

UK Employment Case May Lead To New Discrimination Suits

By **Jules Quinn** (June 22, 2021, 6:02 PM EDT)

The recent Maya Forstater case before the Employment Appeal Tribunal made headlines for the sensitive subject matter it concerned, specifically the ongoing discussions on the recognition and protection of transgender people in society.

Beyond the headlines, the case paves the way for a bigger wave of discrimination cases on the basis that a philosophical belief is a protected characteristic and could trump other protected characteristics.

The Case

Briefly, Forstater was on a consultant contract with the Centre for Global Development. She made various social media posts in relation to the U.K. Gender Recognition Act and the issue of allowing self-identification, including stating that transgender women are men. These were reported to the CGD and her contract was not renewed, prompting her to launch legal proceedings.

The case was first heard in December 2019, in which Judge James Tayler said her view was "incompatible with human dignity and fundamental rights of others" and was not protected. On appeal though, the tribunal endorsed the claimant's gender-critical beliefs as a philosophical belief within the meaning of Section 10 of the Equality Act.

This amounts to giving the claimant a protected characteristic and protection from discrimination or detriment on grounds of her belief. Whether or not her contract was not renewed for these beliefs has now been remitted back to a freshly constituted tribunal to decide.

The ruling drew the attention of many commentators from all sides of the discussion. Transgender status and the rights of the trans community is an emotional and complex issue upon which there are many self-proclaimed experts.

This is in an environment where 78% of transgender and nonbinary youth reported being the subject of discrimination due to their gender identity. Many employers are doing all they can to support trans persons and prevent workplace discrimination. What does that judgment mean for employers?

While the tribunal gives some helpful guidance on what could amount to harassment of a trans employee, so much is now left on the shoulders of the employers to try to police with the tribunal



Jules Quinn

simply saying that the "judgment does not mean that the tribunal has expressed any view on the merits of either side of the transgender debate" and that "whether or not conduct in a given situation does not amount to harassment or discrimination within the meaning of the EqA will be for a tribunal to determine given the case."

Complexities

First, let's be clear in the transgender debate — discrimination on grounds of gender reassignment, a protected characteristic, is unlawful. A quick search of the tribunal's database of rulings, however, and there are few cases launched where transgender and/or gender recognition has taken center stage.

This obviously reflects the small numbers of people who are protected within existing legislation. However, with more focus on the topic and issues around pronouns and dead names, the question rises of how discrimination legislation may move beyond strict gender reassignment criteria comes more sharply into focus. The situation is already a complex one and this case makes it a legal minefield for employers.

In the Forstater ruling, the tribunal makes clear that it will not be the arbiter where two protected characteristics go head to head — in this instance gender-critical philosophical beliefs versus trans rights.

Why? Isn't that its job? It has done it before when discrimination on grounds of sexual orientation met religious belief. This tribunal decision looks dangerously like an abdication of responsibility and leaves employers to pick up the pieces, with the employment tribunal system and the tribunal ready to step in and have the final say on a case-by-case basis.

Employers could then be facing discrimination claims from multiple sides. This simply means uncertainty, which breeds litigation, costs and a horrible waste of employers' time.

The judgment ends with the somewhat obvious clarification that it "does not mean that employers and service provider will not be able to provide a safe environment for trans person."

Translation — employers must provide a safe working environment for trans staff. It adds that "Employers would be liable for acts of harassment and discrimination against trans persons committed in the course of employment."

Employers have all the liability and legal risk in this heavyweight tussle between two sets of protected characteristics, but where is the guidance?

Does this case give employers any help in shaping anti-harassment policies to ward off claims? Well, misgendering a trans employee could amount to harassment. Similarly, "indiscriminately and gratuitously referring to a trans person in terms other than they would wish" is an example of harassment. Dead naming or abusive and offensive transphobic language in the workplace is harassment, but that is hardly news to employers.

But what about the well-crafted and intellectually persuasive social media post? It may still be equally offensive to a trans employee, just as cruel and undermining, but if it amounts to a philosophical belief, the author may well be protected.

Philosophical Questions

As such, employers now have a very real concern that an employee's philosophical belief could be a protected characteristic under Section 10 of the Equality Act that may flip discrimination claims on their head.

