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Dear Peter Cheese and Valerie Hughes-D'Aeth

The CIPD recently published a guide to transgender and non-binary inclusion at work, written by a professor in management and a lecturer in sociology, which drew on my case, *Forstater v CGD Europe*. The guidance mis-states my case and misinterprets the law, and is profoundly one-sided.

Peter Cheese's foreword presents my case (and other cases such as *Bailey v Stonewall*, *Garden Court Chambers* and others) as being about "workplace conflict on the issue of gender critical beliefs". In fact these cases concerned **unlawful discrimination against people with gender-critical beliefs**. Bias against people with gender-critical beliefs is threaded through the CIPD guidance.

The guidance will encourage discrimination against and harassment of gender-critical employees. It is at odds with the standards, reputation, values and virtues of the CIPD. It is not in line with the CIPD Charter, in particular:

1. Positive and active impact on working lives

- (i) Develop and champion policies and procedures that foster fair, consistent and equitable treatment for all.
- (ii) Champion and demonstrate employment and business practices that promote sensitivity for the customs, practices, culture and personal beliefs and rights of others. Whilst upholding and promoting equal opportunity, diversity, inclusion and dignity.

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Directors: Michael Biggs, Rebecca Bull, Julia Casimo, Naomi Cunningham, Maya Forstater, Emma Hilton

- (iii) Do not bully, harass, abuse, discriminate, victimise, or conduct offensive behaviour in the work environment.

2. Civic virtue and stewardship

- (i) Evidence that stakeholders, including the wider community have been considered and (where relevant) consulted in your practice, decisions and actions.
- (ii) Uphold all compliance, regulatory and legal obligations in the country(ies) in which you practise. Role-model more advanced developments where possible, including acting beyond the minimum legal requirements.
- (iii) Act in accordance with the interests of the employer/client except where professional, ethical or legal duties require otherwise.
- (iv) Develop policies and practices under which people are treated with courtesy, dignity and respect. Where possible go beyond the minimum standards of treatment required under employment laws/regulation.

3. Good character

- (ii) Always act in a way which supports and upholds the standards, reputation, values and virtues of the profession. Do not act in a way which might discredit the profession, the CIPD or other members.
- (v) Ensure that your professional judgement is not compromised nor could be perceived as being compromised because of bias, or the undue influence of others.

Its use will discredit the profession, as employers who follow it will face discrimination and harassment claims on the basis of belief.

I note that the guidance has been revised once already since publication to “clarify the law”. That revision is inadequate. I urge you to withdraw the document in its entirety, and review the process by which your organisation was able to commission, sign off and publish it despite its manifest flaws.

I attach more detailed comments and request a meeting to discuss these concerns.

Yours sincerely



Maya Forstater
Executive Director

Comments on CIPD guide

Bias

The research does not appear to have involved talking to a single individual or organisation with a gender-critical viewpoint (or indeed any viewpoint other than gender ideology). There is no sign that the authors reviewed any literature that did not support their prejudice against people with gender-critical views.

This results in a one-sided approach. For example, the guidance recommends that employers:

“speak to your transgender and non-binary staff and/or consult with external organisations to identify terms that staff are most comfortable with, rather than dictating the language that should be used.”

The guidance says:

“Many organisations are likely to have staff or customers who are transgender and/or non-binary who experience harassment and discrimination.”

It fails to point out that many organisations are likely to have staff or customers who are gender-critical or who do not share a belief in gender identity, who are also vulnerable to experiencing harassment and discrimination. This an extraordinary omission, given that the guidance is ostensibly based on analysis of these cases.

This approach is not in line with some of the CIPD charter principles:

- 1 (i)** Develop and champion policies and procedures that foster fair, consistent and equitable treatment for all.
- 2 (i)** Evidence that stakeholders, including the wider community have been considered and (where relevant) consulted in your practice, decisions and actions.
- 3 (v)** Ensure that your professional judgement is not compromised nor could be perceived as being compromised because of bias, or the undue influence of others.

Misstatement of my belief

During my four-year legal case I set out my beliefs carefully in my witness statement and was cross-examined on it. As the judgment notes, my belief is that:

“Sex is biologically immutable. There are only two sexes, male and female... Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than ‘gender’, ‘gender identity’ or ‘gender expression’.”

Your guidance says that “Forstater’s belief was that sex correlates to reproductive biology”.

