



PUMP COURT
CHAMBERS

Discrimination & Diversity at Work

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Introduction

- The role of discrimination law in the workplace: 2025 updates.
- The new sexual harassment rules for employers: proactive 'reasonable steps'
- New Equality (Race and Disability) Bill 2024.
- New and important case law

Proposals for reform

The Employment Rights Bill (ERB) will:

- Require employers to take all reasonable steps to prevent sexual harassment of employees (already in force).
- Re-introduce employer liability for third-party harassment.
- Make reports about sexual harassment protected disclosures.
- Require employers with 250 or more employees to publish equality action plans, detailing the measures they are taking to address the gender pay gap and support employees going through the menopause.
- Require employers with 250 or more employees to publish gender pay gap information in relation to outsourced workers.

Duty to take reasonable steps to prevent sexual harassment

- On 26 October 2024, *section 40A* of the EqA 2010 came into force, introduced by the *Worker Protection (Amendment of Equality Act 2010) Act 2023*.
- Employers are required to take reasonable steps to prevent sexual harassment of their employees during the course of their employment.
- Where the duty is breached, tribunals can uplift the employee's discrimination compensation by up to 25%

What are steps?

- carrying out assessments of a specified description;
- publishing plans or policies of a specified description;
- steps relating to the reporting of sexual harassment;
- steps relating to the handling of complaints.

What are reasonable steps

- Varies from employer to employer
- Depends on facts and circumstances
- Size and resources
- Nature of the working environment
- Risks
- Nature of contact with third parties
- Whether alternative steps could be more effective
- Time, cost and disruption versus benefit
- Previous concerns of sexual harassment
- Effectiveness of steps taken

Preventative / anticipatory duty

Risk assessment

Employers should carry out a risk assessment that considers:

- What risks are present in the workplace?
- What steps can be taken to reduce those risks?
- What steps would it be reasonable to take?
- Employers should implement reasonable steps

Considerations

- Consider all situations where an employee might experience sexual harassment.

Examples of risks:

- Lone or home working
- Customer interactions
- Specific workplace areas
- Social occasions
- Male dominated workforce
- Insecure/casual workforce

Practical Steps

- Develop an anti harassment policy
- Explain types of harassment
- Cover third party harassment
- Explain the sexual harassment preventative duty
- Engage the workforce
- Are policies and procedures well communicated?
- Do you know how your staff feel affected by sexual harassment?
- Do you have management buy in?
- Assess and take steps to reduce risk in the workplace
- Consider reporting mechanisms – Do workers know what to do if they experience or witness sexual harassment
- Have more than one reporting channel
- Record keeping
- Training
- Working with 3rd parties

What to do when a complaint is made?

- Confidentiality is vital
- Consider support for all concerned
- Deal with third party harassment
- Monitor and evaluate actions
- Seek feedback – Survey staff
- Review complaints data to identify trends

Third Party Harassment

- *Section 40* of the EqA 2010 in addition to an employer being prohibited from harassing their own employees or job applicants, they must also not permit a third party to harass their employees. An employer will have permitted a third party to harass one of its employees if both of the following apply:
- The third party harasses the employee in the course of their employment with the employer.
- The employer failed to take all reasonable steps to prevent the third party from harassing the employee in the course of their employment.

Sexual harassment protected disclosures

- Clause 22 of the *ERB* will amend *section 43B* of the ERA 1996 to provide that it will be a *protected disclosure* for an employee to report that sexual harassment has occurred, is occurring or is likely to occur.
- This reflects the government's manifesto commitment to strengthen the rights of whistleblowers in relation to sexual harassment.

Equality action plans

- Future regulations will require employers with 250 employees or more to develop and publish equality action plans showing what steps they are taking in relation to prescribed matters related to gender equality and to publish prescribed information relating to their plans ([section 78A](#), *EqA 2010*).

Dismissal during or after pregnancy or statutory family leave

- Protection against dismissal will be strengthened for pregnant women, those who have been pregnant and those taking or returning from a period of statutory family leave (*clauses 24 and 25, ERB*).
- The existing suite of powers in relation to redundancy will be extended to dismissals for all other reasons.

Day one right to paternity leave

- *Paternity leave* will become a day-one right for eligible employees (*clause 16, ERB*). It currently requires 26 weeks' service at the relevant date.

- ***Higgs v Farmor's School [2025] EWCA Civ 109***
 - On 4 June 2025, the Supreme Court refused Farmor's School permission to appeal against the Court of Appeal's decision in *Higgs v Farmor's School [2025] EWCA Civ 109*.

