

Philosophical beliefs protected under the Equality Act: After the *Forstater* case

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 the “*protected characteristics*” identified in **Section 4**. “*Religion or belief*” is one such characteristic and is defined in **Section 10**.¹

Contexts in which people’s religious or philosophical beliefs (or lack of such beliefs) must be protected, and which are or may be relevant to UK universities and other Higher Education Providers (“**HEPs**”) and their “constituent institutions” and students’ unions, include: the provision of services and exercise of public functions², employment³, further and higher education⁴ and membership associations⁵. In such contexts, discrimination or harassment based on such beliefs (or lack of them) is unlawful under the Equality Act. The Equality Act applies to both direct and indirect discrimination.⁶ Harassment is defined in **Section 26**. Victimisation is also prohibited.⁷

¹ **Section 10** provides:

“10 Religion or belief

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

[...]”

² **Sections 28** and **29**.

³ **Sections 39** to **41**.

⁴ **Sections 90** to **94**.

⁵ **Sections 101** and **102**.

⁶ Defined in **Sections 13** and **19**.

⁷ **Section 27**.

People whose rights under the Equality Act are infringed may bring proceedings against HEPs (including for damages for unfair dismissal).

The Equality Act thus imposes effective freedom of speech protection obligations on HEPs to the extent that holding (or not holding) certain religious or philosophical beliefs is a “*protected characteristic*”. People who hold (or do not hold) those beliefs must not be discriminated against (or harassed or victimised) for their views, including in respect of appointments, promotions and disciplinary matters.

In the landmark *Forstater* case in 2021⁸, the Employment Appeal Tribunal decided that holding gender-critical views (i.e., disagreeing with aspects of Trans ideology) is a “*philosophical belief*” and, therefore, within the protected characteristic of “*Religion or belief*”. See the Appendix for further detailed discussion of subsequent cases, and what other viewpoints have already been found to be capable of being protected beliefs.

In September 2023, the Employment Tribunal ruled that Sean Corby was expressing a legitimate philosophical belief when he challenged aspects of Critical Race Theory in his ACAS workplace. This is only a first-instance judgment, so not binding on other Tribunals, but it gives some interesting indications of the way a tribunal can be expected to treat a similar case in the future. Anti-Zionist views were held to be protected in February 2024⁹.

The law in this area is still evolving (with other relevant cases already in the pipeline) and, in order to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and holding (or not holding) viewpoints (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as protected beliefs and will, in time, be confirmed as such. These would include, for example, in relation to other aspects of Critical Race Theory and moves to “decolonise the curriculum”, and lawful views in relation to religions and their effects and the Palestinian cause. (See further discussion of why this is the case, and the types of belief which are likely to qualify, in the Appendix.) There can be “inappropriate manifestations” of protected beliefs which do not qualify for protection¹⁰, and this appears to generally work to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

⁸ *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.

⁹ *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. See more on the case at Note 18 below.

¹⁰ See *Wastaney v East London NHS Foundation Trust* (2016) ICR 643.

HEPs should therefore act on the basis that they have duties not to discriminate against, harass or victimise people on the basis of a wide range of lawful opinions held or expressed by them and, effectively, to take steps to avoid this happening, such as ensuring that their staff are properly trained and do not take unlawful actions on their behalf.

See further statements by BFSP on the protection of protected viewpoints under the Equality Act at <https://bfsp.uk/universities-and-free-speech>.

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Appendix: the *Grainger* tests and likely categories of protected viewpoints

There have been numerous judicial decisions about what beliefs are capable of falling within the protected characteristic of “*Religion or belief*”, and how to identify those beliefs. The principles which have evolved are usefully summarised in *Grainger v Nicholson*¹¹, in which five criteria were identified as characteristic of beliefs qualifying for protection:

- (i) the belief must be genuinely held;
- (ii) it must be a belief, and not simply an opinion based upon the present state of information;
- (iii) it must concern a weighty and substantial aspect of human life and endeavour;
- (iv) it must attain a level of cogency, seriousness, cohesion and importance; and
- (v) it must be worthy of respect in a democratic society and not conflict with the fundamental rights of others.

In the *Forstater* case in 2021¹², the Employment Appeal Tribunal decided that holding gender-critical views (i.e., disagreeing with aspects of Trans ideology) is a “*philosophical belief*” and, therefore, within the protected characteristic of “*Religion or belief*”.

The principles established in the *Forstater* case were reinforced by the *Bailey* case¹³ in July 2022, were taken as a given in the significant *Fahmy*¹⁴ case of mid 2023, and in December 2023, James Esses won a substantial settlement from the United Kingdom Council for Psychotherapy (UKCP) following their mistreatment of him for expressing concerns about relevant issues¹⁵.

¹¹ *Grainger v. Nicholson* (2010) ICR 360.

