



Sent by email to:

Professor Deborah Prentice, Vice-Chancellor  
Dr Seb Falk, Senior Proctor, Cambridge University  
Professor Angela Breitenbach  
Professor Bhaskar Vira

25 April 2024

Dear Officers

### **Possible legal and regulatory failures to protect the free speech of Nathan Cofnas**

Alumni For Free Speech (**AFFS**) is a non-partisan organisation to represent alumni of UK universities to encourage high standards of compliance with institutions' obligations to protect the freedom of speech of their students, staff and visiting speakers. More information about AFFS can be found at [www.affs.uk](http://www.affs.uk).

We are writing about events relating to Mr Cofnas, with which you will be familiar. (We should state that, as a focused campaign for free speech, we neither approve nor disapprove of Mr Cofnas' viewpoints.) It appears that your University is at risk of unlawful action as well as regulatory failures, as follows.

Your University appears to be at risk of failing to comply with the following legal and other obligations.

- Section 43(1) of the Education (No 2) Act 1986, which requires it to use all reasonably practicable steps to secure the lawful free speech of its academics. This is a very demanding requirement. Merely subjecting someone to an inappropriate investigation on account of their lawful viewpoints is itself highly detrimental to them, and it is eminently practicable to take steps to not to so that, so a university is therefore required to avoid taking such actions. While we recognise that a university can need to make inquiries in order to establish the facts and their implications in the context of the law and the university's requirements, we ask: has Cambridge worked to ensure that any investigation it is making is appropriate in scope, focus and conduct?

The Office for Students (**OfS**) has produced draft Guidance about the application in practice of the new free speech protection provisions in the Higher Education and Research Act 2017 (**HERA**), when they come into effect on the 1 August 2024. We note that it contains the following specific paragraphs.

“50. [Universities] promptly reject public campaigns to discipline, expel or fire a student or member of staff for lawful expression of an idea or viewpoint. These may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns.

51. Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for a [university] to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely.

52. [Universities] should not terminate employment for, or deny reappointment to, any member of staff because they have exercised free speech within the law to express a particular viewpoint.

53. [Universities] must take reasonably practicable steps to achieve the objective of securing that no member of academic staff is at risk of losing their job or any privileges because they have exercised their freedom within the law to question and test received wisdom, or to put forward new ideas and controversial or unpopular opinions.”

See also examples 6-8.

These provisions reflect requirements under the primary obligation in HERA, i.e. to use all reasonably practical steps to secure free speech. This obligation is not materially different from the existing obligations on universities under Section 43. The OfS' draft Guidance is therefore, logically, equally applicable to the interpretation of the existing law. The OfS' draft Guidance is thus supporting evidence that your University is at risk of breaching, or has already been in breach of its legal obligations to secure free speech.

- The obligations in the Equality Act 2010 not to discriminate against or harass people with the protected characteristic of philosophical belief. As is now well known, various viewpoints on currently contested issues had been ruled to be protected philosophical beliefs under the Equality Act. These include "gender-critical" viewpoints and ones which contest aspects of "critical race theory". Employers and education providers need to avoid discrimination against and harassment of people with such viewpoints in certain specified contexts. Employers are liable for discrimination and harassment committed by their employees in the course of their employment, unless they can show that they took all reasonable steps to prevent this happening.

Of particular relevance to the subject at hand are various recent Tribunal judgements which have illustrated the demanding nature of the requirements to avoid liability. See our associated campaign Best Free Speech Practice's ([www.bfsp.uk](http://www.bfsp.uk)) statement (attached) on the *Meade* case, in particular, in which an employer and a regulatory body were found guilty of discrimination and harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy: indeed, the mere act of inappropriately investigating or subjecting someone to a disciplinary process can constitute unlawful discrimination or harassment under the Equality Act.

Detailed statements on these cases can be found at <https://bfsp.uk/universities-and-free-speech>.

It appears that there is a strong possibility that Mr Cofnas' views would be deemed protected if this came to a Tribunal hearing. So, your University may already be acting unlawfully.

- Obligations under the Human Rights Act 1998 (HRA) to respect Mr Cofnas' right to freedom of speech. The free thought and speech rights of academics and students are protected under the European Convention on Human Rights, as enacted in the UK by the HRA. These freedoms include the freedom to offend, shock and disturb. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression. These rights are subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" for various specified purposes, including for the protection of the rights of others, although this is subject to a "proportionality" test.
- Requirements as to governance: its condition of registration (E2) to have in place adequate and effective management and governance arrangements to deliver principles relating to free speech in practice. These include principles relating to securing freedom of speech and academic freedom.
- Its own requirements relating to free speech.

We have some concerns about the wording of some previous statements about this case made by the University. The Tribunal in the *Meade* case ruled that the claimant's employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing a final warning, themselves constituted harassment; and that a staff member conducting the disciplinary process "labelling [Ms Meade's] Facebook posts as being transphobic was...sufficient...to constitute harassment". The University needs to maintain sufficient neutrality to avoid pitfalls such as this.

Our associated campaign, Best Free Speech Practice ([www.bfsp.uk](http://www.bfsp.uk)), is working to clarify and disseminate what the legal requirements and their implications in practice actually are at UK HEPs. It is clear that there is widespread misunderstanding of how onerous their obligations already are and that, as a result, there are widespread compliance failures. BFSP has produced various detailed Statements for English HEPs about the requirements and their implications in practice. These can be found at <https://bfsp.uk/universities-higher-education>, but the most relevant of them is a general Statement about the requirements and their implications when the law is amended on 1 August 2024 (which will shortly be revised to reflect recent draft OfS Guidance).

Your University has, in this letter, received credible concerns about potential compliance and governance failings. It needs to take prompt and effective action to ensure that it gets this

right. This means ensuring that any investigation it is making is appropriate in scope, focus and conduct, and that any outcome stands up legally.

We will be observing developments with interest. We recognise that this case involves a number of technical complexities, and that assessing them correctly and reaching an appropriate solution will not be straightforward. We will be happy to recognise good free speech protection, if it occurs. Our alumni love their universities, and we are happier providing positive support than creating difficulties, although we will not shrink from the latter.

We do not ask that you engage with us at this stage, but we do ask that you confirm receipt.

Yours faithfully

William Mackesy  
Andrew Neish KC

## **Alumni for Free Speech**

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