Why free speech needs to be a core element of your business's ESG and legal programmes

Free speech is a vital human right, so why is it not part of your ESG programmes?

Recent cases have highlighted legal responsibilities to protect your employees' free speech. Have you kept up? Are you managing your risk appropriately?

We have long taken free speech for granted, so it has not been seen as a necessary concern for businesses. But the arrival of cancellations and pressure on companies to sack employees with various opinions has brought the surprisingly vulnerable state of free speech into sharp relief.

Free speech as a core EGS concern: Free speech is an essential human right and vital to a properly functioning democratic society. It should be a core part of businesses' ESG implementation programmes - both the Social and the Governance elements. As debate gets shut down and people with unpopular viewpoints pushed aside, corporate cultures will get less open and tolerant, to the companies' and their employees' detriment: they are likely to become less enjoyable places to work. Businesses which care about the S and the G need to include a free speech focus, to balance areas which can give rise to free speech problems, such as diversity. It is inconsistent not to.

Protecting free speech is required under Equality Act: risks: Opinions on a range of controversial areas constitute a "protected characteristic" for the purposes of the Equality Act 2010. Businesses must therefore prevent unlawful discrimination and harassment of their employees because they hold these opinions. Businesses are themselves liable for their employees' harassment of colleagues, and need to work to secure that this does not happen. A business that fails to implement appropriate protections for people's free speech is therefore at severe risk of cost and embarrassment. (See a summary of the relevant law in Appendix 1 below.)

What boards need to do:

1. Resolve that their company needs **firm and effective policies and rules** for the protection of free speech, and to implement and give effect to them. Make sure that all senior managers are aware that this is a priority programme.

2. Appoint **someone to supervise and co-ordinate this task**. They should be senior and with appropriate authority, and their views should not mean that they will be likely to resist their task (ie, they should not be wedded to agendas that often lead to suppression of

dissenting viewpoints), or indeed implement it with excessive zeal: moderation is everything.

3. Choose and **implement the right policies and rules**. This will involve research and taking appropriate advice on what policies and rules are appropriate in the context of their company to give effect to free speech and reduce the legal risks under the Equality Act; development of those policies and rules; and review and approval by the board or an appropriate committee. Plan for **review of effectiveness and refinement** of the policies and rules.

4. Make sure that the free speech policies and rules **can be and are effectively enforced**: put effective enforcement procedures in place and make sure they work.

5. Put appropriate **education programmes** in place.

See a more detailed statement of what relevant law requires in Appendix 2 below.

Best Free Speech Practice

November 2023

www.bfsp.uk / info@bfsp.uk

BFSP is part of DAFSC Ltd, company no 14189200. Registered office: 27 Old Gloucester St, London W1N 3AX.

Appendix 1: Legal requirements: protected speech and harassment; the *Fahmy* case

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

The **Equality Act 2010** (the "**Equality Act**") contains extensive provisions to prevent discrimination, harassment and other unlawful actions in specified contexts in respect of people with certain "*protected characteristics*". "*Religion or belief*" is one such characteristic. There have been several judicial decisions about what beliefs are protected by this provision.

In the *Forstater* case in 2021[1], the Employment Appeal Tribunal decided that holding "gender-critical" views is a "*philosophical belief*" and, therefore, within the protected characteristic of "*Religion or belief*". The principles established in the *Forstater* case have been reinforced by subsequent cases, including a ruling [Corby] that views questioning or disagreeing with aspects of so-called Critical Race Theory are protected beliefs.

While each case will depend on its particular facts, it appears highly likely that the following viewpoints are capable of satisfying the criteria for constituting protected beliefs for the purposes of the Equality Act 2010, and will, in time, be confirmed as such.

- Belief in the importance of and advocacy for free speech and human rights.
- Holding views about, and questioning of or disagreement with, religious beliefs and dogma and their effects in practice.
- Holding views about significant aspects of politics, society and social and international relations which are matters of public controversy or debate. There is case law to the effect that left-wing democratic socialism counts as protected for these purposes, so logically other political viewpoints, at least non-extreme ones, must be qualify for equivalent protections.

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—
> (a) the perception of B;

[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

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

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.

The *Fahmy* case: businesses liable for harassment by employees

The *Fahmy*[2] case is one of the most significant cases regarding the protection of viewpoints under the Equality Act in recent years. 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 a spreadsheet 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.

The Tribunal concluded that the comments at the meeting were not of such seriousness as to constitute harassment, but that the staff comments on 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 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.

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

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

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) 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.

Appendix 2: Actions required to reduce the risk of liability for harassment by employees

The Fahmy case is a reminder that, 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, ie 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. 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.

- 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 in the *Fahmy* case.

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