

RECENT DEVELOPMENTS

HUMAN RIGHTS

More on the control of diversity-critical speech: *Higgs* in the Court of Appeal

Higgs v Farmor's School [2024] EWCA Civ

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Introduction

In a previous article written in this journal we explored the dilemmas faced by tribunals and courts when balancing the right to express religious or philosophical views on diversity and equality with the rights of employers and other bodies to control or punish those views as being inconsistent with equality policies or damaging to the rights of others.¹ In these cases, the question is whether the critical views expressed are protected by both domestic law (s.13 of the Equality Act 2010) and the European Convention on Human Rights 1950) – freedom of expression (Article 10) and freedom of thought, conscience and religion (Article 9) – given domestic effect by the Human Rights Act 1998. Those human rights are not, in general, expressed in absolute terms,² and need to be balanced with other rights and duties, provided the restriction is prescribed by law and necessary in a democratic society for achieving a legitimate aim.³ This potentially includes the right of employers and other bodies to enforce their equality and diversity policies, and to protect the rights of affected groups not to be discriminated against. Such counter rights are guaranteed under Articles 8 and 14 of the Convention, securing, respectively, the right to private life and the right not to be discriminated against for exercising their Convention rights.

The key issue in domestic law is to devise a formula by which the rights of all parties are recognised and protected in practice, and to interpret and apply relevant law consistently with relevant Convention rights and the case law of the European Court of Human Rights.⁴ This will ensure that the right to free speech and to hold and manifest protected views are not curtailed for inadequate reasons – for example, that such views are unpopular, or that they simply cause offence to certain groups, or inconvenience to those who are seeking to enforce equality policies. Thus, there needs to be a pressing social need for any restriction on these rights; measures taken against the speech or beliefs need to be proportionate to the legitimate aims recognised by the qualifying provisions of Articles 9 and 10.⁵ There has, however, been a good deal of judicial and academic disagreement surrounding the process by which that balance is drawn, including what constitutes a protected belief, and whether that belief was the real reason for the discriminatory

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¹ See Steve Foster, 'The formula for justifying dismissal and discipline for diversity-critical speech' (2024) *Coventry Law Journal* 31.

² There is an absolute right under Article 9 to hold those opinions, but manifestation of such views is subject to lawful and necessary restrictions.

³ See, for example, *Eweida v United Kingdom*, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

⁴ This duty is imposed on the courts and tribunals by ss. 2 and 3 of the Human Rights Act 1998, which, respectively, require such bodies to take into account relevant European Court jurisprudence, and to interpret legislation, wherever possible, in light of the rights contained in the Convention, as given effect to by the 1998 Act.

⁵ In addition, certain speech will lose the protection of the Convention when, under Article 17 of the Convention, where it seeks to destroy the rights of others.

treatment.⁶ The decision of the Employment Appeal Tribunal in *Higgs v Farmor's School*,⁷ below, appeared to establish that a person should not be penalised for holding and manifesting their protected beliefs unless the measures taken against them were legitimate and necessary and proportionate in the circumstances. The EAT also made it clear that a protected belief is recognised as such despite the employer seeking to suppress or punish the view for another reason – the test, therefore was whether there was a sufficiently close and direct nexus between the speaker's conduct and her beliefs.⁸ This also ensures that a protected belief will not always win out, and needs to undergo a proportionality assessment to decide the outcome of the claim, either under discrimination law,⁹ or in an unfair dismissal case.¹⁰ This also allows the tribunal or court (in cases of direct discrimination) to decide that the real reason for the disciplinary action is not sufficiently related to the protected belief, but rather to the manner or circumstances in which those views were expressed.¹¹

These tests require the judge to assess a number of factors, such as the nature of the employment, the content of the employee's speech and actions, and the impact of those words or actions on the contract of employment and in upholding diversity and equality policies. The argument of the employee in the present appeal in *Higgs* was that once the court or tribunal decides that the views in question are protected by law, and there has been direct discrimination, then there is no need for the case to be decided on its merits, and no balancing exercise is required to determine the final outcome. This argument is based mainly on the idea that the employee has been subject to *direct* discrimination because of their views, and that the legislation does not provide for a defence of justification (proportionality) to excuse such discrimination. The Court of Appeal in *Higgs* was thus charged with answering that question: is it possible to justify an act of *direct* discrimination under the Equality Act 2010 by referring the case back to a tribunal to conduct a balancing exercise?¹² The Court of Appeal thus had the opportunity to clarify any inconsistency between the above tests and to provide guidance to employers and others on the enforcement and extent of protected beliefs. The Court of Appeal's decision in this case was therefore important not only in terms of the interrelationship of domestic law with Convention rights and the case law of the European Court of Human Rights, but for the balancing of various rights and interests in these cases.

