Liability for discrimination and harassment by staff against people with protected beliefs under the Equality Act: sufficient institutional neutrality is key:

The *Phoenix* 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. Views which challenged aspects of Critical Race Theory were subsequent ruled to be protected[2], as were anti-Zionist ones[3]. 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) in respect of other currently contested areas (including, for example, in relation to other aspects of CRT 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. (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 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

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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 ACAS*, September 2023.

3 *Miller, Bristol University*, February 2024. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that Mr Miller made "manifestations" of this which were antisemitic and thus not protected.

not qualify for protection[4], 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 subjecting an employee 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 subjective and objective tests 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 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.

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4 See *Wasteney v East London NHS Foundation Trust* (2016) ICR 643.

The *Phoenix*/*Open University* case

An Employment Tribunal[5] has found The Open University liable on more than 25 counts of discrimination against and harassment of Professor Jo Phoenix.

Professor Phoenix held gender-critical views which she regularly expressed, and was a founder of the Open University's Gender Critical Research Network ("**GCRN**").

She was multiply harassed by members of the Open University's staff for these views before, around the time of and after establishment the GCRN, including an aggressive open letter and an online pile-on. These were all attributable to the Open University under Section 109(1).

The Tribunal found the Open University liable on more than 25 counts (we lost count), with more than 395 (we lost the will to count) individual events of harassment as result of individuals signing or issuing the open letter and other public documents being found to be harassment.

After a false start, the Open University had the grace to acknowledge error and express contrition (itself unusual) and announce an independent inquiry.

None of this is a (legally) surprise following earlier cases, in particular the *Fahmy*[6] case, given the nature of the events. Various things are shocking, though, including the sheer nastiness of some of the attacks on Professor Phoenix. The definition of 'harassment' includes a 'purpose' limb and an 'effect' limb. It is telling that it is relatively rare for 'purpose' harassment to be found, but that a significant number were found this case.

It is significant that a number of events were held to be discrimination as well as harassment, because Professor Phoenix was subjected by colleagues to detriments because of her gender-critical views (which were attributable to the Open University under Section 109(1)). It is easy to think that discrimination is constituted by events such as an employer not promoting or disciplining a person, and this case is a reminder that attributable discrimination can be constituted by a huge range of detrimental actions by staff.

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5 *Ms J Phoenix v The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021. Note that *Phoenix* 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 has moved.

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

Implications of the *Phoenix* case: action required by employers

Types of statements which may constitute harassment

A key aspect of the *Phoenix* case which is legally interesting is which actions or events were ruled to constitute harassment or not. Cases have emphasised the importance of not encouraging "a *culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"[7]; and that "*beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society*"[8]; and the distinctions made in the earlier *Fahmy* case indicated that the bar is not low, which has to be right in the interests of balance and proportion.

Events which did constitute harassment

- As in the *Meade*[9] case, equating gender-critical views with transphobia was held again and again to be harassment, as was calling the GCRN a 'hate group'.

- Now famously, a senior colleague telling Professor Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table.

- An open letter was signed by 368 people, which was found to have stereotyped Professor Phoenix's views, contained untrue statements and was widely published. It was found to contain multiple forms of both 'purpose' and 'effect' harassment. All the signatories bar two were found to have harassed Professor Phoenix by signing the letter.

- Other public letters and statements were likewise found to be harassment, including ones disassociating groups from the GCRN.

- Calling on people to sign the open letter was itself treated as harassment, as well as statements saying they stand in solidarity with the signatories of public letters issued.

- A number of tweets, and retweets of hostile statements and information, were ruled to be both 'purpose' and 'effect' harassment.

- A key feature of many of the events which were harassment was that they were considered to be inviting people to join a pile-on: this can in itself can be harassment, and rightly so.

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7 *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] ILRL 336 at paragraph 22.

8 *Forstater* (see Note 1 above) at paragraph 116.

9 *Ms R Meade v Westminster City Council and Social Work England* (2024) ET Case No: 2201792/2022 & 2211483/2022).

- Finally, leaving a statement on the Open University's website, despite requests to remove it, itself constituted a separate act of harassment from the issuing of the statement itself.

Actions which did not constitute harassment

- Admonishing Professor Phoenix for swearing a lot during a meeting.

- Not praising Professor Phoenix's success in obtaining a big grant, although this was held to be discrimination.

- A statement which was found to have a purpose of reassuring the trans and non-binary community, even though it was unwanted conduct related to Professor Phoenix's gender-critical beliefs.

The nature and "level" of the actions which constituted harassment in the *Phoenix* case will strike fear into the hearts of leaders and administrators across the country.

Actions by employers in order to avoid liability

To avoid liability for unlawful discrimination against or 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 discrimination or harassment. This requires an employer to take the following steps.

- Ensure that its staff understand what constitutes discrimination and harassment, what are protected viewpoints, and that discrimination against and 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.

- Conduct appropriate training, particularly about not attacking people for their viewpoints and the boundary between robust but legitimate debate and bullying or harassment.

