

Forstater v CGD Europe

Forstater wins her appeal, but trans rights remain mostly unaffected by this clumsy judgment

Maya Forstater holds 'gender critical' views. When her consultancy contract was not renewed, she brought a claim at the Employment Tribunal that she had been discriminated against due to her beliefs. The tribunal concluded that the claimant's belief that she would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment" was "not worthy of respect in a democratic society" ('Grainger V'). As a result, the tribunal held that her views were not protected as a 'philosophical belief' under the Equality Act 2010 ('EA 2010').

Forstater appealed to the Employment Appeals Tribunal ('EAT') with the Equality and Human Rights Commission intervening in her support. Today the EAT released its decision that her views are protected under the EA 2010.

The EAT sought to draw a distinction between merely holding a belief and manifesting that belief. In particular it found that only holding the belief rather than manifesting it is protected (para. 78). As such trans people's rights to bring claims for discrimination or harassment under EA 2010 arising out of the actions of 'gender critical' people remain unchanged (para. 104).

Further, calling a transwoman a man at work *may* be unlawful behaviour (para. 104), as it was before today's ruling.

The legal impact of this ruling seems to be minimal. Trans people's rights remain unchanged. 'Gender critical' feminists can now bring claims if they are discriminated against for merely holding 'gender critical' beliefs, but this judgment does not give them a license to act on their beliefs in ways that are harmful to others.

The EAT was crystal clear that this ruling has no impact on the rights of trans people and it is worth quoting extensively from the EAT's summary:

*"a. This judgment does **not** mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.*

*b. This judgment does **not** mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.*

*c. This judgment does **not** mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct.*

*d. This judgment does **not** mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.”*

The biggest concern is the bar for protection of beliefs seems now so low that other extremists might also now be protected. Only beliefs such as Nazism and totalitarianism are clearly excluded from protection (para. 111). The EAT clumsily argued that white supremacists would not be protected (para. 100) but racists or anti-Semites who stop short of publicly calling for hostility or violence against specific groups (but whose views nonetheless contribute to a climate that provokes both) may well argue that they should be protected.

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