Equality Act: complaints and disciplinary processes must not be used to suppress protected viewpoints; the importance of sufficient institutional neutrality:

After the *Meade* 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 various specified contexts. "*Religion or belief*" is one such characteristic. 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.

The landmark *Forstater* case[1] established that holding gender-critical views is a protected belief. In the subsequent *Corby*[2] case, views which challenged aspects of Critical Race Theory were ruled to be protected. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, employers and others need to work on the basis that advocacy for free speech and human rights, and opinions (whether religiously or philosophically based)

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[1] *Forstater v. CGD Europe et al.* (2021: 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

[2] *Corby v Advisory, Conciliation and Arbitration Service* (September 2023, ET 1805305/2022). Mr Corby (whose wife is black and who, as the Employment Tribunal noted, has "throughout his life… spent large amounts of time with black people and formed close relationships with them" was ordered to remove posts on an internal communications system which were critical of aspects of Critical Race Theory ("**CRT**"). He successfully argued that his views were protected under the Equality Act, although the issue of whether being required to remove the posts was discriminatory under the Equality Act has yet to be decided. See https://assets.publishing.service.gov.uk/media/651d42146a6955000d78b29f/Mr_S_Corby_v_Advisory_Concilliation_and_Arbitration_Service_-_1805305.2022_-_Preliminary_Judgment.pdf Whether views critical of CRT were protected had already been litigated and subject to a substantial payment, albeit not a formal judgement. In May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns that (inter alia) the DWP's adoption of aspects of CRT.

in respect of other currently contested areas (including, for example, in relation to other aspects of Critical Race Theory and moves to "decolonise the curriculum", and lawful views in relation to relation to Israel/Palestine), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. See BFSP's detailed *Statement about what sorts of beliefs are protected following the Forstater case*. There can be "inappropriate manifestations" of protected beliefs which do not qualify for protection[3], and this appears to generally work to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

While BFSP's primary focus is currently free speech at UK universities and other higher education providers ("**HEPs**"), 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.

Discrimination includes an employer or person exercising a public function subjecting an employee or person in respect of whom which they exercise that function to a detriment because of their protected viewpoint.

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

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(1) 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**

[3] See *Wasteney v East London NHS Foundation Trust* (2016) ICR 643.

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 *Meade* case: complaints and disciplinary processes suppressing free speech; official disapproval of dissenting viewpoints as discrimination and harassment

The *Meade*[4] case makes important clarifications regarding the protection of viewpoints under the Equality Act.

Social worker Rachel Meade was found by an Employment Tribunal to have been harassed by her employer, Westminster City Council ("**WCC**"), and professional regulatory body, Social Work England ("**SWE**"), on the basis of her protected beliefs under the Equality Act 2010 (in her case the expression of what are known as 'gender critical' beliefs). Following a complaint from a former colleague and Facebook "friend" about posts she had made on a private Facebook group, they took the following actions, which were ruled to have constituted harassment. (The Tribunal stated that it would also have ruled her to have been discriminated against had it been required to rule on that issue.)

WCC:

- subjected Ms Meade to a disciplinary process;
- suspended her on charges of gross misconduct and refused to lift the suspension despite her requests for this;
- issued an investigation report which was hostile in tone and content;
- issued a final written warning; and
- importantly, the Tribunal ruled that WCC's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression, themselves constituted harassment.

SWE subjected Ms Meade to a prolonged investigation into her beliefs, and "fitness to practise" proceedings, and sanctioned her for misconduct.

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[4] *Ms R Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022). Note that *Meade* is not an appeal judgment, so is not in itself binding on future Tribunals, but, combined with other cases, gives a clear indication of the way the law is moving.

The Tribunal stated the following.

- "*[SWE's] failure to check if [the complainant] could be malicious, and not checking his previous social media history, is indicative of a lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate.*"

- SWE "*merely accepting at face value a complainant's subjective perception of offence is not the appropriate test, but rather that an objective evaluation should be undertaken, as to whether a social worker's social media posts had over stepped the line in terms of their content and potentially offensive nature.*" And "*…allowing the subjective belief of one party [to a vitriolic debate] to determine where the benchmark for offence should be taken involves a potential abdication of responsibility for assessing whether a social worker has breached applicable guidelines.*"
- "*…we consider that [WCC's and SWE's] defence of the claim was compromised by the contemporaneous concerns and decision-making process being principally predicated on the view that the beliefs/views expressed were unacceptable.*".

- A WCC staff member conducting the disciplinary process "*labelling [Ms Meade's] Facebook posts as being transphobic was clearly something [Ms Meade] found deeply offensive and in itself would be sufficient, in our opinion, to constitute harassment.*"

Implications of the *Meade* case: action required by employers and regulators

Key lessons

The first lesson to be drawn from the *Meade* case is that an employer's and regulator's **complaints and disciplinary functions** must not be allowed to become instruments of free speech suppression, contrary to the Equality Act. The implications of this are discussed below.

