Miller v College of Policing and Chief Constable of Humberside[1]

> "Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated …" Lord Bingham[2]

Whether the current system of gender recognition embodied in the Gender Recognition Act 2004 should be reformed, and, if so, how, is still a matter of debate. Some assert, vigorously, that gender should be a matter of self-declaration. Others assert it should not be, with equal vigour.

Yet in the case of Forstater, Employment Judge Taylor, in the London Central Employment Tribunal, held that Maya Forstater's beliefs were not worthy of respect in a democratic society. Ms Forstater's views that "men are men" and "women are women", notwithstanding the gender with which they choose to identify, were judged as being likely to upset the transgender community. The Tribunal's decision has caused considerable concern.

In contrast, the case of Miller represents a ringing endorsement of the values of freedom of speech. Mr Miller had posted a series of tweets which expressed similar views to those of Ms Forstater. In form they were, as the judge described them, unsophisticated and profane, but not criminal. Importantly, however, they were congruent with the "gender critical" views of an expert (Professor Stock), who detailed a number of attempts that had been made to prevent her and those sharing similar views from expressing them.

Mr Miller's tweets were read by his Twitter followers, none of whom complained. The judge inferred they were probably likeminded. However, the tweets were brought to the attention of Ms B, a transgender woman. On reading the tweets she was appalled and complained to the Police. They applied the Hate Crimes Operational Guidance (HCOG) and, having determined

[1] [2020] EWHC 225 Admin

[2] R v Shayler [2003] 1 AC 247 at [21]

that no crime had been committed, recorded it as a hate incident. This is defined as:

> "Any non-crime incident which is perceived by the victim or any other person to be motivated wholly or partly by a hostility or prejudice (connected to a protected characteristic)."

Mr Miller was then visited by a police officer who made it clear that if he continued to tweet in this manner then prosecution was likely. The Judge in Mr Miller's case heard evidence from Index on Censorship that the hate incident system was being used more widely to supress gender-critical speech.

Mr Miller claimed, in the Administrative Court, that the HCOG, which had established a system of recording non-crime hate incidents, was unlawful, and that the police treatment of him was an infringement of his Article 10 Convention right. His broader claim failed. Even if the HCOG interfered with his Article 10 right, it was a proportionate means of achieving a legitimate goal– that is, by preventing hate incidents from escalating into hate crimes.

However, Knowles J held that the police treatment of the Claimant himself was unlawful. The warnings they had given would inevitably have a chilling effect on freedom of speech. Moreover, the speech at issue in this case was on a matter of current debate, namely the reform of the Gender Recognition Act, and thus evoked the important connection between freedom and democracy noted by Lord Bingham. The Judge thought that, for the purposes of legal analysis, the tweets should be treated as if they were a newspaper article.

Given the Claimant's tweets, though crude, were not directed at the transgender community and were not criminal, there was no justification for the interference with freedom of speech by the police.

Those who welcome freedom of speech will welcome this decision. Forstater may well be overruled, but even if it is, how does the pro-free speech approach in Miller affect employers? In particular, how will it affect employers who are contacted by a person complaining about the views expressed online by one of its employees? Will the goal of protecting the employer's reputation justify disciplinary action?

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