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Insights

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ANOTHER GENDER CRITICAL PHILOSOPHICAL BELIEF CASE, A NEW CASE ON REDACTION OF DISCLOSURE DOCUMENTS PLUS A GENERAL NEWS ROUND-UP

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SUMMARY

Our June update includes a new gender critical philosophical belief case exploring some new areas (such as the nature of the workplace), a case on redaction of disclosure documents and whether the redacted material was relevant to the issues in the case, and a general news round-up including a survey on whether generative AI is supporting or replacing employees, a study of neurodiverse employees and their workplace experiences, and a look at the trend towards returning full time to the office.

PROTECTED PHILOSOPHICAL BELIEF, ECHR RIGHTS AND SPECIFIC WORKPLACES

This case, which attracted national media attention, highlights both the complexities of the area and raises interesting points on philosophical/religious belief. In particular it considers the expression of a philosophical belief as being a separate issue to simply holding that belief and how the circumstances of different workplaces can affect tribunal decisions.

It also considers, unusually, the relationship between a claimant expressing views that reflect religious/philosophical beliefs and whether that expression affects or compromises the rights of a respondent manager under the European Convention for Human Rights (ECHR). This is unusual because it is normally the claimant expressing the views who claims ECHR protection, as in *Higgs v Farmor's School*, due to be heard at the Court of Appeal in October. In *Higgs* the claimant is arguing that being sanctioned for expressing religious views breaches her ECHR rights. In this case it was the respondent alleging that the claimant had infringed a manager's ECHR rights by expressing philosophical beliefs.

We will give only a brief summary of the facts. The claimant worked in a rape crisis centre. The respondent only employed women, using Schedule 9 of the Equality Act 2010 (EqA) which allows

employers to employ only women if that is a genuine occupational requirement of the job. Individuals who contacted the respondent were called Service Users (SU).

The claimant held gender critical/sex realist beliefs. She believed biological sex was real, immutable and not to be confused with gender identity. She believed that transparency about biological sex was particularly relevant in relation to the work of a rape crisis centre, in that SUs contacting the respondent should, particularly if they request it, be informed of the biological sex of the counsellor they are liaising with. Since the decision of the EAT in *Forstater –v- CGD* in 2021, the beliefs held by the claimant qualify as a protected philosophical belief under the EqA.

The respondent's management, including its CEO, did not share the claimant's views. Their view was that gender choice and fluidity took precedence over biological sex. For example, the CEO was a trans woman without a gender recognition certificate.

One of the respondent's employees (AB) was a biological female who decided to identify as non-binary. AB changed their name to one that could be identified as male. AB was assigned as a counsellor to an SU seeking support regarding sexual violence. The claimant, attending on the helpline, was asked outright whether AB was a man or a woman. The claimant, following on from her beliefs, believed this was a legitimate question for a victim of sexual violence, but wanted to deal with the issue in line with the respondent's trans inclusive policy.

The claimant prepared an email and requested guidance on it. The email, to the SU, was eventually sent. It read:

> "*Hi – thanks for asking – [AB] is a woman at birth who now identifies as non-binary*"

AB took offence, and relations with both AB and management deteriorated. Management at the respondent took the view that the claimant's views were transphobic. She was subjected to an investigation and disciplinary procedure that in the view of the tribunal was poorly handled. After lodging a grievance and being signed off as sick, the claimant resigned and brought proceedings for, amongst other things, unfair constructive dismissal, and direct discrimination/harassment because of her philosophical belief.

The claimant was successful and there is to be a separate remedies hearing. The decision may be appealed.

In relation to religious/philosophical belief the judgment held that:

- There are two strands to direct discrimination
  - The mere fact of someone holding a particular belief and suffering a detriment for that reason; and
  - A situation where an employee carries out an act which is an expression of their belief and they suffer a detriment as a result of that expression.

