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COMMENT

Beliefs Unworthy of Respect in a Democratic Society: A View from the Employment Tribunal

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INTRODUCTION

There have been a number of tribunal decisions on the admissibility of discrimination claims concerning 'belief' as a protected characteristic under the Equality Act 2010.[1] Some have favoured the claimant, establishing, inter alia, that opposition to fox hunting and hare-coursing,[2] a belief in the 'higher purpose' of public service broadcasting[3] and a commitment to vegetarianism[4] constitute 'philosophical beliefs' for the purposes of the Equality Act. Others do not, such that a belief in wearing a poppy[5] or, in contrast with an earlier decision, a commitment to vegetarianism[6] do not qualify. The admissibility of these claims tended to turn on the extent to which the belief in question was considered cogent or was sufficiently weighty and substantial.[7] In *Forstater v CGD Europe & Anor*, [8] whether or not a belief fell into the protected category focused on the rather different issue of whether or not it was worthy of respect because of its compatibility (or otherwise) with the dignity and rights of others.

THE FACTS

In a preliminary hearing the claimant, Maya Forstater, sought to establish that she had a protected philosophical belief in order to bring a claim for direct

1 Before 2010, under the Employment Equality (Religion and Belief) Regulations 2003 SI No 1660.
2 *Hashman v Milton Park (Dorset) Limited t/a Orchard Park* (2011) ET 3105555/09.
3 *Maistry v BBC* (2011) ET 1313142/10.
4 *Alexander v Farmtastic Valley Ltd and others* (2011) ET 2513832/10.
5 *Lisk v Shield Guardian Co and others* (2011) ET 3300873/11.
6 *Conisbee v Crossley Farms Ltd & Ors* [2019] ET 3335357/2018. For a discussion of this case, see F Cranmer and R Sandberg, 'A critique of the decision in *Conisbee* that vegetarianism is not a belief', (2020) 22 Ecc LJ 36–48.
7 See discussion of the 'Grainger criteria' below.
8 UKET 2200909/2019 (18 December 2019).

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discrimination against the organisation CGD Europe. She had worked for this organisation as a researcher and writer under different consultancy arrangements intermittently from January 2015 to December 2018. She became concerned about changes proposed by the Government to the Gender Recognition Act (2004), specifically the intention to allow people to self-identify their gender.[9] She started to research the subject and began to tweet about it from August 2018. Various examples of her early tweets on the subject were given by the tribunal and included: 'Yes I think that male people are not women. I don't think being a woman/female is a matter of identity or womanly feelings. It is biology.'[10]

In October 2018 some members of staff at CGD Europe complained that some of Ms Forstater's tweets were 'transphobic' and the issue was investigated. Following the end of her last contract with CGD Europe, Ms Forstater was not re-engaged, although she contended that she was an applicant for employment.[11] As a result, Ms Forstater considered herself to be a victim of belief and sex discrimination and lodged a claim at an employment tribunal. The preliminary hearing, and subsequent judgment, addressed the question of whether or not Ms Forstater had a 'philosophical belief' for the purposes of the Equality Act in order to proceed to a substantive hearing.

The focus of the hearing, before Employment Judge Tayler, was therefore on the nature of Ms Forstater's belief, which was summarised, at some length, as follows:

> The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. 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'. She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man.[12]

The question for the tribunal was therefore whether this belief constituted a philosophical belief under section 10(2) of the Equality Act. However, there is

9 Ibid, para 23.
10 Ibid, para 25.
11 Ibid, para 31.
12 Ibid, para 77 (Tayler EJ).

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an early indication in the judgment that the judge did not entirely view the issue in these straightforward terms, commenting that he considered that there was potential for overlap between holding a belief and harassment of others.[13]

