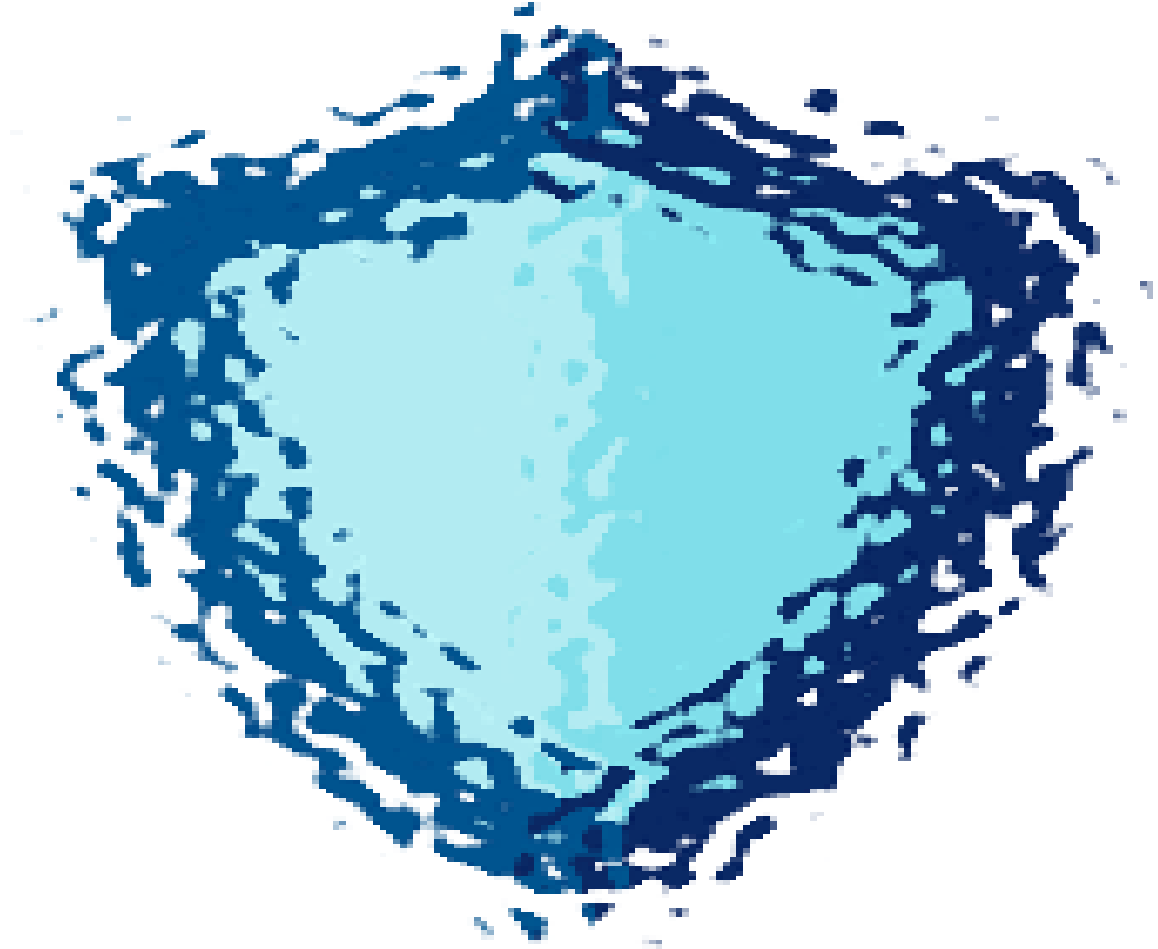


Agenda

- Self isolation rules
- ‘no jab, no job’
- Working from home
- Right to work checks
- Case law update
- On the horizon



Covid19 – setting the scene

- Health & Safety at Work Act 1974
 - Safe system of work
 - Reasonable steps to reduce workplace risks
- Employment Rights Act 1996
 - Health & safety dismissals
 - in circumstances of danger which are ‘serious and imminent’:
 - leaving work or refusing to return;
 - taking steps to protect self or others
- Equality Act 2010
- Data Protection Act 2018



