

Is a belief that there are only two sexes and that it is impossible to change sex a belief protected by the Equality Act 2010?

By [Daniel Brown](#)

3PB Barristers

Forstater v CGD Europe & Others

[] paragraph number of ET's reasons

Introduction

In *Forstater v CGD Europe & Others*, the ET determined (at a Preliminary Hearing) that the Claimant's belief: that there are only two sexes and that it is impossible to change sex is not a 'belief' within the meaning of section 10 Equality Act 2010.

Terminology

At the outset, the ET explained that it had sought to avoid causing offence by its use of terminology but noted some of the difficulties with terminology in the case [8-11], including but not limited to 'outmoded' language used in section 7 Equality Act 2010 [60]. The terminology used in this case summary reflects that used by the ET.

The facts

The Claimant describes herself as a researcher and writer on topics including public policy, tax and business; in 2018, she posted an average of between 5 and 10 tweets a day [21].

The claim was brought against three Respondents: the Second Respondent, the Center for Global Development, a not-for-profit think tank based in Washington DC that conducts research about international development, the First Respondent, the European arm of the Center for Global Development, and the Third Respondent, the President of the Center for

Global Development [1]. (In its reasons, the ET referred to the First and Second Respondents as ‘the Respondent’ [2] and a similar approach is adopted below).

The Claimant first entered into a consultancy agreement with the Respondent from 6 January 2015 to 31 May 2015, she then held a Visiting Fellowship from 9 November 2016 to October 2017 before entering into further consultancy agreements covering the periods 1 March 2018 to 1 May 2018 and 5 April 2018 to 31 December 2018. At the Preliminary Hearing, the Claimant contended that, following 31 December 2018, she had been an applicant for employment such that she continued to benefit from the protections provided by the Equality Act 2010.

In or around 2017, the Claimant became aware of proposed changes to the Gender Recognition Act 2004 and she started to tweet about the subject in 2018 [23-24].

The Claimant has also supported campaigns involving the words “woman, wumæn, noun, adult human female” being displayed on billboards, projected onto buildings and printed on T shirts [26].

In October 2018, some of the Respondents’ staff made complaints about some of the Claimant’s tweets, which were alleged to be “transphobic” [29-30].

The Claimant’s case was that when her consultancy agreement came to an end on 31 December 2018, the Respondent did not renew it because she had expressed her opinion that sex is immutable [3]. The Claimant pursued claims of direct and indirect discrimination.

The Claimant’s belief

The ET made detailed findings as to what the Claimant’s particular belief actually was:

The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than “gender”, “gender identity” or “gender

expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds [77].

The ET also noted that:

The Claimant contends that the belief is "important" because it is necessary to support her sense of self, her feminism and political activism, belief in the importance of single sex services, support for single sex education, use of women only changing rooms and showers, old-age care, family planning and maternity services, upbringing of children, women only services for the vulnerable and her political online activism. In her evidence, she focused particularly her contention that it is important that there can be some spaces where particularly vulnerable women and girls, who have been subject to sexual assault by men, are only open to women assigned female at birth [78].

However, the ET took the view that 'on a proper analysis these are reasons why she considers that her belief in the immutability of sex is important, rather than the belief itself' [78].

Legal principles

The ET's reasons include a detailed discussion of the law in this area, including reference to sections 7, 10 and 26 Equality Act 2010, section 3 Human Rights Act 1998, Articles 8, 9, 10, 12 and 17 European Convention on Human Rights and section 9 Gender Recognition Act 2004, as well as relevant case law [46-73].

Section 10 Equality Act 2010 states as follows:

- (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.
- (3) In relation to the protected characteristic of religion or belief—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

- (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

Ultimately, in deciding whether the Claimant's belief was within the scope of section 10 Equality Act 2010, the ET applied the criteria set out by the EAT in *Grainger plc v Nicholson* [2010] ICR 360, at paragraph 24 ("the *Grainger* criteria"):

- (i) the belief must be genuinely held;
- (ii) it must be a belief and not an opinion or viewpoint based on the present state of information available;
- (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and
- (v) it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The ET's analysis

The ET observed that many of the Claimant's concerns do not rest on a belief that biological sex is immutable: it is possible (for example) to accept that transwomen are women but maintain that there are certain circumstances in which it would be justified to exclude transwomen from spaces generally open to those women assigned female at birth, or to take the view that, if there would be an unfair advantage, transwomen ought not to be able to compete on an entirely equal basis in sport with women assigned female at birth [79-80]. Similarly, while in some circumstances it may be relevant to know that a person is a transwoman or a transman (as the case may be) in order to provide them with proper medical care, that view does not rely on a belief that it is impossible to change one's sex [81].