Nevertheless, the judge then correctly proceeded to apply the criteria for identifying philosophical belief, first stated in *Grainger plc v Nicholson*,[14] which are as follows:

i. The belief must be genuinely held;
ii. It must be a belief and not an opinion or viewpoint based on the present state of information available;
iii. It must be a belief as to a weighty and substantial aspect of human life and behaviour;
iv. It must attain a certain level of cogency, seriousness, cohesion and importance; and
v. It 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 reminded itself of the rules of interpretation for the *Grainger* criteria (including that the bar must not be set 'too high' for establishing the existence of the criteria, in particular criterion (iv); that 'genuinely held' means held in good faith; and that there is a difference between a belief and an opinion).[15] It also reminded itself that both belief and lack of belief are protected characteristics, with possible implications for Ms Forstater's belief if presented in negative terms.[16]

In applying the first three criteria, the judge concluded that the claimant's belief was genuinely held, that it constituted a belief and not an opinion or viewpoint, and that it concerned 'substantial aspects of human life and behaviour'.[17] In considering the fourth criterion, with some apparent reluctance he conceded that the belief attained the necessary (modest) level of 'cogency, seriousness, cohesion and importance' to qualify ('even though there is significant scientific evidence that it is wrong').[18] However, with regard to the fifth criterion, the judge concluded: 'I consider that the Claimant's view, in its absolutist nature, is incompatible with the human dignity and fundamental rights of others.'[19] The justification for this conclusion which then followed focused on the fact that the claimant had gone 'so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned'; this was

13 Ibid, para 6.
14 [2010] ICR 360 at para 24 (Burton J).
15 *Forstater*, paras 52–55.
16 Ibid, para 56. This issue was considered in some detail by Judge Tayler, but ultimately found not to assist Ms Forstater (para 93).
17 Ibid, para 82.
18 Ibid, para 83.
19 Ibid, para 84.

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wrong because 'if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman [and] that is not something the Claimant is entitled to ignore'.[20] As a result, Ms Forstater's belief was not a philosophical belief protected by the Equality Act.

ANALYSIS

The decision in *Forstater* was to some extent foreshadowed by another recent employment tribunal decision, *Mackereth v The Department for Work and Pensions and Anor.*[21] In this case, the claimant had been dismissed from his role with the Department for Work and Pensions for failing to comply with the department's policy on using preferred pronouns to refer to transgender people. His subsequent claim for discrimination was on the grounds of religion and belief (specifically that, as a Christian, he took Genesis 1:27[22] to mean that every person is created by God as either male or female; that it is not possible to change this gender; and that any attempt to do so is sinful). In its findings, the tribunal declared that 'belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to trangenderism in our judgement are incompatible with human dignity and conflict with the fundamental rights of other, specifically here, transgender individuals'.[23]

Mackereth was a merits hearing and, although the belief was held not to be protected, the judge went on, notwithstanding, to explore the substantive issues, concluding against the claimant. Perhaps alarmed at the public reaction to the judgment, the judge added a confusing postscript which stated that the tribunal had no doubt of the claimant's 'entitlement to hold [his] beliefs' but that what the case concerned was 'whether he was entitled to manifest those beliefs in the circumstances that applied'.[24] How this postscript can be reconciled with the earlier part of the judgment which declared the claimant's actual beliefs to be incompatible with human dignity and the rights of others is unclear.

There is no such ambiguity on this central issue in *Forstater*. Yet the ruling lends itself to critique for several reasons. The first concerns the way in which the judge interpreted his role in determining what was a preliminary question – was Ms Forstater's belief a protected one? – in order to determine eligibility to proceed to a full hearing. At one stage, he lamented that 'It can

20 Ibid, para 54.
21 (2019) ET Case 1304602/2018.
22 'So God created man in his own image; in the image of God he created him; male and female, he created them.'
23 *Mackereth*, para 197 (Perry EJ). The tribunal, while not disputing that Christian belief in general was protected in law, chose to apply the *Grainger* criteria to 'sub-sets' of Christian belief, thus choosing to treat religious beliefs and philosophical beliefs in the same way (para 194).
24 Ibid, paras 262–263 (Perry EJ).