Brief facts

- C, a teacher, employed by R, a secondary school, for six years
- Responsibilities included overseeing students who had been removed from class for disruptive behaviour
- R received a complaint that C had expressed “homophobic and prejudiced views” on C’s Facebook page
- C was suspended pending investigation, & eventually dismissed for gross misconduct

Allegations

- 1(a). “illegal discrimination” (harassment)
- 1(b). “Serious inappropriate use of social media . . . [t]hat could bring the school into disrepute”
- 2. Three breaches of R’s Code of Conduct:
 - “Inappropriate language and/or language which may demean or humiliate pupils
 - Posts “call into question your suitability to work with children . . .”
 - “. . . online persona is not consistent with the professional image expected of you . . .”

(Higgs [18 – 23])

Dismissal

- Finding of gross misconduct, plus (quoting selectively):

“[y]ou were dismissive of those that could take offence, calling them liberals . . . Overall we were not satisfied that any lower level of disciplinary sanction would be appropriate in view of the nature of your misconduct and your lack of understanding of the potential impact upon the school. We concluded that there were no exceptional mitigating circumstances and therefore concluded that the correct sanction was summary dismissal.”

(Higgs, [24])

- Claims under ss 13 & 26 EqA 2010 (UD & WD out of time)
- C not asked at CMPH to be precise about the ‘religion or belief’; clarified at FH that the beliefs were (EWCA’s phrase) “essentially an elaboration of the beliefs expressed in the posts”: Higgs [27] (& [13])
- C’s protected beliefs could not be equated with hostility to gay or trans people
- R had concluded that the language of her posts might reasonably lead readers to think that she did; that (in the ET’s view) was the reason for dismissal
- Hence, dismissal not “because of” protected beliefs, but because R feared that the manner of their expression would be perceived as showing she held unacceptable views

(Higgs, [98] – (& especially) [105])

- The appeal be allowed and this matter remitted . . . for the determination of the question whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant's rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others.

(Higgs, [111])

- C appealed on the basis that (inter alia) the EAT was bound to conclude that R's interference with her rights cannot be justified. Permission granted.
- R sought to cross-appeal on the basis that the ET's enquiry "is confined to those matters known to and operative upon the mind of the decision-maker. It is subject to neither a "prescribed by law" test nor a proportionality exercise . . ." Permission refused.
- EWCA (unanimous, lead judgment Underhill LJ) allowed the appeal re: dismissal; substituted its own finding on that issue; dismissed the appeal otherwise: Higgs [157] - [174]; particularly [157] & [174]

Legal Framework

- Section 13(1) Equality Act 2010

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

& NB s 26 requires that the conduct be “related to a relevant protected characteristic”

Manifestation

- The protection against discrimination “because of . . . religion or belief” includes discrimination on the grounds of manifestation of the same: Higgs [54] & Bougnaoui v Micropole SA C-188/15, [2015] ICR 139 (re: the wearing of a headscarf by a Muslim employee)
- “. . . 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”: Higgs [35], Eweida v United Kingdom [2013] IRLR 231
- The right under the 2010 Act is not an unqualified right: Higgs [56]
- But query: how it is qualified?

Article 9 ECHR

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Free speech / Article 10

- Necessarily entails the freedom to express opinions that may shock and offend: Higgs, [62]
- Is particularly important in the case of “political speech”: [63]
- And particularly significant, in that case, is the chilling effect of restrictions on freedom of speech: [64], considering R (Miller) v College of Policing [2021] EWCA Civ 1926, [2022] 1 WLR 4987

Higgs, [65]:

“These are principles which any court or tribunal must have at the forefront of its mind in considering a case involving freedom of speech, including the expression of religious or other beliefs . . . [t]he present case is concerned with an interference with free speech on the part of an employer against an employee, and it is necessary to assess whether the interference was justified in the context of the employment relationship and the law applicable to it . . .”

- Explained at [66] – [97] of Higgs (esp. [74])
- The limitations in Article 9.2 are relevant to both s 13 and s 26 Equality Act 2010
- [74]: “. . . Adverse treatment in response to an employee’s manifestation of their belief [is] not to be treated as having occurred “because of” that manifestation if it constituted an objectively justifiable response to something “objectionable” in the way in which the belief was manifested. [Page] thus introduced a requirement of objective justification into the causation element in section 13(1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention . . . ”
- (“objectionable” = “to which objection could justifiably be taken” = “inappropriate”, but NB Falk LJ finds “inappropriate” more helpful: Higgs [181])

Justification

- Very helpful guidance at [112] endorsing Eady J's guidance at [93] – [94] of the EAT's decision. In short:
- The foundational nature of the rights must be recognised . . .
- Where limitation of the rights is objectively justified given the manner of the manifestation, that is not “because of” or “related to” the exercise of the rights.
- Justification is context-specific; the employment relationship will be relevant.
- Always ask: whether the objective is sufficiently important to justify the limitation; whether the limitation is rationally connected to that objective; whether a less intrusive limitation would work; & whether, balancing the severity of the limitation on the worker's rights against the importance of the objective, the former outweighs the latter.