Covid19 – setting the scene

- **Montanaro v Lansafe Ltd**

- M had under 2 years service
- M asked for holiday but received no reply
- Went on holiday to Italy anyway
- Italy advises against travel due to Covid
- M did not return to work
- Was dismissed
- Automatically unfair dismissal
 - ‘in circumstances of danger... which were serious he took appropriate steps to protect himself’



Covid19 – setting the scene

- Criminal offences:
 - Employees: duty to inform employer of requirement to self-isolate - £50 fine
 - E.g. if told by Test & Trace
 - No obligation to inform if:
 - ‘pinged’ via app alert
 - exempt from self-isolation
 - Employers: allowing employees to attend work if self-isolating (but WFH is ok)
 - £1,000 - £10,000 fine



Covid19 – self-isolation rules

- England, from 16 August
- Exemptions from self-isolation for close contacts
 - Fully vaccinated and 14 days have elapsed
 - Below 18 years and 6 months
 - Part of a Covid19 vaccine trial
 - Medically exempt from vaccination
- Golden rule = you must self-isolate if you have symptoms, even if fully vaxxed
- Isolation = 10 clear days



Covid19 – self-isolation rules

- If exempt:
 - will be advised to take a PCR test
 - for 10 days, advised to:
 - limit close contact with non-household
 - wear a face covering in enclosed spaces
 - limit contact with the CEV
 - take part in regular lateral flow testing
 - Does this affect your risk assessment?
 - **Question:** will you adopt measures for those at work who are exempt from self-isolation?



Covid19 – sick pay

- SSP is payable to employees obliged to self-isolate
 - E.g. instructed by NHS Test & Trace
 - Or those with Covid symptoms
- £96.35 per week
- Waiting days do not apply
- But absence must be for 4+ days
- An 'isolation note' counts as evidence
- Small employers (under 250) can recoup 2 weeks per employee



Covid19 – sick pay

- There is no SSP entitlement for:
 - Quarantine
 - Being ‘pinged’ by the NHS Covid19 app
 - Self-isolation if exempt
- Unless employee has Covid symptoms
- Contractual sick pay: sickness rather than self-isolation
- What if employees voluntarily choose to self-isolate?



Covid19 – sick pay

- 2 classes of employee:
 - Those required to self isolate – SSP
 - Those not required to self isolate – no SSP
- Double vaxxed v vaccine sceptics
- Voluntary self-isolation – question:
 - What would you pay?
 - Nothing, normal pay, sick pay, SSP?
- Also consider – WFH, annual leave



Covid19 – discrimination

- Consider discrimination risks:
 - Employee who is medically exempt from vaccination
 - Exempt from self-isolation, therefore no SSP
 - May have a disability – consider reasonable adjustments
 - Double vaxxed employee who wants to self-isolate / WFH:
 - What is the reason? A protected characteristic?
 - Consider reasonable adjustments



No jab, no job

- 3 strands:
 - Refusal to employ unvaccinated staff
 - Asking existing staff about their vax status
 - Dismissing staff who refuse:
 - the vaccine
 - to disclose their vaccination status



No jab, no job

- Refusal to employ unvaccinated staff
 - 11 November:
 - Staff in a CQC registered care home will need to be fully vaccinated
 - Recruitment:
 - s60 Equality Act 2010:
 - prohibits health-related questions prior to a job offer, unless:
 - for the purposes of making reasonable adjustments
 - to establish if the candidate can do an intrinsic function of the job
 - monitoring diversity
 - Comply with Data Protection Act in relation to any health information obtained