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be difficult to tease out what constitutes a belief and what are expressions of belief.'[25] To illustrate this contention he gave examples of 'certain tweets … which it is strongly arguable included stereotypical assumptions about trans people'.[26] Yet in the same paragraph he concludes that these did not 'represent the core of the Claimant's belief'. This did not provide much clarity. Surely a better approach would have been to focus clearly on the underlying belief (which indeed, as noted earlier, he did capture, if at somewhat unnecessary length) and treat the way in which this belief was stated as representing 'manifestations' of that belief rather than overcomplicating the analysis by considering the possibility that each statement (via a tweet, for example) might amount to a separate belief or component of belief. At a substantive hearing, this might allow for the possibility that some expressions of the core belief might be acceptable and some (perhaps those which were bound up with unnecessarily offensive language) might not be (perhaps because they might amount to harassment), while leaving the legitimacy of the core belief intact. There are some parallels with the case of *Ngole v University of Sheffield* (albeit a judicial review hearing under Article 10 of the European Convention on Human Rights, rather than a claim under the Equality Act),[27] where the court focused on the offensive way in which the claimant's religious views on same-sex marriage had been expressed, rather than seeking to doubt the legitimacy of the underlying belief.[28]

Yet the judge in *Forstater* specifically rejected this approach:

> I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief, and will be relevant to determining whether the belief is a protected characteristic.[29]

This, it may be argued, is an approach fraught with danger.[30] The implication is that a belief, before it is even expressed, is beyond the pale owing to its capacity to 'violate the dignity of others' (that is, cause offence). Indeed the judge seems to go so far as to suggest that because dignity will be violated then that fact in itself operates to demonstrate that a belief rather than 'an action based on belief' is in play.

25 *Forstater*, para 76.
26 Ibid.
27 [2017] EWHC 2669 (Admin).
28 The claimant, a student of social work, was ultimately successful in his attempt to overturn a decision to exclude him from his MA course.
29 *Forstater*, para 88 (Tayler EJ).
30 The same approach also appears, more opaquely, in the reasoning in *Mackereth*, paras 201–202.

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A second concern is the way in which the judge emphasises what he describes as the 'absolutist' nature of the belief as contributing to its incompatibility with human dignity and the rights of others. He opines:

> I conclude ... that the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. This approach is not worthy of respect in a democratic society.[31]

Apart from the fact that, in his example, he appears to have identified a manifestation, or 'action based on belief' (referring to someone by their non-preferred gender), rather than an underlying belief, the implication that a belief, if it is 'absolutist', is somehow less deserving of protection is surely misplaced. This is nowhere suggested in the *Grainger* criteria (and appears to be based on no other authority than Judge Tayler's own). Indeed it might be suggested that an absolutist belief, based presumably on some identified (perceived) truth or authority, is more likely to be 'cogent, serious, cohesive and important' and less likely to amount to 'an opinion or viewpoint based on the present state of information available'; in other words, absolutist beliefs, because of their very nature, are more likely to meet the other *Grainger* criteria.

Judge Tayler also considered that the 'absolutist' nature of the belief served to knock down the claimant's Article 10 right to freedom of expression, stating that 'The human rights balancing approach goes against the Claimant because of the absolutist approach she adopts.'[32] However, in a preliminary hearing on admissibility, the need to engage with substantive Article 10 issues was unclear. If there was such a need, then a one-line dismissal of the issues seems rather inadequate and cannot be said to amount to the application of a 'balancing approach' as the judge suggested.

An allied concern is that Judge Tayler took something of an 'absolutist' view of the issue himself, arguing that those who have 'transitioned' have the right 'thereafter to be treated *for all purposes* as being of the sex to which they have transitioned'.[33] Yet he himself cites possible exceptions to this 'rule' (such as competitors in sports) and other areas of law where transgender status is not fully recognised.[34] It might be concluded from this that transgender rights are not in fact 'absolute', as implied, as there is still contention over their form and extent (as the consultation over the proposed changes to the Gender Recognition Act, noted by Judge Tayler,[35] would suggest). It might be argued

31 Ibid, para 90 (Tayler EJ).
32 Ibid, para 91.
33 Ibid, para 84, emphasis added.
34 Ibid, paras 79–80.
35 Ibid, para 86.

