# Employee holding gender critical beliefs suffered harassment and employer failed to take reasonable steps to prevent it

**In Fahmy v Arts Council England, an Employment Tribunal considered whether an employee suffered harassment related to her gender critical beliefs and whether her employer was able to avoid liability on the basis that it had taken reasonable steps to prevent it.**

**What happened in this case?**

Ms Fahmy worked for Arts Council England (**ACE**). She holds gender critical beliefs, meaning she believes that sex is real, important and immutable and should not be conflated with gender identity. She does not believe that trans women are women, nor that trans men are men.

ACE created a fund to support creative and cultural activities during the Queen's Platinum Jubilee. The London Community Foundation (**LCF**) was responsible for awarding part of this funding to organisations in London. In April 2022, the LCF made a funding award to an organisation called the LGB Alliance to make a film. The LGB Alliance has faced accusations that it is transphobic due to the exclusion of trans issues from its campaigning remit. Following a negative reaction on social media, LCF suspended the grant.

On 14 April 2022, ACE held a "drop in" Teams video meeting open to all staff to discuss this decision. Around 400 out of 700 staff members attended, including Ms Fahmy. The meeting was chaired by Mr Mellor, the Deputy CEO of ACE. During the meeting, Mr Mellor said that the LGB Alliance was *"a divisive organisation"* with a history of trans-exclusionary activity and that his personal view was that the funding award had been a mistake.

Ms Fahmy challenged Mr Mellor, stating that it was misleading to describe the LGB Alliance as anti-trans. She also asked how gender critical views were protected within the organisation. Other employees on the call made comments criticising Ms Fahmy's position stating that it was *"extremely disappointing"* to see a defence of the LGB Alliance. Another said that ACE was not obliged to protect people's views, only to protect the welfare of its employees.

After the meeting was over, Mr Mellor contacted Ms Fahmy to acknowledge that the session must have been "*uncomfortable"* for her and that she might be feeling *"a little isolated and bruised".* He also said these were hard issues to resolve. Ms Fahmy replied, stating that she did not feel bruised or isolated and she agreed that it was adifficult subject. She challenged Mr Mellor's decision to voice his personal views in the Teams meeting and said this conflicted with ACE's duty to foster freedom of speech or a respectful working environment.

Later that day, Mr Mellor went on to send an all-staff email saying the *"…well-being of everyone….is our number one priority, and it always will be. This includes all our LGBTQIA+ colleagues…I particularly want to express my personal solidarity with our trans and non-binary colleagues…".*

On 11 May 2022, another employee, known only as "SB", sent an all-staff email encouraging staff to sign a petition created to raise a formal grievance about the Teams meeting and the colleagues who had expressed *"clear, homophobic, anti-trans views".* It was open to staff to add comments and several posted comments which referred to gender-critical beliefs as a *"cancer"* and equated such views to racism or sexism. Another comment described the LGB Alliance as "*a glorified hate group*" supported by *"neo-Nazis, homophobes and Islamophobes…".*

The next day, Ms Mitchell, Ms Fahmy's line manager, emailed Mr Henley, the CEO of ACE, raising concerns about the petition and the associated comments. She said that it encouraged *"poor and unprofessional behaviour from staff"*, that some of the comments could be seen as *"inciting hate"* and that some were clearly directed at Ms Fahmy. She asked that consideration be given to the distress caused to Ms Fahmy and other members of staff. The petition was eventually removed after it had been up for around 26 hours.

In September 2022, Ms Fahmy brought a claim alleging harassment related to her gender critical beliefs. She also brought a claim of victimisation. This briefing discusses the harassment claim only.

**What was decided?**

It was not in dispute that Ms Fahmy's gender critical beliefs were protected under the Equality Act 2010 following the EAT decision in *Forstater v CGD Europe*. Therefore, the issue the Tribunal had to determine was whether she had been harassed on the grounds of those beliefs during the Teams meeting and as a

result of the petition.

