Liability of employers for harassment by their staff of people with protected beliefs under the Equality Act:

After the *Fahmy* case

Equality Act: protected viewpoints, harassment and liability for employee actions

The **Equality Act 2010** (the "**Equality Act**") prohibits discrimination against and harassment of people with various "*protected characteristics*" in specified contexts, including employment. "*Religion or belief*" is one such characteristic. See BFSP's Statement about what sorts of belief are protected following the landmark *Forstater* case in 2021[1]. People who hold (or do not hold) those beliefs must not be discriminated against, harassed or victimised for their views. People whose rights are infringed may bring proceedings, including for damages for losses suffered.

While BFSP's main focus is currently free speech at UK universities and other Higher Education Providers, and their "constituent institutions" and students' unions, the requirements of the Equality Act apply in a wide range of other contexts such as employment, the provision of services and exercise of public functions, and membership associations.

Harassment is defined in **Section 26** as follows:

> "(1) A person (A) harasses another (B) if:
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> […]
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

[1] *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf.

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

It is crucial to note that this contains both a subjective and an objective test as to whether a particular action constitutes harassment. The Employment Tribunal has stated that the relevant threshold will not be met by things said or done that are *"trivial or transitory, particularly if it should have been clear that any offence was unintended"*, and the courts have emphasised the importance of not encouraging *"a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"*.

Section 109 provides that anything done by an employee in the course of their employment must be treated as also being done by their employer; it does not matter whether that thing is done with the employer's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent the employee from doing the alleged act, or anything of that description.

An employee or agent of an employer contravenes **Section 110** if he or she does something which is treated as having been done by the relevant employer and the doing of that thing amounts to a contravention of the Equality Act by the relevant employer. Under **Section 111**, a personal claim may be brought against anyone who has caused a contravention of relevant parts of the Equality Act.

The *Fahmy* case

The *Fahmy*[2] case is one of the most significant cases regarding the protection of viewpoints under the Equality Act since *Forstater*. It does not create new law, and is not an appeal judgment, so is not in itself binding, but it shines an important spotlight on the risks for employers of harassment by their employees of colleagues for their viewpoints, and the need for them do everything they reasonably can to prevent this.

Ms Fahmy was a long-standing employee of Arts Council England (**ACE**). She held and expressed gender-critical viewpoints, in particular in an internal online meeting which was heated on the subject of gender-critical views and transphobia. Hostile comments were made via the chat function at this meeting.

"Extremely offensive" comments were made in connection with a subsequent "petition" (in link from a "support sheet" emailed to all staff). Some of the comments were such that the staff making them were subject to disciplinary proceedings, and one was found to be guilty of harassment of colleagues in breach of ACE's Dignity at Work policy (the other two resigned before the process was completed).

An internal investigation concluded that it was entirely unacceptable for ACE's internal email system to be used as it was.

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[2] *Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

The Tribunal concluded that the comments at the meeting were not of such seriousness as to constitute harassment, but that the staff comments in relation to the petition constituted harassment and that, pursuant to section 109, ACE was liable for that harassment.

The convener of the teams meeting was criticised by the Tribunal for expressing personal views in solidarity with one side of the debate, although it concluded that his actions did not cross the threshold for creating an intimidating etc environment. The Tribunal stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in the *Fahmy* case.

The Tribunal also noted that ACE's Dignity at Work policy misdescribed harassment by excluding reference to harassment relating to a person's protected belief, which rendered it inconsistent with the Equality Act.

Implications of the *Fahmy* case

Types of statements which may constitute harassment

The *Fahmy* judgment illustrates the kinds of statements likely to be viewed by a tribunal as constituting harassment in the workplace of those with protected viewpoints.

The following were stated as (together) constituting harassment: describing gender-critical views as "bigotry", a "cancer that needs to be removed", "should not be tolerated" and "discriminatory, transphobic", and likening them to racism and sexism; and calling the LBG Alliance (which promotes gender-critical viewpoints and which Ms Fahmy was defending) a "cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes". It is not clear how many of these statements it would have taken in order for the threshold to have been crossed.

It is also worth noting that the comments at the online meeting were quite strongly expressed, but these were held not to constitute harassment. They included the convenor of the meeting stating that the LBG Alliance was, in his personal opinion, "a divisive organisation that has a history of anti anti trans-exclusionary [sic] activity", and another saying that it was "extremely disappointing to see people trying to defend [the LBG Alliance] here of all places." This is a reminder that comments and statements, even strongly expressed ones, which a recipient may find offensive, do not necessarily constitute harassment. The bar is not low.

Actions by employers in order to avoid liability

To avoid liability for unlawful harassment by their employees of colleagues in respect of their viewpoints, employers must be able to show that they qualify for the Section 109(4) Defence, i.e. they have taken all reasonable steps to prevent their employees from committing that sort of harassment. This requires an employer to take the following steps.

- Ensure that its staff understand what constitutes harassment, what are protected viewpoints, and that harassment of people with such viewpoints is unacceptable; and that tolerant, personally respectful discourse, including when made through internal

communications systems, is expected within the work environment, while making it clear that this requirement does not prevent staff from disagreeing, sometimes strongly, with each other's ideas.

- Have appropriate policies, practices and requirements to ensure that the above is understood and complied with, including requirements as to behaviour backed by disciplinary measures. The fact that ACE knew that its Dignity at Work policy wrongly omitted protected viewpoints from the list of characteristics protected from harassment, but had not updated the policy, was mentioned by the Tribunal in connection with it failing to qualify for the Section 109(4) Defence.

- Conduct appropriate training, particularly about not attacking people for their viewpoints and the boundary between robust but legitimate debate and bullying or harassment. The fact that that ACE knew that it needed to put appropriate training in place, but had failed to do so, was mentioned by the Tribunal in connection with it failing to qualify for the Section 109(4) Defence.

- Actively and appropriately enforce its relevant policies and requirements. ACE did this, starting disciplinary proceedings shortly after the relevant events had happened.

- Ensure that its internal communications systems (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed.

- Have appropriate systems in place for reporting and management of problems, and for review and improvement of its policies, practices and requirements.

- Ensure that it has appropriately senior, experienced and empowered personnel with responsibly to carry the above into effect.

In order to ensure that they and their employees do not harass their employees for their viewpoints, organisations need to maintain i**nstitutional neutrality.** This is a recurring failure which BFSP encounters in connection with free speech problems.

- If an employer takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of creating a hostile environment for (i.e. harassing) people who hold the other viewpoint, or creating an environment in which their employees feel free or even encouraged to do so.

- The criticism by the Tribunal of the convener of the online meeting in the *Fahmy* case for expressing personal views in solidarity with one side of the debate is a good example of the problems taking sides causes. While it appears to BFSP that he was sincere in attempting to prevent inappropriate behaviour (and he was not himself held to have harassed Ms Fahmy), the Tribunal stated that his taking sides provided "the basis, or

opened the door, for the subsequent petition and the comments" which constituted the harassment.

- Employers and their representatives therefore need to maintain neutrality in respect of matters of public debate or controversy, while of course complying with their wider relevant legal obligations.

Finally, it is worth noting, as a significant aside, that the discussions which gave rise to the *Fahmy* case were about whether ACE should have made a grant to the LBG Alliance, given its gender-critical viewpoints. It must be likely that, were ACE to have decided not to provide funds to the LBG Alliance, or withdrawn those funds, because of the LBG Alliance's viewpoints, that would constitute unlawful discrimination under Section 29 of the Equality Act (provision of a service to the public).

Best Free Speech Practice

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