- 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 and more generally to ensure compliance with free speech requirements. A key failing appears to be that there was no such person.

Key general lesson: the importance of institutional neutrality

In order to ensure that they (including through their employees) do not discriminate against or harass their employees or others for their viewpoints, organisations need to maintain sufficient **institutional neutrality on matters of polarised public debate**, taking an approach which is careful to avoid actions or language which risk counting as discrimination or harassment, while complying with their general legal obligations. This is a recurring failure which BFSP encounters in connection with free speech problems. The detailed reasoning is as follows.

- If an employer takes sides with one contested position in an area of passionate and polarised debate – and in situations where it is not legally required to do so (for instance, to stop communication which has itself crossed the line into harassment) – it necessarily sets itself against the other position. This gives rise to a very obvious risk of actions or communications which discriminate against or create a hostile environment for (i.e. harass) people who hold the other viewpoint, or creating an environment in which their employees feel free or even encouraged to discriminate against or harass them.

- An example of this is that equating gender-critical views with transphobia, a bitterly contested view, was held again and again to be harassment in *Phoenix*. 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.

This leads to a key aspect of a loss of neutrality: **inappropriate enforcement of contested viewpoints (including allowing its employees do so through discriminating against and harassing colleagues) will itself be discrimination and harassment and must not be allowed to happen**.

This has profound implications for many employers, whose requirements relating to diversity include (for instance) an equation of gender-critical views with transphobia. A recent study[10] 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* and *Phoenix* cases. Employers and others need to review and change their

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

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 *Meade* and *Phoenix* must be that inappropriate enforcement of other ideological positions, such as 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)[11].

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 The Open University

We have some sympathy for The Open University, in that the *Forstater* case and its implications emerged during the row on its watch; but only some sympathy, as it appears thereafter not to have then acted with an appropriate level of competence and care for good governance and compliance, which would have meant recognising that things were going very wrong and working to set them right. The Open University needs to give careful thought to (indeed, be asked) the following questions and issues.

Failures to recognise and deal with the free speech compliance failures

- What were the steps that should have been taken, and when, to prevent the failures which occurred? Why did it not occur to it that it was acting with complete disregard for its duties to protect Ms Phoenix's legitimate free speech?

- Once the implications of the *Forstater* case became known, why did its staff not act with integrity, competence and care for good governance to recognise the errors made and work to set them right?

    - Is this a symptom of lack of understanding of and/or care about free speech protection, and a lack of a senior person with designated responsibilities for ensuring free speech protection? Who should have been responsible for dealing with this governance and compliance failure once it was evident? Why did this not happen?

[11] The *Corby* case: see Note 2 above.

- Has it since changed its practices, procedures and rules so as to ensure that they are in compliance with its free speech related obligations? If not, why not? What does it need to do to get its practices, procedures and rules right?

- To what extent were its free speech protection and governance failures a result of a failure of active institutional neutrality? What to do to set this right?

Management and governance failings

- Was its governing body/senior management informed, and indeed told the full truth, about the problem? At what stage, and was that early enough? If not, who misled them and why, and what disciplinary action should be taken?

- To the extent that they were informed, did its governing body/senior management operate as they should, proactively with integrity, competence and care for good governance and compliance? If not, why not?

  - Did they get inside the issues, and question/examine the staff who were reporting to them?

  - If not, what were the failings, who was responsible and what should be done to ensure they never happen again?

  - To what extent did fear of disputes and aggression play a part, and a failure of neutrality? What should be done to address that?

- Whether its staff 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 *Phoenix* case? If so, which ones and what were the details of the relationships and of liaison made? Did it/they accept advice or viewpoints from or use materials provided by them? If so, what, when and in what way? Were these relationships responsible for their compliance failures at a general level (e.g. leading to a failure of institutional neutrality) or a specific one? Should they terminate those relationships?

- 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? This must surely include having a senior person with designated responsibilities and sufficient powers for ensuring free speech protection, who does not have other responsibilities or agendas which could conflict materially with their ability or willingness to work proactively to secure free speech and avoid future disasters.

Employee defaults and discipline

- Did staff breach their duties or it rules, e.g. against bullying, harassment and the like? If so, who and in what circumstances?

- What disciplinary action should be taken against staff whose actions contributed materially to its unlawful actions and governance failures? What are the reasons not to be taking action in this regard?

- With reference to **Sections 110 and 111** of the Equality Act (see above), should any action be taken in respect of any of its staff. with the governing body's duties to conserve the institutions assets in mind.

General

- It appears that criminal harassment may be involved (see above), which The Open University 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. It needs 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 wider issues affecting English HEPs and their colleges and students' unions: they will have duties under the **Higher Education and Research Act 2017** ("**HERA**")[12] 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[13].

These duties will have similar consequences and impose similar requirements in practice to the implication of the *Phoenix* and other cases, i.e. that HEPs must not allow their employees to discriminate against and harass their colleagues for their viewpoints, or the HEP's complaints and disciplinary functions to become instruments of free speech suppression; 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

February 2024

[12] 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.

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

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