Case Numbers: 2200179/2022
2211483/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Rachel Meade	**AND**	(R1) Westminster City Council (R2) Social Work England

FULL MERITS HEARING

Heard in person on 5-14 July 2023 and deliberations in Chambers on 7, 23 and 24 November 2023.

Before: Employment Judge Nicolle

Non-legal members: Ms N Sandler and Ms P Breslin

For the Claimant: Ms N Cunningham, of Counsel
For the Respondents: Mr S Cheetham KC, of Counsel

JUDGMENT

1. The claims for harassment on account of the Claimant's protected beliefs pursuant to S 26 of the Equality Act 2010 (the EQA) succeed, with the exception of allegation a, the 2nd, 3rd and 4th bullet points in allegation i and allegation k against the First Respondent.

2. The claims for harassment on account of the Claimant's protected beliefs pursuant to S 26 of the EQA succeed, with the exception of allegations c, e and j, against the Second Respondent.

3. We do not find that those allegations which we found did not constitute harassment succeed as direct discrimination claims against both the First and Second Respondents under S 19 of the EQA.

REASONS

The Hearing

4. The hearing took place in person from Wednesday 5 July 2023 until Friday 14 July 2023. Whilst there was sufficient time for the completion of the witness evidence and submissions there was inadequate time for the Tribunal to undertake its deliberations and reach its conclusions. The earliest date upon which the Tribunal could reconvene were unfortunately not until 7 November 2023.

5. Whilst the hearing had been listed as a hybrid hearing no witnesses gave their evidence remotely and the hearing was therefore fully in person.

6. At the outset of the hearing a request was made by an attendee for permission to live tweet the proceedings which was granted, on the condition that the tweets related to a factual description of the evidence given, and avoided pejorative statements regarding the witnesses or the evidence they gave.

The claims

7. The respective claims against the Respondents dated 7 January 2022 and 16 December 2022 had previously been consolidated. Mr Cheetham confirmed that he was instructed on behalf of both Respondents.

The hearing bundle

8. There was an agreed bundle comprising of 2590 pages. A small number of additional documents were added to the bundle during the hearing.

Witnesses

9. The Claimant gave evidence pursuant to her First and Second witness statements. The following individuals gave evidence on behalf of the Second Respondent:

- Berry Rose, Head of Triage and Case Progression (Ms Rose).
- Eleanor Poole, Head of Hearing Operations and Case Review (Ms Poole).
- Francis Edouard-Whittaker, Acting Case Examination Operations Manager
- (Mr Edouard-Whittaker).
- Graham Noyce, Professional Case Examiner (Mr Noyce).
- Laura Kenny, Investigator (Ms Kenny)

10. Heather Martin, Lay Case Examiner (Ms Martin) gave a witness statement but was not able to attend.

11. The following witnesses gave evidence on behalf of the First Respondent:

- Ann Ffrench, Interim Strategic Employer Relations Lead in HR (Ms Ffrench).
- Bernie Flaherty, Deputy Chief Executive for Westminster City Council and the Bi Borough Executive Director of Adults Social Care and Health of the Royal Borough of Kensington, Chelsea, and Westminster City Council (Ms Flaherty).
- Claire Weeks, Head of Operational Peoples Services, and a Senior HR Lead (Ms Weeks).
- Donna Barry, Head of Service for the Tri-Borough Adult Services Discharge Team (Ms Barry).
- Hazel Best, Principal Lawyer of the Bi-Borough Social Care and Education Legal Team (Ms Best).
- Hilary Harris, Team Manager in the Tri-Borough Adult Hospital Discharge Team (Ms Harris).
- Pedro Wrobel, Executive Director of Innovation and Change (Mr Wrobel).
- Rachel Soni, Bi-Borough Director of Health Partnerships (Ms Soni).

12. The First Respondent also produced witness statements for Helen Farrell, Interim Director of Family Services (Ms Farrell) and Karen Thain, Senior Solicitor in the Legal Services Department (Ms Thain) neither of whom were called.

