Twitter Thread by Maya Forstater

Maya Forstater
@MForstater

New in the Industrial Law Journal "Belief vs. Action in Ladele, Ngole and Forstater" by Professor Robert Wintemute, Kings College London

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CASE NOTE

Belief vs. Action in *Ladele*, *Ngole* and *Forstater*

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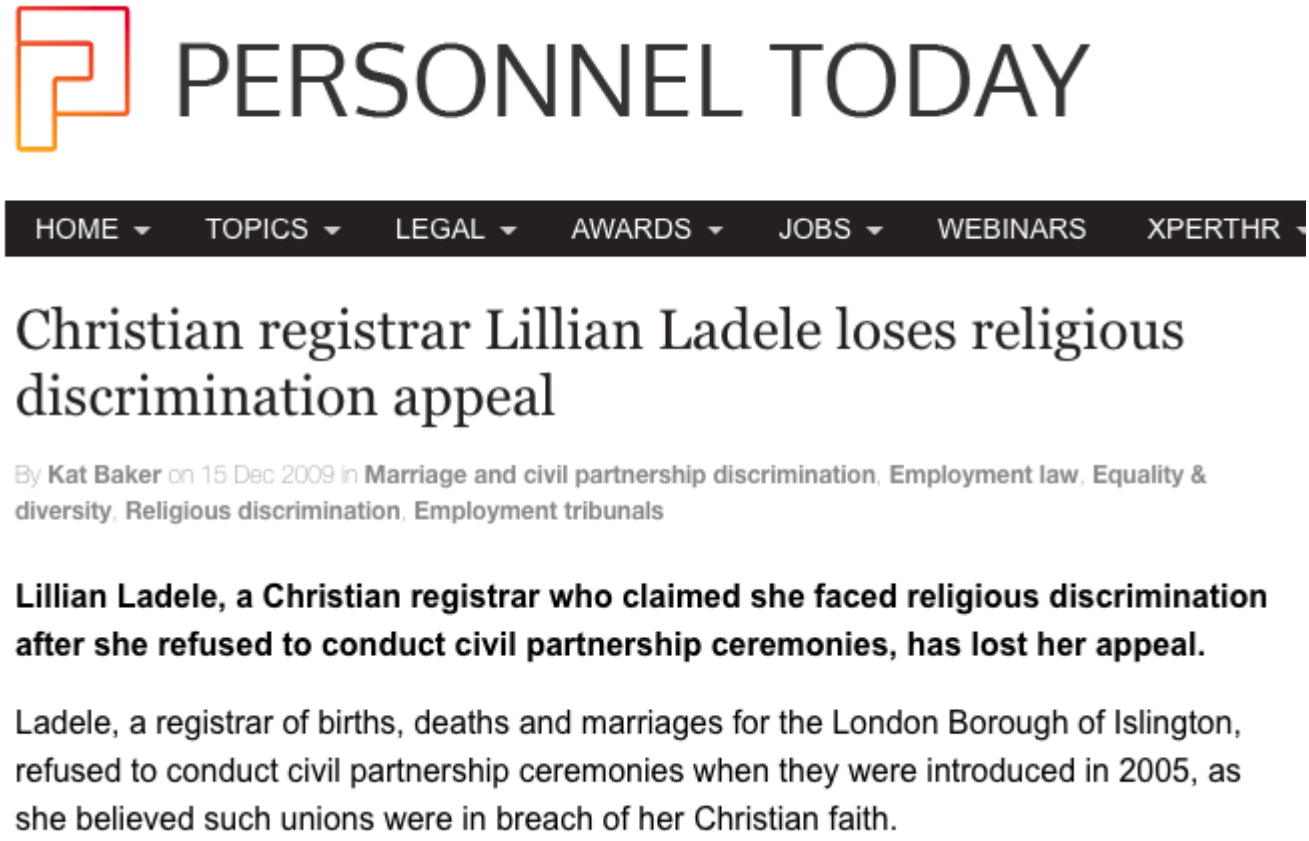
1. INTRODUCTION

On 18 December 2019, the London Central Employment Tribunal ruled, in *Maya Forstater v CGD Europe*,[1] that a belief that there are only two biological sexes, neither of which can be changed ('[b]eing female is an immutable biological fact, not a feeling or an identity'),[2] does not come within the category 'any religious or philosophical belief' in section 10(2) of the Equality Act 2010: '…[T]he Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an

Wintemute asks "Did the Employment Tribunal correctly distinguish the claimant's belief from hypothetical (speculative, future) harmful action that might involve

discrimination against, or harassment of, a transgender co-worker or customer? "

He considers the case of Ladele - a registrar whose religious belief meant she would not conduct same sex weddings - her belief could not be accommodated, because she had chosen to act on it in a way that caused harm to others.



