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FREE SPEECH UNION

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Ken Bremner MBE

Chief Executive

South Tyneside and Sunderland NHS Foundation Trust

Sunderland Royal Hospital

Kayll Road

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3rd August 2023

Dear Mr Bremner,

I am writing to you in my capacity as General Secretary of the Free Speech Union, a non-partisan, mass-membership public interest body that stands up for the speech rights of its members and campaigns for free speech more widely.

This letter concerns the 'Transitioning at Work and Gender Diversity Policy' at the South Tyneside and Sunderland Foundation NHS Foundation Trust ('the Trust') that was recently brought to our attention. The policy came into effect on 13th July 2023. Having reviewed it, we believe the policy must be urgently withdrawn and substantially amended, as it appears to discriminate against NHS employees with gender critical beliefs.

We are especially concerned by its insistence that female staff cannot refuse to use the same bathroom facilities as biological males and cannot express any concerns about having to do so.

Definition of 'Transphobia'

One of the fundamental problems with the policy is its definition of the term transphobia as: "The fear or dislike of someone based on the fact they are Trans, *including denying their gender identity or refusing to accept it.* Transphobia may be targeted at people who are, or who are perceived to be, Trans." (My emphasis.)

Trans employees and service users should, of course, be free from discrimination and harassment. But the Trust must strike a balance between protecting trans individuals

from harassment and discrimination and protecting the rights of gender critical employees and service users.

By stating that “the Trust does not accept transphobia in any form”, given the Trust’s definition of ‘transphobia’ includes “refusing to accept” a trans person’s “gender identity”, the policy is effectively stating that the Trust will not tolerate any employees with gender critical beliefs.

We think this definition of ‘transphobia’ is too broad and the accompanying statement that you do not accept it “in any form” is, as a result, too dogmatic. It is perfectly possible to refuse to accept that a trans person has changed their gender because, according to your belief, sex is binary and immutable, but nevertheless treat that colleague with dignity and respect. It is that standard which the NHS should insist upon and not insist that employees should accept something that runs contrary to their beliefs.

Further, the demand to accept gender identity goes beyond what is required by the Equality Act 2010, which protects individuals in relation to gender reassignment – that is, the process of changing gender – and not in relation to their gender identity. In this respect, the Equality Act gives the Trust no valid grounds to restrict the speech of gender-critical employees.

To insist on this would be to create an intimidating, hostile, degrading, humiliating or offensive environment for an employee relating to a protected characteristic, i.e., their belief that sex is binary is immutable, which would be contrary to Section 26 of the Equality Act 2010.

Examples of transphobia

The problem you have created for yourself by defining ‘transphobia’ so broadly is compounded by the examples you give of ‘transphobic’ behaviour. These include:

- 1) A trans-woman... referred to as ‘he’ despite having requested to use the pronoun ‘she’;
- 2) Refusing to use the same facilities as a Trans or Non-Binary member of the team;
- 3) Refusing to use the pronouns of the affirmed gender of a colleague.

Is it really the position of the Trust that a female member of staff, e.g. a devout Muslim, not wishing to use the same toilets as a biological man with in-tact male anatomy is transphobic? And would the Trust really discipline or sack a female member of staff who refused to do so? If not, what does it mean to say “the Trust does not accept transphobia in any form”?

Compelled speech and gender pronouns

The policy states that “Staff should *always* use the name, pronoun or term a person requests in written and verbal communication with them” (my emphasis). This explicitly includes neo-pronouns like ‘zie’ or ‘hir’, which are both cited in the policy, as well as the contested use of ‘they’ to refer to a single individual. “Deliberately using the

wrong gender pronoun” is “tantamount to harassment” and will be “investigated”, the policy states.

The compulsory use of pronouns, mandated even for individuals who do not share a belief in gender identity ideology, is an untested point of law. But a court might well decide that insisting someone with gender critical beliefs use a trans or non-binary person’s preferred pronouns is a form of unlawful discrimination. It might also conclude it amounts to a breach of Article 10 of the European Convention on Human Rights. In *Lee v Ashers Baking Company*, the Supreme Court concluded that Article 10 rights include the right not to express a particular opinion.

It seems reckless for the Trust to be including in one of its policy something that may well turn out to be unlawful.

In addition, we are concerned by the requirement on “all employees” to be “supportive of colleagues who are planning to, or have already, engaged in transitioning and those who live as Non-Binary”. This is an unreasonable standard. Employees should be expected to tolerate those with different beliefs to theirs about trans issues – a requirement which should apply to those on both sides of this debate – as well as tolerate those who have ‘transitioned’. But they should not be required to positively affirm a person’s decision to transition, particularly given the mounting evidence about the harms this can cause.