The second lesson is that an employer or regulator must maintain sufficient **institutional neutrality** on contested issues so as to ensure it satisfies its duties under the Equality Act, and take all reasonably practicable steps to ensure that its employees do likewise (in order to be able to avail itself of the Section 109(4) Defence). In the *Meade* case, the Tribunal criticised an apparent willingness to accept a complaint from one side of a debate without appropriate objective balance of the potential validity of different views. (See also the next point.)

The third lesson, which is also evidence of a profound and systemic failure in institutional neutrality, follows from the Tribunal's ruling that WCC labelling Ms Meade's gender-critical posts as being transphobic itself constituted harassment, and that its implied continuing disapproval of Ms Meade's conduct even as it was withdrawing the final warning also constituted harassment: **inappropriate enforcement of contested viewpoints will itself be discrimination and harassment**.

- This has profound implications for many employers and regulators, whose requirements relating to diversity include an equation of gender-critical views with transphobia. A recent study[5] by the Committee for Academic Freedom reported that 9 UK universities had statements doing just that, all using similar wording and all apparently derived from the campaign group Stonewall. Policies of this kind, which bind an institution into prejudicial conclusions about protected philosophical beliefs, run a significant risk of being unlawful, considering the logic in the *Meade* case. Employers and others need to review and change their policies and rules to ensure that they do not (and are not likely to) constitute discrimination or harassment. They also need to restructure or terminate their relationships with external campaign groups which are of a nature which has caused them to go down this path towards unlawfulness.

- The inexorable logic of this ruling must be that inappropriate enforcement of aspects of Critical Race Theory ("**CRT**") must be harassment, and indeed it has already been ruled to be discrimination (which is subject to a higher standard of proof the harassment) in the *Corby* case and treated as such another settled case[6]. Further, it must be highly likely that an employer promoting CRT-derived views, such as that all white people are inherently racist and that only white people can be racist, will also be found to be discrimination and harassment on grounds of race under the Equality Act.

- Likewise, inappropriate enforcement of aspects of agendas such as "decolonisation" of curriculums which are derived from aspects of CRT which have been or will be found to be discriminatory or harassment must, logically, also be highly likely to be found to be discrimination and harassment.

Assessing complaints and allegations: excluding where inappropriate

- Complaints and allegations should be assessed to confirm whether they are genuine, or whether they are false, malicious or vexatious. If they are the latter, they must be excluded.

- If complaints and allegations are made which seek adverse consequences for a person which are disproportionate to the matters complained of, this itself can be harassment and should be considered carefully in this light, and the employer or regulator must not entertain complaints or allegations to the extent they seek such disproportionate consequences.

- Complaints and allegations must be assessed for whether they are made in respect of people's protected viewpoints. If they are, they must be excluded or at least treated with great caution. If complained-of viewpoints are lawful, there will usually need to be a

[5] See https://afcomm.org.uk/2024/01/15/nine-uk-universities-label-gender-critical-academics-transphobes-investigation-reveals/.

[6] See Note 2 above.

presumption that any complaints or allegations about them are inappropriate, unless good reason can be shown for proceeding with the process, for instance because the way the protected views are expressed is likely to constitute an "inappropriate manifestation" of that viewpoint; in this case, the employer/regulator should proceed with caution.

Conducting complaints and disciplinary processes

- Complaints and disciplinary proceedings should not proceed if they are likely to constitute unlawful discrimination or harassment; in any event, complaints and disciplinary proceedings must be dealt with and conducted in such a way as to avoid unlawful discrimination and harassment.

- As discussed above, sufficient institutional neutrality on contested issues must be maintained so as to ensure compliance with the Equality Act, and ensure that organisations' employees do likewise (to avoid an attributable failure pursuant to Section 109(1)).

Rules against misuse of complaints and disciplinary processes; enforcement

- The bringing of an unjustified complaint or allegation against a person for their protected viewpoint is likely, following the *Meade* and landmark *Fahmy*[7] cases, to itself constitute harassment under the Equality Act and should be regarded in this light; as would urging disproportionately severe consequences for the alleged perpetrator. This would be attributable to their employer if done "in the course of their employment", under Section 109, unless the employer had done enough to qualify for the Section 109(4) Defence.

- An employer or regulator must therefore make it clear that misusing its complaints and disciplinary processes would itself be a disciplinary offence; and bring disciplinary proceedings against people who make false, malicious, unjustified or vexatious complaints or allegations against a person on account of their protected viewpoints, or urge disproportionately severe consequences for the alleged perpetrator.

Other actions by employers in order to avoid liability

An employer or regulator must also:

- ensure that its relevant staff understand what constitutes discrimination and harassment, what are protected viewpoints, and that discrimination against and harassment of people with such viewpoints is unlawful; and how to conduct relevant processes so as to avoid failures in this regard;

- conduct appropriate levels of training about free speech and its protections for all its different types of staff;

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[7] *Ms D Fahmy v Arts Council England* (2023) ET case no 6000042/2022. A statement in this important case can be found here: https://bfsp.uk/universities-and-free-speech.

