beliefs nor their manifestation that was the reason for, or a substantial cause of, his treatment; rather, it was because of the time, the place, to whom he had expressed his beliefs and the manner in which he expressed them which was objectionable and caused his dismissal.[28]

The tribunal then considered the justification for the employer's action, noting that the school had already tried a less intrusive approach in 2016 by seeking to educate the claimant in the potential harm of delivering such sermons. Despite that, he chose to embark on the same path in 2019 because of his objection to the Educate and Celebrate programme, and in doing so placed pupils at the risk of harm again. In doing so, he abused his position of trust and acted contrary to his safeguarding duties and obligations to comply with the Regulations. Given the claimant's stance that he was just doing his job, had done nothing wrong, had been discriminated against and deserved an apology, the school could have no confidence that he would not do the same again, and it had been justified in concluding that his conduct amounted to gross misconduct and that summary dismissal was appropriate.[29]

The tribunal then found that there had been no breach of his Convention rights – Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of speech. The school's actions were justified to meet its legitimate objectives of safeguarding pupils from the risk of harm and complying with the Regulations, and thus there had been no breach of the right to freedom of thought, conscience and religion under Article 9. Further, the duty to safeguard pupils from the risk of harm and the requirement to comply with the Regulations outweighed the claimant's right to express his beliefs in the manner he did in a school environment, and thus there was no breach of his right to freedom of speech under Article 10.[30]

[27] On appeal, he was reinstated subject to compliance with various management instructions, but as he was reinstated part-way through the academic year, he was not given a teaching timetable.
[28] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [262, 283-285, 290, 295].
[29] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [304-306].
[30] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [311-313].

Accordingly, all his claims of direct discrimination failed.[31] Similarly, with respect to his claim of harassment, the tribunal noted that a referral to the Government Prevent programme and the imposition of management restrictions had not been related to the claimant's beliefs, but to the objectionable manifestation of them. The claimant had used his position of authority to risk harm for his own gratification and it was therefore not reasonable to subsequently claim that the consequences amounted to harassment.[32] The tribunal also rejected his claim for victimisation, finding that there was no evidence that the non-allocation of the claimant's timetable had been linked to the presentation of his employment tribunal claim. His dismissal by reason of redundancy was genuine and not artificially orchestrated to get rid of him in consequence of him issuing proceeding, and any allegations of victimisation were not well-founded.[33] Finally, the tribunal found that the decision to dismiss the claimant fell within the range of reasonable responses of a reasonable employer in the circumstances, and thus his claim of unfair dismissal was not well-founded.[34]

This decision, thus, follows the decision in *Page*, finding that the reason for the employee's treatment was not related to the claimant's beliefs nor their manifestation; but rather, it was because of the time, the place, to whom he had expressed his beliefs, and the manner in which he expressed them which was objectionable and caused his dismissal. The tribunal's consideration of the fairness of his treatment thus appears to be conducted outside the scope of the rights contained in Article 9 of the Convention, as that right was not engaged. On the face of it the Appeal Tribunal's decision and approach in *Higgs* appears complex. However, put simply it means that in deciding to dismiss or take action against an employee for expressing diversity-critical views, an employer must first establish whether there is a sufficient link between those views and the rights protected under the 2010 Act and the European Convention. If that is the case then the employer needs to make it clear that the reason for dismissal was that the employee manifested them in an (objectively) objectionable manner, it not being for the employer to exclude the protection of that belief on grounds that they, as employers, perceived it as objectionable. That was the error into which the tribunal fell – it declared that the reason was not related to a protected belief without enquiring into the nexus issue - and hence the appeal was allowed. Then, once that nexus is established, a tribunal must assess the dismissal in terms of its compatibility with the criteria established by the Convention – that the interference was sufficiently prescribed by law, had a legitimate aim (the rights of others), and was necessary and proportionate in achieving that aim. In such a case, the tribunal would consider all the circumstances, including the tone on the comments, how they would be perceived and what effect they might have, and the position and duties of the employee.

Accordingly, the Employment Tribunal in *Randall* appear to have fallen into the same trap as the Tribunal in *Higgs*, by not asking whether the teacher's views were sufficiently connected with his religious or philosophical beliefs, and *then* considering whether the employer was justified in disciplining him for the way in which the views were manifested. To say that he was not dismissed for manifesting such views, but for his attitude towards the regulations thus appears to conflate both aspects of the enquiry, and although the outcome may be the same, this approach is contrary to the one advocated in *Higgs*. Consequently, the issues of legitimacy and proportionality of the employer's actions are in danger of being side-stepped.