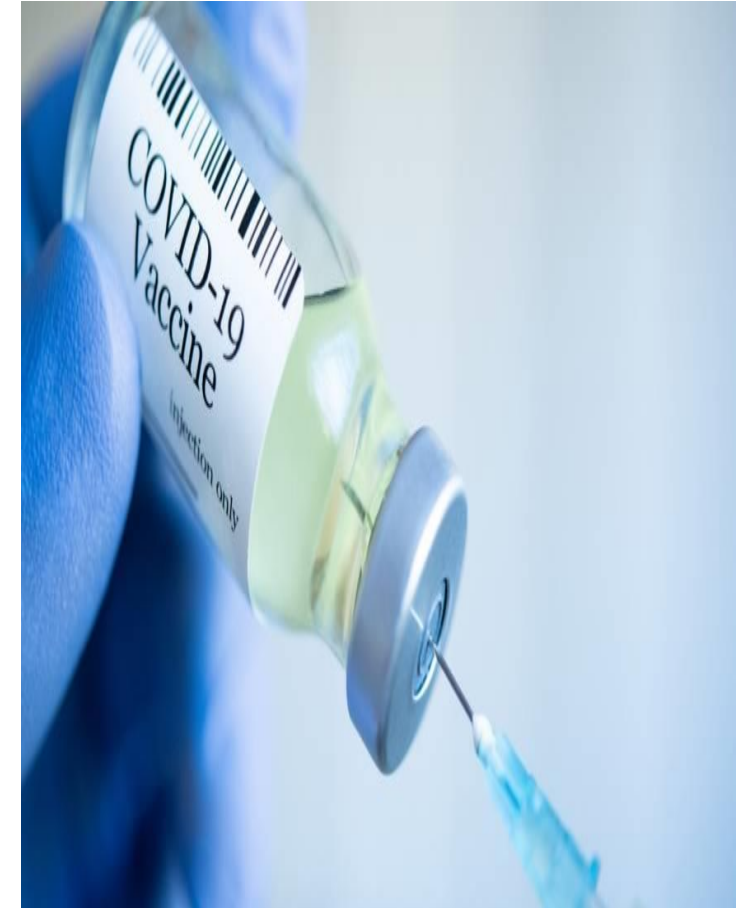
No jab, no job

- Refusal to employ unvaccinated staff
 - Discrimination risks:
 - Why is the candidate unvaccinated?
 - A clinical reason e.g. trypanophobia?
 - Is it a disability?
 - Pregnancy or breastfeeding?
 - Refusal on religious grounds
 - Refusal based on philosophical belief e.g. ethical veganism
 - Human Rights & ethical issues
 - Vaccination requires informed consent



No jab, no job

- Asking about vaccination status
 - Data Protection – ICO guidance:
 - Health information = special category data
 - Processing should be ‘fair’, relevant & necessary
 - A specific purpose is required
 - No justification if:
 - The data is collection for no specific reason
 - Its collected, ‘just in case’;
 - The aim can be met in another way
 - Sector, work type, work environment



No jab, no job

- Asking about vaccination status:
 - Be open and transparent
 - Why do you need the data?
 - How will you use it?
 - How will it be stored?
 - How long will you hold it for?
- Consider voluntary disclosure
 - Part of a vaccination policy
 - **Question** – who has a vaccination policy?
 - May help build trust/ increase engagement