Intolerance of gender critical staff

The policy states that “managers must not make supportive comments such as ‘I understand your concerns’ to staff who, for example, complain about Trans or Non-Binary colleagues having access to gendered spaces. Myths about Trans and Non-Binary people have no place in the Trust and it is important that Trans and Non-Binary colleagues are fully supported in these circumstances.”

This fails to strike a balance between the rights of transgender employees and the rights of employees with gender critical beliefs.

Similarly, the policy dictates that the Trust must not “give credence to transphobic comments or behaviour by supporting those who demonstrate transphobic attitudes or make transphobic complaints about colleagues”.

The Trust’s definition of transphobia makes clear that these “transphobic attitudes” could include anodyne statements of scientific fact endorsed by a majority of the British public, e.g that sex is binary.

The policy dictates that staff must ensure “that their own behaviour cannot be construed as bullying, harassment or victimisation (transphobia) by acting with compassion, honesty and respect at all times”.

No thought seems to have been given to the predicament this will create for gender critical staff. How can those staff act with “honesty... at all times” if they believe that sex

is an immutable biological fact yet are expected to affirm the beliefs of those who think sex is a social construct “assigned at birth”?

That little or no consideration has been given to the rights of gender critical employees is confirmed by the Equality Impact Assessment, which states that “the policy applies to all staff regardless of religion or belief” and that there is “no” “impact/risk” for people who may have different beliefs, including, presumably, Muslims and orthodox Christians. This is manifestly untrue.

Given this, gender critical staff will understandably find the policy’s suggestion of “additional training on Gender Diversity” for those who “require” it ominous. Such training, if it reflects the tone and content of this policy, is likely to be highly partisan and to ignore the rights of gender critical staff.

Reporting

We are further concerned by the mechanisms for the reporting of transphobia. In addition to the low threshold for such accusations, we are troubled by the policy’s call for staff who have concerns “about another member of staff’s attitude towards Trans and Non-Binary people” to report this to their line manager, or the “Freedom to Speak Up Guardian” or HR.

If that ‘attitude’ includes genuinely discriminatory behaviour or harassment, then reporting it may well be reasonable. But on the basis of the capacious definition of ‘transphobia’ within the policy this reads like an invitation for staff to be reported merely for expressing their gender critical beliefs.

Criticises UK legislation

We are also concerned that the policy, rather than reflecting existing law, criticises the Equality Act in what seems an inappropriately partisan way for a public body. It states that “the language of the Equality Act is outdated”, and, indeed, its definition of a “transgender or trans person” entitled to various protections in the Trust goes beyond the definition of the protected characteristic of ‘Transgender’ in the Equality Act. Indeed, the Trust’s policy clearly reflects what it would like a more ‘up-to-date’ Equality Act to say, rather than what the Equality Act actually says. We believe the Trust’s ‘Transitioning at Work and Gender Diversity Policy’ is a breach of the Equality Act and the Trust is unlikely to persuade a court to overlook this fact because, in its view, the Equality Act is “outdated”.

The policy is not a neutral document aimed at protecting the rights of a diverse workforce. Rather, it is suffused with the language of trans rights activists, like “sex... assigned at birth”, “deadnaming” and unscientific jargon like “gender fluid”.

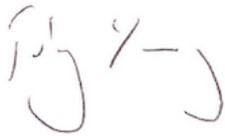
Further action

We are writing to request that this policy be immediately withdrawn and an urgent review undertaken, bearing in mind the legal duties of the Trust to balance the rights

and needs of all its employees, including those with gender critical beliefs. The Trust employs more than 8,300 people. They will hold a wide variety of religious and philosophical beliefs. They all deserve fair and equal treatment from their employer.

The Free Speech Union has dealt with 30 cases involving the NHS since it was founded in February 2020, including drawing attention to unlawful policies like this one. Should you refuse to withdraw this policy and any of your employees find themselves being disciplined – or worse – because they fall foul of it, we stand ready to support them. That includes helping them take the South Tyneside and Sunderland NHS Foundation Trust to the Employment Tribunal.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Toby Young'.

Toby Young
General Secretary
The Free Speech Union
toby@freespeechunion.org

cc. The Rt Hon Steve Barclay MP, Secretary of State for Health and Social Care
The Rt Hon Kemi Badenoch MP, Minister for Women and Equalities
Allison Thompson, Chair, South Tyneside and Sunderland NHS Foundation Trust