[31] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [356].
[32] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [359, 363].
[33] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [375, 386].
[34] *Randall v Trent College Ltd* [2023] 2 WLUK 493 [395].

On the other hand, in both the *Page* cases, the Court of Appeal accepted that the claimant's beliefs on adoption were not the reason for dismissal; rather it was the appearance of bias with regard to how he would carry out those duties. Accordingly, a dismissal in response to a complaint of discrimination would not constitute victimisation if the reason for it was not the complaint as such but some feature of it that could properly be treated as separable. This was shown in the recent decision in *Omooba v Michael Garrett Associates Ltd (T/A Global Artists), Leicester Theatre Trust Ltd*,[35] where the Employment Appeal Tribunal confirmed that an actor had not been dismissed for her religious views on homosexuality, but for the need to deal with the dysfunctional situation that had arisen was because of her posts. In other words, the reason for the dismissal was the commercial risk to the employer's business if clients and agents left as a result of the posts.[36] These decisions follow the test of 'but for' and concentrate on whether religion and belief significantly influenced the respondent's decision,[37] but it is unclear now that tribunals can take that approach if there was sufficient link between the beliefs and the disciplinary action.

Balancing the free speech rights of employees with equality and diversity

Ultimately, the proportionality of the employer's disciplinary action will be tested by the court or tribunal, but the different approached adopted in these cases causes some confusion about what strength a judge should give to those views and any interference with them.

There is still, therefore, a distinction between cases where the reason for a sanction is that the claimant held and/or manifested the protected belief, and where the claimant had manifested that belief in some particular way to which objection could justifiably be taken.[38] Whether such actions are justified should be judged by a careful assessment of all the circumstances of the case, and must strike a fair balance between the rights of the individual and the legitimate interests of the institution for which they worked.[39] This is supported by the decision of the Court of Appeal in *Ngole*,[40] overruling the decision of the High Court that the university's issue with anti-gay comments on social media was not the religious motivation or the religious content of the postings, but how they could be accessed and read by people, service users included, who would perceive them as judgemental, incompatible with service ethos, or suggestive of discriminatory intent.[41] Thus, following *Ngole*, courts should insist that the full context and other circumstances of the speech and its impact are considered, underpinned by essential free speech, and, to a reasonable degree, the religious or other Article 9 rights of the speaker.

This flexible approach was also taken recently by the Employment Tribunal in *Forstater v GDP Europe and others,*[42] a case which clarified the meaning of belief under the Equality Act 2010 and Article 9 of the Convention, and stressed the need for proportionality in such cases. F, a consultant for the respondents, posted tweets expressing her concerns about, inter alia, proposed changes to the Gender Recognition Act 2004. In a hearing to determine whether her belief was a philosophical belief,[43] the

[35] [2024] I.R.L.R. 440.
[36] [2024] I.R.L.R. 440, [154-155]. The case was complicated by the fact that the claimant was to play the role of a lesbian woman in the play, *The Colour Purple,* a role that she later admitted she would not play because of her beliefs.
[37] *Nagarajan v London National Transport* [2001] 1 AC 501.
[38] In September 2023, in *Corby v ACAS*, Leeds Employment Tribunal, 6 September 2023, an employment judge ruled that holding a view that does not subscribe to critical race theory was a protected characteristic under the Equality Act 2010. An employee of ACAS took the organisation to an employment tribunal after managers ordered him to remove comments he posted on a workplace social media platform that were critical of Black Lives Matter, arguing that critical race theory is divisive because it portrays white people as racist. In the Tribunal, Ayre J ruled that he had given his beliefs careful consideration and they fell under the "religion or belief" section of the 2010 Act. In April 2024 the tribunal will consider whether he was unlawfully discriminated against. See Matt Dathan, **'**Critical race theory opponent is protected, EA rules', *The Times*, 29 September 2023, 17
[39] *Page v National Health Service* [2021] EWCA Civ 255 [100-101].
[40] *R (Ngole)* v *University of Sheffield* [2019] EWCA Civ 1127
[41] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) [169].
[42] Decision of the London Central Employment Tribunal, 6 June 2022 (unreported).
[43] *Grainger Plc v Nicholson* [2010] 2 All E.R. 253. The criteria is as follows: the belief must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and