Before we examine the Court of Appeal's decision in *Higgs*, it should be noted that recently the Supreme Court had to decide whether the term 'sex' in the 2010 Act referred to binary sex, or included those who had now represented themselves as male or female in contrast to their binary sex. In *For Women's Scotland Ltd v Scottish Ministers*,¹³ the Supreme Court held that a person's sex was determined at birth and was separate from a person's sexual orientation and representation of such. This judgment is mentioned here as much (though not all) of the recent debate and expression over sex and sexual orientation is based on both parties' disagreement on

⁶ See Foster, n. 1, above, and John Bowers, Accommodating difference: how is religious freedom protected when it clashes with other rights; is reasonable accommodation the key to levelling the field? (2021)10(2) *Oxford Journal of Law and Religion*, 275; 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) I.L.J. 1; Steve Foster, Free speech, equality and diversity: the legitimacy of controlling content-based expression under the ECHR and in domestic law (2023) 28(3) *Communications Law*, 102; Michael Foran, Discrimination and manifestation of belief: *Higgs v Farmor's School* (2024) 53(2), I.L.J., 285; James Murray, Manifestations of protected philosophical beliefs and academic free expression (2024) 5 E.H.R.L.R., 467-475; Keith Patten, Protected beliefs under the Equality Act: Grainger questioned (2024) 53(2) ILJ, 239.

⁷ [2023] ICR 1072.

⁸ Following the tests laid down in *Grainger plc v Nicolson* [2010] IRLR 4.

⁹ Equality Act 2010.

¹⁰ Employment Rights Act 2010.

¹¹ See, for example, *Page v Lord Chancellor* [2021] EWCA Civ 254 and *Randall v Trent College* [2023] 2 WLUK 493.

¹² This is permissible under the Act in a case of *indirect* discrimination – where a general condition has been enforced on everyone, but particularly affects those who hold protected beliefs – for example a rule which prohibits employees from voicing political views in and outside employment, but, the employee, argues, is irrelevant once she has been punished for holding the protected belief.

¹³ [2025] UKSC 16

that point. Thus, although the judgment of the Supreme Court was seen as a victory for those who insisted that sex was binary (and that non-traditional relationships are an offence to Christianity), the judgments in the *Higgs* (not a case involving gender identity and sex) and the *For Women's* cases add little to the *legal* arguments on the expression of such views and the balancing of respective arguments and claims. Indeed, the judgment has been referred for review in both the domestic and European Courts.¹⁴

***Higgs*, the facts and decision of the ET and EAT**

Before examining the Court of Appeal's judgment in *Higgs*, let us recap the decisions of the Employment Tribunal and the Employment Appeal Tribunal in that case.

Higgs was employed by a school as a pastoral administrator and work experience manager. She was dismissed for gross misconduct after the school received an external complaint about her Facebook posts, 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 LGBTQ+ 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 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. 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.¹⁵ Thus, 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 because 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.¹⁶

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 that approach; but rather found that the school's reason for disciplining and dismissing her 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'.¹⁷ Thus, the tribunal did not engage with the question whether this was, nonetheless, because of, or related to, his

¹⁴ A trans judge is taking a case to the European Court, arguing that the Supreme Court ruling interferes with trans rights to private and family life and freedom from discrimination: 'UK's first trans gender judge appeals to the European Court of Human Rights over Supreme Court ruling' *The Guardian*, 29 April 2025. Also, a hearing has been scheduled at the High Court in November 2025 to consider a judicial review arguing that the interim guidance issued by the EHRC following the Supreme Court ruling is in breach of trans and intersex people's rights human rights and contradicts existing legislation. The argument is that the guidance puts trans and intersex people at risk of being outed or singled out by their employers; and the advice that trans people should be excluded from the single-sex toilet corresponding to the gender they transitioned into is in contradiction with workplace legislation. See Leigh Day, 'Legal Challenge against EHRC Gender Guidance continues' 31 July 2025.

¹⁵ *Higgs v Farmor's School* [2023] EAT 89 [41-42].

¹⁶ *Higgs v Farmor's School* [2023] EAT 89 [57-58].

¹⁷ *Higgs v Farmor's School* [2023] EAT 89 [81].

manifestation of her beliefs.¹⁸ The Appeal Tribunal thus allowed the appeal, but remitted the case back to the tribunal for determination of whether the measures adopted by the school were prescribed by law; and, if so, whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others.¹⁹

Higgs in the Court of Appeal

The employee appealed against the EAT's ruling, arguing that once her belief had been accepted as coming within the 2010 Act, the treatment by the employer was automatically in breach of the Act, and thus there was no need to refer the matter back to the tribunal.

Allowing the appeal the Court of Appeal firstly clarified the ruling in *Page v NHS Trust Development*,²⁰ which decided that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred because of that manifestation, where it constituted an objectively justifiable response to something objectionable in the way the belief had been manifested. The Court of Appeal explained that that case introduced a requirement of objective justification into s.13(1) of the Act; and that *Page* was to be understood on the basis that incorporating the objective justification test was necessary to render s.13 compatible with ECHR rights (and in accordance with the Human Rights Act 1998 s.3, which required a Convention compliant interpretation wherever possible).²¹ The Court of Appeal in *Higgs* explained that even if s.3 was not engaged, there was nothing objectionable in the proposition that direct discrimination could be capable of justification. Direct discrimination in manifestation cases was different from discrimination on the ground of other protected characteristics because it was based not on the possession of the characteristic as such but on overt conduct; that put it in a special category that required a flexible approach.²²

