Justifying the unjustifiable: the Court of Appeal hands down its decision in *Higgs v Farmor's School*

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***Higgs v Farmor's School* [2025] EWCA Civ 109**

Introduction

The long-anticipated judgment in *Higgs v Farmor's School* was handed down by the Court of Appeal in February this year. As an appeal from the Employment Appeal Tribunal ('EAT'), it will be of particular interest to employment lawyers working in the education sector. However, we think there are also pertinent lessons for practitioners representing student/parents, schools and universities, where questions of balancing freedom of speech, institutional reputation and the rights of others frequently come into play.

Background

Ms Higgs brought claims of direct discrimination and harassment based upon her protected beliefs (arising out of her Christian faith), which included a lack of belief in same sex marriage, or that a person could change their sex or gender in the Employment Tribunal ('ET'). She had been dismissed by her employer following a complaint about posts she had made on her personal Facebook page, which urged readers to sign petitions about matters relating to sex education and LGBT issues. The ET had described those posts as being *"florid and provocative"* in the language used. Ms Higgs' claims were dismissed by the ET.

Ms Higgs had already brought a successful appeal to the EAT. Eady J remitted the matter to the ET, giving guidance on the correct approach to cases where a distinction might be drawn between the protected belief itself, and the expression or manifestation of that belief.

A full note of the EAT's decision in that appeal is available here [link]. In summary, the EAT determined that the ET had too readily accepted a distinction between Ms Higgs' protected belief and the manner of its expression, without properly considering whether there was a "nexus" between the alleged misconduct and her beliefs. It therefore failed to carry out the

appropriate balancing exercise that properly took into account Ms Higgs' rights under the European Convention on Human Rights (ECHR).

Ms Higgs nonetheless appealed the EAT decision, on the basis that the EAT could (and should) have decided for itself that her claim should succeed.

Consideration of Law: objectively justifying the unjustifiable

At the heart of the judgment is the vexed question of how to square s.13 Equality Act 2010 (direct discrimination, which cannot be justified), with a need to allow clearly inappropriate manifestations of belief to be curtailed in appropriate circumstances.

Underhill LJ, giving the leading judgment, considered in great detail the existing authority of ***Page v NHS Trust Development Authority [2021] EWCA Civ 255***. This case made a distinction between (i) less favourable treatment because a claimant held or manifested a protected belief and (ii) less favourable treatment because a claimant manifested that belief in a way to which objection could justifiably be taken (paragraph 68**,** ***Page***; paragraph 69, ***Higgs***).

As was made clear in ***Page***, this distinction mirrors the distinction in Article 9 ECHR between the unqualified right to freedom of thought, conscious and religion (Article 9(1)) and the qualified right of freedom to manifest one's religion or beliefs (Article 9(2)). The ratio of ***Page*** was that any less favourable treatment that was legitimately because of an objectionable (or inappropriate) manifestation of a belief was not to be treated as less favourable treatment *because of* the manifestation of belief itself. This introduced a requirement of objective justification into the causation element in s.13(1) (paragraph 74, ***Higgs***).

In ***Higgs***, Underhill LJ explored the jurisprudential question that has arisen as a result of ***Page*** and other consistent decisions: how can the objective justification test enter into the framework of s.13 Equality Act 2010, which does not permit for any justification of direct discrimination on the basis of belief?

Underhill LJ considered this could be done in two ways. The first is using s.3 Human Rights Act 1998 (the provision that states that domestic law should be interpreted, as far as possible, to be compatible with ECHR rights) (paragraphs 81-83). The second was to rely on ordinary domestic principles of statutory construction. Put simply, the drafters of the Equality Act 2010 could not have intended that an employer should be obliged to tolerate all conduct by an employee which constituted a manifestation of a belief. Furthermore, the courts have already extended the definition of "belief" in s.10 Equality Act to include manifestations of belief. This

was an act of constructive interpretation. As such, it is also permissible for the courts to imply a qualification to that extension so that objectively objectionable (or inappropriate) acts which are ostensibly manifestations of belief do not need to be treated as such (paragraph 85-88).

Determination of the Appeal

Having explained the legal framework the Court went on to consider the key question in this appeal: could it decide Ms Higg's case or did it need to be remitted? The Court noted the language of the ET's judgment made it *"reasonably clear […] that the Tribunal thought it strongly arguable, to put it no higher, that the School's treatment of the Claimant had been disproportionate"* (paragraph 103). The context of those comments was the ET expressing that questions of proportionality were not relevant to its decision.

The EAT concluded that those comments were insufficient to satisfy the test from *Jafri v Lincoln College [2014] EWCA Civ 499*, which would permit the EAT to decide the matter for itself on the basis that only one outcome was possible (paragraph 110).

As this point was central to the Claimant's appeal, the Court of Appeal therefore heard submissions on the justification of the School in dismissing the Claimant.

In addition, the Court was invited to, and did, endorse the guidance given by Eady J in the EAT decision (at paragraph 94 of that judgment, repeated at paragraph 112 in the Court of Appeal's judgment) on the various factors that are likely to be relevant to the assessment of proportionality in an employment context (see further under 'Comment' below).

Justification and the Relevance of Reputational Damage

It should be noted that the ET's conclusions included that the Claimant was not in fact hostile to gay or trans people, and that her conduct in the workplace itself was never criticised or called into question. The case on justification inevitably therefore rested on matters of public perception and reputational damage, including the risk of the Claimant continuing to post similar material.

