

The Balancing Exercise: Navigating Tensions in a Diverse Workplace

Podcast Transcript | 28 June 2024

Lucy: Hello, everybody. Thanks for joining us. You're listening to a podcast from the employment team at Lewis Silkin. This is our new podcast series for HR professionals, where we'll be discussing the topics that you are grappling with on the ground. I'm Lucy Hendley, and I'm joined today by my colleague, Anna Bond.

Anna: Hi, Lucy. It's great to be here.

Lucy: So, starting the series with a bang, we've got a meaty topic to delve into today. We're going to be looking at how employers can uphold their culture, whilst at the same time navigating the tension that is inevitably going to arise in a diverse community.

Anna: And we're going to be speaking today about how to handle situations arising from employees' expressions of beliefs, particularly controversial or divisive ones, which other employees can take offense to. And we're really excited to talk to you about this today. It's something that we at Lewis Silkin discuss a lot as a team. It's one of the topics we see coming up more and more from clients and where the case law is developing really speedily. And it can be a really tricky area for employers. There are competing rights and interests to balance and sensitivities you might feel you need to tiptoe around while still upholding your company values and culture.

So, our plan today is to settle on some practical strategies that should help to ease relationships and at the same time hopefully minimise legal risk.

Lucy: Yes, absolutely. So, Anna, we often see this topic being referred to as "culture wars", but I don't think that really that quite covers the issue. So, I think, really, what we're talking about today is the difficulty employers find themselves in when they're trying to promote their DEI values, whilst navigating strong beliefs held, and indeed expressed, by some employees. Of course, there have always been differences in people's perspectives in society, but that really seems to have heightened over recent years. Social media has not only provided a platform for public expression, and got people used to being able to express their beliefs, but it's also enabled people to find others who share those beliefs, pulling people together around different issues.

Anna: Yes Lucy I totally agree with you that the language and the way these topics are handled, particularly in the media, can be really divisive and unhelpful, actually. And when you look at this in the context of a workplace, where there might be conflict between employees with different beliefs or beliefs that intersect with other people's identities, and those people are required to work together, that's when it can become really difficult for employers to manage. And I think that's particularly so because of the range of possible issues that employees can now be discussing and also how widely available social media is. When you might not have ever spoken to colleagues about stuff that's not related to work before, suddenly you're following everyone on social media, you're seeing things that might never have come to light in the office.

So, a lot of the cases in this area have related to gender critical beliefs and the rights of trans and non-binary people. But actually, there are a huge variety of beliefs which could result in tensions in the workplace, for example, related to major social or political issues like the situation in Palestine or things we've seen discussed for longer in case law, like veganism.

Lucy: Yeah, exactly. And one lesson we've learned from the case law is that a really wide scope of beliefs will be afforded protection as a religious or philosophical belief. And this can include beliefs which others will find very offensive. There are many beliefs that we have found in this category, such as ethical veganism or anti-Zionism or belief in climate change.

Anna: I've certainly seen some beliefs put forward by employees, which you might find really surprising. But I think it's important to recognise that even if people find the particular belief comical or insignificant to them, and this is key to the tensions, isn't it? Even if they find that belief deeply offensive, it doesn't necessarily stop that belief from being protected in law.

Lucy: So we know, therefore, that the scope of protection is wide. And the other important lesson I think we've learned from the case law is that not only do we have the right to hold a protected belief, which to a certain extent we've always known, but I think now we know that this includes a limited right to manifest that belief. And that could, for example, include an employee expressing that belief, couldn't it?

Anna: Yeah. And that's the crux of it, isn't it Lucy? What the case law is saying is that employers have to tread more carefully than we might initially have thought. And just to try and bring that to life, let's say, for example, I overhear someone making a cup of tea at work today, it's the day after Father's Day, and that person says something along the lines of, "I don't agree with a child having two mothers". Now, that may well be linked to a religious belief that that person holds. Even so, that's offensive to me on a personal level. So, on the face of it, I might feel I'm being subjected to harassment related to sexual orientation and that I should be protected from that, particularly in the workplace. What we're saying and what the case law is saying is that that other employee may also be protected in expressing that belief. Is that right?

Lucy: Yeah, basically that's right. But although employees do have a right to freedom of expression, this can be limited to the extent necessary to pursue a legitimate aim.

A legitimate aim could include discrimination against others. And we've discussed already that it's often very relevant when we're talking about objectionable beliefs. So, all this means that whilst an employer can, in some circumstances, discipline an employee for the way they've manifested their belief, you need to tread quite carefully. And it's difficult. It's so important for many employers to be able to uphold their values and protect other employees. But, Anna, how then do we find ourselves in a position where we can actually do that, protect other people, uphold our values when someone is expressing a protected belief which contradicts that and is potentially inflammatory. Shall we have a look at the case law to see if we can get some guiding principles along the way?

Anna: Yes, absolutely.