Lord Justice Underhill noted that the European Court in *Eweida* had identified a fundamental difference between the right to hold a religious belief, which is absolute and unqualified, and the right to manifest it, which is subject to the limitations identified in Article 9(2) ECHR.²³ The reason being, that holding of a belief is in the nature of a characteristic, but its manifestation constitutes conduct that is outward facing and may need to be limited so as to take account of other interests. In judging the manifestation, the phrase 'necessary in a democratic society' in Article 9(2) required an assessment of the proportionality of the limitation in question, as set out by the Supreme Court in *Bank Mellat v Her Majesty's Treasury (No.2)*,²⁴ where Lord Reed identified four questions:

- (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question;
- (ii) (ii) whether the limitation is rationally connected to that objective;
- (iii) (iii) whether a less intrusive limitation might be imposed without unacceptably compromising the achievement of the objective;
- (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. Lord Reed noted that, in essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

Thus, *Eweida* established that the manifestation of a belief does not extend to every act that is in some way inspired, motivated or influenced by that belief. In order to count as a 'manifestation'

¹⁸ *Higgs v Farmor's School* [2023] EAT 89 [82].

¹⁹ *Higgs v Farmor's School* [2023] EAT 89 [ibid].

²⁰ [2021] EWCA 225.

²¹ *Higgs v Farmor's School* (Court of Appeal) [2025] EWCA Civ 109 [74].

²² *Higgs v Farmors School* [2025] EWCA Civ 109 [84].

²³ note 3, above

²⁴ [2013] UKSC 38.

within Article 9, as the act in question must be intimately linked to the religion or belief, and a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. Although the 2010 Act does not refer explicitly to a manifestation of a belief, it was clear that the prohibition against direct discrimination must be read as extending to such circumstances.²⁵ The Court of Appeal also noted that there will be cases where the treatment complained of was *ostensibly* on the ground of conduct that manifested a religious or other belief, but where it is found that the *real* reason was an animus against the belief in question; that would not be a ‘manifestation’ case at all, because the employer is motivated simply by the fact that the employee holds the belief. However, in a genuine manifestation case, the employer has no objection to the employee holding the belief and is motivated only by the conduct that constitutes its manifestation.²⁶

The Court of Appeal then dealt with the question of any reputational damage caused to the employer by the employee’s posts. In the Court’s view, if that was the effect of the tribunal’s reasoning, it was wrong in principle, as an employer did not have *carte blanche* to interfere with an employee’s right to express their beliefs on that basis. However, neither did an employee have *carte blanche* about what they could say in public as the characteristics of the employment relationship could entitle the employer to impose limitations on the employee’s rights to manifest their beliefs and of free expression, such considerations being relevant to the proportionality of such interference. Thus, the tribunal could consider the subject-matter of the expression of belief (a statement about matters which had nothing to do with the employer’s business was less likely to damage its reputation than a statement about matters which were central to it); the way the employee expressed their beliefs (even where the belief was protected, an employer could suffer reputational harm from being associated with an employee who expressed it publicly in an inappropriate way; and whether it was clear that the views expressed were personal to the employee. Thus, the school’s reliance on reputational damage was open to it in principle.²⁷ The Court of Appeal then stressed that in the context of objective justification, it is necessary to judge an employee’s statement by what is said rather than by what some readers might choose illegitimately to read into it. That, in the Court’s view is particularly important in the current social media climate, where messages are often read hastily and sometimes by people who are partisan or ill intentioned, or who simply succumb to the common human tendency to find in a communication what they expect to find rather than what is actually there. Falk LJ thus added that the test is an objective one: what meaning do the words used actually have and what message would they convey to a reasonable reader?²⁸

Turning to the facts, the employee had submitted that the accusation that she had homophobic and transphobic attitudes was not based on any actual expression of such attitudes in the posts, but on an assumption that anyone who expressed the protected beliefs must be homophobic or transphobic. In the Court’s view, whether the school’s response to the posts had been objectively justified, it was necessary to judge the employee’s statements by what they actually said, albeit including any necessary implications, rather than by what some readers might illegitimately read into them²⁹ Further, in the Court’s view, the tribunal would be bound to find that the dismissal had not been objectively justified and therefore constituted unlawful discrimination. Even assuming that the school had been entitled to take objection to the posts on the basis that the language had been gratuitously offensive and that it had been used in the context of sex education in schools and was accordingly relevant to the employee’s work, dismissal, in the Court’s view, had unquestionably been a disproportionate response. Even if the language passed the threshold of objectionability, it was not grossly offensive, and it did not appear to be primarily intended to

²⁵ *Higgs v Farmors School* [2025] EWCA Civ 109 [54]. Underhill LJ cited *Bougnaoui and anor v Micropole SA* (Brief 1067), the European Court of Justice held that, in so far as the ECHR uses the term ‘religion’ in a broad sense to include the manifestation of religious beliefs, the EU legislature must be considered to have intended to take the same approach when adopting the EU Equal Treatment Framework Directive (No.2000/78).

²⁶ *Higgs v Farmors School* [2025] EWCA Civ 109 [55]

²⁷ *Higgs v Farmors School* [2025] EWCA Civ 109 [144]

²⁸ *Higgs v Farmors School* [2025] EWCA Civ 109 [81].