As to the Teams meeting, the Tribunal said that it had been unwise for Mr Mellor to express personal views which had aligned him with one side of the debate. Indeed, the Tribunal remarked that his actions in this respect had *"opened the door"* for the subsequent petition and comments. Yet, the Tribunal concluded that his comments at the Teams meeting did not amount to harassment. Nor did the Tribunal believe that the comments expressed by other colleagues during the Teams meeting amounted to harassment. Ms Fahmy had chosen to engage in what was a robust debate on a controversial topic. Although she was angry and upset, it had not come as a shock to her, and she had said herself that she did not feel bruised or isolated.

However, the harassment claim was upheld in relation to SB's email about the petition and the comments arising from this made by other members of staff. Ms Fahmy had been left feeling *"deeply upset".* ACE sought to avoid liability for this harassment on the basis that it had taken all reasonable steps to prevent it from occurring. In particular, it had suspended SB, had taken disciplinary action against two employees who had posted comments, and it had a Dignity at Work policy in place. However, the defence failed because:

- the Dignity at Work policy had not been reviewed since 2019;

- the Dignity at Work policy did not accurately set out the characteristics protected under the Equality Act

2010. It referred to “gender” (which is not a protected characteristic) and omitted both “sex” and “belief” (which are protected characteristics); and

- ACE knew that it needed to update its equality training to include belief discrimination, but it had failed to do so on the basis that it had not found a suitable trainer to deliver the training.

**What are the learning points for employers?**

It is clear that this is a debate which provokes strong feelings. Employers must equip themselves to navigate this potential clash of rights.

On the one hand, gender critical beliefs are protected beliefs and workers should not be discriminated against or harassed for holding or expressing such beliefs. On the other hand, trans workers are also protected from discrimination and harassment. Further, other workers who are not trans themselves may still find the expression of gender critical views to be offensive and also complain of harassment.

In either case, employers can be vicariously liable for acts of discrimination or harassment committed by their workers. What practical steps can be taken to manage this risk?

- Ensure that Dignity at Work policies (and related policies) are up to date. Ideally, such policies should be reviewed on an annual basis.

- Ensure that the terminology used in such policies reflects the Equality Act 2010 (e.g. “sex” rather than “gender”) and that it covers all protected characteristics. Underline that those holding gender critical beliefs *and* trans workers are protected from discrimination.

- Set out the standards of behaviour expected from staff, including the need to treat colleagues with dignity and respect, both in person and in virtual meetings and also in electronic communications. Explain that disciplinary action will follow where staff fail to meet such standards, up to and including dismissal.

- Advise those in managerial positions to take care when and how they express their personal opinions on the debate. As happened in this case, doing so may embolden employees on one side of the debate to become more antagonistic towards those on the other side, in turn, risking harassment claims.

- Ensure that such policies are actually communicated and read by staff. Consider asking staff to provide a written acknowledgement that they have read and

understood them.

- Deliver equality training to staff, ensuring that it is balanced, thoughtful and clearly presented and also refreshed at regular intervals. Failure to do this may mean that you cannot rely on a defence that you have taken all reasonable steps to prevent discrimination. Ensure that the training covers belief discrimination alongside other types of discrimination. This is an area which is often overlooked in the training scope.

- Respond quickly and effectively to complaints of discrimination or harassment.

- Continue to monitor this fast-moving area of law. The Tribunal's decision in another gender critical belief case – *Meade v (1) Westminster City Council and (2) Social Work England* – is expected later this year.

Fahmy v Arts Council England

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# Employee unfairly dismissed for refusing to put work app on her personal phone

**An Employment Tribunal has ruled that a journalist was unfairly dismissed for refusing to install an "intrusive" work-related app on her personal phone, which would have left her unable to separate her work and home life. The employer should have considered alternatives such as providing her with a work phone or installing the app on her laptop.**

**What happened in this case?**

The Claimant worked as an Online News Editor for the Respondent newspaper. The Respondent had regarded her as a self-employed freelancer, but it was later determined that she was actually an employee.