The words “correlates” and “correlation” (which mean “to bear reciprocal or mutual relations: a change in one thing results in a similar or opposite change in the other thing”) do not appear anywhere in my statement or the judgments in my case. It is a concept that relates to the relationship between two sets of variables, not a binary definition. This idea that sex is a sliding scale is the precise opposite of what I believe.

I do not think that male and female are continuous variables that correlate with reproductive biology. Sex *is* reproductive biology.

If a man feels attracted to femininity, wears lipstick, grows his hair long, changes his name or wears fake breasts I do not think he is any less male. Similarly, a woman who eschews traditionally feminine pastimes, cuts her hair short or wears trousers is not less female. I consider these to be profoundly offensive, sexist ideas.

The use of the word “correlates” is sloppy and inaccurate, and reveals that the authors have not understood the beliefs of people with gender-critical views at all.

Misstatement of the law and promotion of discrimination

Throughout the guidance, people with gender-critical views are presented as being a problem, rather than as employees with the same rights and protections as others.

For example, after the guidance introduces the Equality Act and obligations in relation to protected characteristics (on page 5), it says “The Equality Act (2010) may also protect gender-critical views, as holding these views is not in itself unlawful discrimination.” In the glossary it describes this belief as “capable of protection under the UK Equality Act (2010) on the grounds of the protected characteristic of ‘Religion or Belief’, even if such a belief or opinion may be considered profoundly offensive and even distressing.”

In fact the belief *is* protected. There is no need to qualify this with uncertainty, or to set it apart from the general prohibition against harassment and discrimination, or to comment on the belief being offensive or distressing to some people.

The guidance adds: “However, this does not give anyone the right to manifest any beliefs in a discriminatory way at work, and the manner of expression of these beliefs could amount to unlawful discrimination depending on the circumstances.” This is equally true of the belief in gender ideology, or indeed any belief.

Guidance from the CIPD should not describe one set of views pejoratively: this was the error in law made by the judge in my first tribunal, and by my employer. Doing so is likely to encourage discrimination.

This orientation of the guidance towards the interests and demands of those who identify as transgender (which it encourages employers to “define with generosity of spirit”) and its prejudice

towards those with gender-critical beliefs are not in line with the CIPD Charter 1(ii), which calls on members to “champion and demonstrate employment and business practices that promote sensitivity for the customs, practices, culture and personal beliefs and rights of others whilst upholding and promoting equal opportunity, diversity, inclusion and dignity”.

Guidance founded on ideology

The guidance is a partisan document that promotes a particular viewpoint, using ideological terms such as “cisgender”, “deadnaming” and “misgendering” and mixing them in with legal terms in the glossary. For example, the section on key terminology states: “Cisgender refers to a person whose gender identity aligns with their birth sex.” This uncritically promotes the contested idea that everyone has a “gender identity”. It is like calling someone who does not believe in the religion they were brought up in an apostate.

The guidance defines “misgendering” as “referring to someone using a word, especially a pronoun or a form of address, which does not correctly reflect the gender with which they identify”. This again promotes a contested belief system. The words man, woman, male, female, boy, girl, son, daughter and so on (and their associated pronouns) are commonly (and in law) determined by a person’s sex. That some people wish to repurpose these words to refer to gender identity does not make this the correct usage. (Indeed it is often necessary to refer to a person’s sex for their own or others’ safety or to fulfil a legal requirement.)

The glossary defines sex opaquely as “a biological or legal category where people are assigned either male or female, typically based on biological or physiological attributes”. The Equality Act in fact defines the protected characteristic of sex clearly as being a man or a woman, and goes on to clarify that “man” means a male of any age and “woman” a female of any age. Presumably the guidance ignores the legal definition of sex for the purposes of the Equality Act, because expressing the law means undertaking what the guidance defines as deliberate “misgendering”.

Encouraging unlawful discrimination based on belief

The guidance states: “While employees have the right to hold protected beliefs, this does not give anyone the right to manifest these beliefs in a discriminatory fashion at work.”

It states that **“it would be unlawful to deliberately misgender someone”**. This is wrong in law. There is no law that states that it is unlawful to refer to people by their sex when that is against their wishes, and in many situations it may be necessary for their own health and safety, or that of others (such as when explaining sex-based rules and who they apply to).