²⁹ *Higgs v Farmors School* [2025] EWCA Civ 109 [148-151].

incite hatred or disgust for homosexuals or Trans people. Further, the language was not the employee's own, but a summary of previously published views of others. Although that did not absolve her of responsibility for re-posting, it was relevant to the question of culpability. Also, there was no evidence that the school's reputation had been damaged, as neither the panel nor the tribunal had believed that the employee would let her views influence her work. Although the panel believed that the employee had no insight into the consequences of her actions, lack of insight could not justify dismissal rather than a less serious sanction, although there could be no universal rule. In the Court's view, if the case was not one that would otherwise justify dismissal, it was hard that it should be marked up in seriousness because of a failure to make an acknowledgement of fault which the employee would genuinely find difficult.³⁰ The Court noted that the employee's posts were published in a forum that had nothing to do with the school and would be likely to be seen by only a small number of people, not all of whom would know of her connection with the school. Although this was highly relevant to the extent and gravity of any reputational damage that the school might suffer, it was not a complete answer, as there was no guarantee that the posts would only be seen by those to whom she had granted access and, in any event, publication only to her Facebook friends could still in principle have damaged the school's reputation among the local community who had close connections to the school.³¹

The Court of appeal thus concluded that the tribunal was bound to find that the dismissal was not objectively justified and accordingly constituted unlawful discrimination. Although the Court was prepared to assume (without deciding) that the school was entitled to object to the Facebook posts, on the basis that the language used was gratuitously offensive to gay and/or trans people in its reference to 'the LGBT crowd', and that the context of sex education in schools was relevant to her work, the dismissal was unquestionably a disproportionate response. Even if the language used was objectionable, it was not grossly offensive; the description of the promoters of gender fluidity as 'the LGBT crowd' did not appear to be primarily intended to incite hatred or disgust for gay or trans people, but was one of a series of derogatory sneers, alongside 'liberal school systems' and 'far-left zealots'. Although the posts used 'stupidly rhetorical exaggeration' about child abuse and the promotion of mental illness, this was not likely to be taken literally. They were, therefore, a long way from the kinds of direct attack on, for example, homosexuality which could be found in other cases. Further, the language was not her own (except for her repetition of the word 'brainwashing'), as she had reposted messages from others and had made clear to the school that she did not agree with the language used. Further, there was no evidence that the reputation of the school had been damaged; rather, the school's concern was about potential damage. The school accepted that there was no possibility that readers of the posts would believe that they represented the school's views, and any reputational damage would only take the form of the fear expressed by the original complainant: that H might express homophobic and transphobic attitudes at work. While the school's reputation could have been harmed had that belief become widespread, the risk was speculative at best. The posts were made on H's personal Facebook account, in her maiden name and with no reference to the school. By the time of the hearing, only one person was known to have recognised who she was. Finally, even if readers of the posts feared that H would let her views influence her work, neither the disciplinary panel nor the tribunal believed that she would do so. There was no reason to doubt her assertion that her concern was specifically about the content of sex education in primary schools; that she would not bring this into the secondary school where she worked; and that she would never treat gay or Tran's pupils differently. The Court of Appeal thus allowed the appeal and substituted a finding that H had been unlawfully discriminated against.³²

³⁰ *Higgs v Farmors School* [2025] EWCA Civ 109 [157-166], citing *R (Ngole) v University of Sheffield* [2019] EWCA 1127.

³¹ *Higgs v Farmors School* [2025] EWCA Civ 109 [166].

³² The Court considered that it was not in a position to decide whether the disciplinary process leading to H's dismissal was also unjustified. It accepted that the school was entitled to investigate the complaint; indeed, it would have been irresponsible not to have done so. However, it was debatable whether that investigation needed to be

The Court of Appeal then went on to clarify the principles of free speech that relate to these cases, Underhill LJ noting three key principles derived from the relevant case law. First, freedom of speech necessarily entails the freedom to express opinions that may shock and offend; secondly, the protection of freedom of speech is particularly important in the case of ‘political speech’ – that is, expression of opinion on matters of public and political interest; and thirdly, it is important to be alive not just to the effect of restrictions on freedom of speech in the case under consideration, but to their chilling effect more widely. Thus, any court or tribunal must have these principles at the forefront of its mind when considering a case involving freedom of speech, including the expression of religious or other beliefs.³³ These principles were considered by the Court of Appeal in *Page*, where it was held that a magistrate was not subjected to direct discrimination when he was removed from judicial office and from a non-executive directorship of an NHS Trust after publicly expressing his faith-based objection to the adoption of children by same-sex couples. His Lordship stated that *Page* was decided on the basis that adverse treatment in response to an employee’s manifestation of his or her belief was not to be treated as having occurred ‘because of’ that manifestation if it constituted an objectively justifiable response to something ‘objectionable’ in the way in which the belief was manifested. ‘Objectionable’ in this context meant ‘to which objection could justifiably be taken’, and thus *Page* introduced a requirement of objective justification into the causation element under the Act and treated the test of objective justification as not substantially different from that under Article 9(2) of the Convention.³⁴

First, although the reasoning in *Page* did not directly apply the four-step process identified in *Bank Mellat*, it was a compressed version of the same exercise, involving (a) the identification of a feature of the employee’s conduct to which the employer could legitimately object (broadly corresponding to step (i)), and (b) an assessment of whether the employer’s response to that feature was proportionate (broadly corresponding to steps (ii)–(iv)). Secondly, in addition to the test of objective justification, Article 9(2) contained a requirement that the act be ‘prescribed by law’, which did not cause any conceptual problem, because the employer’s rights under the employment contract provided the necessary framework of ‘law’. Thirdly, the burden of proving objective justification was on the employer, and fourthly, although *Page* imported a test of objective justification into the separability approach, it only did so because the Convention protects the right to manifest a religious belief, and this had no impact on the application of the separability approach in other cases.³⁵

Underhill LJ then accepted that his judgment in *Page* did not clearly explain the jurisprudential basis of the decision that an objective element could be introduced into the 2010 Act and explained that, in accordance with s.3 of the Human Rights Act, the incorporation of the test of objective justification in Article 9(2) was necessary to render the Act compatible with Convention rights. Underhill LJ adopted ‘a more sophisticated argument’. The Equality Act did not explicitly protect the manifestation of a belief, but only the right not to be discriminated against because of, or on grounds of, religion or belief. That implicitly extends to the protection of a manifestation of a belief, as the domestic courts were obliged as a matter of EU law and s. 3 of the Human Rights Act to construe the Act to achieve the result stated by the ECJ, and for achieving consistency with the Convention. In his Lordship’s opinion, that did not go against the grain of the Act to ‘read down’ ss. 4 and 13 of the Act in that way, but was necessary to achieve compatibility with the rights conferred by Article 9 with the result that the right to manifest a belief received only the qualified protection identified in Article 9(2). The option most consistent with the reasoning in *Page* would, thus, be to read words into s. 13(1) providing that treatment

disciplinary in nature, whether it was necessary to suspend H during the investigation, and whether the investigator was justified in finding a case to answer. Given that H’s real complaint concerned dismissal, however, the Court expected that the parties would be pragmatic so as to avoid remission of the complaint about the disciplinary process. [2025] EWCA Civ 109 [170].

³³ *Higgs v Farmors School* [2025] EWCA Civ 109 [100].

³⁴ *Higgs v Farmors School* [2025] EWCA Civ 109 [103].

³⁵ *Higgs v Farmors School* [2025] EWCA Civ 109 [102].

that was a proportionate response to the objectionable way in which an employee manifested a protected belief should not be treated as having been done because of that belief.³⁶

His Lordship also added that *Page* could be justified by applying ordinary principles of domestic construction; that the legislature could not have intended that an employer should be obliged to tolerate any conduct at all by an employee which constituted a manifestation of a belief, whatever form it took and whatever the circumstances.³⁷ The Court in *Page*, drawing on the separability approach, believed that such a limitation was best incorporated into the Act by treating it as going to the requirement of causation in s.13 of the Act. The result was that, where the act complained of was objectively justified, it should not be treated as being done ‘because of’ the manifestation in question. It was argued that this approach undermined an essential feature of the law of direct discrimination – namely, that direct discrimination cannot generally be justified. While Underhill LJ saw the force in that objection, he considered that it could not prevail if the incorporation of an objective test was required by s.3 of the Human Rights Act, and that in any event, certain types of direct discrimination – notably, direct age discrimination – were capable of justification.³⁸ Underhill LJ also suggested that direct discrimination in ‘manifestation’ cases is different from other types of discrimination because it is based, not on the possession of a protected characteristic, but on overt conduct that has the potential to have an impact on the interests of society and the rights and freedoms of others. That distinction may put it in a special category that requires a more flexible approach.³⁹

Higgs v Farmors School: commentary

Cases where individuals are penalised for airing anti- or alternative views on sexual diversity have attracted an enormous amount of media coverage, public discussion and litigation before tribunals and courts. Following the much-anticipated ruling of the Court of Appeal in *Higgs* we should now be closer to resolving the dilemma in balancing the right of individuals, including employees, to hold and manifest their religious, conscientious and philosophical views on sexuality without fear of dismissal or other disciplinary action.

As seen in the introduction, such views potentially engage a number of statutory and human rights.⁴⁰ In addition, Article 9 guarantees the absolute right to hold views based on thought, conscience and religion, and a conditional right to manifest such views, subject to any restriction which is clearly prescribed by law, and necessary in a democratic society to achieve a legitimate aim; in these cases, the protection of the rights of others (or, possibly, public morality). The task of domestic law in this area is, at least, twofold. First, it must accommodate, and then balance, the rights both of the speaker – to hold and express their views on sexuality – and the rights of others – not to be discriminated against on grounds of those views and their acceptance by employers or other bodies, or the right (and duty) of employers and other bodies to uphold principles of equality and diversity. This involves making a distinction between views that represent one’s thought, conscience and religion (or in domestic law, religion and belief), and views that do not come within those definitions – either because they are not serious or strong enough to be included or are inconsistent with current democratic views and practice: for

³⁶ *Higgs v Farmors School* [2025] EWCA Civ 109 [104].

³⁷ *Higgs v Farmors School* [2025] EWCA Civ 109 [105]. Examples included the wearing of clothes or jewellery that would create a serious risk to health and safety at work, or religious proselytization in the workplace. It followed that it was in accordance with the legislative purpose to construe the Equality Act, so far as possible, so as to incorporate some such limitation.