¹² *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

¹³ In which an Employment Tribunal found that a barristers' Chambers which stated that they were investigating the claimant and considering appropriate action following complaints about her expression of gender-critical views on social media had acted unlawfully in doing so, and that views which were critical of the Stonewall campaign's Trans ideology were protected viewpoints See: *Bailey v. Stonewall Equality Ltd and others*, Case No: 2202172/2020 https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms_A_Bailey_vs_Stonewall_Equality_Limited_Reserved.pdf.

¹⁴ *Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

¹⁵ UKCP issued a formal statement: “UKCP recognises that gender-critical beliefs (that sex is both binary and immutable) are protected under the Equality Act 2010. UKCP also recognises the validity of the

In an earlier case, belief in Scottish independence was held to be a philosophical belief.¹⁶ The *Anna Thomas* case strongly indicates that further widening of the application of these principles is highly likely¹⁷.

In September 2023, the Employment Tribunal ruled that Sean Corby was expressing a legitimate philosophical belief when he challenged aspects of Critical Race Theory in his ACAS workplace. This is only a first-instance judgment, so not binding on other Tribunals, but it gives some interesting indications of the way a tribunal can be expected to treat a similar case in the future, particularly in instances where an employee expresses a ‘colour-blind’ critique of the Critical Race Theory approach to racism.

Anti-Zionist views were held to be protected in February 2024 in the *Miller v University of Bristol*¹⁸.

Consistent with the above principles, and the judgements in the *Forstater, Corby, Fahmy, Miller* and other cases:

- (i) while each case will depend on its particular facts, it appears highly likely that the following viewpoints are capable of satisfying the criteria in *Grainger v Nicholson* constituting protected beliefs for the purposes of the Equality Act 2010, including the Public Sector Equality Duty under it, and will, in time, be confirmed as such; and
- (ii) in order not to find themselves acting unlawfully, universities (and their constituent institutions and students’ unions), businesses and other bodies to which the Equality Act applies would be ill-advised not to act on the basis that this is the case.

Category of likely protected characteristics

Gender-critical beliefs, as discussed above.

professional belief that children suffering from gender dysphoria should be treated with explorative therapy, rather than being affirmed towards irreversible and potentially damaging medical intervention. Psychotherapists and counsellors accredited by UKCP are fully entitled to hold such beliefs and any discrimination against them on this basis, including by UKCP-accredited training organisations, is unlawful.’ As Mr. Esser said, “this is an extremely important statement, which I hope will ensure that what happened to me will never happen to another trainee therapist”.

¹⁶ *McEleny v Ministry of Defence*, ET, 2019. An Employment Tribunal judgment which has not been published, but the case has been widely reported. It is subject to significant limitations: the Judge said that membership of and support for the SNP did not in themselves meet the *Grainger* tests: it was the claimant’s belief in the importance of Scottish sovereignty that did so.

¹⁷ See footnote 18.

¹⁸ *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that the Mr Miller made “manifestations” of this which were antisemitic and thus not protected.

Belief in the importance of and advocacy for free speech and other human rights.

Holding views about, and questioning of or disagreement with ideologies, assertions, viewpoints, campaigns, proposals and programmes (together, “**relevant viewpoints**”) relating to, certain matters associated with race or racial history and their implications, and in particular:

- (i) aspects of so-called Critical Race Theory¹⁹ (for instance in respect of concepts such as so-called “white privilege” or “white guilt”) or of the Black Lives Matter movement; and the promotion of a requirement to be “anti-racist” rather than “non-racist” or “colourblind”;
- (ii) “*decolonising*” curriculums; and
- (iii) history and the behaviour and moral character of peoples and countries, in particular in connection with the British or other empires, colonies, slavery and such matters.

Holding views about, and questioning of or disagreement with, religious beliefs and dogma and their effects in practice.

Holding views about, and the questioning of or disagreement with relevant viewpoints relating to, significant aspects of politics, society and social and international relations which are matters of public controversy or debate, where such views satisfy the *Grainger* tests. These must include viewpoints on the Palestinian cause and Israeli/Palestinian relations (noting that anti-Zionism has already been ruled protected). There is case law to the effect that left-wing democratic socialism counts as protected for these purposes, so, logically, other political beliefs, at least non-extreme ones, must be capable of satisfying the *Grainger* tests. But membership of and support for a political party has been held not of itself to meet the *Grainger* tests²⁰.

If belief in Scottish independence can satisfy the *Grainger* tests, so surely can carefully thought-through belief in the demerits of Scottish independence, and also viewpoints both for and against Brexit.

¹⁹ See above re the *Corby* case. This has also been litigated and subject to a substantial payment, albeit not yet 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 Critical Race Theory, in particular the distribution of materials asking white employees to “assume” they were racist, was a breach of the Civil Service Code requiring them to be politically impartial and could lead to discrimination against white people.

²⁰ See for instance the *McEleny* case discussed at footnote 16 above.