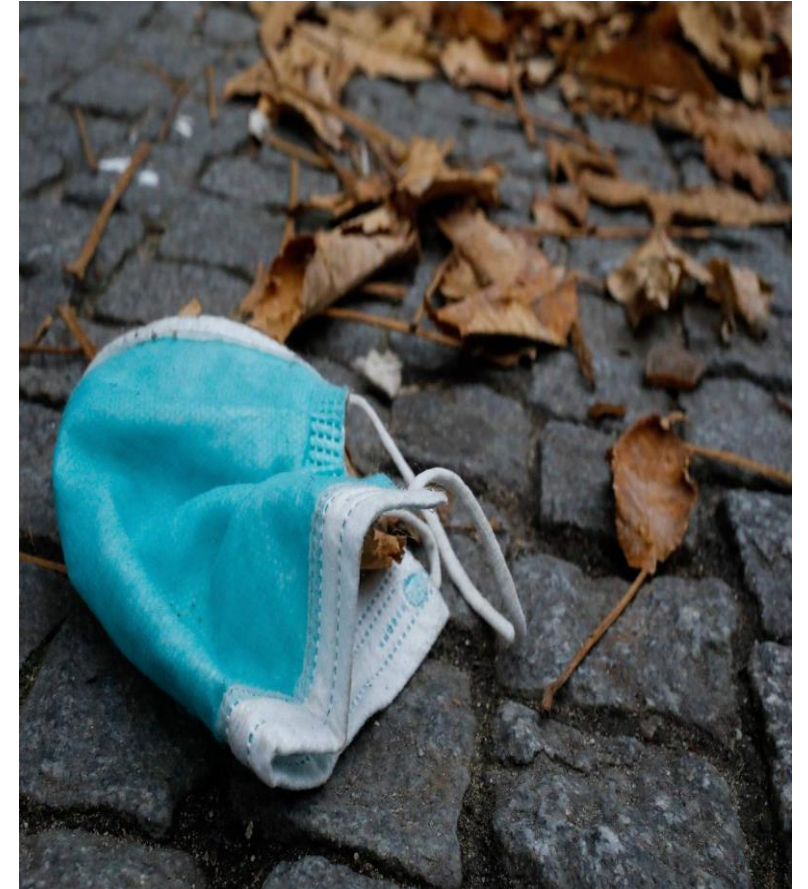
No jab, no job

- Dismissal
 - for refusing to disclose vaccination status
 - for refusing to be vaccinated
 - may be a 'reasonable management instruction'
 - what is your reason for asking?
 - nature of workplace will be highly relevant
 - consider discrimination risks and alternatives
 - a fair procedure will be required
- Risk analysis – risk of employee claim vs risk of claims from Covid transmission