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that this uncertain context makes it almost perverse to suggest that a belief such as that of Ms Forstater should be considered unworthy of respect in a democratic society; indeed, it might rather be characterised, once expressed, as a reasoned contribution to an important contemporary public debate.

A fourth concern is that the judge's approach appears to be wrong in law, specifically with reference to *Grainger* criterion (v). The test of whether a belief is worthy of respect in a democratic society and compatibility with human dignity and the fundamental rights of others (alongside the other *Grainger* criteria) finds its authority in the seminal House of Lords judgment in *Williamson v Secretary of State for Education and Employment*.[36] In that judgment, consistency with 'basic standards of human dignity or integrity' was undefined but an example of what might fail to meet that standard was a belief involving 'subjecting others to torture or inhuman punishment',[37] suggesting that a belief such as that of Ms Forstater, with no such implications, would by some distance successfully meet the criterion. Judge Tayler, on the other hand, concluded that 'people cannot expect to be protected if their core belief involves violating others [*sic*] dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them'.[38]

What Judge Tayler appears therefore to have done is to re-interpret the criterion. What has emerged in the process is a new definition which seems to conflate the notion of harassment, as understood under discrimination law,[39] with incompatibility with human dignity (under *Grainger*). He appears to have done this largely based on his own insight,[40] though he might perhaps have been influenced to some extent by the reasoning in *Mackereth*.

CONCLUSION

A number of difficulties with the decision in *Forstater* have been considered in this discussion. Perhaps chief among these has been the tendency, also apparent in *Mackereth*, to confuse core beliefs with action on those beliefs (or, in Article 9 terms, manifestation of those beliefs). It is extremely difficult to see how holding a belief that to be male or female is an immutable characteristic could of itself be a cause of harassment of others. It is only when that belief is acted upon (or manifested) in particular circumstances (for example, by refusing to use preferred gender pronouns) that the question of possible harassment arises. It is

36 [2005] 2 AC 246.
37 Ibid, para 23 (per Lord Nicholls).
38 *Forstater*, at para 87.
39 Equality Act 2010, s 26.
40 With the aid of his oft-quoted manual, *The Equal Treatment Bench Book*, first referred to at paragraph 11 of the judgment.

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submitted that the judge in *Forstater* erred by widening the definition of belief to include actions. This, it may be argued, was only appropriate at a later hearing.

Notwithstanding, the judge does appear to regard what might be described as Ms Forstater's core belief (that is, being 'absolutist in her view of sex') as unacceptable in a democratic society. This belief is of course shared by many people within conservative religious traditions, albeit for different reasons. As has been seen, in the decision in *Mackereth*, the logical consequence of the tribunal's stance is to declare beliefs in portions of sacred texts, such as the Bible, as incompatible with human dignity and therefore, applying *Grainger*, unworthy of respect in a democratic society.

Such a decision has wide-reaching implications, suggesting, inter alia, that what were recently mainstream religious (and non-religious) views about gender are now beyond the pale of what is acceptable belief in twenty-first-century Britain. *Forstater*, like *Mackereth*, is a non-binding first instance decision. It is to be hoped that a higher court, if and when given the opportunity, might take a rather different approach.

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The Caroline Divines and the Church of Rome: A Contribution to Current Ecumenical Dialogue – A Review Article

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INTRODUCTION

Readers of the *Journal* will recall the Ecclesiastical Law Society's long tradition of serious ecumenical engagement, embodied in the biennial Lyndwood Lecture with the Canon Law Society of Great Britain and Ireland, and recall that a

1 This comment is an extended review of *The Caroline Divines and the Church of Rome: A Contribution to Current Ecumenical Dialogue* by Mark Langham (Routledge, 2018, 252pp (hardback £105.00) ISBN: 978-1-47248-981-4). Monsignor Mark Langham was co-secretary of the third phase of the Anglican–Roman Catholic International Commission (ARCIC III) from 2009 to 2013 and Bishop Christopher Hill was an Anglican member of the commission from 2009 to 2018 and a consultant to it from 2019, having been Anglican co-secretary to the first two phases of ARCIC.