Error of law in ET

- The ET had found that the reason was not because of, or related to, C's actual beliefs, but the concern that her posts might be seen as evidence that she held other beliefs
- But that failed to deal with the question whether this was because of, or related to, C's manifestation of her beliefs
- R's views were relevant to determining whether C's Convention rights had been interfered with, but that did not decide the prior question (whether the posts were "manifestation")
- If they were, then the ET needed to determine the 'reason why' question by asking itself whether this was because of, or related to, that manifestation of belief (prohibited under the EqA), or whether it was in fact because the claimant had manifested her belief in a way to which objection could justifiably be taken .

Stereotypes

Higgs [172] (obiter)

- Discrimination will occur where the reason given for the treatment is significantly influenced, consciously or unconsciously, by a stereotype that persons who hold or manifest the relevant belief will share attributes of a group which they might not in fact possess

Employers' Challenges

- Employers face a significant ongoing challenge to balance the rights of all individuals in the workplace. Since the EAT's decision in *Forstater v CGD Europe and others* [2021] UKEAT/0105/20, the majority of beliefs will meet the final *Grainger* test of being worthy of respect in a democratic society and be protected beliefs. Employers have to find a way to manage the rights of employees who may hold protected beliefs that conflict with the beliefs of others within the workplace and protect their own business interests.

Ritson v Milan Babic Architects Ltd [2024] EAT 95

- PIDA
- *Ritson v Milan Babic Architects Ltd [2024] EAT 95*, the EAT upheld a tribunal's decision that an employee had not made qualifying disclosures in relation to the possibility of the employer breaching the terms of the Coronavirus Job Retention Scheme.

Alleged disclosure 1

- "Hi Mian from your email about putting us on the job retention scheme and from my own reading too my understanding is that I'm not allowed to work in this period. This is different from self employed people who get the money even if they do work but I don't want to cause any problems for you or I by working while you're claiming the grant. I believe David is still working on PRL? Kind regards Ian."

Alleged disclosure 2

- "Milan, I am thinking about your business. There is no option to continue working under the job retention scheme and if we break the rules and HMRC find out you risk having to pay back all of the grant money that they will give you for wages. Surely it's not worth taking that risk when you have self employed people that are still able to work during this time without it causing any problems."
- Reply "It's your choice today but it will be mine later."
- Then wrote to say HMRC would not pay in April 2020 so redundancies followed.

ET reasoning upheld by EAT

- The claimant appealed. Rejected by EAT. Reasoning sound and legal tests applied. Although Mr Babic's comment in the text message dated 3 April 2020 constituted a detriment, the tribunal had found that this was because of Mr Babic's anger and frustration regarding his perception of the claimant's inflexibility in relation to assisting in resolving a discrete work issue regarding the PRL project. There was no challenge to this finding. In the EAT's view, it was clear that the tribunal was drawing a distinction between the claimant's prior messages and his conduct, namely his perceived lack of flexibility, which was separable from any alleged protected disclosures (which were not found in any event).

Equality (Race and Disability) Bill

- **Mandatory Pay Gap Reporting:** Large employers (250+ employees) will be required to report on ethnicity and disability pay gaps, similar to the existing gender pay gap reporting framework.
- **Extended Equal Pay Rights:** The bill proposes extending the right to make equal pay claims to ethnic minority and disabled workers.
- **Equal Pay Enforcement Unit:** A new regulatory and enforcement unit will be established to improve the handling of equal pay claims and address potential loopholes, including those related to outsourcing.
- **Dual Discrimination:** The bill may also address dual (or intersectional) discrimination, where individuals experience discrimination based on multiple protected characteristics.
- **Preparation for Employers:** Employers should begin collecting and analysing ethnicity and disability data to prepare for potential mandatory reporting.

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She is ranked in the latest Chambers and Partners Directory: "Experienced in representing everyone from individuals to multinational corporations at any level of court"; and in the Legal 500: "She is quick to grasp the key issues and has strong client engagement skills" and she is: "Well known for acting in complex discrimination cases".