

Gender critical beliefs are protected under the Equality Act 2010 and the European Convention of Human Rights

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In Forstater v CGD Europe and others the EAT held that gender critical beliefs, including beliefs that biological sex cannot be changed and is different to gender identity, are protected beliefs under the Equality Act 2010 and the European Convention of Human Rights.

What does the law say?

Workers are protected from discrimination in employment on the grounds of their religious or philosophical belief. However, only philosophical beliefs which meet a certain standard are protected. In order to be covered, a philosophical belief must satisfy five criteria. Namely, the belief must:

1. be genuinely held;
2. be more than a mere opinion or viewpoint;
3. concern a weighty and substantial aspect of human life and behaviour;
4. have a certain level of cogency, seriousness, cohesion and importance; and
5. be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others.

In the last few years, Tribunals have had to grapple with the question of whether gender critical beliefs meet this standard.

In October 2019, in the case of Mackereth v Department for Work and Pensions and anor, an Employment Tribunal held that a Christian doctor's beliefs that God created males and females and that people cannot choose their gender or change their sex were **not** protected beliefs as they were incompatible with human dignity and conflicted with the fundamental rights of others. Dr Mackereth's appeal of this decision is due to be heard in October 2021.

A few months later, in December 2019, at a Preliminary Hearing in the case of Forstater v CGD Europe and ors, an Employment Tribunal held that Ms Forstater's beliefs that being male or female is a biological fact (as opposed to a feeling or identity) and that people cannot change their sex were **not** protected beliefs as they were not worthy of respect in a democratic society and were incompatible with human dignity and conflicted with the fundamental rights of others. Ms Forstater appealed this decision and her appeal was heard in April 2021.

By contrast, in October 2020, in the case of Higgs v Farmor's School, an Employment Tribunal held that Ms Higgs' beliefs that people cannot choose their gender or change their sex were worthy of respect in a democratic society and **were** protected beliefs. However, the Tribunal also found that Ms Higgs had not been disciplined and dismissed because of those beliefs, but because of inflammatory language she had used in Facebook posts which could have led readers to believe she was homophobic and/or transphobic. Ms Higgs is seeking permission to appeal this decision.

Also relevant is the Tribunal's decision in September 2020 in the case of Taylor v Jaguar Land Rover Ltd, where it was decided that a worker who was transitioning from male to female, and who self-identified as non-binary and gender fluid, was protected from discrimination on the grounds of gender reassignment despite not undertaking a surgical transition.

This briefing considers the Employment Appeal Tribunal's (EAT) decision in Ms Forstater's appeal. This is important because it is the first appellate (and, therefore, binding) decision on the matter.

What happened in this case?

Ms Forstater was a visiting fellow of CGD Europe and also

worked on specific projects for them on a consultancy basis. CGD Europe is linked to the Centre for Global Development based in the US.

Ms Forstater believes that:

- Being male or female is a biological fact which is not capable of being changed and is not a feeling or identity. As a result, in her view, a trans woman is not really a woman and a trans man is not really a man.
- A person can identify as another sex, ask people to refer to them by their identified sex and change their legal sex, but this does not, in fact, change their actual sex.

In late 2018, Ms Forstater began expressing her beliefs on her personal Twitter account. Colleagues from the Centre for Global Development in the US saw her tweets and raised concerns that they were transphobic and offensive. The matter was investigated, and the decision was taken not to renew Ms Forstater's visiting fellowship and to end her consultancy work.

Ms Forstater claimed that she had suffered direct discrimination and harassment because of her philosophical beliefs. At a Preliminary Hearing, the Employment Tribunal held that Ms Forstater's beliefs satisfied the first four criteria needed to acquire protection from discrimination (see above). However, they decided the beliefs were not worthy of protection in a democratic society because they were absolutist and meant that she would refer to a person by the sex that she viewed as appropriate, even if this meant violating their dignity or creating an intimidating, hostile, degrading or offensive environment for them. Although it was true that Ms Forstater had a right to freedom of expression (arising under the European Convention of Human Rights (**ECHR**)), this was not an absolute right and could be infringed where the beliefs being expressed violated the rights of

others, as was the case here.

Ms Forstater appealed to the EAT.

What was decided?

The EAT allowed the appeal, holding that Ms Forstater's beliefs were protected philosophical beliefs under the Equality Act 2010.

The EAT said the Tribunal had erred in its application of the fifth criterion needed to acquire protection from discrimination, namely that it be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others. Only the most extreme beliefs the expression of which would be akin to Nazism or totalitarianism or which incited hatred or violence would be excluded for failing to satisfy that criterion.

Ms Forstater's gender critical beliefs did not seek to destroy the rights of trans persons and did not fall into that category. Although her beliefs may be offensive to some and could even result in the harassment of trans persons in certain circumstances, they were protected under the right to freedom of thought, conscience and religion under the ECHR and as philosophical beliefs under the Equality Act 2010.

The EAT acknowledged that some trans people would be disappointed by the judgment and it took the opportunity to correct any misconceptions about the decision. The EAT stressed that:

- the EAT had not expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing;
- it does not follow that those holding gender-critical beliefs are free to misgender trans people with impunity. Whether or not such conduct would amount to harassment or discrimination will be for a Tribunal to

determine in a given case;

- trans people are protected from discrimination and harassment. The protected characteristic of gender reassignment may apply to a proportion of trans people, but there are also other protected characteristics that could potentially be relied upon in the face of such conduct; and
- employers are capable of providing a safe environment for trans people. Employers continue to be vicariously liable for acts of harassment and discrimination against trans people committed in the course of employment (save where reasonable steps have been taken to prevent such actions).

The case has been sent back to the Employment Tribunal to decide whether Ms Forstater was, in fact, discriminated against and/or harassed because of her gender-critical beliefs.

What does this decision mean for employers?

Employers must now be ready to navigate this clash of rights.

On the one hand, gender critical beliefs are protected beliefs and workers should not be discriminated against or harassed for holding such beliefs (for example, by being gossiped about, shunned or labelled as a “transphobe” or “bigot”).

On the other hand, trans workers are also protected from discrimination and harassment on the grounds of gender reassignment (for example, by misgendering them) and potentially other grounds. Further, other workers who are not trans themselves may 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 its workers. What practical steps can employers take to manage this risk?

- Update relevant policies to reflect the fact 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. Explain that disciplinary action will follow where staff fail to meet such standards, up to and including dismissal.
- 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 thoughtful and forcefully presented and refreshed at regular intervals. As a [recent case](#) showed, a failure to do this may mean you cannot rely on the defence that you have taken all reasonable steps to prevent discrimination.
- Respond quickly and effectively to complaints of discrimination or harassment.
- Continue to monitor this fast-moving area of law, in particular, the appeals in the Mackereth and Higgs cases and also the forthcoming Tribunal decision in the Forstater case itself.

[Forstater v CGD Europe and others](#)

If you would like to discuss any issues arising out of this decision please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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