Employment Law Brief *with* Darren Newman

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March is going to be a big month for issues around trans rights and discrimination based on religion and belief. We have two cases coming before the Employment Appeal Tribunal and a crucial Tribunal hearing in the most high-profile case of the three – Forstater v CGD Europe.

Forstater has already been to the EAT once. In June 2021 it was held that her philosophical belief – that biological sex was immutable, and that gender reassignment did not alter the fact that an individual was biologically either male or female – was held to be covered by the Equality Act 2010. This overturned the finding of the Employment Tribunal that her belief was not protected because it was not worthy of respect in a democratic society. The EAT held that only those with the most extreme beliefs – they specifically referenced Nazi's as an example – could be excluded from protection on that basis. The case now returns to the Tribunal to decide whether or not Ms Forstater was actually discriminated against.

Not enough of the extensive commentary around this case has made it clear that establishing that a belief is protected by the Equality Act is of no real use if that belief was not in fact the reason for the less favourable treatment complained of. Ms Forstater is making an allegation of direct discrimination. That means she is alleging that she was treated less favourably because of her philosophical belief. The treatment in question is the non-renewal of a freelance research contract and so the question is whether the employer would have renewed the contract of a researcher who did not have Ms Forstater' s beliefs, but who was in all other respects in the same situation.

The facts of Ms Forstater's case have yet to be established -that is what the forthcoming Tribunal hearing is for. But let's take a hypothetical example. Suppose somebody's philosophical beliefs led them to behave in a way that was considered to be rude and discourteous towards colleagues and that as a result the employer subjected them to some detriment like a warning or withholding an expected promotion. The issue would be whether the employer would have treated someone who was equally rude and discourteous, but who did not have that philosophical belief, any differently. In other words, was the reason for the less favourable treatment the belief itself or the conduct that was prompted by that belief.

The two cases coming before the EAT in March may revisit this issue. In Mackereth v Department for Work and Pensions Dr Mackereth was engaged under a contract with the DWP to carry out assessments of service users claiming certain benefits. He is a committed Christian and part of his particular belief is that it is neither possible nor appropriate for individuals to seek to change their sex or gender. He described this as a

'conscientious objection to transgenderism'. As a result he felt unable to comply with the DWP's policy on gender reassignment which required him to respect the gender identities of the service users he was assessing. Not only did he refuse to refer to service users using their preferred pronouns, but he made it clear that he would not use their preferred form of address – ie 'Ms or Mr' – if that conflicted with what he perceived their true sex to be. His contract was terminated and he claimed discrimination based on religious belief.

The Tribunal found that his beliefs was not protected because they were incompatible with human dignity and conflicted with the fundamental rights of others. Following Forstater, it would seem that this finding must in fact be wrong. However offensive his views might be to others, he is not advocating violence or the sort of extreme measures that the EAT said would be required to deny a belief protection.

I think Dr Mackereth should succeed in persuading the EAT that his belief is protected – but he should still lose his case. This is because he was not excluded from his role on the grounds of his belief but because of the way in which he indicated that he would behave. He made it clear that he would not follow the DWP's guidelines in relation to transgender service users and the Tribunal agreed that that would expose them to claims of discrimination and harassment. Anybody who refused to follow the guidelines would have been treated in exactly the same way regardless of their beliefs. It follows that applying that rule to Dr Mackereth was not direct discrimination. Nor was it indirect discrimination. It may be that the requirement to follow the guidelines caused people who shared Dr Mackereth's very particular beliefs a disadvantage. However the Tribunal found – and I am sure the EAT will agree – that imposing guidelines designed to ensure that service users are treated with respect and not discriminated against is a 'proportionate means of achieving a legitimate aim' and not unlawful.

The other case due before the EAT is less extreme. In Higgs v Farmors School the claim concerned a teacher who was dismissed for social media posts relating to gender identity that were considered by the school to be potentially offensive to parents. Her unfair dismissal claim was withdrawn (presumably settled) and she did not claim indirect discrimination. The Tribunal accepted that her beliefs about gender identity were protected but held that her dismissal was not 'because of' those beliefs but because of her social media activity. The appeal will be heard at the beginning of March, but I struggle to see the EAT reaching a different conclusion.

My hope is that the clear decision of the EAT in Forstater will move us on from the rather stale debate about which beliefs should be regarded as protected by the Equality Act. The scope of the Act can be very wide - encompassing all sorts of irrational or even offensive beliefs - without causing any difficulties for employers. Provided the courts continue to see a clear distinction between the belief

itself and conduct that is motivated by that belief then the key question will be whether the limits placed on that conduct by the employer are proportionate and designed to further a legitimate business aim. That seems to me to be a reasonable way of balancing potentially competing rights.

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