I think the first tip I would give arises from slightly clearer cut situations where an employer can take action based on someone's beliefs because they are disproportionately preventing that employer from pursuing a legitimate business interest. And a good example of this is the case of *Mackereth*. So, Dr. Mackereth worked as a health and disabilities advisor and that involved him conducting assessments of applicants for disability related benefits. Because of his Christian beliefs that a person cannot change their sex, he objected to using pronouns or any style of address, which was inconsistent with the gender a service user had been assigned at birth, i.e. he stated that he would misgender trans and non-binary service users he happened to be assessing. That was inconsistent with the employer's policies of inclusivity and preventing discrimination against trans and non-binary service users. So, the employer explored this with him, but there was no solution identified. He refused to address service users according to their wishes and their gender identity, and he was therefore dismissed.

He brought a claim and the Tribunal and later the Employment Appeal Tribunal found that this dismissal was not discriminatory, and that the employer had been entitled to take that step. I think this is a relatively straightforward one. Because Dr. Mackereth's job involved him dealing with people face to face, there was evidence about the effects on transgender people of refusal to recognise their gender and there were no practical alternatives for him to stay in the role in a way that enabled the employer to uphold their own anti-discrimination policy.

So, the first tip really is to identify your legitimate business interest and have clear policies and processes in place highlighting your business values and the expectations of employees.

Lucy: Yeah, definitely. And I think the second tip then for me relates to the response that you take as an employer. So, it's really about the need to avoid knee-jerk reactions when, as an employer, you identify a conflict. It's sometimes

easier said than done. But if an employee's belief doesn't sit comfortably with your company values, it's really still important that you are looking to follow full internal procedures and not simply listen to whoever it is that's shouting the loudest.

I think the case that highlights this the most clearly is *Phoenix*. Joanna Phoenix was employed by the Open University as a professor and was found to have suffered numerous detriments due to her beliefs. The university cancelled some gender critical events that Phoenix wanted to run and indeed the gender critical network that she co-founded. Because of her beliefs, Phoenix was accused of being transphobic and the Tribunal described the treatment of her as a "pile on", creating a chilling effect on Phoenix for expressing her gender critical beliefs. In response, the university issued messages of support for trans people, but they didn't acknowledge at all what Phoenix had suffered because of her beliefs. I think that's a really good example of an organisation making a knee-jerk reaction to something due to their concern about the risk of backlash from colleagues, of course, who are supporting trans inclusion, but also, I think the concern about the public more broadly.

In doing that, it failed to consider the rights of the employee who was manifesting a protected belief. It is a difficult one because you can see why they were concerned, but ultimately what went wrong here was a failure to see both sides of the issue.

Anna: Yeah, absolutely. And I think generally the case law in this area isn't saying that the employer couldn't intervene at all. It's just saying that employers have to consider the impact on everyone involved.

Lucy: So, tip two then - avoid knee-jerk reactions, consider both sides of the conflict. Anna, I can see people worrying at this point about needing to get to grips with the finer detail of a particular belief. And that's obviously quite daunting but managers don't need to pick sides or express a view. I mean, really, the priority when handling situations arising from the expression of a belief is focusing on the impact that that belief is having on others in the workplace. You don't need to understand the intricacies of the belief itself, but you do have to think about both sides.

Anna: Yeah, often it's really complicated, and employers can't be expected to be experts on every topic. But what you do need to do is to take a proportionate approach to interfering on what might be an expression of someone's protected belief.

Of course, knowing where to draw that line is the million-dollar question. And for this, I think it's helpful to look at the next case we're going to discuss, which is *Higgs* and the shopping list of criteria that the courts have given us in *Higgs*, which employers can use to weigh out the proportionality of any action they want to take.

So, to talk through this one, Mrs. Higgs was a pastoral administrator in a school. She made some posts on her private Facebook account, interestingly, stating that schools should not teach (and I'm going to quote from what she posted), schools should not teach, "same-sex relationships, same-sex marriage and gender being a matter of choice" and she stated that this was "brainwashing children". People raised concerns about this, not least because she was a pastoral worker who would have worked with LGBT+ children herself, and she was dismissed as a result of that. She brought a claim saying that those posts were an expression of her Christian beliefs and she'd been discriminated against on that basis. We don't actually have the final judgment yet on whether Mrs Higgs was discriminated against, we're still waiting for that one.

But what we do have is some really helpful EAT guidance which lists the factors employers should consider when they're weighing up the proportionality of taking action because of an expression of belief which has caused offence like this.

We've written an article on this which lists out the detail of that guidance. And we'll link to that and to other articles we've written around this topic in our episode notes. It includes looking at: the content, tone and scope of what the person has said or done; the audience of any posts they've made; looking at whether the employee's made it clear they were their own personal beliefs, not suggesting it was the employer's position; and also looking at the nature of the employer's business.

