Sex and gender: belief and agnosticism after Forstater

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Has the EAT's decision in Forstater brought any light to the heated debate on the subject of sex and gender in the workplace?

In the June 2021 issue of *ELA Briefing*, Robin Moira White published a response to an article from the previous month's Briefing by Anya Palmer and Monica Kurnatowska. She offered rebuttals of a number of assertions made in their rundown of recent case law in this area and the practical tips they suggested for how employers could implement the law. In itself, it exemplifies the sex and gender debate that even specialist lawyers acting in good conscience cannot agree on the fundamentals. There are few agreed starting principles and there is apparently no neutral position.

One facet of the debate has, at least for now, been settled by Choudhury P's helpfully clear and comprehensive judgment in *Forstater*: 'gender critical' views are protected under the religion and belief provisions in s.10 EqA. Catapulted to notoriety by JK Rowling's infamous tweet in December 2019 declaring #IStandWithMaya, this high-profile case has generated a great deal of heat on social media. In real life – and in particular in the workplace – the question is whether it has also brought light.

The facts

In November 2016, Maya Forstater was engaged by the respondent, a not-for-profit think tank, as an unpaid visiting fellow and a paid consultant. Her fellowship was renewed a year later.

In 2018, Ms Forstater began to tweet about the Government's consultation on reform of the GRA. Complaints were made internally. Contrary to popular mythology, there were no allegations that she had misgendered anyone at work or subjected colleagues to transphobic harassment. Rather, she was told that tweets such as one in which she said that 'a man's internal feeling that he is a woman has no basis in material reality' were 'problematic' and 'exclusionary'. In March 2019, she was told that her appointment was not to be renewed.

Ms Forstater brought a complaint of direct religion and belief discrimination, indirect sex discrimination and victimisation in the employment tribunal. She pleaded that her relevant belief was 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'.

The decisions in the tribunal and the EAT

The tribunal determined after a preliminary hearing in November 2019 that Ms Forstater's belief was not a 'philosophical belief' for the purposes of s.10 EqA because it fell foul of the fifth criterion in *Grainger*, the leading case on identifying whether a belief is covered by s.10 EqA. The criterion is that the belief must be 'worthy of respect in a democratic society and not incompatible with basic standards of human dignity' (*Grainger V*).

It is fair to say that the tribunal's decision caused considerable surprise among employment lawyers, and it never seemed likely to survive the EAT. Nonetheless, the EAT felt it necessary to set out, in the headnote of its judgment overturning the tribunal, a curious page-long list of what the preliminary issue was *not* about, another indicator of the fraught debate surrounding this topic.

The Grainger V standard and Article 17 ECHR

Mindful of its obligation under s.3 HRA, the EAT approached s.10 EqA and *Grainger V* in the context of the Articles 9 and 10 ECHR jurisprudence (para 26). Both Articles confer qualified rights, to freedom of thought, conscience and religion and freedom of expression respectively. These rights may be denied at source by the operation of Article 17, which provides that nothing in the Convention confers the 'right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein'. Alternatively, Article 9 or 10 rights may be restricted or circumscribed by the qualifications in the second paragraph of each Article.

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The EAT decided that *Grainger V* was coextensive with Article 17. That is, only beliefs that are 'aimed at the destruction' of Convention rights can be classified as not 'worthy of respect in a democratic society' and 'incompatible with the basic standards of human dignity'. This was the 'benchmark' for the purposes of *Grainger V* (para 62).

The respondent objected in submissions that applying the Article 17 standard would mean that only beliefs amounting to totalitarianism or which were akin to Nazism would fall outside *Grainger V*. The EAT agreed, observing that 'that is as it should be' (para 70).

Importantly, the EAT emphasised that there is no question of 'balancing rights' at this stage of the analysis, and that the tribunal should not have attempted to do so (para 102). The conclusion of the tribunal had been that Ms Forstater's belief 'necessarily harms the rights of others' (a finding that was problematic in several respects (para 99)). The EAT's judgment establishes that this is the wrong approach: there is no need to decide whether, and if so the extent to which, the belief 'has an impact on' the rights of others; the question is only whether it is aimed at *destroying* those rights (para 59). Thus the belief need only be judged on its own terms. The balancing of rights occurs at liability stage, where the qualifications in Articles 9(2) and 10(2) come into play (para 102).

This must be the correct analysis, not least because at the preliminary issue stage the tribunal is deciding whether the claimant has a right – or a protected characteristic – at all. It cannot balance rights that do not exist.

The EAT's neat formulation of the extent of *Grainger V* sharply delineates the outer edges of the criterion in a way which will prevent tribunals from getting drawn inexorably down the rabbit hole, as the tribunal did in *Forstater*, of evaluating the belief against some moral, ethical, philosophical or even political standard of its own choosing.

Moreover, fundamental to the law of freedom of expression is the principle that free speech includes 'not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence' because 'freedom only to speak inoffensively is not worth having' (*Redmond-Bates*; see also *Ibragim Ibragimov*).