The Court (unsurprisingly) made clear that there was no *carte blanche* to dismiss employees simply because of the views of third parties, and gave three points of guidance on dealing with questions of proportionality in cases where reputation and views of third parties are used as a defence (paragraphs 140-142):

1. First, expressions of belief that are relevant to the employer's business are more likely to harm its reputation than expression of beliefs that are nothing to do with its business;
2. Secondly, the manner of expression is important. Views expressed in offensive or insulting language are more likely to harm the reputation of an employer (although merely expressing a belief *"intemperately"* will not be sufficient);
3. Thirdly, whether the views expressed are clearly personal to the employee or whether they could be imputed to the employer will be relevant.

The Court's Decision

The Court concluded that it would not be open to the ET to accept that dismissal was objectively justified: such a dismissal was *"unquestionably a disproportionate response"* (paragraph 158). As such, there was only one outcome and there was no need for the question to be remitted.

The reasons for the Court's decision were, in summary (paragraphs 159-163):

1. The language used, although potentially objectionable, was not *"grossly offensive"*;
2. The language used was not the Claimant's own, as she had shared the posts of others (while not absolving her of responsibility for re-posting, this was relevant to the degree of culpability);
3. There was no evidence of actual reputational damage to the School. Its concern was only about *potential* future reputational harm;
4. Neither the School nor the ET thought that the Claimant would let her views affect her work.

Addressing the School's argument around the Claimant's lack of *"insight"* into the effects of her actions, Underhill LJ notes that acknowledgment of wrongdoing may be particularly difficult in protected belief cases and makes an interesting observation that may be of value to Claimant practitioners:

> *"There are understandable reasons why in some cases an employee may not be willing to admit that the conduct in question was wrong, or seriously wrong, particularly if it was the manifestation of a deeply-held belief. If the case is not one that would otherwise justify dismissal, it is hard that it should be marked up in seriousness because of a failure to make an acknowledgement of fault which the employee would genuinely find difficult. The position may be different where the employer needs to be*

confident that the employee understands what they have done wrong in order to prevent a more serious or damaging occurrence of the same conduct in the future […]" (paragraph 165) (see also *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127 at paragraphs 109-112 on this point).

Final note: "objectionable" vs "inappropriate"

Finally, in his decision, Underhill LJ made clear that the word *"inappropriate"* could be used instead of the words *"objectionable"* or *"to which objection could justifiably be taken"*. In a short concurring judgment, Falk LJ noted that *"inappropriate"* is a more helpful term when describing an employee's conduct (paragraph 181). We agree this is much clearer language and urge its adoption going forward.

Comment

Freedom of expression in academic institutions has always been a vexed subject. But with the rise of social media and the ease by which views can be shared, this subject is ever more complex. This case deals with one type of scenario that can play out in a multitude of ways: can a student or employee be disciplined for something that they have said or done, which they argue is an expression of their beliefs? Is this discrimination? While the case focuses on employment law, in our view the same reasoning would apply to the disciplining of a student or pupil in similar circumstances.

In our view, the following is a useful guide (drawing together the reasoning of the EAT and Court of Appeal) for approaching these questions:[1]

1. **Does the student or employee hold a protected belief under s10 EqA?** This can be a religious or philosophical belief, but remember not all beliefs will pass the *Grainger* test.[2] They must be sincerely held and deep rooted; purely political opinions are not sufficient. They must also not have the effect of destroying the rights of others.[3]
2. **Is the act in question a manifestation of that belief?** The test is whether there is a "sufficiently close or direct nexus" between the act and the belief itself.[4] Some acts will clearly pass this, others will not.

[1] Although it is emphasised that this is only a guide to aid understanding and is no substitute for legal advice in any specific case.
[2] See *Grainger plc v Nicholson [2010] IRLR 4*
[3] See *Forstater v CGD Europe [2021] UKEAT 0105_20_1006* and *Thomas v Surrey and Borders Partnership NHS Foundation Trust [2024] EAT 141*
[4] See *Eweida v UK (2013) 57 EHRR 8*

3. **If so, is the sanction motivated by the expression of the belief itself (or third parties' reaction to it) or by something objectively inappropriate about the way in which it was expressed?** What is the school/university really objecting to?

4. **Finally, if the latter, is the sanction a proportionate response to the inappropriate conduct in question?**

When considering the final question, there are a number of factors which *might* be relevant (not all will be relevant in all cases, and some will be more pertinent in schools or universities).[5] These are:

(i) the content of the manifestation;
(ii) the tone used;
(iii) the extent of the manifestation;
(iv) the worker's/student's understanding of the likely audience;
(v) the extent and nature of the intrusion on the rights of others, and (where relevant) any consequential impact on the employer's ability to run its business;
(vi) whether the worker/student has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk;
(vii) whether there is a potential power imbalance given the nature of the worker's/student's position or role and that of those whose rights are intruded upon;
(viii) the nature of the employer's business (or academic institution) (we note that for universities, this is likely to be a weighty factor where the expressions may be related to a member of staff's academic work);[6]
(ix) whether the limitation imposed is the least intrusive measure open to the employer.

[5] These are paraphrased from paragraph 94, *Higgs* (EAT) and paragraph 112, *Higgs* (CA)
[6] See, for example, *Miller v University of Bristol* ET 1400780/2022

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