- have appropriate systems in place for reporting and management of problems as regards free speech issues, and for review and improvement of its policies, practices and requirements;

- take such other action as is necessary to ensure that it qualifies for the Section 109(4) Defence as regards the behaviour of its employees (see BSP's detailed Statement "*Employers liable for harassment by their employees: the Fahmy case*" at https://bfsp.uk/universities-and-free-speech; and

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

Criminal matters: the Protection from Harassment Act 1997 (the "PHA")

Taking various types of action against a person is criminalised. Most relevantly, under the PHA, a person must not pursue a course of conduct which amounts to, and which he knows or ought to know amounts to, harassment of another person. Harassment in this context includes alarming a person or causing a person distress. Intent does not have to be proved. Illegal activity by an employer or other relevant organisation will give it acute problems. If it discovers that illegal activity has or may have occurred, it will need to act promptly and carefully. This will likely involve taking and following timely legal advice.

Issues and questions for WCC and SWE

We have some sympathy for WCC and SWE, in that the *Forstater* case and its implications emerged after the disciplinary proceedings had started; but only some sympathy, as they appear thereafter not to have then acted with integrity and care for good governance and compliance, which would have meant recognising their errors and working to set them right. Instead, they appear to have tried to brazen out the problem without conceding error or setting right the injustice they had done (reminded of the Post Office scandal?). WCC and SWE need to give careful thought to (indeed, be asked) the following questions and issues.

- How WCC and, even more so, SWE, which is supposed to be working dispassionately to promote the highest professional standards, came to buy into this contested ideology so apparently uncritically, and considered that this was a good thing to impose?

- Why did it not occur to them that they were acting with complete disregard for the legitimate free speech of Ms Meade?

- Once the implications of the *Forstater* case became known to them, why they did not act with integrity and care for good governance to recognise the errors made and work to set them right. Have they since changed their practises, procedures and rules so as to ensure that they are in compliance with their free speech related obligations? If not, why not?

- Rather than acknowledge errors, apologise to Ms Meade and set right there failures, why did they try to brazen out the problem? They must ensure that this cannot recur.

- Who should have been responsible for dealing with this governance and compliance failure once it was evident? Why did this not happen?

- Were their boards informed, and indeed told the full truth about the problem? If not, who misled them and what disciplinary action should be taken?

- To the extent that they were informed, did their boards operate as they should, with integrity and care for good governance and compliance? If not, what were the failings, who was responsible and what should be done to ensure they never happen again?

- Whether they or any individuals liaised with external pressure or advocacy groups (such as Stonewall) about (a) generally, the ideology they espoused and how to enforce it, and (b) about the events relating to the Meade case? If so, which ones and what were the details of the relationships and liaison made? Did it/they accept advice or viewpoints from or use materials provided by them? If so, which ones, when and in what way? Were these relationships responsible for their compliance failures? Should they terminate those relationships? Under Section 111 of the Equality Act, a personal claim may be brought against anyone who has caused a contravention of relevant parts of the Equality Act: does this apply to eg Stonewall or any of its staff?

- What disciplinary action should be taken against staff whose actions contributed material to their unlawful actions and governance failures?

- Finally, what steps are needed to ensure that its governance, processes, practices and requirements are such as to ensure that a scandal of this sort never recurs.

- We do not see how the above can be done properly without review and recommendations from an appropriately qualified independent reviewer, or at least independents specialist lawyers. And their conclusions should be made public.

- It appears that criminal harassment may be involved (see above), which both organisations should have known once it became clear that harassment may have happened in the Equality Act context; yet the Tribunal found that that harassment continued right up to the end. Both organisations need to take urgent legal advice about whether criminal harassment has been committed by any of the individuals or organisations concerned and what they should do if it is.

English universities and other HEPs and their colleges and students' unions: duty to secure free speech

Turning as an afterword to English HEPs and their colleges and students' unions: they have duties under the **Higher Education and Research Act 2017** ("**HERA**")[8] to take "*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*" to secure freedom of speech (within the law) for the staff, members and students of and visiting speakers to the HEP[9].

These duties will have similar consequences and impose similar requirements in practice to the implication of the *Meade* case, i.e. that an HEP's complaints and disciplinary functions should not be allowed to become instruments of free speech suppression, with the detailed consequences and required actions described above, and that sufficient institutional neutrality must be maintained; the difference being that all viewpoints are protected under HERA, and not just those which count as "protected characteristics" for the purposes of the Equality Act.

Best Free Speech Practice

January 2024

Details of the Committee (authors) and Editorial and Advisory Board of BFSP are on the BFSP website.

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

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[8] With effect from 1 August 2024; similar duties apply under the Education (No 2) Act 1986 prior to then. Those latter duties continue to apply to relevant Welsh institutions; relevant Scottish institutions have similar obligations.

[9] HERA **Sub-sections A1(1)-(2).**