tribunal held that her belief failed to satisfy the fifth criterion, namely that the belief had to be worthy of respect in a democratic society, and should not conflict with the fundamental rights of others.[44] On appeal, the Employment Appeal Tribunal held that her gender-critical belief was a protected philosophical belief,[45] and that the fifth *Grainger* criterion was only not satisfied where there existed an extremely grave threat to European Convention principles.[46] In this case, the gender-critical belief was widely shared, including amongst respected academics, and such a belief demanded particular care before it could be condemned as not worthy of respect in a democratic society.[47] When the case was referred back to the tribunal to determine whether she had been discriminated against on the basis of that belief,[48] it stated that the tweets had to be considered with reference to Article 9(2) of the Convention, and that expressing opposition to that reform had a potential impact on the rights of others.[49] However, that did not mean that debate on proposed legal reforms could not take place or could be significantly restricted in a democratic society.[50] At the very least, therefore, diversity critical views, if sufficiently linked to the individual's religion or belief, must be pitted against diversity and equality policies and the rights of others, and any interference with the speaker's free speech and religion and belief rights must be prescribed by law and necessary and proportionate to uphold any legitimate aim.[51] On the facts, therefore, the tribunal upheld the claimant's claim.

Further evidence of this an increased latitude to diversity critical speech is seen in two recent employment tribunal decisions. The first decision, in *Meade v Westminster City Council,*[52] was, as with *Ngole,* decided in the context of social work employment, where we would expect the policies on diversity to be more strictly applied. In this case, the tribunal upheld the employee's claim for discrimination and victimisation after she had shared gender critical posts on social media. After Social Work England received a complaint about her posts, she was subjected to a Fitness to Practise investigation, concluding with a formal sanction, later withdrawn. When the council learned of the sanction, Ms Meade was suspended on charges of gross misconduct. The tribunal held that the claimant's Facebook posts and other communications fell within her protected rights for freedom of thought and freedom to manifest her beliefs as protected under Articles 9 and 10 ECHR. Further, it considered it wholly inappropriate that an individual such as the claimant, espousing one side of the debate should be labelled discriminatory, transphobic and to pose a potential risk to vulnerable service users. That, in the tribunal's view, equates her views as being equivalent to an employee/social worker espousing racially discriminatory or homophobic views. The opinions expressed by the claimant could not sensibly be viewed as being transphobic when properly considered in their full context from an objective perspective, but rather her expressing an opinion contrary to the interpretation of legislation.[53]

---

importance; and 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.

[44] *Forstater v GDP Europe and others*, decision of London Central Employment Tribunal 18 December 2019 (unreported). See Robert Wintemute, 'Belief vs action in Ladele, Ngole and Forstater' [2021] *Industrial Law Journal* 104. See also, *Fahmy v Arts Council England* [2023] WLUK 423 (ET).

[45] *Forstater v GDP Europe and others* [2022] ICR 1.

[46] ibid [82], following *Campbell v United Kingdom* (1982) 4 EHRR 293 and *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

[47] ibid [110-115]. See Sharon Cowan and Sean Morris 'Should "gender critical" views about trans people be protected as philosophical beliefs in the workplace? Lessons for the future from Forstater, Mackereth and Higgs' (2022) 51 (1) *Industrial Law Journal* 1.

[48] *Forstater v GDP Europe and others,* decision of the London Central Employment Tribunal, 6 June 2022 (unreported).

[49] ibid [287]. It then rejected the respondent's argument that they were being compelled to manifest gender-critical belief by association with the claimant ([291-293]).

[50] *ibid* [287].

[51] Thus, the claimant will not automatically succeed in their claim, simply because they were sanctioned for their beliefs. See *Mackereth v Department of Work and Pensions* [2002] ICR 1609, discussed below. In that case, the tribunal found that the employer's practice and policy had the legitimate aims of ensuring that service users were treated with respect and did not suffer discrimination in respect of the department's services and complying with an overarching policy of commitment to equal opportunities.

[52] Decision of the Employment Tribunal 24 November 2023 (case numbers 2201792/2022 2211483/2022.