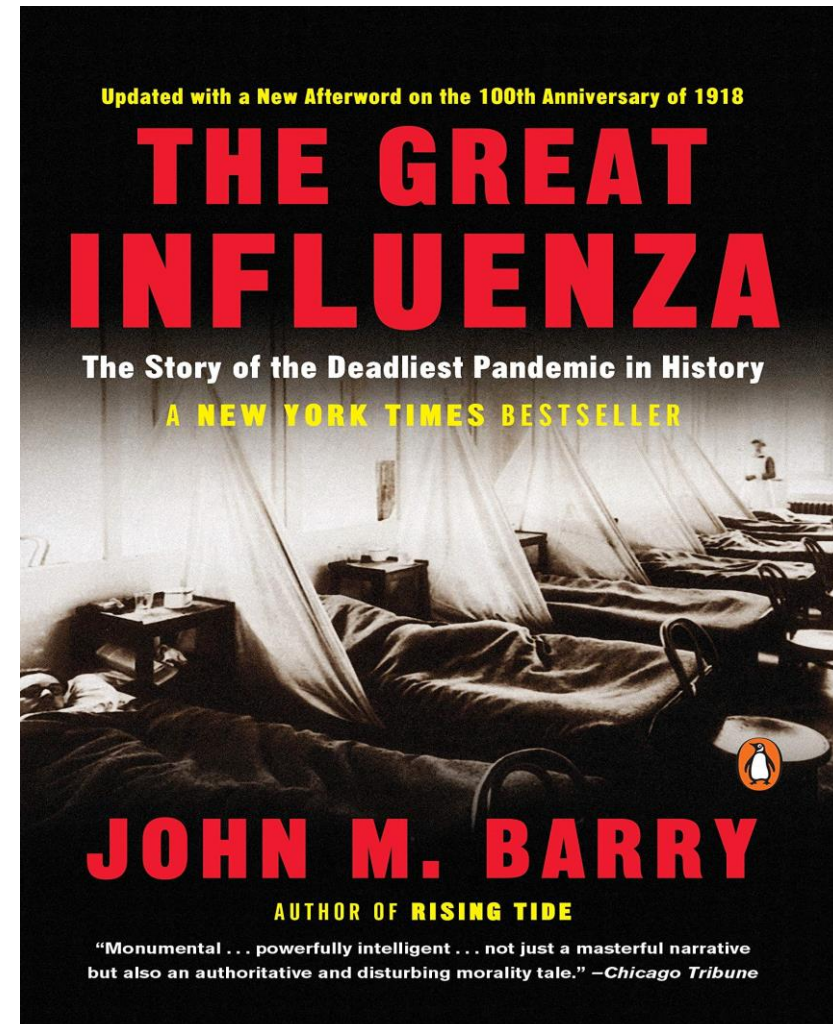


Covid: autumn and winter plan

- Updated '*Working Safely*' guidance from last week
- Plan A
 - Ask staff to WFH if feeling unwell
 - Ensure adequate fresh air to indoor spaces
 - Provide hand sanitizer and clean regularly
 - Face coverings not mandatory but should be worn indoors
- Plan B
 - Covid passports?
 - Mandatory WFH or face coverings?



‘in the next ... pandemic, be it now or in the future, be the virus mild or virulent, the single most important weapon against the disease will be a vaccine. The second most important will be communication’



Working from home

- 5 essential steps:
 1. Conduct a risk assessment?
 - Health & safety obligations still apply
 2. Adopt a WFH Policy
 - Who is eligible?
 - Timescales?
 - Attendance & availability standards
 - Equipment – who provides it? Who pays?
 - Data security & confidentiality
 - Dress code
 3. Provide IT support & communication channels
 4. Maintain a connection to your culture
 5. Consider wellbeing, especially mental health



Right to work checks

- Why?
 - Prevent illegal working
 - Draconian sanctions
 - £20,000 per illegal worker
 - serious cases: imprisonment
 - closure of business order
 - seizure of earnings
 - revocation of business licenses
 - Check = statutory excuse
- Who?
 - The employer, not recruiter or third party
- When?
 - Before employment starts



Right to work checks

- What?
 - Check original documents
 - E.g. passport, Visa, Immigration status document
 - Checklist – ‘List A’ and ‘List B’ documents
- How?
 - Obtain the original documents
 - In the presence of the employee
 - Check – dates, photo, endorsements
 - Up to 5 April 2022
 - Scanned or photo docs are OK
 - Check can be done via video call
 - Photocopy
 - Endorse “RTW check completed on [date]”
 - Retain – during employment & 2 years after



Right to work checks

- On-line checks:
 - Via Home Office checking service
 - <https://www.gov.uk/view-right-to-work>
 - Biometric passports or residence cards
 - Will need a 'share code' from the employee
- Repeat
 - No need to repeat check unless:
 - Right to work is time limited
 - List B documents are the time limited ones

