Employment

Does a belief that sex is biologically immutable amount to a philosophical belief protected by the Equality Act 2010?

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This is the question which the employment tribunal has recently grappled with in *Forstater v CGD Europe and others.*

Ms Forstater was a researcher who worked for the think tank CGD. She claimed that her contract was not renewed because of views she expressed on social media and elsewhere regarding transgender persons and proposed changes to the Gender Recognition Act 2004 (GRA 2004).

Currently, if a person obtains a gender recognition certificate (GRC) under the GRA 2004 then their gender becomes the acquired gender for all purposes. An application for a GRC is determined by a panel and must show that the applicant has gender dysphoria, has lived in the acquired gender for two years, and intends to continue so living until death.

The Equality Act 2010 (EqA 2010) prohibition on *discrimination based on gender reassignment* applies only where a person is proposing to undergo, is undergoing, or has undergone a sex reassignment process.

Ms Forstater was critical on social media of proposed changes to the GRA 2004 that would move to a system of permitting persons to self-identify their gender.

Ms Forstater believed that there was no difference between sex and gender, that sex was an immutable biological status observed at birth, that it was not possible to change gender, and that she could not be bound to refer to a transgender person by the pronoun appropriate to their acquired gender, even if they had obtained a GRC. As the tribunal recorded:

“When questioned during live evidence the Claimant stated that biological males cannot be women. She considered that if a trans woman says she is a woman that is untrue, even if she has a [GRC].“ *(Paragraph 41.)*

Ms Forstater claimed that she fell within section 10 of the EqA 2010 as having one of the following:

- The belief that being male or female was an immutable biological fact and that there was no difference between sex and gender.
- The lack of a belief that sex was different to gender and that gender could “trump“ sex.

She supported this belief by focusing on “inheritance of genetic material“ to say that sex was determined at conception, and by claiming that permitting changes in gender created dangers for women by allowing “men“ to enter women‘s spaces.

Addressing the reasons for Ms Forstater‘s beliefs, the tribunal examined a review of scientific thinking on gender and sex and noted that modern thinking in this area had moved beyond the binary approach to sex and gender adopted by Ms Forstater. The tribunal also noted the non-sequitur in Ms Forstater‘s concern about women‘s spaces. It was possible

to accept that trans women were women, but still exclude them in certain circumstances from certain spaces. This was potentially possible under the EqA 2010 as a proportionate means of achieving a legitimate aim.

The main issue for the tribunal was whether the Grainger criteria applied to a lack of belief as they did to belief. These five criteria, set down in *Grainger plc v Nicholson [2010] ICR 360*, establish a minimum threshold which a claimed belief must cross before it is recognised for the purposes of section 10 of the EqA 2010. For present purposes, the most important criterion was that the belief "must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others."

The tribunal concluded that the *Grainger* criteria did apply to a lack of belief. The consequence of this was that a claimant seeking the protection of section 10 of the EqA 2010 for lack of belief needed to show that their absence of belief was in some sense "philosophical", rather than simply that there was a philosophical belief which they did not share.

As a consequence, Ms Forstater needed to show that both her belief and lack of belief satisfied the *Grainger* criteria.

The tribunal reviewed the domestic, EU and Convention jurisprudence, including:

- *P v S and Cornwall County Council [1996] ICR 795*, in which the ECJ concluded that discrimination on the grounds of gender reassignment constituted sex discrimination.
- *Goodwin v UK [2002] IRLR 664*, in which the European Court of Human Rights (ECHR) concluded that a failure by the law and society to recognise a change of gender represented a serious interference with the right to private and family life.

Applying the *Grainger* criteria, the tribunal concluded that Ms Forstater had satisfied all but the last criterion. Finding that Ms Forstater's beliefs were not compatible with human dignity or worthy of respect in a democratic society, the tribunal commented:

"The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a person, even if that person has a Gender Recognition Certificate … The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act." *(Paragraph 85.)*

Therefore, the Claimant did not possess a philosophical belief or lack of belief protected by section 10 of the EqA 2010.

This case throws up a number of points of interest.

First, this is helpful confirmation that the *Grainger* criteria apply to test the quality of an absence of belief in the same way they do a positive belief. It would not be enough for an enthusiastic carnivore not to believe in the tenants of ethical veganism (to take a recent example); their beliefs in opposition would also have to satisfy the *Grainger* criteria.

Second, a practical concern was raised by the tribunal about the appropriateness of dealing with this as a preliminary issue given the distinction between the holding of a belief and the manifestation of a belief.

Persons have absolute rights to hold beliefs, but the right to manifest them is qualified. The preliminary issue was supposed to be limited to the question of whether the belief held qualified for protection. However, perhaps inevitably, this began to engage the question of how Ms Forstater manifested her belief; the way in which she treated transgender persons amounted to harassment, which was relevant to the *Grainger* criteria.

It may be more helpful for claimants to deal with all matters at the final hearing so that a tribunal can grapple with the question of whether a particular belief might be protected, but manifestations resulting in harassment might not.

Here, the tribunal resolved the issue by saying that Ms Forstater‘s beliefs would necessarily result in the violation of the dignity of others. One might query this with a strained hypothetical world in which an alternative claimant held similar beliefs but never attempted to identify transgender persons by their birth gender, and so on.

Third, the tribunal found that the issue of a GRC under the GRA 2004 did not produce a “legal fiction“ as claimed by Ms Forstater, but produced substantive rights. It is welcome to see that the scheme of the GRA 2004 is not being treated as a mere legal deeming, given how central and significant its operation is to the lives of transgender persons.

Finally, the tribunal raised the possibility of an exclusion of transgender women from certain spaces intended for women as being a legitimate means of achieving a proportionate aim, and therefore not indirectly discriminatory. This seems technically correct, but rather difficult to imagine in reality. Much as the question of women-only spaces occupy a central role in the public debates in this area, it is difficult to see how the fact of a person having been born male produces any logical link to, for example, a danger of assault, such that the blanket exclusion of trans women from certain spaces would be proportionate.

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