³⁸ *Higgs v Farmors School* [2025] EWCA Civ 109 [106].

³⁹ *Higgs v Farmors School* [2025] EWCA Civ 109 [107]. Finally, the Court accepted that a decision maker will discriminate where the reason for the treatment is significantly influenced, whether consciously or unconsciously, by a stereotype that persons who hold or manifest a particular belief will share attributes of a group which they might not in fact possess. However, it was unnecessary for the Court to reach a decision on H’s argument that the person who complained about her Facebook posts was guilty of unlawful stereotyping and that the school had adopted those discriminatory views. *Higgs v Farmors School* [2025] EWCA Civ 109 [108].

⁴⁰ Protection is also provided to employees under the Employment Protection Act 1995 against unfair dismissal in such circumstances; such dismissal claims often being combined with claims under the 2010 Act.

example, beliefs based on racial or other prejudice. The second general problem is how the above dilemma can be achieved in a way that reconciles domestic law with our obligations, under the Human Rights Act 1998 and the European Convention on Human Rights. The Convention does not require that our law corresponds exactly with relevant Convention rights; it could, therefore, provide *greater* protection to free religious speech, or, indeed, to the counter right to be protected against such views. Such is the margin of appreciation offered to states in these areas. However, domestic law needs to strive for as much consistency as possible with Article 9 (and 10) of the Convention in this area. One of the essential purposes of the 1998 Act was to avoid unnecessary applications to the Strasbourg Court, and, thus, to resolve ‘Convention’ rights and issues at the domestic level. Disappointed applicants at the domestic level – whether it be the speaker or someone whose Convention rights have been affected by the speech and its protection – are likely to appeal to the European Court of Human Rights for protection.⁴¹

Now let us consider more specific issues raised under those two broad questions, and which lay at the basis of the appeal in *Higgs*, and the need for the Court of Appeal to provide clarity in this complex and controversial area.

How should domestic courts and tribunals determine whether the view is protected, under both domestic law or under Article 9 and 10 of the Convention, and at what point of their investigation should that question be resolved?

To engage Article 9 or the protection under the Equality Act 2010 the views must fall within the definitions established by the European Court of Human Rights or domestic law. In this sense, clear guidance has been provided by the EAT in the case of *Grainger v Nicolson*.⁴² Alternatively, in unfair dismissal cases, the speaker may rely on Article 10 of the Convention, which provides a more general right to hold and express opinions, and which is more dependent on a general right not to be treated unfairly for holding or expressing opinions. The test in *Grainger* subjects the belief or opinion to standards of cogency and seriousness in order to justify its recognition as a *human* right, as well as excluding views and opinions that are inconsistent with democracy and human dignity and the *fundamental* rights of others. This test would exclude views that are inconsistent with Article 17 of the Convention, which excludes the protection of certain Convention rights (such as speech etc.) when those views are aimed at the destruction of the rights of others. Thus, views based on racial or other hatred, or in our type of case, abject intolerance to the rights of sexual minorities, could fall foul of Article 17 and, thus, the protection offered by Articles 9 and 10 ECHR, and the Equality Act 2010.⁴³

⁴¹ The litigation involving the ‘gay cake’ case (*Lee v Ashers Baking Company* [2018 UKSC 47]) is a good example of this; here, the decision of the Supreme Court upholding the right of the shop to hold views on homosexuality was appealed to the European Court on the basis that domestic law failed to provide adequate protection to the customer’s right to private life (under Article 8) and freedom from discrimination (under Article 14). The case was dismissed as the claimant had failed to exhaust all effective domestic remedies before using the Convention procedure and applying to the Court for an international remedy (*Lee v United Kingdom*, Application No. 188060/19). That case is a perfect illustration of the need for common practice and interpretation between domestic law and the jurisprudence of the European Court in these areas – where specific domestic law is based on the rights contained in the Convention; thus, helping domestic law to provide remedies and justice consistently with our obligations in international human rights law. At the very least, not to follow or accommodate the principles used by the European Court under Article 9 when applying domestic law in this area, risks further litigation in Strasbourg, adding to the confusion over the relationship between the two mechanisms for resolving human rights disputes.

⁴² Thus, the belief must be genuinely held; must be a belief and not an opinion or viewpoint based on the present state of information available; 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 importance; and it must be worthy of respect in a democratic society, and not be incompatible with human dignity and not conflict with the fundamental rights of others.

⁴³ There is some case law that exclude such views from protection, although there is often uncertainty as to whether the view loses protection under Article 17, or because, more broadly, whether there is a legitimate reason to restrict or exclude that opinion or its manifestation, and that reason was dealt with proportionally by the decision maker. See, for example, *Thomas v Borders Partnership NHS Trust* [2024] EAT 141 – a belief in English nationalism,

Also important is the question, *at what point* the court or tribunal determine whether the speaker has been discriminated against under the Equality Act or in breach of their Article 9 rights under the Convention. Is it when it is deciding whether the opinion or belief comes within the Act or Article 9, as interpreted by the European Court and under the *Grainger* test, or at a later stage when, having decided that the opinion *is* protected, but needs to be compromised for a legitimate reason? The test adopted in *Page* appears to consider the real reason for the sanction – whether it was the speaker’s protected beliefs, or the objectionable manner in which the speaker has expressed that belief. This gets round the problem that there appears to be no justification for an act of direct discrimination under the 2010 Act. The court or tribunal thus decide that the *real* reason for the sanction was not based on the protected category, but another reason relating to the manner and circumstances of the expressed belief. However, following *Higgs* in the Court of Appeal, this can be achieved by importing a justification defence into the Equality Act, even for cases of direct discrimination, and thus ceases to provide any real obstacle to judicial reasoning in this area.

