Practice Guides

DIVERSITY AND INCLUSION

Contributing Editor
Timothy Chow

LEXOLOGY
Getting the Deal Through

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When Worlds Collide: Protecting and Reconciling Divergent Views in a Diverse Workforce

Simon Kerr-Davis[1]

How can employers protect and reconcile the divergent views and interests of a diverse workforce?

This chapter discusses the situation where employees find themselves in conflict with each other or with their employer as a result of a tension between different protected characteristics. The chapter considers some of the situations where such conflicts have arisen and explores the legal framework through case law examples and analyses the practical steps that employers can take to encourage diverse and inclusive policies that allow the divergent views of those with different protected characteristics to be reconciled and managed. The chapter considers both the employment law framework and the practical diversity implications of these situations. Although drafted from an English law perspective, the concerns raised by conflicts between different strands of diversity, and the methods to reconcile divergent views, are applicable in all jurisdictions where a framework of protected characteristics exists. The law as stated is current as at September 2021.

The rise of diversity and inclusion

One of the most significant changes in the world of employment over the past five years has been the increased importance and profile of issues of diversity and inclusion. Consumers and employees have come to expect a level of recognition and action on diversity issues; investors (who are often subject to their own environmental, social and governance requirements) have begun to assess businesses in a way that includes diversity and inclusion metrics; and regulatory developments have also increased the urgency for companies to address diversity issues. The business cases cited for diversity and inclusion vary from a moral imperative to a financial one (as illustrated by the work of McKinsey showing the enhanced performance of companies with

1 Simon Kerr-Davis is counsel in the London employment practice at Linklaters.

active diversity policies)[2] to an established belief that diversity of thought simply leads to better corporate decision-making.

The legal framework underpinning diversity and inclusion

Despite the increased expectations of employees, the increased interest of consumers and the increased activity of regulators in relation to diversity and inclusion, the legal framework around diversity issues has remained surprisingly static in the UK. There is, for example, no obligation on an employer to maintain a diversity and inclusion policy or to take positive steps towards a diversity and inclusion agenda or to carry out diversity audits within their business. The protections offered by the current legislation are primarily individual protections against discrimination for individual employees to exercise. The Equality Act 2010 unified the legislation on discrimination into a single act, but did not materially change the protection offered. The structure of the legislation is relatively simple:

- The employee claiming protection must either have, or be associated with someone who has, a protected characteristic. The protected characteristics are a closed list, being gender, race, disability, age, religion or belief, sexual orientation, gender reassignment, marriage and civil partnership and pregnancy and maternity. (Notably, social class origin is not a protected characteristic.)
- In order to be actionable, prohibited conduct must also have taken place, falling into one of the following categories:
    - direct discrimination, that is, less favourable treatment because of a protected characteristic;
    - indirect discrimination, that is, treatment under a provision, criterion or practice that, although applied equally to all employees, puts those with a particular protected characteristic at a particular disadvantage compared with others;
    - harassment, that is, unwanted conduct relating to a protected characteristic, or conduct that has the purpose or effect of violating the dignity of an employee or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee; and
    - victimisation, that is, where an employee is subjected to a detriment because he or she has brought proceedings, given evidence or information in connection with proceedings, or assisted another person to do so or alleged that a breach of the Equality Act has taken place.
- Specific additional protections apply in relation to certain of the protected characteristics, notably the duty to make reasonable adjustments in relation to a disability, but the broad scheme of the Equality Act applies equally to each of the strands of protected characteristics and does not expressly create a hierarchy of protections, nor does it expressly address the situation where protected characteristics come into conflict with each other.

Bring your whole self to work?

It is a cliché of diversity and inclusion that employees should be encouraged to 'bring their whole selves to work', but the principle is a good one – employees who feel that they can be

2 *Why diversity matters* (www.mckinsey.com) (2015); *Delivering growth through diversity in the workplace*, McKinsey (2018); *How Diversity & Inclusion Matter*, McKinsey (2020).

themselves and that their minority characteristics are appreciated and respected are more likely to perform well. A culture of acceptance is also more likely to foster a diverse talent pool, with the well-established competitive advantages that this has been found to bring. But there are limits to this, and it is not difficult to imagine situations where the beliefs and practices of one group may conflict with the beliefs and practices of another. The first case to confront this issue did not arise until 2008 in the case of *Ladele v London Borough of Islington*.[3]