Notwithstanding the above observations, the ET concluded that the belief relied on by the Claimant was genuinely held, that it was more than an opinion or viewpoint based on the current state of information available and that it goes to substantial aspects of human life

and behaviour, such that the first, second and third of the *Grainger* criteria were satisfied [82].

Was the Claimant's belief sufficiently cogent? The ET noted that the Claimant's belief 'largely ignores intersex conditions' [83]. In addition, the ET recorded that:

biological opinion is increasingly moving away from a[n] absolutist approach to there being genes the presence or absence of which determine specific attributes, to understanding that it is necessary to analyse which genes are present, which are switched on, the extent to which they are switched on and the way in which they interact with other genes [83].

On the other hand, the ET directed itself that coherence mainly requires that a belief can be understood and not too much more should be expected; a scientific belief 'may not be based on very good science without it being so irrational that it [is] unable to meet the relatively modest threshold of coherence' [83].

In addition, the ET felt unable to 'ignore that the Claimant's approach (save in respect of refusing to accept that a Gender Recognition Certificate changes a person's sex for all purposes) is largely that currently adopted by the law, which still treats sex as binary' [83].

In light of the above, the ET concluded that the fourth of the *Grainger* criteria was also satisfied.

The ET then considered the fifth criterion. It took the view that 'if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore' [84]. The ET continued its reasoning in the following terms:

The Claimant's position is that even if a transwoman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act [85].

... The Claimant can legitimately put forward her arguments about the importance of some safe spaces that are only [to] be available to women identified female at birth, without insisting on calling transwomen men [86].

... Calling a transwoman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them [87].

As set out above, I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief, rather than something separate, and will be relevant to determining whether the belief is a protected philosophical belief [88].

...

I conclude from this, and the totality of the evidence, that the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society [90].

In arriving at the conclusion that the Claimant's belief is not protected by the Equality Act 2010, the ET made brief reference to *Lee v Ashers Baking Company Ltd* [2018] IRLR 1116 [72 and 91], commenting that the Supreme Court's judgment in that case does not undermine its analysis. The ET also dismissed the suggestion that it had failed to engage with the importance of the Claimant's qualified right to freedom of expression because it 'is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts' [91].

Finally, the ET observed that this case is a good example of the need, at least in some circumstances, for the *Grainger* criteria to be applied 'to the lack of belief' [92]. That is to say, while the belief that a transwoman is a woman does not offend human dignity (and therefore would not fail the fifth *Grainger* criterion), 'the lack of that belief does because that lack of belief necessarily involves the view that trans women are men' [92]. The ET thought it was a

'slight of hand' to suggest that the Claimant merely does not believe that transwomen are women because she positively believes that they are men [93].

For the reasons above, the ET concluded that whether the case is put on the basis of belief or on the basis of lack of belief, the 'view held by the Claimant fails the *Grainger* test and so she does not have the protected characteristic of philosophical belief' [93].

Comment

The judgment in this case is of course a first instance decision and, as such, not binding on ETs in other cases.

However, the ET's view that the *Grainger* criteria should be applied, at least in some cases, to the lack of belief in question appears to have been contrary to the approach of the parties: that it is necessary to apply the *Granger* criteria to the belief that the person does not hold, such that, on the facts of this case, if the "gender identity belief" is a philosophical belief, the Claimant's lack of that belief is necessarily also protected [56]. The ET noted that the parties' approach does find some support in the EHRC Code of Practice [57]. But the ET appears to have taken the view that a lack of belief will only be protected if it is itself religious or philosophical [58]. The ET reasoned that atheism is protected because it is a philosophical belief, 'rather than merely because atheist[s] are not adherents to a large number of protected religions' [58].

It appears likely that this judgment will be appealed and therefore in light of the above, depending on the outcome of any appeal, 2020 could see a significant development in the law concerning the scope of protection afforded to philosophical beliefs and/or the protection of freedom of expression in the employment context.



Daniel Brown

Barrister

3PB Barristers

0330 332 2633

daniel.brown@3pb.co.uk

3pb.co.uk