[53] In April 2024, Rachel Meade was awarded £58,000 in exemplary damages for harassment and sex discrimination, the tribunal concluding that Social Work England's actions were a "serious abuse of its power as a regulatory body". The

The second case, *Pheonix v Open University,*[54] was decided in the context of academic debate at universities, where there has been much social and moral controversy over the expression of gender critical speech.[55] In this case, the tribunal held that a university professor had been constructively dismissed, discriminated against and harassed because of comments relating to biological sex and gender identity. The claimant was a Professor of Criminology at the Open University, known for her research on sex, gender, and justice. Before the tribunal she claimed that there had been a public campaign of harassment after she expressed views about the silencing of academic debate on trans issues, criticised Stonewall's influence in universities, expressed views that male-bodied prisoners should not be in female prisons, and set up the Open University Gender Critical Research Network. She claimed that she was publicly vilified by hundreds of her colleagues, called transphobic, compared to a racist by managers, and silenced and shunned within her department. She claimed that she had been discriminated against on grounds of her "philosophical belief", in other words, that biological sex is real and important; a person cannot change their biological sex, and that biological sex should not be confused with gender identity.

The tribunal noted that the right to freedom of expression comes with duties and responsibilities, and can be subject to limitations over public safety and the protection of rights and reputations. However, the extent to which an employer can restrict an employee's manifestation of religious beliefs must be determined by factors such as the content, tone, extent, and impact of the speech, as well as the nature of the employer's business and any power dynamics. The tribunal found that the unwanted conduct related to Phoenix's gender-critical beliefs, the University believing that her views caused divisiveness, and she was effectively telling her off for having expressed those beliefs. This followed the setting up in 2021 of the Open University gender-critical Research Network by the claimant, focusing on promoting research from a gender-critical perspective. There followed an open letter signed by 368 OU staff and researchers, calling for the withdrawal of the OU's support for the GCRN and asserting it conflicted with OU's obligations under the Equality Act 2010. The tribunal found that the open letter was not an exercise in academic freedom, but rather stigmatised Phoenix and aimed to damage her reputation. It also found it to be aimed at countering gender-critical beliefs. The tribunal also found that the University's failure to respond directly to Phoenix's concerns of harassment was unwanted conduct, and was related to Phoenix's gender-critical beliefs – and that while that was not intended to violate her dignity or create an intimidating environment, it was due to a fear of a faction within the OU and being seen to be gender-critical. Dealing with the complaints and criticisms from staff who found a podcast offensive and insensitive towards trans people, the tribunal found the podcast did not cross the line of acceptability, disagreeing with claims that it was demeaning or belittling. While the tribunal recognised some comments in the podcast lacked 'sensitivity', it did not interpret them as outright hostility towards trans individuals.

The tribunal's task in these cases, therefore, is to distinguish between expressing views simply representing one side of the transgender debate, and expressing discriminatory transphobic or homophobic views.[56] In *Meade*, the posts in question were regarded by the tribunal as merely repeating or adding to the ongoing debate on this issue: the central thesis that individual were not capable of

tribunal also called on it and the Council to train their employees in the principles of free speech and protected belief. See Jonathan Ames and Catherine Baksi. 'Social worker suspended over gender-critical views £58,000', *The Times*, 29 April, 2024.

[54] Decision of Watford Employment Tribunal, 24 January 2024 (case numbers 3322700/2021/ 3323841/2021.

[55] The best-known dispute in this area involves Kathleen Stock, a former Professor of Philosophy at Sussex University who caused national controversy when claiming, before Parliament, that "the claim "transwomen are women" is a fiction, not literally true", and that "spaces where women undress and sleep should remain genuinely single-sex".

[56] See two recent tribunal decisions where the claimants beliefs on race issues, were not deemed to be protected. The first case was *Cave v Open University* [2023] 5 WLUK 25. Here, an employee, who described himself as an English nationalist, was dismissed after he made racist posts on social media. The tribunal found that his belief in English nationalism could not be categorized as a philosophical belief worthy of protection under the Equality Act 2010 because it was not worthy of respect in a democratic society, was incompatible with human dignity and conflicted with the fundamental rights of others. The second case was *Sunderland v The Hut.com Ltd* [2023] UKET 2300911/2022, where an employee's dismissal for anti-religious comments made on social media did not amount to discrimination and harassment based on her conservative philosophical beliefs. The tribunal found that there was insufficient evidence to demonstrate a belief in conservatism or a belief that went beyond a political viewpoint.

changing their sex, and highlighting examples where gender recognition can be dangerous and damaging to women's rights. Thus, the tribunal examined a number of posts, such as a link to a petition to the International Olympic Committee that male athletes should not compete in female sports; and a link to a petition that women have the right to maintain their sex-based protections, to include female only spaces such as changing rooms, hospital wards, sanitary and sleeping accommodation, refuges, hostels and prisons. The tribunal also examined a number of satirical posts relating to the ongoing controversy surrounding the JK Rowling affair, and other conflicts between both sides.[57] The Tribunal was obviously influenced by the employee's naivety and lack of intent to discriminate and offend, and felt that the language used by the employee did not deprive her of her protection under Article 9.

