ISSN 1759-2925

DISCRIMINATION LAW ASSOCIATION

Briefings

JULY 2024 | VOLUME 82 | **1088-1100**

1089

Gender critical cases: making bad law?

Oscar Davies, barrister at Garden Court Chambers,♦ argues that the law is tying itself in knots over gender critical cases and a new approach is needed urgently to make the UK safer for trans people. Oscar considers that in recent gender critical cases, judges have taken the wrong approach, permitting the erosion of trans and non-binary people's rights. Judges must focus on what the belief is, and whether it contains elements of transphobia. If a belief is protected, the manifestations must comply with the Equality Act 2010, or the employer is likely to be justified in sanctioning the employee. Sex has its place, but gender identity – and trans identity – must be respected.

'Gender critical' cases are a hot seat of litigation in the UK. But are judges getting it right in their approach?

A 'belief' can be protected in certain circumstances under s10 of the Equality Act 2010 (EA). S10 states: *'Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.'*

For a philosophical belief to be protected – i.e., so you can seek compensation based on being discriminated against because of or related to that belief – it must pass the five *Grainger* criteria, from the EAT case of *Nicholson v Grainger plc* [2010] 2 All ER 253, [2010] ICR 360, [2009] Briefing 549.

The focus in the gender critical cases is on the fifth criterion (*Grainger* V): 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'*. This is the battleground in current litigation as to whether a belief which may be contentious should be protected.

While each person's individual belief may be summarised differently, those who hold gender critical views generally believe that sex is immutable, sex matters and that sex is not to be conflated with gender or gender identity.

Others consider that 'gender critical' is merely a broad-spectrum dog whistle (an expression which has a secondary meaning intended to be understood only by a particular group of people) that is a euphemism for views which espouse and encourage transphobia, often with the effect of erasing trans people's existence by either suggesting trans people (i) are mistaken about their gender or (ii) are actively deceiving society in their chosen gender because their sex is what is said to define them.

The *Forstater* litigation

Forstater v CGD Europe and others (2021) UKEAT/0105/20, [2021] IRLR 706, [2022] ICR 1, [2021] All ER (D) 62 (Jun), [2021] Briefing 998 was a case brought by Maya Forstater, a researcher, writer and adviser on sustainable development, against her former employer, the Center for Global Development (CGD), a not-for-profit think tank based in the EU and US. She was appointed a visiting fellow of CGD in November 2016, which was renewed in 2017. In that capacity, she carried out paid consultancy work on specific research projects.

Forstater regularly posted comments on Twitter relating to transgender issues. Regarding Pips Bunce, a senior director at Credit Suisse who describes themselves as being 'gender fluid' and 'non-binary', Forstater said: *'Bunce does not "masquerade as female" he is a man who likes to express himself part of the week by wearing a dress'* and *'Bunce is a white man who likes to dress in women's clothes'*. In a letter to Anne Main MP, Forstater stated: *'Please stand up for the truth that it is not possible for someone who is male to become female. Transwomen are men, and should be respected and protected as men.'*

♦ This article first appeared in the New Law Journal, Issue 8068, April 26, 2024. It is reproduced here with kind permission of the author and the NLJ.

In Autumn 2018, some staff at CGD raised concerns about some of Forstater's tweets, alleging that they were 'transphobic' and '*exclusionary or offensive*'. An investigation into Forstater's conduct followed, the result of which was that she was not offered further consultancy work and her visiting fellowship was not renewed.

Forstater lodged proceedings in the employment tribunal alleging, among other matters, direct discrimination because of her gender critical beliefs and/or harassment related to those beliefs. The tribunal directed that there be a preliminary hearing to determine, among other matters, whether the belief relied upon by the claimant amounts to a philosophical belief within the meaning of the EA 2010, s10.

...a central part to evaluating whether a belief should be protected at the *Grainger V* stage is whether the belief infringes on Article 17 of the ECHR, which prohibits the destruction of the rights of others.