If an employer dismisses an employee for saying something controversial or unpopular, in an attempt to safeguard staff under the Equality Act, that dismissed worker could use the same legislation to launch a claim.

So what amounts to a philosophical belief? It is irrelevant that you don't accept you may be wrong or there is another side to the story, and it is irrelevant that the scientific foundations of your belief are weak.

What cannot be is a belief aimed at the destruction of any rights and freedoms set forth in the European Court of Human Rights. The latter is a very high bar — it essentially prevents these beliefs from including a belief in Nazism or torture or inhuman punishment.

One's belief cannot seek to destroy the rights of others or be wholly incompatible with the principles of democracy. Between those two goal posts, provided it is genuinely and seriously held, "worth of respect in a democratic society," and is not just an opinion, a belief is potentially covered.

Making this a little topical, what about those opposed to getting the COVID-19 vaccine? Freedom to decide what goes into your own body, particularly when there is no policy of mandatory vaccine in the U.K. is a belief on a "weighty and substantial aspect of human life and behaviour," as defined by the Equality Act.

If employers refuse to allow employees into the office, or allow them to travel to conferences or to participate in team events on grounds of vaccine status, isn't this also discrimination on grounds of a genuinely held philosophical belief?

Inevitably there is going to be litigation here as more and more employers are pushing for information on vaccination status as a prerequisite for post-pandemic reentry.

To keep things topical, the recent moves to make vaccination mandatory for care home staff or National Health Service workers could prove an interest test case. There is a reasonable chance that vaccine skepticism could be argued to be a philosophical belief, so firing thousands of workers for not taking the jab could result in a litigious nightmare, perhaps even seeing collective class actions.

There is now increased potential for employers to get mired in claims about all forms of philosophical beliefs — whether on gender, race, politics, religion and so on — and in an increasingly polarized and political world of culture wars, doxxing, activism and the like, it may get messy.

A Difficult Balancing Act

As with the Forstater case, the fact that one's belief may offend, shock or disturb others is irrelevant.

How does that fit with the concept of harassment and an employer's obligation to prevent unwanted conduct that has the purpose or effect of violating an employee's dignity or creating an intimidating,

hostile, degrading, humiliating or offensive environment? This is a desperately difficult situation in which many employers find themselves.

How to balance the rights of their staff? This decision certainly gives the latitude to those with a firmly held belief: "It is only in extreme cases involving the gravest violation of other Convention rights that the belief would fail to qualify for protection at all" and "a person is free in a democratic society to hold any beliefs they wish, subject only to some modest, objective minimum requirement."

Pit that against the limited protection afforded to trans workers and the heavily criticized lack of protection in the Equality Act and the Gender Recognition Act.

To qualify for protection, a person has be proposing to undergo, is undergoing or has undergone a process or part of a process for the purpose of reassigning the person's sex by changing physiological or other attributes of sex, or obtain a gender recognition certificate in a process which the government has accepted has to be more supportive and kinder.

The tribunal satisfies itself that "this judgement does not mean that trans person do not have the protections against discrimination and harassment conferred by the [Equality Act]."

The judgment just gives them considerably less protection than those with a philosophical belief that biological sex is immutable and not to be conflated with gender identity.

Changing tack here, neither party, nor the Employment Appeals Tribunal, took the point that this was, in part, about private tweets by the claimant. Many employers struggle with an employees' rights to privacy and freedom of expression in their personal life.

What an employee says on a private social media account, generally expressing philosophical beliefs, rather than targeting a coworker or even identifying themselves as connected to the employer, is now potentially a shield in any claims of discrimination.

This case also makes it perfectly legitimate for staff to bring into the workplace grievance process and the employment tribunal system private tweets or posts made by a coworker expressing their personal beliefs.

Employers, it appears, now must police the philosophical beliefs of employees wherever they are expressed. And, whatever the opinion expressed, they must be exceptionally careful with what to do if they think an employee has overstepped the mark. Otherwise, employers could find themselves in court facing an unfair dismissal or discrimination claims.

Jules Quinn is a partner at King & Spalding LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.