Establishing 'trump' rights in balancing belief and speech with privacy and freedom from discrimination

Although these cases will be decided by employment tribunals on the basis of employment and discrimination laws, they obviously engage ECHR rights, which tribunals and courts must consider when determining the dispute, and balance effectively and in conformity with the principles of legality and proportionality. To carry out this task, courts and tribunals will also have to assess the importance of each right, without accepting that any right has 'trump' status over the other,[58] but providing adequate recognition and protection of each right in all the circumstances. The recent judgment in *Adams v Edinburgh Rape Crisis Centre,*[59] not only illustrates the courts and tribunals' desire to safeguard diversity critical speech against inflexible equality and diversity policies, but also the difficulties in balancing those views with the fundamental rights of others.

The claimant held gender critical beliefs and believed that biological sex was especially relevant in relation to sexual violence, and that a trauma-informed approach to supporting survivors of sexual violence entailed respecting both their understanding of others as male or female and their choice about whether they wished to engage with male or female support workers. The centre had recently employed a trans woman, and the claimant wished to discover how those two employees should be referred to service users. Following complaints that the claimant had humiliated the employees by suggesting that the claimant and others should disclose their sexual identity, the claimant was subjected to disciplinary proceedings and subsequently resigned, claiming harassment, discrimination and constructive dismissal.

Giving judgment for the claimant, the tribunal first decided that the claimant was subject to harassment on account of her beliefs, as she had been subjected to intimidating, hostile, degrading, humiliating or offensive environment. In the tribunal's view, the claimant had not been disciplined because of her suggested response to the service user; the real reason being that the claimant held gender critical views.[60] The claimant's views were at the root of the way the processes unfolded: the respondent was not simply exercising a normal disciplinary rule in respect of an employee who had sent an email which amounted to misconduct, as there was ample evidence that the claimant was being criticised for her beliefs, which were regarded as equivalent to transphobia.[61]

[57] The JK Rowling post commented on the author's treatment by the Inquisitorial Squad for following the wrong people on Twitter. It also looked at the reposting a tweet from an organisation called Mayday with a cartoon showing two women prisoners with one asking the other "what are you in for?" and the other saying "for saying that Ian Huntley is a man", and a post from Fair Play for Women entitled "meet Karen" and referring to Karen as a male prisoner who had committed sexual assaults against women in prison and asking to sign their petition to get the prison policy changed, and a satirical post stating: "Boys that identify as girls to go to Girl Guides. Girls that identify as boys to go to Boy Scouts. Men that identify as paedophile go to either."

[58] In terms of free speech versus privacy, it has been established that free speech does not have any trump status over privacy, the outcome depending on the application of proportionality.

[59] [2024] 5 WLUK 572.

[60] *Adams v Edinburgh Rape Crisis Centre,* [196-197].

[61] *Adams v Edinburgh Rape Crisis Centre,* [210-229].

With respect to the discrimination claim, the tribunal found that there was a clear nexus between the claimant's beliefs and the behaviour that the respondent said was the reason for her treatment. The claimant had a right to freedom of belief and freedom to express that belief and her views were worthy of protection, and the question was whether there was a conflict between the claimant's right to freedom of expression and freedom of belief, and other Convention rights, including the right to private life of the two employees. The tribunal held that although, as a matter of the general civilities of life, it was entirely appropriate in a workforce to call colleagues by their preferred pronoun that did not involve any breach of a right under the Convention. Although some individuals might be sensitive about having their "gender history" revealed, that was not something that flowed axiomatically from Article 8. In the vast majority of cases, there would be no controversy in asking someone their biological sex, their sex at birth, or their gender identity, and one was required to look at the context. Here the employee worked at a rape crisis centre, and it was a genuine occupational requirement that she be a woman. There was no breach of her right to privacy in those circumstances of telling a service user she was assigned female at birth and now identified as non-binary, and there was no breach of trust and confidence by the respondent in telling that employee that it would respond to service user requests in the manner suggested by the claimant. Accordingly, the respondent unlawfully discriminated against her.[62]

Several aspects of this decision, and the approach taken by tribunal, are worthy of comment. First, the tribunal adopt the *Higgs* approach and find a sufficient nexus between the claimant's beliefs and her treatment. This obviously puts the employer on the 'back foot' as there is a presumption of harassment and discrimination, and the employer needs to justify the disciplinary action. This is indeed possible, as the case of *Mackereth v Department of Work and Pensions* shows,[63] where the dismissal of an employee for refusing to use neutral pronouns towards colleagues was held to be fair, despite the refusal being based on a protected belief. Nevertheless, in cases such as *Adams*, where the tribunal has rejected the employer's claim that the action was taken for traditional disciplinary reasons, it will be difficult for the employer to show that their discriminatory actions are justified in all the circumstances.