Accordingly, the Strasbourg Court generally proceeds in two stages: is the view covered by Article 9; and then can its interference be justified in the proportionate pursuance of a legitimate aim. *Higgs* now appears to use this approach, and thus avoids that inconsistency between domestic law and the resolution of Convention rights. In these cases, therefore, the court or tribunal should take the two-step approach and consider the necessity and proportionality of the sanction once it has accepted that the speaker holds, and/or has expressed, a protected belief. To adopt this approach, the Court of Appeal in *Higgs* has used s.3 of the Human Rights Act 1998 to interpret the relevant legislation in a way that allows a proportionality test to be applied to a case of direct discrimination. In that way, those adopting and affected by diversity policies can understand the two-stage approach, and the courts and tribunals can formulate a reasoned approach to fairness and proportionality in the circumstances of the case. In *Higgs*, the speaker’s argument is that once the belief has been accepted as protected under the 2010 Act, there is then no need to consider the fairness and proportionality of the employer’s sanction. The decision of the Court of Appeal is thus helpful in these cases, as the two-stage approach is more consistent with the one taken by the Strasbourg Court, and more readily likely to be understood by tribunals, courts and the parties to the case.

What is the legitimate aim of the employer or other person in these cases; and is it worthy of protection?

Assuming that it is proper for a court or tribunal to assess the proportionality of a sanction imposed on someone who has expressed their protected belief, what reasons can an employer or other body put forward to justify that treatment or act of discrimination? In order to justify the sanction in terms of Convention rights and their restriction under paragraph (2), in most if not all cases the relevant legitimate aims appear to be ‘the rights of others’ or, more indirectly, the protection of morals.

The reason of rights of others, it is argued, problematic, as what *rights* is the employer or other body seeking to enforce and protect when applying diversity and equality policies against a speaker? In cases such as *Higgs*, the beneficiary of the sanction, or official policy, could be the person who is enforcing the policy – to defend the right to reputation and standing of an employer who wishes to impose standards of equality and diversity in the modern workplace. Can such a claim constitute a ‘right’ under Article 9, or does the right have to be one which is enforceable in the law, rather than in morality or sound industrial practice? It is argued that an employer’s desire to invoke a policy of anti-discrimination or diversity should be recognised as such a right: not only is that policy consistent with ideas of equality enshrined in the European Convention and

which included the view that there was no place in British society for Muslims or Islam, was not capable of protection under article 10, as it would offend the protection of rights set out in Article 17.

the Human Rights Act 1998, but is augmented by a statutory duty imposed under the 2010 Act to secure such equality. The employer or other body surely have the right to insist that employers and others under their control assist them in achieving those duties; or at least do not frustrate their efforts to meet those duties.

The aim of achieving and furthering morals is more indirect and less simple to justify. Traditionally, that concept has been employed by the European Court to justify restrictions of the right to free speech that fall foul of domestic laws on indecency, obscenity and blasphemy.⁴⁴ To impose a duty on employers and other bodies to protect the aims of public morality, and as a consequence impose a duty on the speaker to respect those standards, appears rather far-fetched and unnecessary; and perhaps that concept could be included under the grounds of the rights of others, above, and the rights of others to equality, discussed below.

We can now consider the rights of those who are directly or indirectly affected by the expression of protected beliefs: in the *Higgs* type of case, those affected are those who feel that they are under attack from anti-diversity views, and that such views interfere with the enjoyment of their Convention or other legal rights. Although it is accepted that no one, including minority groups, have the 'right' not to be offended by such beliefs and their manifestation, it is argued that viewing such beliefs as merely offensive belies the reality of such views and their impact on the targeted group. In practice, therefore, the public manifestation of such views, particularly those based on traditional views on equality, diversity and morality has had, and continues to have, a deleterious impact on the enjoyment of the rights of various sexual groups. In such circumstances, therefore, it is arguable that the term 'rights' should be extended to the right to be included in the equal protection of rights. That does not include the right for others to agree, unreservedly, with that group's inclusion, or for the right to be free from offence, but it is still possible to argue that those groups have a right to respect for such views and inclusion in public affairs and discussion.