Ladele v London Borough of Islington

Ms Ladele was a registrar of births, deaths and marriages for the London Borough of Islington. She was employed from November 2002 and was a Christian who believed that same sex partnerships were 'contrary to God's law'. In December 2005, following the introduction of civil partnerships, all registrars working for the London Borough of Islington were redesignated as 'civil partnership arrangement registrars'. Ms Ladele was not asked to consent to the change of role and informed her line manager that she was opposed to participating in civil partnerships on account of her Christian beliefs. The line manager's response to this was to direct Ms Ladele to the equality and diversity policy that Islington operated, 'Dignity for All', and to inform Ms Ladele that she was in conflict with this policy and the line manager went further stating that she considered the refusal to officiate at civil partnerships to be discriminatory on grounds of sexual orientation. Notwithstanding this, the line manager did propose a temporary measure that Ms Ladele would not be asked to officiate at civil partnership ceremonies, but that she would still be expected to perform all other duties related to civil partnerships. Ms Ladele felt unable to accept this and wrote to Islington formally setting out her reasons. She received no response to her letter. However, she did remain off the rota of registrars who covered civil partnerships and her duties were instead covered by other members of staff on an informal swap basis.

Ms Ladele's actions caused tension within her department and in November 2006 a number of lesbian and gay members of staff raised a written complaint to their line manager alleging that in refusing to participate in civil partnerships, Ms Ladele was breaching the 'Dignity for All' policy and was discriminating against the gay community at large. Their complaint received a response the following day (on a confidential basis) assuring them that disciplinary action would be taken against staff who refused to undertake their duties. Ms Ladele meanwhile complained to Islington that she felt victimised by members of staff and unsupported by management.

Disciplinary proceedings were commenced against Ms Ladele in May 2007 and at the conclusion of the disciplinary process in September 2007 Ms Ladele was found guilty of gross misconduct and Islington repeated its offer to excuse her from conducting civil partnership ceremonies but on the basis that she would still be required to undertake all other work in respect of civil partnerships. She was informed that a possible consequence of refusing this offer would be that her employment would be terminated.

Ms Ladele issued tribunal proceedings against Islington claiming that she had been directly and indirectly discriminated against and harassed on the grounds of her religion or belief.

At first instance, Ms Ladele was successful in her claims before the London Central Employment Tribunal. The Tribunal judgment identified a number of acts of direct discrimination against Ms Ladele.

3 [2009] EWCA Civ 1357.

In summary, the Employment Tribunal considered that Islington had put the rights of the LGBT colleagues and the importance of the LGBT community ahead of the religious views of Ms Ladele. Islington pursued its appeal, and the Tribunal decision was overturned, and the decision to overturn the finding was then approved by the Court of Appeal.

The Court of Appeal found that the reason that Islington had taken disciplinary action against Ms Ladele was not for her holding her religious beliefs, but rather was for refusing to carry out the civil partnership ceremonies and her decision to do so did involve discrimination on grounds of sexual orientation against the wider community. The correct comparator was therefore another registrar who did not share Ms Ladele's religious beliefs, but had refused to carry out civil partnership work because of some other antipathy to the concept of same sex relationships. The Court concluded that such a person would have faced the same treatment as Ms Ladele and her claim to direct discrimination therefore failed.

In relation to the indirect discrimination claims, the Court of Appeal found that Islington could rely on the defence of objective justification. Islington had a legitimate aim of providing civil partnership services on a non-discriminatory basis and it was a proportionate way of pursuing that aim to require all registrars to perform the full range of services. It was therefore entitled to refuse to allow Ms Ladele to pick and choose what duties she would perform depending on whether they were in accordance with her religious views.

The Court noted failings in the way that the case had been conducted, including the failure to respond to Ms Ladele's complaints, but did not consider that these procedural flaws affected the outcome. The judgment focuses more on the refusal by Ms Ladele to carry out work that was within the scope of her role than on Islington's procedural failings or attitude towards her beliefs.

McFarlane v Relate Avon Limited

Although Ms Ladele's case was the first one to consider the position where strands of diversity came directly into conflict, it would not be the last. Indeed, the case of *McFarlane v Relate Avon Limited*[4] followed shortly afterwards, the Court of Appeal giving judgment in April 2010. In this case, Mr McFarlane was a psychosexual counsellor employed by Relate who refused to provide counselling services to same sex couples. He had asked to be exempted from working with same sex couples, but when this request was refused he simply refused to counsel same sex couples. When the employer discovered this, Mr McFarlane's conduct was investigated and he was dismissed for gross misconduct for the refusal, in breach of the employer's equal opportunities and professional ethics policy, to offer counselling services to all couples.