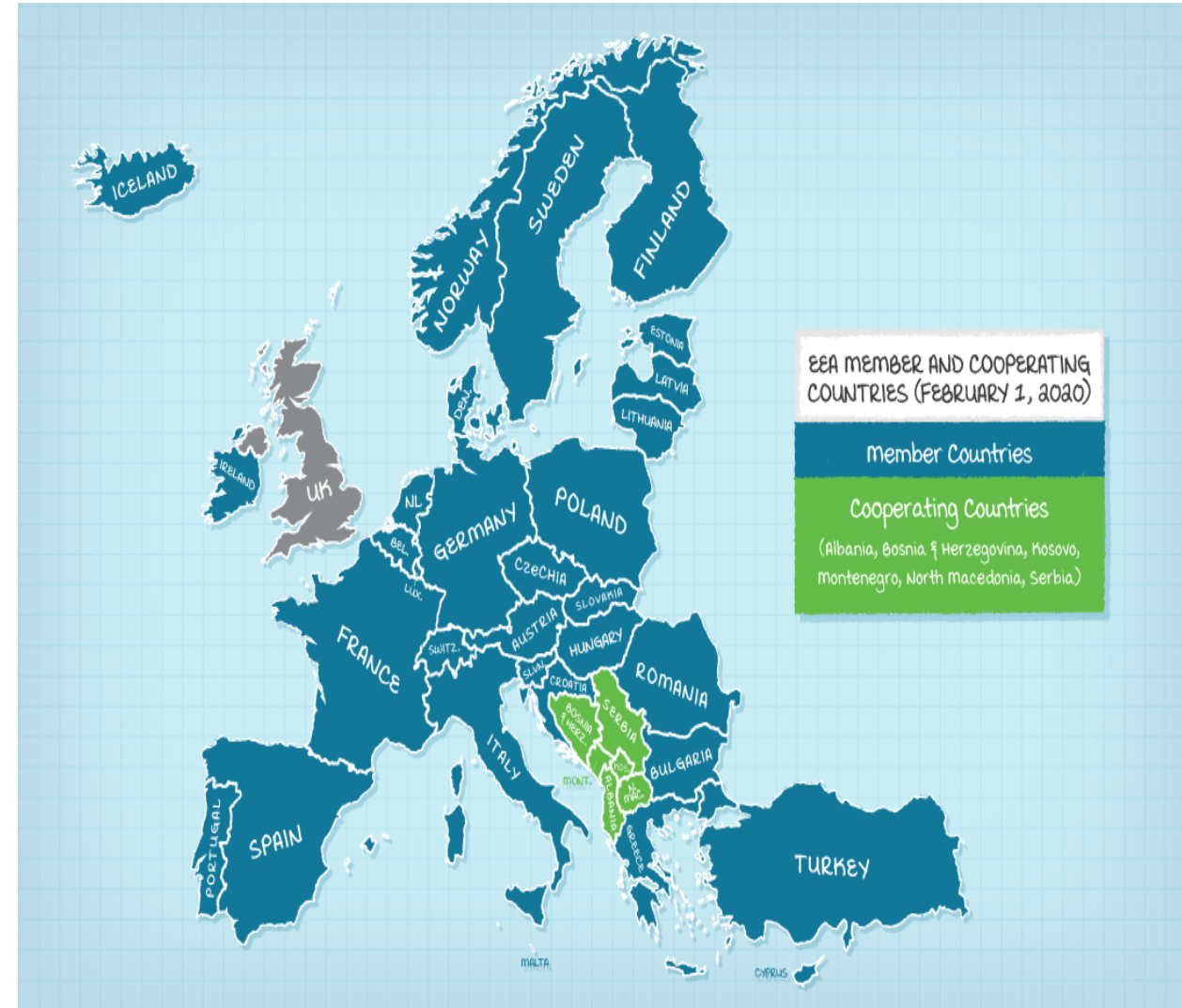
[Right to work checklist \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)



Right to work checks

- From 31 December 2020:
 - Freedom of movement ended
 - EEA & Swiss citizens to be treated as other foreign nationals

- EU Settlement Scheme:
 - Settled status: if in UK for 5+ years
 - Indefinite right to remain
 - Pre-settled status: if in UK for less than 5 years
 - Right to remain in UK for 5 years
 - 1 January 2021: 6 months 'grace period' starts
 - 30 June 2021: grace period ends
 - 1 July 2021:
 - EEA citizens treated the same as other foreign nationals



Right to work checks

- From 1 July 2021:
 - EU, EEA & Swiss: passports alone not enough
 - Except Irish citizens – passport alone will suffice
 - Will need evidence of settled status, visa or other
 - UK based EEA citizens rights protected whilst applying for settled status
 - Can take up employment pending application
 - Employer can check via Certificate of Application



Right to work checks

- Categories of EEA workers:
 - EEA employees prior to 30 June:
 - No need to repeat RTW check BUT
 - If you discover no settled status:
 - Advise them to apply within 28 days
 - Check the position
 - If they don't apply, consider dismissal
 - EEA employees with ILTR
 - Vignette on passport will confirm status
 - No need to apply for settled status
 - Just copy, check and retain passport as normal



