Higgs v Farmor's School: protected beliefs, manifestation and proportionality

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Mrs Kristie Higgs v Farmor's School (The Archbishop's Council of the Church of England intervening) EA-2020-000896-JOJ

1. The Claimant/Appellant in this case had been employed by the Respondent primary school in a role involving pastoral care.

2. She posted, on her personal Facebook account, posts which included one referring to mandatory Relationships and Sex Education classes "brainwashing" children in relation to same sex marriage and that "gender is a matter of choice not biology". The post included the statement that "children will be taught that all relationships are equally valid and 'normal'". That text was accompanied by a request that readers sign a petition on the matter.

3. A complaint was received from a parent, stating that the Claimant "has been posting homophobic and prejudiced views against the LGBT community". Further examples of posts were given, where the Claimant had re-posted similar campaigning posts in relation to education around sexuality and gender.

4. The Claimant was, following a disciplinary process, dismissed from her post. The Respondent School accepted that there had been no concerns relating to the Claimant's conduct in her roles at the school. However, it found that the language of the posts concerned was "inflammatory and quite extreme". In relation to the argument the Claimant had put forward concerning her own right to religious freedom and freedom of speech, the disciplinary committee considered that the posts concerned were "not expressing moderate views" and that "it was legitimate for the school to impose restrictions" on those rights.

5. At first instance, the Employment Tribunal dismissed the Claimant's claims of protected belief discrimination. It found that the misconduct alleged against her was that as a consequence of the "florid and provocative language" used in her posts, readers *might reasonably conclude* that she was homophobic and transphobic. According to the Tribunal, the dismissal was therefore "not because of the claimant's beliefs, but was for a completely different reason, namely that as a result of her posts she might reasonably be perceived as holding beliefs (which she denied) that would not qualify for protection under the EqA".

6. Similarly, a claim of harassment failed because the Tribunal found that the Respondent's conduct was not "related to" the protected beliefs.

The Grounds of Appeal and Key Legal Background

7. The Claimant appealed on seven grounds, not all of which are explored here. Among the grounds were that the Employment Tribunal erred in law in failing to consider the proportionality of the interference with the manifestation of the Claimant's religious or philosophical beliefs, and failed to consider whether such interference was prescribed by law (as per the wording of permissible limitation of Articles 9 and 10 of the ECHR, relating to freedom of thought and freedom of expression).

8. It was agreed (and is trite law) that the Employment Tribunal must interpret the Equality Act 2010, so far as possible, in a way compatible with those Convention rights – although there was no specific exploration in this judgment of what sections or wordings of the act provide the locus for that act of interpretation.

9. The EAT engaged in a thorough review of the law relevant to the application of those Articles in discrimination contexts. Eady J noted in particular the caselaw of the European Court which expressed the fundamental nature of the rights contained on those two Articles (including as expressed in *Sahin v Turkey (2007) 44 EHRR 5* and *Handyside v UK (1979-80) 1 EHRR 737*). Also considered were cases making clear that Article 10 protects, in the words of part of the judgment in *De HAes v Gijsels v Belgium [1997] 25 EHRR 1*, "not only the substance of the ideas and information expressed but also the form in which they are conveyed".

10. The EAT considered, and applied, previous cases which recognised a distinction between cases where the reason for the act complained of is (1) the belief or manifestation of it in itself, and (2) the objectionable way in which the belief had been manifested in a particular case (see, for example, *Page v NHS Trust Development Authority [2021] EWCA Civ 255*).

11. Of particular relevance is the EHRC's judgment in *Eweida and Ors v United Kingdom (2013)) 57 EHRR 8*), in relation to the correct approach for determining whether an action is a manifestation of a belief: that it must be "intimately linked" to the belief, but "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case".

12. The thrust of the Claimant's argument on the grounds summarised above was that the Tribunal hadn't properly considered (in light of *Eweida* in particular) whether there was the sufficient "nexus" between her posts and her belief, and therefore had "impermissibly narrowed" its task in that it didn't then go on to consider whether the interference with her Article 9 and 10 rights fell within the permissible limitations of those rights.

The Decision and Guidance

13. The EAT upheld the appeal in relation to the grounds set out above. It concluded that the ET "did not engage with the question whether [the Respondent's treatment of the Claimant] was, nonetheless, because of, or related to, the claimant's *manifestation* of her beliefs". To the extent to which did consider that question, it did so "through the prism of the respondent's view of the Claimant's posts".

14. That resulted in the ET by-passing the balancing exercise necessary as a result of the engagement with the Claimant's rights, including consideration of whether the restriction of her rights was prescribed by law, and were necessary in pursuit of the protection of the rights, freedoms or reputation of others.

15. Remitting the matter to the Employment Tribunal for a determination of the above balancing exercise (it having been decided that the posts *were* a manifestation of her belief), the EAT gave some guidance on how that exercise should be carried out.

16. That guidance (while, of course, exhibiting typical judicial caution in relation to specifics) will be no doubt useful to employers and those advising them in ensuring that there is a rational framework to employ in cases of this kind. The guidance is, in summary:

    a. That the foundational nature of the relevant rights should be recognised;
    b. Where a restriction of manifestation of belief or free expression is objectively justified because of the manner of its expression, it is that manner of expression and not the belief or expression itself which is the reason for the action taken;
    c. Whether a restriction is objectively justified will always be context-specific. However, it will always be necessary to ask the following questions (from *Bank Mellat v HM Treasury [2013] UKSC 39*):
        i. Whether the employer's objective is sufficiently important to justify the restriction;
        ii. Whether the restriction is rationally connected with that objective;
        iii. Whether a less intrusive restriction might be imposed without undermining the achievement of the objective;
        iv. Whether the severity of the restriction outweighs the importance of the objective.

17. Both aspects of the judgment, as summarised below, provide an important reminder to Employment Tribunals (and by extension employers). Firstly, there must be proper engagement with the question of whether there is a sufficiently close "nexus" between action and the protected belief. Findings that it is the manner of expression and not the belief in itself that was the reason for any less favourable treatment should be subject to rigorous scrutiny. Secondly, where there is a connection there is no short-cutting the consideration of the employee's fundamental rights to freedom of belief and of expression.

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