First instance decision

Forstater in that case cast her belief in the following general terms (para 67 of her further particulars):

> *The Claimant believes that 'sex' is a material reality which should not be conflated with 'gender' or 'gender identity'. Being female is an immutable biological fact, not a feeling or an identity. Moreover, sex matters.*

At para 41 of the judgment, the ET explained that her belief further included that if a transwoman says she is a woman, that is untrue, even if she has a Gender Recognition Certificate (GRC). She said she would generally seek to be polite to trans persons and would seek to respect their choice of pronoun but would not feel bound to.

Article 9 of the European Convention on Human Rights (ECHR) states: '(1) *Everyone has the right to freedom of thought, conscience and religion.*' But this may be limited: '(2) *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*'

The tribunal concluded that the specific belief that Forstater held was not a philosophical belief protected by the EA. Her belief failed *Grainger* V largely because the judge considered Forstater's belief '*in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned.*'

Employment Appeal Tribunal

Forstater appealed to the EAT, which broadly agreed that the first instance judge summarised the claimant's belief properly. However, Choudhury P, as he then was, gave judgment overturning the ET's decision, finding that the claimant's belief did pass *Grainger* V, saying at para 79:

> *In our judgment, it is important that in applying Grainger V, tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.*

It was noted that a central part to evaluating whether a belief should be protected at the *Grainger* V stage is whether the belief infringes on Article 17 of the ECHR,

which prohibits the destruction of the rights of others (para 59). The EAT concluded that the claimant's belief did not approach Article 17 and was not akin to Nazism or totalitarianism, and so *Grainger* V was satisfied. The EAT's decision concluded that Forstater did not seek to destroy the rights of others, yet noted that she would sometimes misgender people, and did not dispute the statements made by Forstater regarding Pips Bunce or that *'transwomen are men'*.

The matter was then remitted to the ET for trial with the belief protected, and the claimant won on some of her discrimination claims.

Subsequent cases

The decision in *Forstater* has led to a number of other cases of claimants espousing similar views.

In *Bailey v Stonewall Equality Ltd and others,*[1] 2202172/202, the claimant's belief was that *'a woman is defined by her sex. She disagrees with the beliefs of those who say that a woman is defined by her gender, which may differ from her sex, and is for the individual to identify.'* This was agreed as protected by the respondents, presumably because it was similar to Forstater's belief.

In *Mackereth v Department for Work and Pensions and another* [2022] ICR 1609, [2022] Briefing 1032, the claimant had a lack of belief (i) that it is possible for a person to change their sex/gender, and/or (ii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex. This, at first instance, was considered not protected under *Grainger* because they were *'incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals'* [para 196]. However, the EAT dismissed the claimant's appeal, stating that that tribunal had erred in its approach to considering whether the beliefs were not protected. The ET had applied too high a threshold in so deciding.

...it is evident from the case law that in many cases because the belief itself has been protected first, so too then is the manifestation...

In *Joanna Phoenix v The Open University and others*: 3322700/2021 and 3323841/2021, the claimant's belief that *'sex is immutable'* was protected, and the claimant succeeded on some of her claims.

While a manifestation of the belief will not always be worthy of protection (subject to Article 9(2) ECHR), it is evident from the case law that in many cases because the belief itself has been protected first, so too then is the manifestation (that which has caused distress to other employees or considered by them transphobic), thereby enabling successful claims of gender critical claimants without proper consideration of whether the views intended or had the effect of destroying trans people's rights.

Lowering the threshold

In *Forstater*, the EAT redrew the test for *Grainger* V, effectively lowering the threshold such that only beliefs *'pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms'* would not meet the threshold. The test almost becomes meaningless due to its now very permeable membrane. The wording *'totalitarianism, or advocating Nazism'* did not originate from the previous case law and in fact seems to have originated from respondent counsel's submissions (*Forstater*, EAT, para 38).

There are several issues with this, one being that the test for victimisation claims seems much easier for claimants to succeed in, with a tweet that a claimant is being investigated by the employer being enough for a victimisation claim to succeed (see *Bailey*). This

1 Note that the author's chambers, Garden Court Chambers, were co-respondents in this case.

has had an inadvertent chilling effect on employers/organisations which no longer feel confident in sanctioning gender critical employees, even when their views have overstepped the line into harassing/discriminating against trans colleagues.

What is the actual belief?

