Court of Appeal rules that dismissal for reposting gender critical and anti-same-sex marriage Facebook posts was unlawful belief discrimination

What is the background law?

The Equality Act 2010 protects individuals from discrimination because of religion and belief, which encompasses the manifestation of such beliefs. Individuals also have fundamental rights to freedom of belief and freedom of expression of information and ideas under Articles 9 and 10 of the European Convention on Human Rights (the **Convention**). Individuals also have a right to *manifest* their beliefs, for example, through worship, teaching, practice and words.

Since the manifestation of a belief and the expression of information and ideas may impact others, these rights may be limited to the extent necessary in pursuit of other legitimate aims (a process known as "objective justification"). Legitimate aims could include, for example, protecting an employer's reputation or preventing discrimination against others.

The Convention is incorporated into UK law by way of the Human Rights Act 1998. So far as it is possible to do so, UK

legislation, such as the Equality Act 2010, must be read and given effect to in a way that is compatible with the Convention.

What happened in this case?

Ms Higgs is a Christian and she worked as a pastoral administrator and work experience manager at a secondary school (the **School**). In 2018, the School received a complaint from a parent at the School about a post that Ms Higgs had made on her personal Facebook account. She had reposted a Facebook post written by someone else about same sex relationships and gender fluidity, adding the comment: *"Please read this! They are brainwashing our children!"*. It later emerged that Ms Higgs had reposted other Facebook posts which had referred to gender fluidity as a "*perverted vision*" and which had said the *"…LGBT crowd with the assistance of progressive school systems are destroying the minds of normal children by promoting mental illness".*

Ms Higgs was dismissed for gross misconduct on the basis that her posts:

- amounted to harassment of the complainant parent on the grounds of sexual orientation and/or gender reassignment;
- risked harming the School's reputation; and
- breached the School's Code of Conduct (namely that the posts may demean or humiliate LGBT pupils and cause

concern about her suitability to work with children and that her online persona was not consistent with the professional image expected of someone working in a school).

Ms Higgs claimed she had suffered direct discrimination and harassment in relation to her beliefs, including that marriage is a divinely instituted life-long union between a man and woman, a lack of belief in same-sex marriage, a lack of belief in gender fluidity and a lack of belief that someone could change their biological sex.

The Employment Tribunal accepted that Ms Higgs' beliefs were protected under the Equality Act 2010, however, it dismissed her claims. It held that that the School had dismissed her because it had concluded that the language used in the Facebook posts could lead someone to reasonably believe that she was homophobic and transphobic. Ms Higgs appealed to the EAT.

What did the EAT decide?

The EAT decided that the Tribunal had failed to address the question of whether the School's actions were because of, or related to, a manifestation of her protected beliefs. The EAT held that there *was* a sufficiently close or direct nexus between Ms Higgs' protected beliefs and her Facebook posts, such that they amounted to a manifestation of her beliefs.

Accordingly, the next question was whether the dismissal was in response to a *legitimate* manifestation of the protected beliefs (which would be unlawful belief discrimination), or to the objectionable manifestation of the beliefs? If the latter, the dismissal could *potentially* be lawful if the School was able to show that it was a proportionate step designed to achieve a legitimate aim (i.e. it could "objectively justify" the dismissal).

Since there was more than one possible answer, the EAT remitted the claims to the Employment Tribunal. However, the EAT went on to offer detailed guidance on the principles to be taken in account when assessing the proportionality of any interference with freedom of religion and belief and freedom of expression.

Ms Higgs believed that the EAT should have gone further and held that her claims succeeded, rather than remitting them to the Tribunal. Therefore, she appealed to the Court of Appeal.

What did the Court of Appeal decide?

The Court concluded that the Tribunal was bound to find that Ms Higgs' dismissal was *not* objectively justified, meaning that it amounted to unlawful belief discrimination. Even assuming that the School was entitled to take objection to the Facebook posts, dismissal was *"unquestionably a disproportionate response"* for the following reasons:

1. Even if the language used in the posts was objectionable, it was not *grossly* offensive and it was

not primarily intended to incite hatred or disgust for LGBT people. Rather, the content contained derogatory sneers and rhetorical exaggeration.

2. The offensive language used was not written by Ms Higgs (save for the repetition of the word "brainwashing"). Rather, she was reposting the messages of others. She had made it clear to the school that she did not condone the language, and this was relevant to the question of the degree of culpability.

3. There was no evidence that the reputation of the School had, in fact, been damaged. Indeed, the dismissal letter had accepted that the concern was about *potential* damage in the future. The dismissal letter had also accepted that there was no possibility that readers would believe that the posts represented the views of the School. The only reputational damage was that people *might* fear that Ms Higgs would express homophobic or transphobic attitudes at work. The Court accepted that if that belief became widespread then it could harm the School's reputation, however, the risk of such widespread circulation was *"speculative at best".* The posts were made on a personal Facebook account in Miss Higgs maiden name and with no reference to the School. After the posts were made, only one person (the parent who had complained) was known to have recognised who she was.

4. Even if people who saw the posts feared that she would let her views influence her work, neither the School, nor the Tribunal, believed that she would do so. Ms Higgs had made it clear that she was specifically concerned about the content of sex education in primary schools and that she would not bring these views into the School and nor would she treat LGBT pupils

> differently. There had been no complaints about any aspect of Ms Higgs' work during her employment. It would have been open to the School to have issued a statement making it clear that it was confident that there was no risk that Ms Higgs' views would affect her attitude towards LGBT pupils or parents.

While the Court accepted that Ms Higgs had acted unwisely in reposting the material, this did not justify her dismissal, especially since she was a long-serving employee with an unblemished work record.