By 2017, the Online News team was publishing at least one hundred news stories per day, and it had become impossible for the team's supervisors and editor to review every article before publication. To help with this, the Respondent introduced a new online platform called Viber to track what stories were being submitted and avoid duplication of content. Viber would also alert supervisors more efficiently to when sensitive articles needed to be checked. Initially, the use of Viber was not compulsory.

The Respondent developed concerns that the Claimant had duplicated articles that had already been published by

them.  On 1 November 2019, Ms Aloul, the Editor in Chief, sent the Claimant a message asking her to start using Viber "now" to avoid mistakes in the publication of articles.  Yet on 4 and 26 November 2019, the Claimant published articles on topics that had already been covered.  Again, the Claimant was asked to use Viber.

However, the Claimant objected to having the Viber app on her personal mobile phone.  She said she was getting disturbed by the volume of messages that came through the app, day and night.  She asked to be provided with a separate work phone for this purpose.  The Claimant was told that she could mute the Viber notifications, but she did not feel that was an acceptable solution since she would still be able to see the visual notifications on her phone screen.  Alternatively, she was told to buy a separate phone herself, but that the Respondent would not pay for it as she was a freelancer.

The Claimant continued to refuse to put the Viber app on her phone.  As a result, on 8 January 2020, Ms Aloul gave the instruction to block the Claimant's access to the Respondent's systems.  On 13 January 2020, the Claimant raised a grievance alleging bullying, harassment and race discrimination by Ms Aloul.  The relationship was eventually terminated on 6 February 2020.

The Claimant brought claims alleging that she had been unfairly dismissed.  She also brought claims of breach of contract, unlawful deductions from wages and unpaid holiday pay.  This briefing considers the unfair dismissal claim only.

**What was decided?**

The Employment Tribunal decided that the principal reason for the Claimant's dismissal was that she had refused to put the

Viber app on her personal phone. The refusal to use the app fell within the category of "conduct" and was, therefore, a potentially fair reason for dismissal.

Whether or not the dismissal was, in fact, fair turned on whether the decision to dismiss fell within the "band of reasonable responses". The Tribunal found that it did not. It held that no reasonable employer would have dismissed an employee for refusing to put an intrusive work-related app on their personal phone. The Respondent's approach meant that the Claimant would not be able to separate her home and work life. This was unreasonable given that there were alternative solutions available, such as providing her with a separate work phone or phone number or downloading the app onto her laptop.

In any event, the dismissal was procedurally unfair, given that no investigation or disciplinary hearing took place before a final decision to terminate was taken. Nor had the Claimant received any prior disciplinary warnings about the matter. It was clear that the Respondent did not feel it had to follow proper procedures because it (erroneously) believed that the Claimant was self-employed.

The Tribunal also dismissed the argument that this was a case in which it was fair to dismiss without following *any* procedure on the basis that there had been a complete breakdown in working relations, meaning that a procedure would serve no useful purpose. While there had been some arguments in the past, there had not been a major breakdown in working relations. There was no reason a disciplinary hearing could not have been held.

The Tribunal declined to order reinstatement on the basis that trust and confidence between the Claimant and Ms Aloul had now

broken down.  Instead, it awarded compensation of almost £20,000 for the unfair dismissal, including an uplift of 25% for failure to comply with the statutory Acas Code of Practice on Discipline and Grievance.  The Tribunal also awarded a further £12,000 in respect of the claims for breach of contract, unpaid holiday pay and unlawful deductions from wages.

**What are the learning points for employers?**

Firstly, this decision highlights the need for employers to be clear about the employment status of those working for them.  Had the employer understood that the Claimant was an employee, they could have made sure that they followed a proper process prior to any dismissal.  The failure in this respect meant that the dismissal was unfair and also landed them with an uplift to compensation of 25%.