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Christian registrar Lillian Ladele loses religious discrimination appeal

By **Kat Baker** on 15 Dec 2009 in **Marriage and civil partnership discrimination**, **Employment law**, **Equality & diversity**, **Religious discrimination**, **Employment tribunals**

Lillian Ladele, a Christian registrar who claimed she faced religious discrimination after she refused to conduct civil partnership ceremonies, has lost her appeal.

Ladele, a registrar of births, deaths and marriages for the London Borough of Islington, refused to conduct civil partnership ceremonies when they were introduced in 2005, as she believed such unions were in breach of her Christian faith.

And Ngole, a student social worker who won his case " I never advocated any hate...towards people who are in same sex relationships. ... I never stated that people in same sex relationships should be treated differently.."

Christian wins appeal after being thrown off social work course

Court overturns earlier ruling on Felix Ngole, who was thrown out of university over comments about gay people



▲ Felix Ngole said his rights to freedom of speech and thought were breached when he was thrown off the Sheffield University course. Photograph: Christian Concern/PA

A devout Christian thrown off a university social work course after being accused of posting derogatory comments about gay and bisexual people on Facebook has won the latest round of a legal battle.

Wintemute notes "Ms Forstater was not dismissed because of her treatment of any transgender person, such as a co-worker or a customer of her employer..but because of her co-workers' intolerance of her unfashionable (to them) belief that, in some situations, sex matters"

"The Employment Tribunal noted her statements (on Twitter and to the Tribunal) that her belief would generally not be translated into action, especially in her workplace"

27. … 'Of course in social situations I would treat any transwomen as an honourary female, and use whatever pronouns etc...I wouldn't try to hurt anyone's feelings…'

30. … 'I would of course respect anyone's self-definition of their gender identity in any social and professional context; I have no desire or intention to be rude to people.'

35. … [in the context of a claim that, outside her workplace, she had misgendered a non-binary person by referring to them as 'he'][26] 'I reserve the right to use the pronouns 'he' and 'him' to refer to male people. While I may choose to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe. …'

39.2. 'I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender'…

39.12 '… [E]ven when it is apparent that someone's sex is different from the gender they seek to portray …, it may be polite or kind to pretend not to notice, or to go along with their wish to be referred to in a particular way. But there is no fundamental right to compel people to be polite or kind in every situation'. …

39.13 '…[W]hile it may be disappointing or upsetting to some male people who identify as women to be told that it is not appropriate for them to share female-only services and spaces, avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their bodies.'

41. … She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a 'woman's space', but also more generally. …

"Despite her stating that she would generally be polite and kind, the Employment Tribunal was concerned that Ms Forstater might harass a transgender person in the workplace, even though there was no evidence that she had ever done so"

The Tribunal merged hypothetical harmful action into M Forstater's belief despite the absence of any evidence that she had failed to respect the dignity in the past, and despite the evidence that she would generally respect the dignity in the course of her employment

The Tribunal then described this hypothetical action ('refer[ring] to a person by the sex she considered appropriate') as a 'core component of her belief', which made her belief 'not worthy of respect in a democratic society'

Wintemute concludes "If the ET had correctly made the essential distinction between belief & action, without merging hypothetical harmful action into Ms Forstater's belief, it would have concluded that her belief is 'worthy of respect in a democratic society'."

"Whether one agrees or disagrees w Ms Forstater's belief in two immutable biological sexes, her belief can hardly be put at the same level as Holocaust denial or incitement to violence. "

The ET erred in law by distorting the 5th Grainger criterion, w the effect of sweeping into the 'not worthy of respect' category any belief that some persons might find 'offensive' & therefore consider harassment, if (hypothetically) it were expressed directly in the workplace.

If the EAT (or a higher court) corrects this error of law, and agrees that Ms Forstater has a potential claim under the Equality Act 2010, because her belief falls within section 10(2), another Employment Tribunal can turn to the next question: did Ms Forstater suffer less favourable treatment in employment because of her belief?

ROBERT WINTEMUTE
King's College London