- The tribunal's view on the second issue, which can be more problematic, was that the actions of the claimant in preparing and sending the email regarding AB was closely connected to her beliefs. The claimant had gender positive views, she thought the SU should know the biological sex of who she was dealing with, and the manner in which it was expressed was not egregious or offensive.

- The respondent raised the issue that there was a conflict between the claimant's expression of her belief and the rights of AB under the ECHR. In particular, by revealing AB's biological sex, the claimant had compromised AB's rights to a private life under Article 8 of the ECHR. The tribunal's view on this matter was influenced by the nature of the claimant and AB's work and workplace. In some workplaces, the disclosure of AB's biological sex might be a breach of confidence or an inappropriate sharing of personal information. However, in the context of a rape crisis centre, it was held to be legitimate and not a breach of AB's Article 8 rights to have revealed to an SU that AB was a biological woman. The claimant knew the SU to be a victim of make sexual violence, and that she might legitimately believe AB was a man because of their name. There was also the point that only women could be employed at the respondent, so it would not be a surprise for the SU to learn that AB was a biological woman.

The facts above are only a short summary and the full background highlights the complexities and nuances of this area, and how sensitively and carefully these issues need to be dealt with.

However, on the issue of whether the expression of a belief compromises ECHR rights, this case does not have the clarity of *Higgs* or even *Forstater*. In this case the claimant had received training in expressing herself both verbally and in writing in a non-confrontational manner, so her email regarding AB is carefully worded, as were all her emails and other documents.

Forsater and *Higgs* however are more challenging, and their statements on social media are substantially more confrontational. In *Higgs* one of the issues to be heard by the Court of Appeal in October is balancing social media statements which potentially deride the employer's policies, but at the same time reflect ECHR rights to religious freedom and freedom of expression.

WHY THIS MATTERS

This illustrates, more than most, the complexities and nuances of cases involving gender critical/sex realist philosophical beliefs, and just how sensitively matters need to be dealt with. It also shows how the nature of the workplace can influence decisions, in that some workplaces are more sensitive and robust than others.

Finally, it gives a preview of some of the issues to be covered by the Court of Appeal in *Higgs v Farmor's School* in October.

WHEN CAN AN EMPLOYER REDACT DOCUMENTS?

Following a decline in air travel following the Covid-19 pandemic, the respondent made the claimants redundant. The claimants contested the fairness of the selection process. The claimants brought claims for unfair dismissal and some brought an additional claim for indirect discrimination on grounds including sex and age.

As part of the disclosure process, the respondent disclosed documents with parts redacted. One such document included financial details of (a) pilot costs and potential savings and (b) pilot payroll details. The respondent justified redaction by arguing that the redacted information was not necessary to resolve the issues in the proceedings.

The claimants argued that financial information regarding pilot costs and savings were highly relevant to the proceedings. One of the claimants made an application for specific disclosure, arguing that disclosure of unredacted documents would 'throw important light on whether…[the respondent] chose to depart from the seniority selection criteria which had previously been agreed….in order to maximise salary savings'. A similar application by two other claimants argued that disclosure of such information would "support the claimants' case that the respondent's selection criteria were adopted to ensure maximum permanent savings in salary, contract and term changes".

In short, the redacted passages would show that one of the main drivers for the redundancies was costs savings, which had not been made entirely clear during the redundancy process or agreed as an issue with the claimants' union.

A preliminary hearing was held. The tribunal granted the claimants' applications for specific disclosure and made a case management order requiring the respondent to disclose unredacted copies of the requested internal management documents dating from April to July 2020.

The tribunal considered that the redacted information was relevant to whether redundancy was the true reason for the claimants' dismissal, the fairness of the criteria used for selection (from an unfair dismissal perspective) and the assessment of proportionality in the respondent's defence if the PCP argued by the claimants in their indirect discrimination claims was made out.

The respondent appealed.