The Court also addressed the issue that the School was concerned that Ms Higgs lacked insight into the consequences of her actions and had refused to take the posts down. The Court acknowledged that in some cases a lack of insight might justify dismissal over a less severe sanction but that is not a universal rule. The Court said that if the case is not one that would otherwise justify dismissal then it was hard to see that it should be *"marked up in seriousness"* because of a failure to acknowledge a fault which the employee would genuinely find difficult to do (because it was a manifestation of an important belief).

Separately, the Court said that although the School had been entitled to investigate the complaint made by the parent, it was debatable whether this needed to be disciplinary in nature and whether it had been necessary to suspend Ms Higgs.

What does this mean for employers?

This decision makes it clear that it will not be open to employers to argue that the dismissal of an employee for the objectionable way in which they have manifested a protected belief is entirely separable from their rights to hold and manifest a belief and, therefore, not discriminatory. The objectionable manifestation cannot be viewed in isolation. Instead, the route to safety for the employer is to show that the dismissal is objectively justified – this requires the employer to show that they have acted proportionately in advancing one or more legitimate objectives. This is notable since it introduces the concept of objective justification into direct belief discrimination claims (whereas on the face of the Equality Act 2010, this is reserved for indirect discrimination and discrimination arising from disability claims only). Although helpful to employers to some extent, discharging the burden of objective justification will not be easy, particularly in light of the fundamental importance of an individual's right to hold and manifest a belief and express information ideas.

What are the key practical lessons for employers considering taking action against an employee in connection with the expression of their beliefs or views?

Before doing anything, consider which legal rights are engaged

- Seek legal advice on whether what has been said or done relates to a protected belief held by the employee. If it does, this is likely to engage discrimination protection under the Equality Act 2010 and the right to freedom of thought, conscience and religion under Article 9 of the Convention. Of course, it will not always be possible to make a complete assessment, since

you may well not know what beliefs are held by the employee nor the strength of them.

- Even where you are confident that there is no connection with an underlying protected belief, remember that the right to freedom of expression under Article 10 of the Convention will usually be engaged (save where what is said concerns the expression of certain extreme beliefs). If Article 10 is engaged, then this will be taken into consideration in other types of claim, for example, unfair dismissal claims.

- Ordinarily, employees need two years' service to acquire the right not to be unfairly dismissed. However, it should be noted that where the sole or principal reason for the dismissal is, or relates to, an employee's *political opinions or affiliations*, the two-year service requirement is dispensed with, meaning it becomes a Day 1 employment right.

Focus on precisely why the expression of the belief or view amounts to misconduct

- Caution is needed – the key point emerging from this decision is that employers should avoid overreaching. These cases are complex and the balancing exercise that you need to undertake is nuanced. Helpfully, the Court

of Appeal endorsed the guidance set down by the EAT in this case and this should be used as a guide in future cases. For example, ask yourself the following questions:

- What has the employee said or done? If it is something done on social media, be mindful that there is a hierarchy of wrongdoing. “Liking” does not hold the same weight as reposting something or creating a post (as noted by the European Court of Human Rights in the case of Melike v Turkey). And as the Court of Appeal noted in this case, reposting is not the same as creating a post.

- What is the statement or post in question considered to be objectionable? You need to show that the expression was objectionable. Even if it seems offensive on its face, remember that there is no general right not to be offended. The objectionable nature must go further and jeopardise a legitimate aim of the business. This may include actions which have led to the harassment of others or damaged the reputation of the business (or could do so). However, as this case underlines, you must take great care not to overstate such risks. What is the extent and nature of the intrusion on the rights of others? Has actual damage been done to the business, or is it genuinely likely?

- Did the employee make it clear that the views expressed were personal, or could they be seen as representing the views of the business? Where views are expressed on private social media accounts and there is no link to the employer, this risk is likely to be lower.

Do not jump straight to suspension and disciplinary action

- As the Court said in this case, while it was understandable that the employer wished to investigate the complaint, it was questionable whether suspension was needed or that the process had to be disciplinary in nature from the start. Consult the **Acas Guidance on suspension** before you take a decision to suspend and keep any suspension as short as possible and under review.

- If disciplinary action is needed, the disciplinary process should be fair and conducted in line with the Acas Code of Practice on disciplinary and grievance procedures. Careful investigation looking at evidence on both sides will be needed and you should ensure that the people who run the process are non-partisan.

- Once disciplinary action is started, be prepared for a grievance to be lodged in response. If the employee has manifested a protected belief, that grievance will probably allege that the disciplinary action is discriminatory – and that complaint will be a protected act. This means you will need to be careful to avoid any subsequent detrimental treatment as this could give rise to a victimisation claim.

- If the conclusion is that the employee should be sanctioned for their actions, remember that the interference in the expression of a protected belief should always be done in the least intrusive way possible to achieve the objective in question. Is dismissal really necessary? For example, would a request to take down the post and not repeat with similar posts and the provision of training be enough? In this case, the Court noted that one alternative course of action open to the employer would have been to issue a statement reassuring the community that it had confidence that Ms Higgs' views would not negatively affect her work.

- Be careful not to allow a lack of remorse or remedial action by the employee to swing your decision on sanction. As the Court noted here, if the employee's actions would not justify dismissal in the first place, it is unlikely that a lack of insight will tip the balance towards dismissal. This is especially true in belief cases where the employee's actions will relate to a something they believe in and is of importance to them.

- Bear in mind that even if you do not dismiss, issuing any disciplinary sanction for the manifestation of a protected belief may be viewed as an act of discrimination by the employee and could also be used as a basis for constructive dismissal.

Higgs v Farmor's School

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