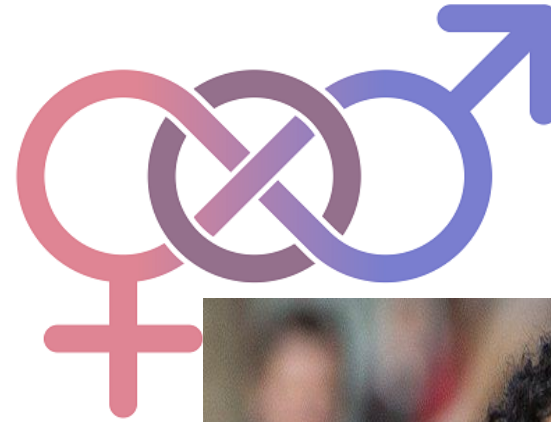
Right to work checks

- Categories of EEA workers:
 - New EEA employees from 1 July:
 - With settled status: request share code & check online
 - Application made for settled status: request certificate of application and check online
 - No settled status, no application:
 - Advise you cannot employ
 - Signpost to EU Settlement Scheme



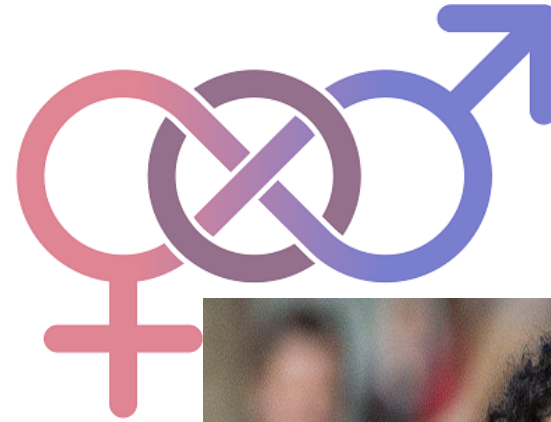
Forstater v CGD Europe

- F employed by non-profit think tank
 - Expressed gender critical views
 - Biological sex not to be conflated with gender identity
 - “woman means adult human female”
 - “trans women are male”
- F dismissed following complaints
- Claimed discrimination based on philosophical belief
- ET – views, ‘not worthy of respect in democratic society’
- EAT - disagreed
 - ECHR, diversity of thought
 - Gender critical beliefs not inherently transphobic



Forstater v CGD Europe

- The case means that:
 - Gender critical views are a ‘philosophical belief’
 - Protected under the Equality Act
- The case does not mean that:
 - the Court took sides in the argument
 - those with gender-critical beliefs can ‘misgender’ trans persons with impunity
 - trans persons are not protected by the Equality Act
- The onus will be on employers to ‘police’ any such arguments at work



Aleem v E-Act Academy

- A was a science teacher
- Disabled due to mental health issues
- Moved to be a cover supervisor, no teaching
- Salary initially maintained but then reduced
- A argued maintaining salary was a reasonable adjustment
- ET disagreed:
 - Academy had warned salary was only temporary
 - Unreasonable to expect higher pay indefinitely
 - Financial difficulties of Academy relevant



Khatun v Winn solicitors

- K was a solicitor
- W proposed furlough for 50% of staff
- 20% pay cut for remainder, including K
- K objected and was dismissed
- ET decided that:
 - Reason for dismissal was potentially fair
 - “some other substantial reason”
 - But was unfair due to lack of procedure
- Importance of:
 - Setting out the business case clearly
 - Meaningful consultation
 - A fair procedure



On the horizon

- Additional pregnancy/ maternity protections:
 - Guarantee of suitable alternative employment:
 - From notification of pregnancy
 - To six months after return from maternity/ SPL
- Neonatal pay (2023):
 - 12 weeks paid leave for parents of premature babies
- Sexual harassment:
 - duty to prevent sexual harassment
 - protections relating to third-party harassment
 - increase of Tribunal time limit: 3 months to 6 months.