Although the facts are essentially very similar to the *Ladele* case, the judgment of the Employment Tribunal was significantly simpler. The Employment Tribunal found that the dismissal was as a result of the employee's refusal to carry out his role and his breach of policy in the way that he had done so. In this case, even at first instance, a distinction was drawn between the employee's belief and the manifestation of that belief by refusing to carry out a part of his job. The reasoning therefore aligned with the Court of Appeal's finding in *Ladele* and that same reasoning was upheld at each stage of appeal.

The case is, however, notable as the Court of Appeal was required to consider a witness statement in support of Mr McFarlane submitted by Lord Carey, a former Archbishop of Canterbury,

4 [2010] EWCA Civ 880.

in which he disputed that the manifestation of the Christian faith in relation to same sex unions was discriminatory, and disputed the idea that such religious views were equivalent to a person who was simply a homophobe.

Even more fascinating than the fact of this intervention by such a senior Church of England priest is the way that the Court of Appeal responded to that intervention. The judges stated that Lord Carey's observations were simply misplaced. The judgment goes further and denies that the judges were seeking to equate the condemnation of homosexuality by some Christians with homophobia, or to represent that position as disreputable or as bigotry. The judges sought to draw a clear distinction between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The right to hold or express a belief was protected in law both through the common law and through the European Convention on Human Rights. However, the law did not offer protection of the substance or content of those beliefs on the ground only that they were based on religious precepts. The Court therefore considered that the law had to firmly safeguard the right to hold and express religious belief, but equally firmly it had to eschew any protection of such a belief's content in the name only of its religious credentials.

Speak up?

One of the key elements to a truly diverse and inclusive culture is that employees feel that they have the psychological safety to express their views, opinions and concerns. Increasingly, the ability for employees to raise issues with their employer is regarded as a fundamental measure of a company's successful and inclusive culture. It is also a key safety valve, with whistleblowing hotlines being regularly used by employers in order to identify business failings. Employees are therefore frequently encouraged to use speak-up hotlines, to speak their minds, and to challenge group think by raising an unpopular opinion. But it is clear that this has its limits and that there are genuine concerns that may arise when an employee raises their concerns in an inappropriate way or on a subject where others' views should also command respect. Finding this balance point can be extremely difficult for employers and will often lead to protected characteristics being invoked to protect both the person expressing the views and the recipients of those views.

Smith v Trafford Housing Trust

A very good example of this arises in the case of *Smith v Trafford Housing Trust*.[5] Mr Smith worked in a managerial position for Trafford Housing Trust. He was a practising Christian and occasional lay preacher. He was also a keen user of Facebook and chose one evening to comment on a BBC news story on his Facebook wall. The story concerned moves to allow gay couples to marry in church. His comment simply asked: 'an equality too far?'. One of his colleagues, who was also a Facebook 'friend', enquired what he meant by his comment. He replied that the Bible specified that marriage was for men and women and that the state should not impose its rules on places of faith and conscience, in his view. The colleague who had sought the explanation was among those who then raised a complaint to the employer that his comment was homophobic and unacceptable. Mr Smith was subjected to disciplinary proceedings that resulted in a finding of gross misconduct and demotion. Mr Smith brought a complaint to the High Court claiming breach of contract and the employer argued that the postings were activities that might bring

5 [2012] EWHC 3221 (Ch).

it into disrepute, that in making the postings he was promoting religious views contrary to the code of conduct; and that Mr Smith's postings failed to treat fellow employees with dignity and respect, which might make another person feel uncomfortable, embarrassed or upset, contrary to the equal opportunities policy and the code of conduct.

