



## Balancing beliefs

With the increasing number of employees bringing claims for discrimination on grounds of their beliefs, it is crucial for employers to be up to date on developments and take time to consider how they can foster an environment of tolerance and inclusion to help prevent such issues arising. In this article, we examine three recent cases:

1. *Owen v Willow Tower Opco 1 Ltd ET/2400073/2022* - an employee's ethical veganism did not meet the test for a protected belief under the Equality Act 2010.
2. *Higgs v Farmor's School and another [2023] EAT 89* - appeal upheld and remitted back to tribunal to decide afresh as the tribunal had failed to appropriately consider the employee's rights to free thought and free speech under the European Convention on Human Rights (ECHR).
3. *Forstater v CGD Europe and others ET/2200909/2019* - at a remedies hearing Ms Forstater was awarded £105,778.47 for her successful claim of direct discrimination and victimisation on grounds of philosophical belief.

### ***Owen v Willow Tower Opco***

The employee was a care home worker. During the pandemic, she argued that her veganism exempted her from the requirement to be vaccinated. Ms Owen was dismissed after an occupational health report confirmed that there was no medical reason she could not be vaccinated, and she persisted in refusing the vaccine even after a law came into force which mandated it for her role at the time.

Ms Owen brought a discrimination claim on the grounds of her philosophical belief in ethical veganism. Although ethical veganism has been previously held to be a protected belief, the tribunal found that on the facts Ms Owen's belief was not held to the extent required to be protected. It was not enough to say she was an ethical vegan, she needed to demonstrate that she genuinely held that belief.

For example, Ms Owen said that she used non-vegan products, but wore gloves while doing so, which the tribunal found "*inconsistent with the extent of the belief*" required in previous case law for ethical veganism to be held as a protected belief. She could not speak to any effect what her belief had on her travel, clothing, holidays, or whether she ate honey or figs. The tribunal noted that "*it was only when it was pointed out to her that she said she did not wear leather, but she did not expand on that and shrugged when she was asked about wool.*"

### **Takeaway**

Although decided based on unusual facts, this case is reassuring for employers in showing where the line can be drawn for when beliefs will be protected under discrimination law. It is a useful reminder that an employee's belief must be genuinely held and hold sufficient weight to affect an employee's life and behaviour to be protected.

### **Higgs v Farmor's School**

Ms Higgs was a pastoral administrator at a school in a pupil-facing role. She reposted and commented on various Facebooks posts via her private personal account criticising the teaching of LGBTQ+ subjects at schools, including *"Please read this! They are brainwashing our children!"* and referring to gender fluidity as a *"perverted vision"*. A parent complained to the school.

The school began a disciplinary process. During the disciplinary investigation, Ms Higgs stated that she did not think her posts would compromise her position of trust when working with children, saying that *"students know me and I know gay students, I wouldn't treat any of them any different. [...] I wouldn't bring this into school."* In terms of the reputational damage to the school, Ms Higgs responded that her Facebook was private and that the posts were directed at her friends who *"would know me as a person and know I wouldn't discriminate."*

At the outcome of the disciplinary process, the school concluded that Ms Higgs had endorsed posts using discriminatory language, indicating that she shared views which were not in line with the Equality Act, and that she had therefore breached the school's conduct policy. Ms Higgs was dismissed for gross misconduct.

Ms Higgs claimed that she had suffered discrimination by the school for the disciplinary process and her dismissal amounting to direct discrimination or unlawful harassment because of or related to her gender-critical beliefs and a lack of belief in same-sex marriage from a Christian perspective.

At first instance, the claim was unsuccessful, but Ms Higgs appealed.

The appeal tribunal upheld her appeal and remitted it back to the tribunal for fresh consideration as it determined that the tribunal had not fully considered Ms Higgs' rights under articles 9 (freedom of thought, conscience and religion including the right to manifest their religion or belief) and 10 (right to freedom of expression) of the European Convention of Human Rights (ECHR rights). In particular, the tribunal had failed to properly engage with the relevant tests, including 1) whether there was a sufficiently close nexus between Ms Higgs' protected beliefs and her Facebook posts to regard those posts as a "manifestation" of her beliefs; 2) whether the actions taken by the school (including dismissal) were because of or related to that manifestation (which would be unlawful under the Equality Act); and 3) whether the school's response was proportionate to that objectionable manifestation. In considering proportionality, the tribunal would need to balance the interference of Ms Higgs' ECHR rights by the school with the legitimate aim being pursued and whether a less intrusive limitation could have been imposed.

### **Takeaway**

Employers must pause to conduct a proper balancing exercise before taking action in cases such as these, even if they regard the manifestation of a belief to be objectionable or there are potential reputational issues at stake. Although this exercise will always be fact specific, the court set out several useful factors to be considered as part of this exercise:

- the content of the manifestation and its tone;
- the extent of the manifestation;
- the employee's understanding of the likely audience;
- the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business;
- whether the employee has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk;
- whether there is a potential power imbalance given the nature of the employee's position or role and that of those whose rights are intruded upon;
- the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; and
- whether the limitation imposed is the least intrusive measure open to the employer.

### **Forstater v CGD Europe**

At the remedies hearing of the publicised *Forstater* claim, the tribunal awarded Ms Forstater a total of £105,778.47 in damages. This included payments to reflect that this was a *"serious case"* of discrimination, but which did not merit an award in the highest band;



CGD's "*oppressive or high-handed conduct in overstating judicial observations*"; and to reflect Ms Forstater's loss of earning capacity due to her restricted opportunities following the discrimination she experienced.

## Takeaway

Employers must bear in mind the sensitivity and publicity surrounding these topics when defending claims in this area or there could be increased sums payable by employers in the event an employee is successful in their claim. Any actions taken or statements made by the organisation may have a significant effect on the employee, and the harm caused will be considered by the tribunal when calculating damages.

## Conclusion

This is an extremely complex and evolving area of law. Given the nature of "religion or belief," people will naturally want to talk about or express their beliefs both inside and outside of work. An employer could find itself facing a grievance from an employee who holds one belief where another employee has expressed a different belief that clashes with their own - but both beliefs are equally protected. Employers will have to make difficult decisions on what actions to take in the circumstances. It is important to remember too that beliefs are protected under discrimination law even if they are offensive, shocking or even disturbing to others if they otherwise pass the legal tests.

This is further complicated by social media and other public platforms, as any beliefs expressed by an employee on personal accounts can now potentially "go viral", causing PR storms for employers who will need to handle both the public and internal issues carefully. As the Forstater case shows, mishandling such a scenario can lead to costly claims.

So, what can employers take from these cases? If an employer finds itself in a similar tricky position, employers should:

- Pause - acting quickly and without careful legal analysis could see an employer at the end of a lengthy, expensive and public court battle further damaging the employer's reputation.
- Listen - to all parties involved before making any decisions and follow all legal processes properly and carefully.
- Consider all facts - including whether what an employee has said or done prevents them from doing their job or infringes on another person's rights amounting to discrimination. If an employer is considering taking disciplinary action, then the practical considerations set out in the Higgs case above are also useful to think through, including considering whether a less intrusive course of action can be taken.

In terms of preventing such claims from arising, this is more difficult in practice as a ban on talking about certain topics could in itself be discriminatory, and a flat out ban on talking about any topics would be impossible practically. Policies and practices, therefore, may do best to reflect tolerance and inclusion.