

EMPLOYMENT LAWYERS' GROUP (NI)

When Rights Collide, the Fallout and the Make Up

- *An analysis of the clash between gender critical beliefs and trans rights*

Rachel Best KC

Email
Rachel.Best@barlibrary.com

Website
www.barofni.com





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GENDER CRITICAL BELIEFS

GRAINGER PLC V NICHOLSON

EAT – 5 CRITERIA:

- i) The belief must be genuinely held;
- ii) It must be a belief and not an opinion or viewpoint;
- iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
- v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.



GENDER CRITICAL BELIEFS

- Philosophical belief in the sanctity of copyright law?
- No according to the CA in *Gray v Mulberry* [2019]
- Opinion on local council policies?
- Unlikely – *Lackey v London Borough of Haringey* 2023
- Belief that COVID-19 vaccine could seriously impact health?
- Potentially
- Belief that sex is biological and immutable?
- Yes- *Forstater v CGD*



MAYA FORSTATER V CGD EUROPE

- Maya Forstater was contracted as a visiting fellow by the Center for Global Development Europe (CGD) think tank. In 2018, she posted several tweets and had a discussion with a staff member expressing her belief that sex is immutable and not to be conflated with gender identity.
- She also expressed her opposition to proposed changes to the Gender Recognition Act 2004 (GRA) that would allow transgender people to achieve legal recognition of their acquired gender based only on self-identification.
- As a result, CGD did not renew her contract at the end of 2018.
- She brought claims for discrimination and victimisation.



MAYA FORSTATER V CGD EUROPE

- ET Claim failed- fifth criteria of Grainger.
- EAT held ET erred in their application of the Fifth Grainger principle.
- A philosophical belief would only fail to satisfy the fifth criteria “***if it was the kind of belief of which would be akin to Nazism or totalitarianism***”.



MACKERETH V DWP

Dr David Mackereth's views related to his Christian beliefs, including that people cannot change their sex or gender.

He applied for a job as a health and disabilities adviser with the Department for Work and Pensions (DWP). He stated his objections to addressing service users by pronouns, titles or forms of address that differed from their sex registered at birth. This contradicted his employer's policy and, after attempting to clarify the position with him, his contract was terminated.

He brought an employment tribunal claim of discrimination on the grounds of religion or belief against DWP.



MACKERETH V DWP

- The tribunal found his gender critical beliefs did not meet the Grainger criteria for protected beliefs under the Equality Act and that, even if they did, no discrimination occurred.
- On appeal the EAT found David Mackereth's gender critical beliefs did meet the Grainger threshold for protection but, nevertheless, that no direct or indirect discrimination took place.



Two important points have been established:

Firstly, that gender-critical beliefs can be protected from discrimination under the Equality Act 2010.

Secondly, however, that the ways in which such beliefs manifest themselves in behaviour might not be protected.

Difficulty for Employers is the need to both avoid discrimination against people because of gender-critical beliefs and also avoid discrimination on the basis of gender reassignment.



BAILEY V STONEWALL EQUALITY LTD & OTHS

- A barrister and founder of the LGB Alliance campaign group, brought a discrimination claim against Garden Court Chambers, and a connected claim against the charity Stonewall, alleging Stonewall had induced or caused the Chambers to discriminate against her because of her gender critical beliefs.
- She had tweeted her opposition to Stonewall's campaign for legal gender self-identification. The respondents accepted, that gender critical belief was protected under the Equality Act but disputed "that her views about Stonewall's campaigning on gender self-identity are part of this protected belief."



Held : Bailey's beliefs and disagreement with Stonewall's campaigning were protected as they could not be separated from one another.

The judgment said: Belief on gender theory is a belief about a weighty and substantial aspect of human life, especially when reform of the law based on that belief may have significant practical consequences for women as currently defined in law.



MEADE V SOCIAL WORK ENGLAND & OTHERS

A tribunal found that Westminster city council and Social Work England had discriminated against Rachel Meade on the basis of her protected beliefs under the Equality Act 2010.

Social Work England sanctioned Meade for misconduct, as a result of a complaint from a member of the public about Meade's FB posts. This led to Westminster city council suspending her on charges of gross misconduct before giving her a final written warning.



HIGGS V FARMOR'S SCHOOL

- Teacher- social media posts re opposition of teaching of “gender fluidity”
- Dismissed due to the posting of messages.
- Brought proceedings – unlawful discrimination on grounds of religion/ belief.
- ET- held beliefs protected but dismissed claim on other grounds.
- EAT- found ET’s reasons for dismissing the claim were legally flawed and ordered that the claim be sent back and redetermined.
- Higgs appeal to CA.
- CA allowed the appeal.



HIGGS V FARMOR'S SCHOOL

- CA: Held that the dismissal of an employee only because they have expressed a religious or other protected belief to which the employer objects, or which it fears will offend a third party with whom it wishes to protect its reputation, will constitute unlawful direct discrimination within the meaning of the Equality Act.



KEY TAKEAWAYS

- Need for employers to be mindful of the kind of workplace culture they want to promote.
- A fair balance must be struck between allowing freedom of speech and tolerating opposing beliefs.
- Whilst also ensuring employees have a safe environment that is free from discrimination and harassment.



KEY TAKEAWAYS

- Employees are entitled to hold gender-critical beliefs.
- Important for employers to review their policies and handbooks; provide training and relevant education programmes in order to help protect both the employees and themselves.