The Court found in Mr Smith's favour. It did not accept that any person reading the postings, which were part of his Facebook wall, which covered diverse topics, could rationally conclude that these two postings were in any sense made on behalf of the employer. The Court also noted that the views expressed were a moderate expression of personally held views about a particular topic, and were not vitriolic or aggressive in nature. It was also noted that the questions from his Facebook 'friend' also took place as a result of further specific questioning by the individual concerned. While the Court did acknowledge that the code of conduct could legitimately restrict or prohibit the expression of views in a work-related context, the Court found it untenable for the prohibition to be extended to his personal or social life. The content of the Facebook wall was inherently non-work related and was an aspect of his social life outside work. The Court made some particularly important findings on the allegation that Mr Smith's conduct breached the employer's code of conduct in that it may make another person feel uncomfortable, embarrassed or upset. In response to this allegation, the Court concluded that: 'the frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech.'

This case is very different from the *Ladele* and *McFarlane* cases. The employee did not refuse to do any part of his job, did not refuse to provide services to customers and did not seek to hide such a refusal from his employer. This case is much more about the simple possibility of an employee holding and expressing personal views held on a religious basis.

In all of the above cases the claimant employee concerned was acting or speaking from a position of religious belief. However, the protected characteristic of 'religion or belief' has been held to expand far beyond the purely religious. In *Grainger plc v Nicholson*,[6] for example, Mr Nicholson claimed protection for his belief in the human causation of climate change and in *Costa v The League Against Cruel Sports*,[7] Mr Costa succeeded in claiming protection for his belief in ethical veganism. The *Grainger* case provides very clear guidance as to the types of belief may be protected under the Equality Act 2010:

- the belief must be genuinely held;
- it must be a belief, not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance; and
- 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.

6 [2010] 2 All ER 253.

7 ET/3331129/18.

Forstater v CGD Europe

This test of whether a belief was eligible for protection under the Equality Act 2010 has come under the spotlight in cases concerning the belief that sex and gender are set at birth and cannot be changed. In the case of *Forstater v CGD Europe*,[8] the London Central Employment Tribunal considered this question. Ms Forstater was a visiting fellow who entered into a consultancy agreement with the respondent's employer, a not-for-profit thinktank. During her tenure she posted tweets expressing her concerns about proposed changes to the Gender Recognition Act 2004, which would allow people to self-identify their gender. She stated that sex was binary and that trans women were men and that trans men were women and that she intended to continue to use what she deemed were the appropriate pronouns for people.

Staff complained that the claimant was expressing transphobic views. Her consultancy agreement ceased at the end of 2018 and was not renewed. She claimed that this was because she had expressed gender-critical opinions, namely that sex was immutable and whatever a person's stated gender identity or gender expression, they remained their sex of birth.

The Employment Tribunal was asked to consider as a preliminary question whether her belief in the immutability of birth sex was a protectable belief under the Equality Act 2010. The Court applied the tests referred to above in *Grainger* and concluded that Ms Forstater's belief was genuinely held, was more than an opinion or viewpoint based on the present state of information available and that her belief went to a substantial aspect of human life and behaviour. On the question of coherence and cogency, the Court found that although her belief may not be based on very good science, as she largely ignored intersex conditions, and may not be the prevailing biological opinion, it was not so irrational that it was unable to meet the modest threshold of coherence. The existence of significant evidence that her belief was incorrect scientifically did not undermine it as a belief.

The most contentious point in the judgment, and the most significant point for the purposes of this article, is the question of compatibility with human dignity. On this ground, the Employment Tribunal at first instance found that Ms Forstater failed in her contention and that her belief should not be protected as a philosophical belief under the Equality Act 2010. Although the Court did recognise her right to campaign against the revisions to the 2004 Gender Recognition Act, and to allow more self-identification and to argue that some spaces should be for women assigned female at birth only, that did not give her the right to misgender a trans person, insisting that a trans woman should be described by the pronoun 'he'.

The Tribunal felt that that could amount to harassment. Even giving due regard to the qualified rights to freedom of expression, people could not expect protection if their core belief involved violating the dignity of others and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The Court found that if part of the belief would result in the violation of the dignity of others then that was a component of the belief itself rather than something separate and would be relevant to determining whether the belief was a protected philosophical belief. As it was a core component of the claimant's belief that she would refer to a person by the sex she deemed appropriate, even if that violated their dignity, the Court felt that this belief overstepped the line and did not merit protection.

