Gender critical cases: sex matters

Complaints about discrimination in relation to any protected characteristic should lead to robust investigations, not heresy hunts, say Maya Forstater & Anya Palmer

Writing in *NLJ* recently, Oscar Davies, a barrister at Garden Court Chambers, said that the law was 'tying itself in knots over gender critical cases' (see 'Gender critical cases: making bad law?', *NLJ*, 26 April 2024, p8). In fact, since 2021, when the Employment Appeal Tribunal (EAT) ruled that gender critical beliefs were 'worthy of respect in a democratic society', tribunals have drawn a series of straight lines between discriminatory conduct and employer liability.

The first organisation to be found liable for gender critical discrimination was Garden Court itself. In July 2022, an employment tribunal ruled that Garden Court had discriminated against one of its barristers, Allison Bailey, in its response to people complaining about her view that people cannot change their biological sex. The tribunal found that Garden Court had discriminated against Bailey, and victimised her, in publicly stating that she was under investigation and in upholding the complaint. (Bailey has appealed against the tribunal's conclusion that Stonewall, who had worked with Garden Court, did not cause or induce the set to discriminate against her. A decision is awaited on the appeal.)

In the article, Davies argued that the battleground in current litigation concerns 'whether a belief that may be contentious should be protected'. But the principle here is well established: protection of freedom of expression 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population' (*Handyside v UK* (1979-80) 1 EHRR 737).

Recent respondents have not contested this point. They have shifted instead to the Bananarama defence: *It ain't what she said, it's the way that she said it*.

A series of employers have lined up to defend discriminatory behaviour on this basis, and have lost convincingly:

- In *Forstater v CGD Europe*, CGD argued unsuccessfully that referring to a man who sometimes wears women's clothing as a 'part-time crossdresser' was offensive. It also claimed that a pamphlet arguing that changing the Gender Recognition Act 2004 to a system of self-ID would harm protections for women's rights was 'anti-trans' and unacceptable (and reminiscent of the Nazis because it used red and black graphics).

  Unsurprisingly, the tribunal found that sharing such arguments (which have now also been used by the government in its Section 35 Order blocking the Scottish government's Gender Recognition Reform (Scotland) Bill) did not overstep any line.
- In *Fahmy v Arts Council England,* Denise Fahmy's colleagues posted a petition with comments condemning the LGB Alliance—an organisation defending gay rights as relating to sex, not gender identity—and by implication Fahmy herself, who had been a lone voice defending the alliance at an online meeting of Arts Council staff.

  Signatories described gender critical beliefs as bigotry, anti-trans and transphobic, a cancer, and held by neo-Nazis. Arts Council England allowed the petition to stay up for over 24 hours, despite Fahmy's distress and pleas to have it taken down. The tribunal found that this was harassment.
- In *Meade v Westminster City Council and Social Work England,* social worker Rachel Meade was investigated by her regulator and then suspended by her employer after a Facebook 'friend' complained about her social media posts.

  Based on this one complaint about posts shared on Facebook with around 40 people, Social Work England, the regulator, concluded that there was a realistic prospect that Ms Meade's fitness to practise was impaired, and that she should receive a public sanction as 'an example to other members of the profession'. Under duress, Meade accepted a written warning. She thought this would allow her to move on. But when her employer learnt of it, she was suspended and subjected to a protracted investigation and disciplinary hearing on gross misconduct charges. She was eventually told she could go back to work with a two-year final written warning, and the threat of further disciplinary action if she voiced gender critical views.

  Meade appealed, saying the sanction was excessive, oppressive and unlawful. She also recanted her earlier apology and asked the regulator to reconsider its decision. Social Work England upped the ante by referring her to a fitness to

practise panel with a statement of case arguing that her views were inherently objectionable. At the last minute, it changed course and asked for the case to be discontinued.

The employment tribunal found that Meade had been harassed by both her regulator and employer and ordered compensation in the highest band of injury to feelings as well as exemplary damages and costs.

- In *Phoenix v The Open University and others,* Professor Jo Phoenix became the target of a campaign of harassment by colleagues at the Open University (OU) in 2019 when she asked questions about a conference which was cancelled amid accusations of transphobia. The harassment ramped up in 2021, after she co-founded a research network on sex and gender. Hundreds of colleagues signed an open letter asking the OU to withdraw support from the network and calling gender-critical feminism 'fundamentally hostile to the rights of trans, non-binary, and genderqueer people'.

  The OU did not take effective action to prevent this bullying, and the tribunal found it liable for more than 25 counts of discrimination and harassment, leading to constructive dismissal.

Of course, not every claim succeeds, and having the protected characteristic of belief does not mean that an employee must be accommodated in every way. In the case of *Mackereth v Department for Work and Pensions and another* [2022] EAT 99, the EAT found that Dr Mackereth, who clashed with his employer over its policy to require use of preferred pronouns for service users, had not been subject to discrimination since the policy applied to everyone and was justified as a means to ensure that the vulnerable clients felt comfortable. The tribunal in *Lister v New College Swindon* found something similar in a further education setting.

The question of whether it is the right policy, in terms of mental health and safeguarding, for a school, college or service for vulnerable people to affirm gender identity is beyond the scope of the Equality Act 2010 (EqA 2010). What these tribunals found was that the respondents' policies were not unlawful in relation to employees who don't believe in gender ideology.

The latest successful case is *Adams v Edinburgh Rape Crisis Centre.* The tribunal found that a rape crisis centre which required its staff not only to use preferred pronouns but to ignore sex entirely in favour of gender identity, did act unlawfully. Counsellor Roz Adams raised concerns that the policy meant rape victims being given ambiguous, misleading or incomplete answers about who would be counselling them. The tribunal found that Adams was subjected to a 'completely spurious and mishandled' disciplinary process, culminating in constructive dismissal. The tribunal described what took place as 'a heresy hunt' designed to 'cleanse the organisation' of those who did not adhere to a 'dogmatic', 'extreme' and 'hardline' view of gender identity.

Unlawful harassment

Davies expresses concern that gender critical cases are asking employers to 'accept and normalise behaviour that might… amount to harassment of co-workers'. However, none of those who have won discrimination claims did anything that approached harassment. Rather, they were victims of it.

Unlawful harassment (defined in EqA 2010, s 26) means engaging in unwanted conduct related to a protected characteristic with the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. Section 26(4) makes clear that it must be reasonable for the conduct to have that effect.

It is not reasonable to expect to be shielded from encountering people with whom you disagree. Nor is it reasonable for a person with the protected characteristic of gender reassignment (who may, for example, change their name, clothing or appearance) to expect other people to believe they have changed sex, or to adopt the idea of gender identity.

Reducing risk of conflict

Davies argues that in a conflict situation 'there is literally nothing the employer can do to escape legal liability' if it employs both people with gender critical beliefs and those who identify as transgender. This is wrong.

An employer can reduce risk of conflict, and escape liability, if it shows that it takes all reasonable steps to prevent unlawful action. Reasonable steps might include promoting toleration of different beliefs and lifestyles, along with professional behaviour, having clear rules about single-sex spaces and providing unisex options, recognising that equating statements such as 'trans women are men' with 'transphobia' is unreasonable, and challenging this view in training and internal communications.

Where employees are being subjected to bullying and harassment from colleagues, employers should step in and make clear the behaviour is not acceptable. Reasonable complaints about bullying, harassment or discrimination, in relation to any protected characteristic, should be investigated but should not lead to heresy hunts. **NLJ**

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