The EAT dismissed the appeal. It was held that the tribunal had reached the correct conclusion. The redacted financial information was likely to be material/relevant to several issues in the case and the respondent had taken too narrow a view of relevance in its disclosure. In particular, the EAT pointed out that the redacted financial information was relevant to the claimants in relation to (a)

transparency on the part of the respondent regarding redundancy criteria, (b) assessment of the actual criteria used, and (c) whether the criteria were influenced by a desire to maximise long-term savings in pilot costs by implementing a change to terms and conditions.

The EAT concluded that the redacted information would have a bearing on any determination about the parties' cases on whether the selection criteria were fair, or whether the respondent was influenced by factors other than those presented. It would also be relevant to reaching a finding on the respondent's legitimate aims regarding indirect discrimination, and an assessment of the proportionality of the redundancy scheme designed to meet those aims. The EAT rejected the respondent's argument that uncovering the redactions was disproportionate. It was ordered that clean copies of the documents be provided.

WHY THIS MATTERS

This case is a reminder of the importance of "relevance" in disclosure. The EAT reminded the respondent that its analysis of the relevance of these documents failed to take into account the potential for the redacted information to adversely affect its own case.

It is not sufficient to consider what material supports either party's case, and relevant documents can include documents that are not supportive at all of a party's case.

Virgin Atlantic Airways Ltd -v- Lee Loverseed, Jonathan Fenton and Niamh O'Connor

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NEWS ROUNDUP

UK TECH EMPLOYERS AND GENERATIVE AI (GENAI)

74% of UK tech employers have incorporated generative GenAI into their business - 51% say it is used as a productivity tool to support existing jobs but 99% state that it will not replace jobs.

A survey carried out among 322 tech leaders globally, including in the UK, found that whilst 74% of UK tech employers have incorporated GenAI into their business, 51% say that it is used for productivity to support existing jobs and to increase efficiency. 55% of UK tech leaders are yet to find clear business use beyond GenAI being a productivity tool, with many businesses facing budgetary constraints. 43% are expected to increase their tech budget, with 36% planning to increase tech headcount. The survey also found that UK tech leaders have implemented GenAI policies to support employees and to ensure safe use in their organisations, with almost 40% being concerned about the misuse of GenAI tools.

99% of respondents agreed that GenAI **will not be replacing jobs**, and that AI will be evolutionary rather than revolutionary.

THE EXPERIENCE OF NEURODIVERSE INDIVIDUALS IN THE WORKPLACE

A recent survey, again focused on the tech sector, gives valuable insights into the experiences of neurodiverse employees at work.

It showed that only 25% of employers have policies in place to support neurodiverse employees. Nearly 75% of respondents were unaware of any neurodiverse support policies and over a third reported they had experienced workplace discrimination related to their neurodiversity, with 80% having experienced challenges at work because of their condition.

While the survey showed that reasonable adjustment requests by those with neurodiverse conditions are usually accepted, with 57% who disclosed their condition reporting a supportive response, less than a third of respondents reported having made a formal request for reasonable adjustments. Ultimately, 85% of respondents reported that they tend to "mask" their neurodivergence at work to appear neurotypical.

EMPLOYERS CALL FOR STAFF TO RETURN TO THE OFFICE

According to a recent survey by one of the top four accountancy firms, employers are increasingly requiring staff to return to the office, with some employers advocating/encouraging a full five-day return. Others are enforcing a minimum number of days in the office. Apparently some professional firms have added office attendance as a feature of performance reviews to incentivise partners to attend the office in person.

However, these actions against remote working have apparently made some staff resentful, leading to an increase in employment tribunal cases. An analysis of tribunal claims mentioning remote working carried out by an HR consultancy showed an increase, although the figures remain modest. However, it is worth noting that, before the COVID-19 pandemic in 2019, only six employment tribunal cases specifically involved working from home.

A survey of chief executives published in October 2023 predicts that 63% of global leaders in the UK will return to in-office working by 2026.

Whether we will all return to a five-day week is questionable, but it does seem that the trend is towards encouraging/persuading staff to spend more time in the office.

This article was written with trainee solicitor Jemima Rawding

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