The EAT found in my case that:

“the Claimant will sometimes refuse to use preferred pronouns if she considered it relevant to do so, e.g. in a discussion about a trans woman being in what the Claimant considered to be a women-only space.”

It expressly found that there is no blanket requirement against “misgendering” in law:

“The second error was in imposing a requirement on the Claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the Claimant’s right to freedom of expression insofar as they relate to her beliefs. However, that right applies to the expression of views that might ‘offend, shock or disturb’. The extent to which the State can impose restrictions on the exercise of that right is determined by the factors set out in Article 10(2), i.e. restrictions that are ‘prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...’ It seems that the Tribunal’s justification for this blanket restriction was that the Claimant’s belief ‘necessarily harms the rights of others’. As discussed above, that is not correct: whilst the Claimant’s belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. **In our judgment, it is not open to the Tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.**”

The CIPD guidance justifies its statement that it would be unlawful to misgender, saying:

“in this instance, we have used the term ‘would’ as deliberate actions of this nature are likely to create ‘a hostile, degrading, humiliating or offensive environment’, and permitting these behaviours (or allowing a clear likelihood of them taking place) is likely to put you at risk. You should therefore support employees to understand that everyone has the right to hold protected beliefs and express them within limits, appropriate to the workplace and in ways that do not discriminate or harass colleagues or breach internal policies.”

This is exactly the misjudgment that was made in my first tribunal and overturned by the EAT.

The guidance is directing practitioners to ignore the case law in favour of what the authors wish the law to be.

The guidance goes on to say:

“You should therefore support employees to understand that everyone has the right to hold protected beliefs and express them within limits, appropriate to the workplace and in ways that do not discriminate or harass colleagues or breach internal policies.

“When assessing whether a particular comment or behaviour has gone beyond those limits, a recent employment appeal tribunal judgment (Higgs) set out that employers should bear in mind things like the content, tone, extent and audience of the comment or behaviour, whether the individual was clear that they were expressing their own views and not those of the organisation, and whether there is a reputational risk to the employer.”

This is again a misstatement of the case law to support a particular biased viewpoint. The judgment in Higgs states:

94.(3) “Whether a limitation or restriction is objectively justified will always be context-specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.

“It will always be necessary to ask (per Bank Mellat): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.”

A general ban on misgendering, based on the misapprehension that “misgendering is unlawful”, would not pass the Bank Mellat test. **The CIPD guidance is encouraging unlawful discrimination against people with gender-critical beliefs.**

Facilities

An example (though not the only one) of how the guidance promotes discrimination in practice is in its treatment of facilities.

It states that “refusing to allow a transgender or nonbinary person to use the facilities they feel most comfortable in may be discrimination”. This is vague and unhelpful. A clear reading of the Equality Act is that:

- refusing to allow a man who identifies as transgender or non-binary to use the male toilets, showers or changing rooms may be discrimination based on the protected characteristic of gender reassignment (though employers may be able to point to the exception in Schedule 3 paragraph 28)
- refusing to allow any man (including one who identifies as transgender) to use the female toilets, showers or changing rooms is lawful under Schedule 3 paragraph 27/28, which provides for the provision of single-sex services
- not providing a gender-neutral option could be indirect discrimination on the basis of gender reassignment, as a person who identifies as transgender or non-binary would be disadvantaged.

The guidance suggests that employers should “think through the scenarios that could be faced by a transgender or non-binary employee”, but does not suggest that they “think through the scenarios faced by gender-critical employees” – for example a female employee who is shocked and frightened to encounter a male colleague in the showers, and who does not believe that having a professed inner gender identity makes a man into a woman. She is likely to experience this as creating a hostile and humiliating environment based on the protected characteristic of sex.

The guidance suggests individualised negotiation of toilet and changing facilities. This is unworkable for any large employer.

Employees need to be able to understand policies and signs. For example, if a facility is labelled female-only, female staff need to know whether this really means female-only, or whether the employer allows male employees (who may identify as transgender or non-binary) to use them. According to this guidance, even to raise this question would be “transphobia” and “unlawful” as it would involve “misgendering” someone else (i.e. accurately noting their sex).

The guidance is likely to lead to conflict and claims of discrimination and harassment based on sex, as it encourages employers not to give clear messages to male staff that they should stay out of female toilets, changing-rooms and showers regardless of how they identify.