Lucy: So that probably sums up what I think is our third tip now, which is to consider the impact of the behaviour and how proportionate your response as an employer is. And in *Higgs*, one of the criteria the EAT clearly identified, was the need to consider whether the step taken in curtailing someone's manifestation of beliefs was the least invasive step that could have been taken. And if you think about *Mackereth* here, the employer considered all other ways of avoiding the dismissal, but ultimately there was no other way of enabling Dr. Mackereth to manifest his beliefs without letting him act in a discriminatory way towards customers.

Anna: Yes, that's right. And where we're seeing employers coming unstuck in the case law is taking a sort of zero tolerance approach when other employees express that something is offensive to them.

And the recent case of *Miller* is a good example of this. So, in this case, the University of Bristol was found to have discriminated against one of its professors, Professor Miller, on the grounds of his anti-Zionist beliefs. So, a departure from the beliefs around LGBT+ identities that we've been seeing. And it was found to be discriminatory, even though Professor Miller was dismissed following a really significant amount of feedback that his beliefs had caused widespread offence, in particular to Jewish students.

And even though the university actually tread really carefully here, so it did a really thorough investigation, several rounds of investigations, and that took a really long time, I think it was a couple of years in the end. Nevertheless, the Tribunal found that its decision to dismiss him for gross misconduct was disproportionate, even though a lesser sanction may have been appropriate.

This is a complex case, I think, because Professor Miller, after his dismissal, then went on to make public statements which critics say were more overtly anti-Semitic and which the tribunal accepted were of a different order and weren't clearly related to his anti-Zionist beliefs. So, it will be interesting to see how that impacts on any compensation that he might be awarded.

Lucy: It's interesting, isn't it? So what's coming out of this really is that, actually, being balanced and looking carefully at the facts in a given situation is always going to be important when a conflict arises. And I think a lot of what we've been talking about so far relates to what we do in the event conflict happens.

But, if I'm allowed to put my workplace mediator hat on for the moment, that will take me, I think, to a final tip, which is actually let's rewind and think about what can be done before this kind of situation escalates, indeed, before conflict arises. And I think it comes down to a number of things here. Really, it's about managing, initially managing the expectations of staff. Be clear about your values and about the behaviours that you expect from people. And ultimately, you're looking to foster an environment of respect.

So, helping people understand that, you know, the beauty of diversity is that we are all coming to the table with different beliefs, backgrounds, and sometimes it's going to be difficult to keep those beliefs from clashing with opposing beliefs of others. It's important to take proactive steps, I think, to deal with that potential conflict if it does arise. You need to sit down as early as possible, have a conversation with those who are on opposing sides and help them see that they don't have to agree with each other's beliefs, but they can respect the right of that person to hold that belief.

So, Anna, a couple of concluding thoughts on this. And I think one thing we're asked a lot now is can we, as employers, show support, for example, for our LGBT+ groups within work, if we're concerned that there are going to be others in the workplace who don't wish to share that support? What would you advise about that?

Anna: Yeah, we're seeing this sort of question come up surprisingly often. And what a great question for us to address as we're coming to you during Pride Month. My short answer on that particular question, Lucy, is that, yes, absolutely, companies can and indeed should keep expressing their support for the LGBT+ communities. We've spoken today about various protective beliefs that intersect with LGBT+ identities. And I think it's important to note that beliefs being protected doesn't extend to the right to have your employer share that belief. So employers can absolutely continue to express their values in this way. In fact, when you think about other protected beliefs, it's clear that employers don't have to align with each employee's beliefs. So, for instance, you may well have ethical vegans in your workplace. It's

very unlikely you will provide a fully vegan canteen because of that. What I would say, though, on this question is focus on the expression of inclusivity towards, for example, the LGBT+ communities, rather than criticism of its critics. So, for instance, celebrating trans day of visibility, is low risk and indeed a great thing to do. On the other hand, any event or statement whose primary purpose is to express hostility towards gender critical beliefs, that's much more likely to cause issues, both in terms of employee relations and potentially legal issues as well.

Lucy: As we've mentioned, it's also very sensible for employers to express their values and position on inclusivity in any policies. And that can help protect against legal risk, as we all know.

Anna: Yes, and while I think it's fair to say that there's no one size fits all approach to managing these situations, any employer that implements a measured approach will hopefully put themselves in a much better position.

It's certainly an area where we'll all continue to watch this space, including at Lewis Silkin. It's a really rapidly developing area of the law. A lot of the cases are under appeal or we're still waiting for final judgments. So Lucy, I've no doubt we'll be meeting to discuss this again.

Lucy: I'm sure we will, Anna. It's absolutely fascinating and of course, even more relevant right now as we find our way through the imminent political debates. But that's definitely one for another podcast. And, actually, on that note, do look out for our next podcast next month, by which time we will know a little bit more about the political landscape ahead. Thank you so much everybody for joining us today and we do hope you found our tips useful.

For more information please contact:



Anna Bond
Managing Associate

+44 (0)20 7074 8485
anna.bond@lewissilkin.com



Lucy Hendley
Head of Client Training

+44 (0)20 7074 8100
lucy.hendley@lewissilkin.com