8 UKEAT/0105/20; [2021] 6 WLUK 104.

Ms Forstater appealed the Employment Tribunal's finding to the Employment Appeal Tribunal (EAT) and the original judgment was overturned. Ms Forstater's belief that sex is immutable and not to be conflated with gender identity was upheld as a protected belief under the Equality Act 2010. In reaching this finding, the EAT returned to the final limb of the *Grainger* case, considering whether the belief was compatible with human dignity, and found that a philosophical belief would only be excluded from protection on these grounds if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under the European Convention of Human Rights. The EAT found that while the belief may be offensive to some and notwithstanding its potential to result in the harassment of trans people in some circumstances, it was capable of falling within the Equality Act 2010 protections. Noting that the judgment only concerned the preliminary issue of whether the belief was eligible for protection, the EAT qualified its judgment by referring to a number of specific factors. It explained that:

- The judgment did not mean that the EAT expressed any views on the merits of either side of the transgender debate and nothing in the judgment should be regarded as doing so.
- The judgment did not mean that those with gender-critical beliefs could misgender trans people with impunity.
- The claimant, like everyone else, would continue to be subject to the prohibitions on discrimination and harassment.
- Whether the conduct in a given situation amounted to harassment or discrimination within the meaning of the Equality Act would be for a Tribunal to determine in any given case.
- The judgment did not mean that trans people do not have protection against discrimination and harassment conferred by the Equality Act. The EAT emphasised that they do.
- The judgment did not mean that employers and service providers would not be able to provide a safe environment for trans people. Employers would continue to be liable for acts of harassment and discrimination against trans people committed in the course of the employment.

However, the points made in the EAT's judgment very clearly flag an awareness of the risk of how this judgment may be perceived. This judgment was, and is, of significant concern to trans people and the EAT was seeking to provide reassurance while at the same time extending the protection of the Equality Act 2010 to people who share the beliefs of Ms Forstater.

In all of the cases discussed above, while there is a threshold test as to whether the belief is capable of protection, it is the expression of the belief that has come under scrutiny in the case law. We can take from these cases that where the expression of the belief results in a breach of contractual terms or a failure to perform duties or the harassment or discrimination of others then the individual expressing their views in these ways is unlikely to find protection under the Equality Act 2010. Although Ms Forstater's belief has been found to be protectable under the Equality Act 2010, it remains to be seen whether she will ultimately win the substantive case.

Diversity and inclusion for all?

What lessons can be drawn from these cases, and how should a truly inclusive employer address issues of conflict between different diversity strands? Some suggestions:

- The culture should be set by the leadership team. This should include setting a diversity and inclusion strategy and identifying priorities in the field of diversity.

- Even where the current priorities relate to a specific strand of diversity, the employer should maintain an inclusive approach to all strands of diversity.
- The employer should work to create an environment of psychological safety where employees understand that they will have different views from others and can discuss those views safely and respectfully.
- Where an employee raises concerns about an issue that relates to diversity, an inclusive employer will use this as an opportunity to explore the issue and to share experiences.
- Inappropriate or difficult views should be called in before they are called out. 'Calling in' is exploring a comment to understand the individual's view, before simply judging it as unacceptable. It allows the employee concerned to explain their view and allows the person hearing that view to explain why they disagree.
- If an employee refuses to do a part of their work, consider how you would treat a comparable employee who was not from the same group. If the refusal would lead to disciplinary action against such an employee, then the case law suggests that the same should apply to the employee refusing as a result of their beliefs.
- Ensure that employees are trained to understand that while a diversity of views may be welcome, harassment in any sense is not. Employees need to understand that actions or the expression of views that create a hostile environment for a fellow employee may amount to harassment.
- Where positive action is proposed to support and encourage particular underrepresented group, an inclusive employer will engage with employees and explain why it is undertaking such action and the underrepresentation that it is seeking to remedy.
- Some issues are simply too difficult for the respectful exchange of views. An inclusive employer needs to recognise the limits around discussions and avoid putting employees in situations where diametrically opposed and passionately held views will cause conflict.
- Focus on the conduct rather than on the reason behind the conduct. Even where a belief may be honestly and passionately held, if the employee conducts themselves in such a way that they harass fellow employees then action should be taken.

Appendix 1

About the Authors

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Simon Kerr-Davis is an employment counsel at Linklaters, with more than 20 years of experience of advising clients in relation to employment law, including discrimination issues. He has been a regular contributor to employment law conferences including with the Employment Lawyers Association and the Industrial Law Society, and has contributed to national media including the *Financial Times* and the BBC's *Today* programme. He is also a member of the Linklaters' Diversity Faculty, a cross-practice group advising clients on diversity issues from both a legal and practical perspective.

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