

# Higgs v Farmor's School - Case summary



## Managing personal opinions expressed on social media

Personal social media posts are at the heart of the case of *Higgs v Farmor's School*. The opinions expressed had consequences for the authors in their workplaces: a school employee was terminated and subsequently brought a discrimination claim on the grounds of religion and/or belief; and an Employment Appeal Tribunal lay member was recused from the panel to which they were appointed. This case shows employers the difficulties they face in managing personal opinions expressed outside the workplace in circumstances where the workplace is notified of offence caused, or where the posts create a perception of bias in those appointed to make decisions.

## Background

Mrs Higgs was a Christian and pastoral administrator/work experience manager at Farmor's School who reposted on her Facebook account pieces written by third parties which referred respectively to the teaching regarding same sex relationships and transgenderism in schools as "*brainwashing*", and relating "*mental illness*" to the concept of gender fluidity. An individual from outside the school expressed concerns that Mrs Higgs's posts demonstrated homophobic and prejudiced views against the LGBT community. Following an investigation and a disciplinary hearing, Mrs Higgs was summarily dismissed on the ground of gross misconduct, a decision that was upheld on appeal.

In the Employment Tribunal's view, the reason for Mrs Higgs's dismissal was not because of her religion or belief (gender-critical views being a protected characteristic) but because it created a concern that she would be perceived as holding unacceptable views in relation to gay and transgender people. The Tribunal found the language of Mrs Higgs's tweets to be "*florid and provocative*", but unlike the Forstater case, no manifestation arguments were strongly advanced. The Farmor's School defence was not based around the way Mrs Higgs expressed herself on social media (although the dismissal letter referred to Mrs Higgs's language as inflammatory and extreme), but the fact that her behaviour had the potential to negatively impact various groups of people, namely pupils, parents, staff and the wider community. Mrs Higgs appealed.

## Appeal

The appeal was listed to be heard by a judge and two lay members. Before the hearing, it came to light that one of the lay members had vociferously expressed opposition to gender-critical views on social media. Mrs Higgs applied to have the lay member recused for apparent bias.

## Decision

The Employment Appeal Tribunal judge decided that the lay member in question should be recused on the grounds of apparent bias. The test for apparent bias is “*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”. There was no suggestion that the lay member would in fact *be* biased, but the judge found that the possibility could not be excluded. This reinforces the importance of perception; it is not just about justice being done, but whether the public would perceive that to be the case.

## What does this mean for employers?

In this Employment Appeal Tribunal hearing, it was the lay member under the spotlight, but it is not too far a stretch to see how workplace decision-makers could be similarly scrutinised. If a disciplinary, grievance or whistleblowing investigation decision-maker expresses controversial views on social media, bias could be argued if the subject matter of the investigation is relevant to those views.

The solution is not to have a social media policy that bans all personal opinions that may offend; democracy and human rights accommodate different views, and employers should foster an inclusive and diverse workplace. This does not, however, allow employees the opportunity to disrespect the views of others, particularly in a workplace context where those with opposing opinions may have to work alongside each other. Meaningful training is critical to bringing greater understanding to employees and those who have to manage conflict.

When it comes to appointing decision-makers, any perceived bias can pose risk to employment processes and perceptions of fairness. If controversial issues are under discussion, any conflicts of interest, whether real or perceived, should be addressed before appointing a decision-maker. For decision-makers themselves, a tougher stance can be taken on expressing views in public that could impact HR processes and procedures.



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