The Court of Appeal does not deal with the issue of legitimate aims directly but appears to accept that employers and others are entitled to restrict manifestations of belief and speech, provided the restriction is necessary, relevant and proportionate. Thus, once the court or tribunal is satisfied that there was a legitimate aim behind the sanction, they will then need to consider a number of questions: whether that legitimate aim was relevant to that employment or other position; and, particularly in unfair dismissal cases, whether the employer's sanction was fair and reasonable. Further, if Convention rights are engaged, whether the sanction was proportionate to protecting any legitimate aim. That involves considering the nature of the employment, together with the employer's or other bodies' public status and its responsibility to uphold diversity and equality; the likely or proven harm caused by the dissemination of those beliefs or views to the undertaking or to those connected to the undertaking (for example customers), including the enjoyment of any human or legal rights of those targeted by those views. It is submitted that most cases determined by the domestic courts in this area, apart from those subject to successful appeal, have managed to consider all, or most of these factors, and that the decisions, have, one way or another, managed to incorporate and examine all these relevant questions. However, it is suggested that a more logical and consistent approach to those issues would clarify the judicial role to balancing resolving these dilemmas, and lead to an approach that is more consistent with both the Court of Appeal's reasoning in *Higgs* and the Strasbourg jurisprudence in this area.

Can the courts or tribunals provide greater protection to the right of free speech and freedom of speech and (religion) over the duty to protect the rights of others to equality and diversity in these cases?

As mentioned above, provided domestic law and its application and interpretation comply with the human and other rights of both the speaker and those affected by those views, the Convention and the 1998 Act allow the legal system to give greater weight to either values of free speech and freedom of thought, conscience and religion or the right of employers and others to enforce

⁴⁴ See, for example, *Handyside v United Kingdom* (1976) EHRR 1.

equality and diversity policies and to respect for their private life and to be free from discrimination. This reflects the margin of appreciation allowed by the European Convention and the Strasbourg Court.⁴⁵

Until recently, the domestic courts appeared to allow anti-discrimination law and practice to be enforced irrespective of the effect such law had on freedom of expression and the right to hold and manifest one's beliefs.⁴⁶ This was despite ss. 12 and 13 of the Human Rights Act 1998 stating that the courts must give 'special regard' to those two rights. The courts thus allowed the legal system to pass and enforce protective legislation, which speakers needed to follow despite their strong opinions and beliefs. Recent case law, from both Strasbourg and domestically, appears to redress this imbalance and insist on sound reasons to interfere with Article 9 and 10 rights. Thus, the argument in *Higgs* and other cases is that general diversity and equality policies should not deprive individuals and groups of their Article 9 and 10 rights, unless that restriction is for a legitimate aim, and the sanction was necessary and proportionate in all the circumstances. This preference for free speech and belief is also strengthened by the fact that those rights are directly protected by the Convention and the Human Rights Act, whereas the right to uphold principles of equality and diversity lack the status of Convention rights, and simply justify a restriction of such rights in appropriate circumstances. This argument has been effectively rebutted by the courts accepting that ss.12 and 13 of the Human Rights Act give effect to Articles 10 and 9 in their entirety – including the restrictions to those rights. Further, as has been pointed out above, certain speech and beliefs may discriminate against certain minorities, thus engaging their Convention rights: to private life, and the right to be free from discrimination in the enjoyment of those rights.

The Court of Appeal's ruling clearly favours, as a starting point, free speech and belief rights over and above claims that such speech interferes with equality and diversity, and the employer's attempts to enforce those policies. The ruling provides a presumption of free speech and opinion, requiring employers and others to provide clear and objective evidence for interference, and to apply proportionate sanctions on the speaker. That represents the case law of the Strasbourg Court and recent decisions in the domestic courts. However, a legal system that ignores the rights of those attacked by speakers runs the risk of rejecting the state's general and legal duty to promote tolerance, equality and diversity – surely an accepted concept in all democratic societies – and, in appropriate cases, of refuting the human rights claims of those affected by the dissemination of opinions and beliefs.

Conclusions

The ruling of the Court of Appeal in *Higgs* goes a long way to clarify the jurisprudential issues raised in these cases.⁴⁷ The judgment is to be commended for creating greater consistency between the ECHR Articles and the case law of the Court and domestic law and decisions in this area; and in a way that is more easily understood by employers, employees and others (including academics). However, insisting that employers and others can only justify disciplinary action against diversity-critical speech if it is objectionably justified, may cause several problems to those enforcing equality and diversity policies, and it may take some time for the case law to provide a clear and reliable guide to those affected.

Equally, the decision, in taking a pro-speech and belief stance, might have failed to accommodate the need to protect others from damaging diversity-critical speech. This might lead to actions, in domestic law and in Strasbourg, in cases different from *Higgs*, claiming that the present law and its interpretation fails to provide adequate protection to a person's right to private life and freedom from discrimination. Those holding 'traditional' views on sex, sexual orientation and sexual practices will see both the Court of Appeal's decision and the recent Supreme Court

⁴⁵ See *Handyside v United Kingdom* (1976) EHRR 1.

⁴⁶ See, for example, *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

⁴⁷ Leave to appeal to the Supreme Court was refused on 10 June 2025.

decision on the meaning of sex, as vindication of their views. In the latter judgment, Lord Hodge in the Supreme Court was careful to point out that the parties bringing the claim should not see the judgment as an outright victory in terms of the ongoing debate in this area. That decision therefore was based on the statutory interpretation of words used in the 2010 Act, not as a statement that one view on sex and sexuality is preferable to another. Equally, although the Court of Appeal's decision appears to favour free speech and belief over the duty to uphold equality and diversity, there will be cases, more complex perhaps than the one in *Higgs*, where that duty, and the individual rights that go with it, will outstrip free speech and belief.