It can be difficult to distinguish between, on the one hand, those beliefs or expressions which fall within the *Redmond-Bates* dictum and which the courts should be astute to protect, and on the other hand, those which are so offensive to society that they fall entirely outside the scope of protection by virtue of Article 17. There is also a difficulty in interpreting the woolly phrase in *Redmond-Bates* 'provided it does not tend to provoke violence'. Much speech might be said to tend to provoke violence of some sort or at some remove, and in the discourse around sex and gender the meaning of the word 'violence' is frequently contested. The EAT helpfully clarifies that *Grainger V* and Article 17 place the acceptable limit of speech and belief at the far extreme, and that they only lose protection if they 'espouse … violence and hatred in the gravest of forms' (paras 79 and 103).

Ms Forstater's beliefs, the EAT held, did not come 'anywhere near to approaching' the Article 17 level (para 111), not least because it remains the law of the land that sex is binary and immutable. On this point, the EAT confirmed that *Corbett* is still the leading case, and commented that it was 'jarring' that a belief which was consistent with the law should be 'declared as one not worthy of respect in a democratic society'(para 115).

Lack of belief

The EAT found also that Ms Forstater was protected under s.10(2) EqA by virtue of her *lack* of the 'gender identity belief', defined as the belief that 'everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and trans women are women'. It was conceded – correctly – that this belief also satisfies the *Grainger* criteria and is therefore apt for protection under s.10 EqA.

The EAT held that the tribunal had applied a flawed test, namely that 'the lack of belief must be religious or philosophical, rather than the protection applying to anyone who does not hold a particular religious or philosophical belief'. The EAT observed that a person's lack of belief 'may arise from simply not having any view on the issue at all', and that it is difficult to see how the *Grainger* criteria could be applied to such a person (paras 105–106).

Manifestation of belief, misgendering and harassment

One consequence of the tribunal having embarked upon a detailed analysis of the worthiness of Ms Forstater's belief was that it impermissibly veered into an evaluation

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of the way in which she expressed – or manifested – her belief. Choudhury P accepted the submission of the EHRC (intervening) that he should reverse his previous decision in *Gray* in this respect, and agreed that, in fact, 'manifestation is not a useful touchstone' in applying *Grainger V* (although it may have some relevance to other parts of the *Grainger* criteria) (para 75).

The focus of the tribunal's findings on manifestation was on the question of misgendering, in particular of trans people who hold GRCs. The EAT found that, having made inconsistent findings of fact as to Ms Forstater's propensity for doing this, the tribunal then effectively imposed a 'blanket restriction' on her use of language to describe men and women (para 103). The EAT pointed out that 'the GRA does not compel a person to believe something that they do not' (paras 94 and 99), and that the proper construction of the provision in the GRA which refers to a person becoming 'for all purposes' the acquired gender is that its meaning is restricted to 'for all legal purposes' (para 97).

Moreover, the EAT said that misgendering does not inevitably amount to harassment contrary to s.26 EqA. Although it often will, a careful assessment of the relevant circumstances is always required (para 99). Even where it does amount to harassment, this does not, in itself, remove the belief from the scope of protection altogether under *Grainger V*. Rather, as examined above, it might justify proportionate restrictions on the expression of the belief under Articles 9(2) or 10(2), which is a matter for the liability stage.

Conclusions

How, after *Forstater*, do employers discharge their newly clarified obligations in equality law, not only to gender critical workers but also to those who hold the 'gender identity belief' and, importantly, to the vast swathes of people who are agnostic on the matter or who are wary of wading into the sex and gender debate?

The EAT's decision has not been appealed and the matter will now return to the tribunal for a final hearing on the merits. The outcome may cast light on some of the questions posed above, although, unless it goes to appeal, it will be of limited authority.

In the meantime, employers should perhaps start by considering whether their diversity and inclusion training adequately takes account of belief as a protected characteristic, and whether the definition of harassment in their policies is sufficiently nuanced to take account of the range of protected beliefs on sex and gender. They should also think carefully about the extent to which their publicly expressed corporate values and their internal communications serve, in effect, to compel adherence on the part of their workers to one side of the debate or the other.

KEY:

Forstater	*Forstater v CGD Europe* UKEAT/0105/20/JOJ
EqA	Equality Act 2010
GRA	Gender Recognition Act 2004
Grainger	*Grainger Plc v Nicholson* [2010] ICR 360 EAT
HRA	Human Rights Act 1998
ECHR	European Convention on Human Rights and Fundamental Freedoms
Redmond-Bates	*Redmond-Bates v DPP* [2000] HRLR 249 (QB)
Ibragim Ibragimov	*Ibragim Ibragimov v Russia* (2019) (1413/08 and 28621/11)
Corbett	*Corbett v Corbett* [1971] P 83
GRC	Gender Recognition Certificate
Gray	*Gray v Mulberry Co (Design) Ltd* [2019] ICR 175 EAT

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