



PUMP COURT

CHAMBERS

Discrimination & Diversity at Work

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Mostly about case law

- *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 .

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

- Distinguish between:
 - Whether the act is a *response* to the thing said, and
 - Whether the act is *because of* the thing said
- (i.e. distinguish between the factual cause and the “reason why”)

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.

Leicester City Council v Parmar [2025] EWCA Civ 952

- All about comparators
- *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 56: the burden of proof does not shift simply because C proves a difference in protected characteristic and a difference in treatment. C must prove facts from which an ET could properly draw an inference that the reason for the difference in treatment is discrimination.

Parmar: facts

- C had been disciplined
- Disciplinary officer Ms Lake had not disciplined employees of other ethnicity than that of C in similar circumstances
- Comparable employees Ms Lake had previously subjected to disciplinary action were Asian
- That was (in the ET) sufficient to shift the burden



- Evidential comparators are “no more than tools which may or may not justify an inference of discrimination . . .”
- Usefulness depends on extent to which the circumstances are the same
- Comparators may, in conjunction with other material, justify the inference of discrimination
- “It was the totality of the evidence which shifted the burden of proof . . .”

EAT upheld by EWCA

- Held: the EAT was right to characterise the ET's reliance on comparators as a reliance on evidential rather than statutory comparators
- The ET was entitled to decide that the circumstances of the evidential comparators were sufficiently similar to those of C to mean that their different treatment by the Council supported an inference of discrimination.
- The comparison is a matter of fact and degree for the ET
- Take-home messages:
 - Even if the comparators aren't statutory comparators, they can be evidentially weighty
 - Don't get carried away with *Madarassy*
 - Consider the totality of the evidence.

Contact details

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Ezra Macdonald is an employment specialist, with substantial complementary experience of commercial and property law.

His advocacy experience is extensive, including appearances before the Employment Tribunals, the Employment Appeal Tribunal, the County Court, the High Court, the First-Tier Tribunal (War Pension and Armed Forces Compensation Chamber, Social Entitlement Chamber, Criminal Injuries Compensation Chamber; and Property Chamber); the Upper Tribunal (Administrative Appeals Chamber, Immigration and Asylum Chamber, and Tax & Chancery Chamber); the Magistrates' Courts, the Crown Court, and the Coroner's Court. He is frequently instructed on behalf of both claimants and defendants in civil proceedings; on behalf of union- and privately-funded claimants in the Employment Tribunals; and by large respondent organisations, including the third sector.

Ezra is ranked as a Leading Junior in the Legal 500 2026 for Employment. Sources say that he is *“quite possibly the most intelligent barrister around. His knowledge borders encyclopaedic and he is also seemingly completely unflappable. More generally he is a very affable character.”*



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