One of the issues is that belief is often being dealt with as a preliminary issue, which separates it out from the actual manifestations of that belief which are complained about. This divorce can create absurd results, when the belief which is self-described by the claimant is not the extent of the belief at all. Judges must be able to scratch below the surface of the belief and dig deeper as to what that actually entails, and what its implications are for others, including trans people.

Is the belief limited to *'sex is immutable'* – or is there more to it? Does *'sex is immutable'* include legal sex as well as biological sex, which would mean that a person with a GRC, in a gender critical person's view, does not actually attain the sex that the purpose of the Gender Recognition Act 2004 (GRA) gives them? If that is the case, it is difficult to see how the belief does not seek to destroy the rights of trans people with a GRC.

The framing of a gender critical belief as solely *'sex is immutable'* conveniently omits gender. However, if the belief leads to manifestations such as *'transwomen are men'*, the belief elides sex and gender such that the actual belief seems to be *'sex is immutable and gender does not exist/is not important/trans people are lying'*. It is one thing to say you cannot change your (natal) sex; it is another to say that you cannot change your gender. At the core of many gender critical beliefs seems to be a paternalistic prerogative seeking to strip people of their rights of self-definition, where a gender critical person may self-define their sex/gender, but a trans person may not – in essence, that a transgender person has no right to claim any aspect of the gender that they live in. Imagine telling someone you're a lesbian and they laugh in your face. Who are these people who think they have a right to tell you who you are?

...belief is often being dealt with as a preliminary issue, which separates it out from the actual manifestations of that belief which are complained about.

Yet a belief that sex and gender are the same/gender doesn't exist/gender cannot be changed is not the belief which has been protected. The failure of tribunals to recognise this has led to perverse conclusions, whereby claimants voicing views online which may be considered transphobic, such as *'a transwoman is a man'*, can sue their employer for disciplining them.

The basis of identity

Crucially, if one looks at the content of the statements such as *'a man's internal feeling that he is a woman has no basis in material reality'* (said by Forstater) or that a transwoman is a man, this flies in the face of the very basis of transgender identity. Transgender identity clearly has a basis in 'material reality'. Trans life is not a fiction. It is strange to have to repeat this in 2024, but trans people are protected under EA, s7 and have been protected under Article 8 of the ECHR since 2002 (*Christine Goodwin v the United Kingdom* (no 28957/95)). Gender identity as part of one's individual autonomy is a core component of their Article 8 rights (see also *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 All ER 1).

The reality is that lots of trans people probably agree that sex matters. However, so does gender, and respect for one's gender is crucial. If someone's gender is not respected (wrong pronouns, deadnaming, etc.), then this is likely to lead to harassment and/or discrimination on the basis of gender reassignment under EA, s7. If a manifestation of a belief is a *'transwoman is a man'*, how can this not be objectively anti-trans or transphobic? It denies the very basis of the trans person's gender.

Interrogating the belief

Moving forwards, it is necessary that tribunals interrogate the alleged belief more critically. What is actually being complained about, and how does this relate to other rights such as trans and non-binary rights? If the matter is to be decided as a preliminary issue, the question must be asked at the same time, before the belief is protected: does the actual belief infringe on the rights of others, notably trans and non-binary people? Only then can the tribunal make a fair assessment as to whether the belief properly passes *Grainger* V, and whether it should be protected.

Ideally, belief will be considered along with the substantive issues. That way, the belief and its manifestations are not divorced from one another, and the tribunal can come to a more realistic conclusion of what makes up the belief, and whether the employer's reaction to the expression of that belief is justified.

Ideally, belief will be considered along with the substantive issues. That way, the belief and its manifestations are not divorced from one another...

The EAT in *Higgs v Farmor's School* [2023] EAT 89, [2023] Briefing 1069 gave instructive guidance as to the proportionality exercise which must be undertaken when considering whether a reaction to a manifestation of a gender critical belief will be justified in terms of investigating and potentially disciplining the person with that belief (see para 94).