Secondly, the tribunal's finding on the scope of the privacy rights of the affected employees, weakened the strength of those claims and, accordingly, skewed the balance between belief and privacy. In the tribunal's view, there was nothing to suggest that the disclosure of other employees' sexual identity, or whether they were born male or female, involved a breach of Article 8 ECHR. Two points need to be made here. One is that an employment tribunal is hardly in a position to lay down precedents and guidance with regard to scope of ECHR rights, and indeed cited no real authority in support of such a proposition. Second, even if they are right in declaring that there is no absolute or general rule prohibiting such disclosure, it is another step to say that an individual employee has the right to make that disclosure. On the facts, given the nature of the centre and the employment contract, there may be an argument in favour of making such disclosures, but again, that should be the responsibility of the employers and not individuals motivated by their personal, philosophical beliefs. The decision is, therefore, questionable on those grounds, and an appeal is likely.

Conclusions

It will be interesting to see whether the tribunal in *Higgs* finds that the dismissal violates Articles 9 and 10 of the Convention, after applying the legitimacy and proportionality test to the specific facts, and the status of the employee. Similarly, it will be interesting to see whether there will be an appeal in the *Adams* case. Proving a protected belief and the required nexus does not guarantee that the action will succeed, and the tribunal must consider all the circumstances, and in particular, whether those views are objectionable with respect to the employer's equality policies, the duties of the employee and the tone and level of offensiveness of the employee's views. In the meantime, the

[62] *Adams v Edinburgh Rape Crisis Centre,* [230-238]. The tribunal also found that the respondent's practice of disciplining gender-critical views amounted to indirect discrimination (paras 239-241), and that the respondent's treatment of the claimant and her belief amounted to constructive dismissal (paras 245-246).
[63] [2002] ICR 1609.

decision of the Appeal Tribunal established a prima facie right to hold and express those views, subject to the employer satisfying us that the interference was justifiable.

On that basis, the Tribunal decision in *Randall,* although correct in terms of overall fairness, is likely to be wrong in its approach if we rely on the reasoning in *Higgs*. However, the Court of Appeal decisions in *Page,* and the EAT's decision in *Omooba***,** appear to allow a tribunal or court to look beyond the connection with the claimant's religious or philosophical beliefs, and decide that the *real* reason for dismissal or victimisation was something separable from victimisation of a protected belief. Thus, until *Page* is overruled by an appropriate court, there is room for a court or tribunal to find that an individual had not been disciplined on grounds of a protected belief, but for the way, and the circumstances in which that view was expressed. Whichever approach is adopted by the courts and tribunals, the decisions in these cases are creating a growing jurisprudence in an attempt to distinguish between protected and impermissible anti-diversity speech.[64] What is accepted is that not all diversity-critical views are worthy of dismissal or other penalties, some attracting protection under the Convention rights of free speech and religion and conscience. However, as most cases are fact-sensitive and dependent on various factors, it will be quite some time before that case law provides clarity and coherence in what is an area filled with attrition and mistrust.

The decision in *Meade*, on the other hand, adds to a building jurisprudence concerning the acceptability or otherwise of diversity critical speech. Views on homosexuality and Trans gender issues that are simply contrary to ideas of diversity and respect for such groups will not offend principles of free speech and religious or other opinions. There must be some evidence of discrimination or clearly objectionable language or conduct. However, as we have witnessed in the cases above, that is a fluid distinction, made more uncertain by the nature of the employee's duties and the functions and outreach of the employer.

Finally, the law and its application will benefit from a measured balance of the conflicting rights by higher judicial authorities than employment tribunals. If employment law is now affected by human rights law, then serious consideration should be given to the scope of those rights and the jurisprudence of the domestic courts, and to the Strasbourg Court.

[64] In Scotland, the Hate Crime and Public Order (Scotland) Act 2021 has just come into force, on 1 April 2024, and which creates a new crime of stirring up hatred against any of the protected groups covered by the Act, including sexual orientation and transgender identity.