# Employment Law Brief

## With Darren Newman

It is a sad reflection on the heat generated by the debate over trans rights that in its decision in Forstater v CGD Europe the EAT had to spell out what its decision did not mean. It did not mean that they were expressing a view on the merits of either side of the transgender debate; it did not mean that trans people were not protected by the Equality Act and it did not mean that employers and service providers would not be liable for acts of harassment and discrimination against trans people carried out in the course of employment.

What the decision does mean however is that those with gender-critical beliefs – which we can broadly take to be a set of beliefs about the importance of biological sex rather than gender expression in the consideration of discrimination against women – are entitled to the protection of the Equality Act. Their beliefs fall within the protected characteristic of religion or belief.

Ms Forstater is a freelance writer and researcher whose contract as a visiting fellow at a think tank was not renewed – she alleges – because of the gender critical views that she had expressed on social media. The Tribunal initially dismissed her discrimination claim, finding that her beliefs about the immutability of biological sex – she essentially believes that trans women remain biologically male and that in some circumstances it is important to acknowledge this – did not qualify for protection. The Tribunal found that her beliefs were 'not worthy of respect in a democratic society'. This certainly seems an extreme position for the Tribunal to take. Her beliefs are controversial and considered by many to be offensive – but they are also widely shared. Condemning them as not worthy of respect seems like a rather partisan line for the Tribunal to take.

There is slightly more to it than that. The Tribunal's finding was based on one of the accepted criteria for judging whether or not a belief is protected. In the case of Grainger v Nicholson (2010) the EAT set out five criteria derived from case law dealing with the right to freedom of religion and belief under Article 9 of the European Convention on Human Rights. The fifth criterion is that the belief must be 'worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others. The Tribunal's view was that Ms Forstater's beliefs failed this test because they were in conflict with the rights of trans people established by earlier decisions of European Court of Human Rights.

The EAT has overturned this decision and held that only the most extreme beliefs should be held to fail the 'worthy of respect' test. They really were very clear about this: saying that it was only beliefs 'akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms' that were excluded from protection. That certainly sets the bar pretty high. It should at least avoid a slew of further cases in which Tribunals have to weigh up a range of controversial opinions and decide on whether or not they are worthy of respect. In the vast majority of cases, it will be clear that they are.

There really should not be a problem with opening up the category of religion and belief in this way. As the EAT made clear, just because Ms Forstater is protected by the Equality Act, that does not erode the protection afforded to anyone else. The right not to be discriminated against or

harassed does not involve a right to discriminate against or harass others. Protected characteristics under the Equality Act are not in competition with each other - it is not accidental that Section 4 of the Act lists them in alphabetical order. It is unlawful to treat somebody less favourably on the grounds of their belief, but it is not unlawful to require them to treat others with respect and avoid subjecting them to harassment. This distinction is particularly important when it comes to the protected characteristic of religion and belief because a strong belief in a controversial position – whether religious or philosophical – might well affect how you interact with others. But so far Tribunals and the EAT have been happy to draw a clear distinction between someone's beliefs and their behaviour. A good example is the case of Wasteney v East London NHS Foundation Trust (2016). In that case an employee was disciplined for failing to respect professional boundaries when pressing her religious views on a more junior employee. This was held not to be discrimination because the employer was not concerned with what the employee believed, but with how she behaved – and they were two different things.

Some forms of religious expression – for example, a Sikh wearing a turban – may be inseparable from the belief itself. But in most cases there is a distinction to be drawn. If the employer's rule about behaviour is very strict it may amount to indirect discrimination because it places people with that belief at a particular disadvantage. But there is no indirect discrimination if the employer can show that the rule is a 'proportionate means of achieving a legitimate aim'. Protecting other employees from unlawful harassment is certainly a legitimate aim and treating harassment as a disciplinary matter seems proportionate to me – although everything, as ever, depends on the circumstances.

What I think the Forstater case does mean is that employers cannot simply exclude an employee on the basis that they have a belief that their colleagues may find objectionable or even highly offensive. But if that belief is expressed in some way that impacts on the workplace and creates a hostile working environment, then that is a different matter. The employer will need to be careful to keep matters in proportion and not overreact. Debate and argument is perfectly legitimate as long as both sides enter into the discussion of their own free will and express themselves with a modicum of basic courtesy. When things escalate beyond acceptable boundaries, however, the employer is entitled to step in and insist that such matters are kept out of the workplace. Nothing in the EAT's decision in Forstater prevents an employer from applying basic common sense.

**Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman**