# Belief discrimination and freedom of speech at universities

Oscar Davies, Garden Court Chambers

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# Topics

1. Higher Education (Freedom of Speech) Act 2023
2. Recent case law
3. Human rights position

# Higher Education (Freedom of Speech) Act 2023

- The Higher Education (Freedom of Speech) Act 2023 was passed in **May 2023**.
- **The Act's main provisions come into force on 1 August 2024, with certain other matters not applying until 1 September 2025**.
- The Act imposes new free speech duties on universities (and also constituent colleges and students' unions). It builds upon the existing duties set out in **section 43 of the Education (No.2) Act 1986** and other legislation relevant to freedom of speech.
- The Act will be regulated by the Office for Students (OfS).

- **Issues** covered include the **organisation of speaking events**, but also how **employment arrangements** are managed – in particular the **recruitment, promotion, discipline and dismissal** of academic staff.
- **Documentation** covered includes **management arrangements, governing documents** (statutes, ordinances, bye-laws, etc.), **free speech policies** and codes, recruitment policies, harassment and disciplinary policies, settlement agreements, and funding arrangements.
- The law includes a **statutory tort** that from August will enable individuals to bring **legal proceedings against a university, college or students' union that fails to comply with their freedom of speech duty**.

## *Relevant case law*

- *Miller v University of Bristol* ET/1400780/2022
- *Phoenix v The Open University* ET3322700/21
- *Raquel Maria Rosario Sanchez v University of Bristol*
- *Lister v New College Swindon* ET/1404223/2022

# *Miller v University of Bristol* ET/1400780/2022

- The Bristol employment tribunal held that an academic's belief that **political Zionism** (which he defined as an ideology which holds that a state for Jewish people ought to be established and maintained in the territory that formerly comprised the British Mandate of Palestine) **is inherently racist, imperialistic and colonial**, and therefore ought to be opposed, **qualified as a protected philosophical belief.**

- The tribunal held that Professor Miller's belief met the test set out in ***Grainger:***
  1. It was genuinely held
  2. Was not an opinion or point of view
  3. It concerned a weighty and substantial aspect of human life and behaviour
  4. was coherent and cogent.
  5. Professor Miller's opposition to Zionism, which was not opposition to the idea of Jewish self-determination or of a preponderantly Jewish state existing in the world, but to the exclusive realisation of Jewish rights to self-determination within a land that is home to a very substantial non-Jewish population, was worthy of respect in a democratic society.

# *Miller v University of Bristol* ET/1400780/2022

- The Tribunal found that Miller was subject to **direct discrimination** from the university over its **decision to sack him** – and to reject a **subsequent appeal** from him against that decision.

- The ET, guided by the recent case of *Higgs v Farmor's School and another* [2023] EAT 89, determined that the Claimant's dismissal stemmed directly from actions linked to his underlying belief.

- Considering the restrictions on manifesting beliefs and freedom of expression, the ET **weighed** the Respondent's aims of safeguarding its reputation and others' rights against the severe impact of dismissing an academic, which could hinder research and teaching, affecting societal discourse.

- While fault was acknowledged in the Claimant's actions, the investigations found no antisemitism, incitement to violence, or threat to safety, suggesting a lesser disciplinary sanction would have been proportionate without compromising the Respondent's aims.

# *Phoenix v The Open University* ET3322700/21

- Watford Employment Tribunal agreed that Professor Phoenix's **gender critical beliefs** were protected.
- She believes in the immutability and importance of biological sex which comes from the fact that being female is something she has always believed and is core to who she is. She believes that biological sex is real, that it is important, that a person cannot change their biological sex and that sex is not to be conflated with gender identity.
- She likened to "the racist uncle at the Christmas dinner table" by her Deputy Head of Department in a face-to-face conversation.
- When she established an academic research group (GCRN) to promote research into sex, gender and sexualities from a gender critical perspective, the university received a litany of complaints.
- An open letter was also published, signed by 368 of the claimant's colleagues, objecting to the GCRN and calling for it to be closed down as it was allegedly hostile and harmful to the trans community (which the tribunal found to be factually untrue).

# *Phoenix v The Open University* ET3322700/21

- The claimant raised a grievance of bulling and harassment and noted that she had even received death threats. After beginning to suffer PTSD and other symptoms of stress, she resigned.
- The tribunal found that she had suffered **direct discrimination, harassment and victimisation because of those beliefs, and was constructively dismissed.**
- The claimant had been entitled to exercise her right to manifest her beliefs by setting up the GCRN. Although the university did not disaffiliate GCRN as had been demanded, it did not do enough to protect the claimant from harm, out of fear of being seen to support gender critical beliefs.
- In particular, it **failed to produce an outcome to her grievance** once she resigned and refused to take down certain online statements against the GCRN produced by other groups within the university. This failure to act was in itself an act of harassment and the termination of the grievance process constituted post-employment victimisation.

# *Raquel Maria Rosario Sanchez v. University of Bristol*

- Slightly older case (2022) but interesting *cf* Jo Phoenix case.
- The claims stem from objections to Ms Sanchez's chairing of a gender-critical event, where she was billed as a PhD student of the University's Gender and Violence Research Centre.
- Students at the University were concerned that the reference to her role at the research centre suggested that the views of Ms Sanchez and the organisers, the campaigning group Woman's Place UK ("WPUK"), were endorsed by the University and protested.
- Ms Sanchez complained to the University about an open letter criticising the event; a critical motion subsequently debated by the Bristol Students' Union (over which the University had no control); and critical, sometimes hostile, social media posts.
- In particular, the actions of a fellow PhD student ("AA") were singled out. AA was later subject to disciplinary proceedings, which were ultimately abandoned – the conduct of those proceedings was also the subject of Ms Sanchez' claims.

# *Raquel Maria Rosario Sanchez v. University of Bristol*

- She sued the University of Bristol in the county court for negligence, breach of contract and sex discrimination. But a judge dismissed her claims, saying the university had not failed in its duty of care.
- HHJ Ralton emphasised that the case was **focused solely on the University's management of Ms Sanchez' complaints, not her beliefs per se.**
- With this in mind, this case is something of a **red herring** for both the gender-critical movement and for the transgender community and its allies. Ms Sanchez' comprehensive loss does not move the needle on the gender-critical movement's attempts to deprive the transgender community of its rights, nor on the efforts of the transgender community and its allies to safeguard those rights.

## • *Lister v New College Swindon* ET/1404223/2022

- Not higher education but principles likely to be applicable in HE.
- Mr Lister was employed as a teacher at the college. Mr Lister holds gender critical beliefs. It is his belief that sex is binary and immutable and should not be confused with gender identity. Whilst in his role as a teacher, a pupil asked Mr Lister to call him by a male name and to use male pronouns as that is how they wished to be identified.
- However, the College received a complaint from another pupil that he was not using preferred name and pronouns as requested. The complaint alleged that his conduct had also been inappropriate in several ways, such as repeating negative comments about gender reassignment and gesticulating to avoid using the name of the pupil. The pupil's complaint was investigated and upheld.
- A disciplinary investigation followed; it was alleged that Mr Lister had failed to follow the College's policy on gender reassignment. Mr Lister was dismissed because of his treatment towards the pupil.

## • *Lister v New College Swindon* ET/1404223/2022

- Mr Lister's claim was dismissed.
- The Tribunal found that the **College's policy on gender reassignment** had sought to **protect the pupil** and that **Mr Lister had manifested his belief in an objectionable manner** which ought to be prohibited to ensure the protection of others. Further, it found that the pupil's own rights and freedoms had been violated.
- This decision highlights **the duty of educational bodies to ensure that pupils rights and freedoms are protected**. That if teachers **have beliefs that are manifested in a manner that may be considered harmful to pupils**, it can be **reasonable to dismiss the employee following** an investigation.
- Conversely, it is important that the **rights of the teacher to have personal and political beliefs** are also taken into consideration.

## • *Lister v New College Swindon* ET/1404223/2022

- The Teaching Regulatory Agency (TRA) has guidance on conduct that is incompatible with being a teacher who includes actions or behaviours that promote extremist political or religious views or attitudes.

- The guidance considers the influential role that a teacher can play in the formation of pupils' views and behaviours as well as the level of trust and responsibility.

# Human rights position

Human Rights usually engaged in HE belief cases:

- Article 9
- Article 10

Sometimes:

- Article 8

of the European Convention on Human Rights (ECHR)

The Higher Education (Freedom of Speech) Act 2023 does not seem to made much of a difference to Art 10 balance or applicability.


GARDEN COURT
CHAMBERS

# Disability discrimination and negligence claims following *Abrahart*

Georgie Rea, Garden Court Chambers

28 June 2024

# Disability- Equality Act 2010

**Section 6**

*(1)A person (P) has a disability if—*

*(a)P has a physical or mental impairment, and*

*(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

**Schedule 1**

- Physical or mental impairment
- Adverse effect on day-to-day activities, substantial (“more than trivial”)
- Long term - lasted or likely to last 12 months or to end of life
- Certain conditions deemed disability; cancer, HIV infection, MS
- Excludes - most addictions, criminal tendencies (Equality 2010 (Disability Regs),
- Equality Act Guidance 2010 on determining disability

**Equality Act 2010 Technical Guidance on Further and Higher Education**

*“There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment not the cause. ” [page 222]*

# Identify the prohibited conduct – Direct discrimination

- Difference in treatment (Direct Discrimination) v difference in outcome (Indirect Discrimination)

**Direct discrimination (s13)**

  - because of a protected characteristic, A treats B less favourably than A **treats or would** treat others.
  - No need for an actual comparator.
- If the protected Characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

# Prohibited conduct – Indirect discrimination (s19)

A applies to B a provision, criterion or practice (PCP) that is discriminatory.

PCP is discriminatory if:

- A applies, or would apply, the PCP to persons with whom B does not share the characteristic
  - *i.e. it is applied to all - which is why perpetrators (in ignorance) often claim there is no discrimination as the PCP is applied equally to all*
- It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage *when compared* with persons with whom B does not share it
- It puts, or would put, B at that disadvantage, and
- A cannot show it to be a proportionate means of achieving a legitimate aim.

# S15 Discrimination arising from disability

- A treats B **unfavourably** because of something arising in consequence of B's disability, and
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- S15 does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

# Other Disability specific discrimination

**S20 and 21 Failure to make reasonable adjustments**

- Where a PCP of A's puts a disabled person at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who are not disabled – requirement to take such steps as it is reasonable to have to take to avoid the disadvantage.

- Where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled – requirement to take such steps as it is reasonable to have to take to avoid the disadvantage.

- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

# Pro-active Duty to Make Reasonable Adjustments

***R (ota Nur) v Birmingham CC* [2021] EWHC 1138**

*Indirect Discrimination and Failure to make Reasonable Adjustments*

LA's housing allocation policy (PCP) under which families with dependent children were given priority for houses found to indirectly discriminate against households with disabled adult members and no children. LAs operating such allocation policies were bound by the **pro-active duty to make reasonable adjustments under the EqA**. LA found in breach of that duty as it had failed to make adjustments to its policy to ensure that households with disabled members had a fair and reasonable opportunity of securing a suitable property.

# *The University Of Bristol v Abrahart* [2024] EWHC 299 (KB)

High Court rejected University's appeal against May 2022 ruling by the Bristol County Court that the University contributed to the death of Natasha Abrahart, by discriminating against her on the ground of disability contrary to the *Equality Act 2010*.

- Natasha had a known history of social anxiety and staff were aware she had missed or struggled to participate in several oral assessments during that academic year.
- The University was also aware she had sought medical treatment for her mental health.
- Natasha sadly took her own life in April 2018, on the morning she was scheduled to deliver a presentation to fellow students and lecturers.

The High Court ruled:

- University of Bristol failed to make reasonable adjustments.
- She had been indirectly discriminated against and discriminated against on the grounds of disability.

# Duty to Make Reasonable Adjustments- Structured Approach

(see paras 149, 157, 161-164, 166-167, 171 of judgment).

**1. Reasonable Steps to Avoid Disadvantage (s.20)**
•Education institutions must take reasonable steps to prevent disabled persons from suffering disadvantages due to their provision, criterion, or practice (PCP).
•*Archibald v Fife Council* [2004] followed: more favourable treatment might be necessary if reasonable to mitigate disadvantage.

**2. Duty to Disabled Persons (Sch.13 para.3(3)(c)(i) and (ii))**
•Duty applies to all disabled persons or students "generally".
•Duty is "anticipatory," meaning it applies even if the institution was unaware of the specific individual's needs before the issue arose.
•The requirement to anticipate specific disadvantages depends on the circumstances and whether reasonable steps could have been taken to avoid the disadvantage.

**3. Expectations from Education Providers**
•Providers are not expected to predict the needs of every prospective student.
•They must consider and take reasonable steps to remove barriers for various types of disabilities.
•Cited case: *Roads v Central Trains Ltd* [2004].

# Duty to Make Reasonable Adjustments- Structured Approach

**4. Knowledge of Disability**
•The responsible body does not need actual or constructive knowledge of a claimant's disability or its effects.
•The claimant does not need to specify the required adjustments initially.

**5. Clarity of Claimant's Case by Hearing**
•By the hearing, the claimant's necessary adjustments should be clear.
•If evidence suggests a reasonable adjustment could have been made, the burden shifts to the institution to prove no breach of duty (s.136).

**6. Assessment of Reasonableness**
•Compliance with the duty depends on an objective assessment of reasonableness, considering all circumstances.
•Relevant factors include what the institution should have known or anticipated.

**7. Court's Role**
•The court determines if the institution took reasonable steps to address the disadvantage, weighing both parties' interests and issues.
•The duty might require more favourable treatment for the disabled person if it mitigates their disadvantage.

# S149 PSED – Steps to take account of disabilities

**Similar anticipatory approach in PSED to RA**

S149 (3) Involves **having due regard**, in particular, **to the need** to—

(a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take **steps to meet the needs** of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) **encourage** persons who share a relevant protected characteristic **to participate in public life or in any other activity** in which participation by such persons is disproportionately low.

S149(4)

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, **steps to take account of disabled persons' disabilities.**

# Practical Steps

- If a Student has an **Education, Health and Care Plan (EHCP)**, this will no longer apply when they go to university (even though they can technically continue until 25 years old: Apprenticeships and further education covered but not Higher Education)
  - Mention special educational needs on the UCAS form.
  - Share EHCP with the university prior to attending.
  - The Equality Act covers *admissions, exclusions, conferring of qualifications, teaching and access.*
  - Consider what reasonable adjustments you may need in advance.
  - Register with student disability service as soon as you are enrolled.
  - Personal academic tutor, Subject Tutors, Pastoral Tutor, Halls of Residence, Student Union.

- **Student loans** are available also Disabled Students' Allowance which is non-repayable.
  - Apply 6 months in advance for the Disabled Students' Allowance.

- Some universities do not provide parents with information, because of the **Data Protection Act 2018** (i.e. the student is now an adult).
  - Advise parents to get a Data Protection Act consent from your young person on the university file, and have a copy of it, so that this doesn't happen.

# Resources

## Student Mind

Know Before You Go: https://www.studentminds.org.uk/knowbeforeyougo.html

Transition into University: https://www.studentminds.org.uk/transitionintouniversity.html

## UCAS

Students With Physical or Mental Health Conditions And Learning Differences

https://www.ucas.com/undergraduate/applying-university/individual-needs/disabled-students#talk-to-course-providers

# Thank you

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# The Office of the Independent Adjudicator (OIA) and judicial review

Ollie Persey, Garden Court Chambers

1 July 2024

# What is the OIA?

- Independent body set up to review student complaints about higher education providers in England and Wales (Part 2 of the Higher Education Act 2004)
- OIA Rules
- OIA Guidance on the Rules
- “Our main focus will often be the final decision of the higher education provider; we won’t normally start a brand-new investigation.”
- Who can complain? Students and former students.
- What can students complain about? “anything their higher education provider has done or failed to do, provided the complaint is one we can review.”
- Higher education provider needs to be a member of the OIA
- Normally expect a student to have completed internal procedures
- 12-month time limit to lodge complaint
- 90 days for review unless highly complex
- OIA an only make recommendations, although they are usually followed

# What the OIA does and does not review

- Admission: “We cannot look at a complaint from a person whose application for study is rejected or badly handled.” *Different* situation if the student has registered or has left and re-applied for admission.
- Academic judgement: NB can still look at fairness of procedure, communication, decision-making that goes beyond academic judgement.
- Student employment
- Legal proceedings: *“If a student has applied for permission to bring a judicial review claim against the higher education provider and has been refused permission, we would normally consider that those proceedings have been concluded and we would not look at the student’s complaint. However, we may accept the complaint if the judge has refused the student permission to bring the judicial review claim because the OIA is an ‘alternative remedy’ available to the student. We would only accept such a complaint for review if the judge has not reached conclusions on the merits of the case.”*

# Back to basics on alternative remedies

*R (Fire Brigade Union) v South Yorkshire Fire and Rescue Authority* [2018] EWHC 1229 (Admin) [2018] 3 CLR 27 at para. 131, the Court held:

> *"It is important that the judicial review jurisdiction should be not stultified by over-enthusiastic reliance on the proposition that it should be a remedy of last resort. Judicial review [claimants] are often told they have selected the wrong target, or invoked the wrong remedy…. [T]he appropriateness of granting or withholding relief* ***depends on all the circumstances and each case turns on its own facts.****"* (Emphasis added.)

# The OIA as an alternative remedy to judicial review - an unclear picture

*R (Rafique-Aldawery) v St George's, University of London* [2018] EWCA Civ 2520; [2019] PTSR 658 at §18 per Nicola Davies LJ:

> *"The OIA is, and is recognised by the courts as being, a suitable alternative remedy to judicial review. It is relatively swift and cost effective, one which students can invoke without recourse to instructing lawyers. It is rare for an OIA review to exceed 12 months; the current average review time is below 100 days. It is a remedy which is amenable to judicial review. It does not provide rulings upon legal rights and obligations, however the OIA does scrutinise the behaviour of the HEI to a standard which would reflect that contained in judicial review proceedings. Moreover, the redress it can provide has a practical flexibility which judicial proceedings lack, e g it can recommend the student's reinstatement on the course of study. In practice, it is rare for an HEI not to follow the findings/recommendations of the OIA. Further, as the courts have made clear, judicial review is a remedy of last resort in circumstances where an alternative, albeit not identical, remedy exists.*

# The OIA as an alternative remedy to judicial review- an unclear picture

*R(Carnell) v Regents Park College and Conference of Colleges Appeal Tribunal* [2008] EWHC 739 (Admin) per Black J at §30:

> *"I have considered the question of the OIA very carefully. The fact that the OIA complaints procedure is no longer available is by virtue of the Claimant choosing not to pursue it initially and then maintaining that course following receipt of the acknowledgement of service of the other parties. He would have been within the Rules of the OIA scheme had he abandoned his judicial review proceedings at that stage and submitted his claim to the OIA with a request for it to be entertained out of time. The circumstances of this case are not, in my judgment exceptional in such a way as to justify the exercise in my discretion to grant permission for judicial review when that original remedy would have been available to the Claimant had he made different choices."*

# The OIA as an alternative remedy to judicial review- an unclear picture

*R (Rafique-Aldawery) v St George's, University of London* [2018] EWCA Civ 2520; [2019] PTSR 658 at §19 per Nicola Davies LJ:

- *"...the judge in providing guidance was doing so with the best of intentions in order to assist any student in the future. My concern is that such guidance provides a general rule which students would or could feel obliged to follow in respect of what, in reality, would be only a limited number of cases. Such detailed guidance could result in a rigidity of approach, meaning that a student would feel compelled to contemplate judicial review proceedings, which could involve consulting lawyers, when available to the student would be a relatively informal and swift means of practical resolution which the student could embark upon without the need for and cost of lawyers."*

# The OIA as an alternative remedy to judicial review- an unclear picture

OIA Guidance at 14.3:

> *"Our processes are informal and it is not usually necessary to use a lawyer. Often when lawyers are involved the process can take longer and become legalistic."*

*R (Maxwell) v Officer of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1236 at §§ 33-34:

> *"…the courts are not entitled to impose on the informal complaints review procedure of the OIA a requirement that it should have to adjudicate on issues, such as whether or not there has been disability discrimination. Adjudication of that issue usually involves making decisions on contested questions of fact and law, which require the more stringent and structured procedures of civil litigation for their proper determination… It is contrary to the whole spirit of a scheme established for the free and informal handling of students' complaints that the outcomes under it should replicate judicial determinations, which continue to be available in civil proceedings in the ordinary courts, for which the OIA is not and was never intended to be a substitute."*

# Recommendations as an effective remedy?

- There is an argument that the OIA is not an 'effective remedy' under Article 13 ECHR for a Convention right claim.

- This is because the OIA can only make recommendations rather than an issue legally binding decisions: see (*Leander v Sweden* (1987) 9 EHRR 433 at §82; *Silver v United Kingdom* (1983) 5 EHRR 347 at §§ 114-115; *Segerstert-Wiberg v Sweden* (2007) 44 EHRR 2 at §118.

# *XYZ v City, University of London* CA-2023-00634

- City University expelled XYZ, a final year student about to sit his exams. He was expelled with immediate effect, after being found guilty of serious sexual assault following a fundamentally unfair disciplinary process in which the University breached its own Disciplinary Codes.
- Refused permission on the papers and at an oral renewal hearing, principally on the basis of the OIA as an alternative remedy.
- The Court of Appeal rejected the University's proposal of "*hiving off the issue of alternative available remedy"* at that hearing. The issue needed to "*be seen in full context and [was] not a purely arid question of law that can safely or properly be disposed of separately."*
- Lawyers involved on both sides throughout the internal procedures.
- Significant impact on XYZ's mental health/reputation/education/career.
- Court of Appeal in granting permission had described this allegations as "very serious".

# Drawing the threads together?

- Case-by-case approach to whether the OIA is an adequate alternative remedy.
- Alternative remedy *can* go to question of relief, not just permission.
- The more complex - particularly legally complex - the case is, the less likely the OIA is an adequate alternative remedy.
- Urgency.
- Convention rights and recommendations… to be continued.