Most recently, in the case of *Lister v New College Swindon* ET 1404223/2022, the tribunal was clear that a claimant's gender critical beliefs expressed in not referring to a pupil by the correct pronouns, and making transphobic and homophobic tweets, did not lead to a successful claim. Lister's dismissal was a proportionate response to the complaints made against him by both pupils and colleagues. In particular, the fact that Lister said he would not have changed his behaviour had a less serious sanction been applied played an important part in why the dismissal was justified and proportionate.

In *Lister*, the tribunal has clearly understood that the nature of the manifestations would have likely been harassing and/or discriminatory to the pupils and colleagues (especially if they were trans). This is the correct approach, in contrast with the remitted tribunal's approach in *Forstater*, where the judge somehow concluded that a statement such as *'a man's internal feeling that he is a woman has no basis in material reality'* was not objectively unreasonable because it was close to the protected belief (para 295 of that judgment), thus making the reasoning circular.

Outside the ETs, in *Ali v Green Party of England & Wales* [Central London County Court, February 9 2024; see Briefing 1099 in this edition], the claimant claimed discrimination based on his gender critical views for being removed as a spokesperson for the Green Party. HHJ Hellman was careful to specify that it was not discriminatory for a political party merely to remove a spokesperson on the grounds of belief, provided it follows a fair procedure in doing so. He stated:

> *The Green Party could not, in any event, have been compelled to maintain Dr Ali as a spokesperson if (outside of a party election period) he expressed beliefs that were inconsistent with Party policy, or if they reasonably concluded that he would do so, as this would infringe their article 9(1) rights by obliging them to manifest a belief which they did not hold* [para 243].

Wrong turns in the law

In a common law system, it is not infrequent for the law to take wrong turns. This is then rolled back on. Notable examples include:

- The subjective element of the test for dishonesty in *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689 was overruled by the SC in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391, [2018] 2 All ER 406.

- In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 All ER 1031, the SC overruled the long-standing, prudent doctor standard of care (departing from the House of Lords decision in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, [1985] 1 All ER 643) in favour of a new reasonable patient standard which obliges doctors to make their patients aware of all material risks of the recommended treatment and of any reasonable alternative treatment.
- In *Arthur JS Hall & Co (a firm) v Simons* [2002] 1 AC 615, the House of Lords departed from settled previous authority and held that barristers were not immune from claims in professional negligence.

Here, judges are frequently making the same mistake in failing to recognise that gender critical views often include anti-trans sentiments. Judges are unusually being asked to accept and normalise behaviour that might – at the same time – also amount to harassment of co-workers. This goes against the grain of the EA's purpose: to protect people from discrimination in the workplace and in wider society.

The consequence is that workplaces become less safe for trans people, and trans people may be less likely employed by employers due to envisaged issues.

We now seem to be in a position that if an individual A harasses B with behaviour which infringes their dignity, but so long as A's behaviour is capable of being labelled as having a connection (nexus) to an opinion and also A's opinion is not so bad as to be totalitarianism/Nazism, then there is nothing the employer can do. If it doesn't investigate, B has a viable tribunal claim against the employer. If it does investigate, A has a viable tribunal claim against the employer. There is literally nothing the employer can do to escape legal liability to one of those two parties.

The tribunals have tied themselves in knots, which are only going to get knottier - with more claims coming from both sides – if they are not untangled soon. The consequence is that workplaces become less safe for trans people, and trans people may be less likely employed by employers due to envisaged issues.

The bigger picture

It is notable that gender critical beliefs – as legitimised by decisions of the tribunals and courts – are unique to the UK, with those in other countries resisting trans rights mainly being right-wing extremists and from certain religious groups. International bodies such as ILGA-Europe and the Council of Europe have noted how trans lives and the legitimacy of trans identity have, since 2016 proposals for GRA reform, been turned into a culture-war issue and an indefinite form of 'debate' in the UK unlike anywhere else.

It is time for UK law to get in step with other progressive countries, or it will continue to drop in international rankings for safety of LGBT+ people. (The Rainbow Map shows that the UK has dropped down the list, from 14th in 2022 to 17th in 2023.) Sadly, the courts and tribunals will be part of the reason for this drop.

In 50 years' time, this slew of cases will be considered 'bad law' and history will not treat the decision-making in them kindly unless a change in approach is made soon.