Secondly, employers facing resistance from employees about the use of technology should explore whether any other solutions are available.  In this case, the issue may have been swiftly resolved by providing a work phone or installing the app on a laptop.  Had the Claimant continued to refuse to use the app in those circumstances, it is likely that the employer could have fairly dismissed for misconduct, subject to following a fair procedure.

Thirdly, the decision reminds employers to be wary of the degree to which work-related technology intrudes into the personal lives of employees.  Although many employers in this situation would  have provided a work phone, it may well have come with an expectation that the employee would monitor notifications outside normal working hours.  This still presents the problem of leaving employees unable to separate their work and home lives and blurring the line between

working time and non-working time. Depending on the circumstances, it may not be unreasonable for an employee to refuse to do so.

And it may not be long before workers are given a specific legal right to disconnect. The Labour Party has indicated that it would legislate to introduce a right for workers not to be contacted about work outside of normal working hours. Indeed, several EU member states have already successfully introduced legislation or guidance in this area, including France, Italy, Spain, Ireland, Portugal and Belgium. Further, in January 2021, the European Parliament passed a resolution calling for a new EU Directive to introduce a right to disconnect.

Alsnih v Al Quds Al-Arabi Publishing & Advertising

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# New law passed which will shake up flexible working regime

**On 20 July 2023, the Employment Relations (Flexible Working) Act 2023 received Royal Assent and became law. The Act**

**introduces reforms to the flexible working regime, which are due to come into force in a year's time. The statutory Acas Code of Practice on flexible working will be updated to reflect the changes to the law.**

**What is the background to the reforms?**

In September 2021, the Government published a consultation setting out its proposals for change to the flexible working framework. In particular, views were sought on whether the right to request flexible working should become a Day 1 employment right (currently, 26 weeks' service is required before a statutory request can be made).

The Government responded to the consultation in December 2022 and confirmed that it would make the right to request flexible working a Day 1 employment right. It is estimated that this will bring a further 2.2 million employees within the scope of the flexible working regime.

Separately, the response confirmed that the Government would support the Employment Relations (Flexible Working) Bill 2022-23, a Private Members' Bill sponsored by the Labour MP, Yasmin Quereshi. The Bill received Royal Assent on 20 July 2023 and became the Employment Relations (Flexible Working) Act 2023.

**What changes will be made to the flexible working framework?**

The Act will make the following changes to the flexible working framework:

- Employees will no longer be required to explain what effect they think the requested change would have on their employer and how that effect might be dealt with.

- Employees will be permitted to make two flexible working requests per year rather than one.

- Employers will be required to consult with employees before refusing requests.

- Employers will have two months to make a decision on a flexible working request rather than three, unless an extension is agreed.

However, the Act does *not* take forward the Government's proposal of making the right to request flexible working a Day 1 employment right. The Government has said that secondary legislation will be introduced separately to implement this.

**Are there any other changes employers need to know about?**

On 12 July 2023, Acas launched a consultation on proposals to update its statutory Code of Practice on handling flexible working requests. Although the Code is not legally binding, it is taken into account by Employment Tribunals when considering relevant cases. The Code has been updated to reflect changes to ways of working since the Code was first introduced in 2014, and to reflect the new legal reforms. The draft Code encourages employers to approach requests with an open mind and engage in meaningful dialogue. It also:

- Provides clarity on what consultation should involve and recommends that meetings are held both when a request is to be rejected or accepted.

- Extends the categories of individuals who may accompany an employee at meetings to discuss a request (so that it mirrors the position for disciplinary and grievance meetings).

- Provides guidance on the information that employers should set out to help explain their decision.

- Encourages employers to allow for an appeal process where a request is rejected.

- Provides information about the planned new right for workers to be able to request more predictable working patterns (which is separate to the right to request flexible working).

The consultation on the draft Code close 6 September 2023. Acas has said it will also update its non-statutory guidance on flexible working, which complements the Code.

Separately, on 19 July 2023, the Government launched a call for evidence on "non-statutory" flexible working. This covers regular flexible working arrangements that have been agreed outside the statutory regime, as well as ad hoc arrangements which are occasional or temporary in nature. In particular, the Government wishes to understand the extent to which individuals and businesses are using such practices, how and why they are using them, as well as the barriers and the benefits. It also wants to receive examples of best practice and case studies. The Government wishes to develop an evidence base in this area, which it says will inform the Government's future flexible working strategy.

**What steps should employers take now?**

The Act provides that the changes may come into force on a date or dates specified by the Secretary of State. The Government has said it "expects" the measures to come into force approximately a year after Royal Assent, in order to give employers time to prepare i.e. in July 2024. The

intention is that the secondary legislation introducing the Day 1 right to request flexible working will be introduced at the same time.

Therefore, employers have a year to prepare for these changes. We would recommend that you consider taking the following preparatory steps:

- Consider whether you will specify what flexible working options would be suitable for a role in job advertisements and identify candidates' preferences in job interviews. Although this will not prevent an employee asking for something different on Day 1 of their employment, the hope is that discussing this upfront will allow a suitable pattern to be identified from the off, rather than having to deal with a request in the first few months of employment.

- Revise your flexible working policies to reflect the legal reforms. Although employees are no longer required to explain the potential effect of their request, we would recommend that this is still encouraged on the basis that it may help speed up consideration of the request.

- Consider what your consultation process will look like. As the draft Code outlines, this should usually include a face-to-face meeting. Where you are tending

towards rejecting a request, a meeting affords the employee an opportunity to make further submissions and allows time for consideration of alternatives. Where you are tending towards accepting a request, a meeting can add value by allowing an opportunity to discuss the request in more detail and think about ways to implement the arrangement successfully.

- Train HR and line managers on how these reforms will impact the handling of flexible working requests. When the Acas Code is finalised, HR and line managers should be asked to read it.

- Consider whether you need to devote further resource to the management of flexible working requests, in light of the ability to make two requests per year, the shorter time frame for providing responses and that requests may be made from Day 1 of employment.

- Consider whether record-keeping procedures should be strengthened (for example, to record how many requests have been made within a 12-month period and to document what consultation has been undertaken).

In addition to the above, you may wish to contribute to the consultation on the Acas flexible working code and the call

for evidence on non-statutory flexible working.

Employment Relations (Flexible Working) Act 2023

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# Government announces plans to relax paternity leave rules

**The Government has announced that it intends to introduce legislation to make it easier for fathers to take paternity leave. It is not yet known when these changes will come into force.**

Last month, the Government published its response to a 2019 consultation on reforming parental leave and pay entitlements. In its response, the Government announced plans to make the following changes to the paternity leave framework:

- **Allowing discontinuous blocks of leave:** eligible employees will be able to take the two weeks' statutory paternity leave in two separate blocks of one week of leave (currently, only one week or a single block of two weeks may be taken).

- **Providing a longer window within which to take the leave:** eligible employees will be able to take their statutory paternity leave within 52 weeks of birth or placement for adoption (currently, it must be taken in the first eight weeks after birth or placement for adoption).

- **Simplifying notice requirements:** the notice requirements will be changed to make them more proportionate to the amount of time the father or partner plans to take off work. It is proposed that fathers will need to give 28 days' notice before each period of leave they intend to take, although the notice of entitlement will still need to be given 15 weeks before birth.

At the same time, the Government confirmed that it does not intend to reform either the shared parental leave or unpaid parental leave frameworks.

The Government has said secondary legislation will be needed to effect these changes and will be introduced in due course.

We will provide a further update on these reforms once the draft legislation has been published.

Parental Leave and Pay: Government response, June 2023

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