Agreed List of Issues

13. There was a consolidated list of issues at pages 197-202 in the bundle. Mr Cheetham confirmed that the following arguments were no longer being pursued:

a) That the Claimant's gender critical belief was not a protected belief under s10 of the Equality Act 2010 (the EQA).

b) That certain elements of the claims were out of time on the basis that the treatment complained of did not constitute conduct extending over a period of time.

c) That the Tribunal may not have jurisdiction to hear certain elements of the claim in respect of harassment or direct discrimination as result of the

Claimant having a potential statutory right of appeal against the Second Respondent such that the Tribunal does not have jurisdiction.

14. Ms Cunningham confirmed that complaints were no longer being pursued in respect of the alleged treatment set out at paragraphs 2(c),(h), (9) (d), (f) and (g) of the List of Issues.

15. It is not necessary to set out the List of Issues at this point but they will be addressed sequentially in the Tribunal's conclusions.

Chronology and submissions

16. The Tribunal was provided with a comprehensive agreed chronology. Ms Cunningham provided the Tribunal with opening submissions and both parties provided closing submissions to which they extemporised on Friday 11 July 2023.

The Claimant's solicitor's transcript of the evidence

17. The Tribunal was provided with an 86 page transcript of the evidence which had been typed by the solicitor accompanying Ms Cunningham. Whilst the Tribunal primarily relied on its own notes of evidence it also made reference to this comprehensive and accurate transcript. Mr Cheetham did not have any objection.

Relevant case law background

18. Somewhat unusually we consider it beneficial to set out the relevant case law developments pertaining to the status of gender critical beliefs and their protection under s10 of the EQA. The reason for this is that it is necessary to consider the Respondents' treatment of the Claimant in the context of what has been a developing area of law and in a wider context of considerable public debate regarding gender self-identification, gender critical beliefs and proposals to reform the legal status of those seeking to re-categorise their birth gender.

19. In a judgment sent to the parties on 18 December 2019 the London Central Employment Tribunal dismissed a claim from Ms Forstater on the basis that her gender critical beliefs were not protected under s10 of the EQA. Ms Forstater successfully appealed against this determination in a judgment handed down by the EAT on 10 June 2021. Given that the nature of Ms Meade's claim bears very significant similarities to that of Ms Forstater it is relevant to set out relevant parts of the EAT's judgment.

20. The Claimant and Ms Forstater hold gender-critical beliefs, which includes the belief that sex is immutable and not to be confused with gender identity. They both engaged in debates on social media about gender identity issues, and in doing so made some remarks which some transpeople found offensive and "transphobic". Ms Forstater considered that statements such as "woman means adult human female" or "transwomen are male" are statements of neutral fact and are not expressions of antipathy towards transpeople or "transphobic".

21. In July 2018, the Government launched a consultation on proposed amendments to the Gender Recognition Act 2004 (the GRA) which would have made legal recognition of self-identified gender easier. Ms Forstater was concerned at the proposed amendments to the GRA.

22. The EAT was unequivocally of the view that Ms Forstater's belief fell within s10 of the EQA. It did so on the basis that her belief did not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17 of the European Convention on Human Rights (the ECHR), which concerns prohibition of abuse of rights. The EAT considered that Ms Forstater's belief that human beings cannot change sex, whilst also protecting the human rights of people who identify as transgender, is not a belief that seeks to destroy the rights of transpersons. Whilst it is a belief that might in some circumstances cause offence to transpersons, the potential for offence cannot be a reason to exclude a belief from protection altogether. Whilst such beliefs may well be profoundly offensive, and even distressing to many others, they are beliefs that are, and must be, tolerated in a pluralist society. This is particularly the case where a belief, or a major tenet of it, appears to be in accordance with the law of the land.

23. Following the EAT's judgment the Forstater case was returned to a differently constituted Employment Tribunal. In a judgment dated 6 July 2022 it was held that the claim of direct discrimination because of belief succeeded in respect of the decisions not to offer Ms Forstater an employment contract and not to renew her visiting fellowship.

24. The Tribunal held that the beliefs expressed by Ms Forstater did not amount to an objectionable or inappropriate manifestation of her beliefs.

<u>Ms Allison Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd and representatives of Garden Court Chambers</u>

25. Whilst this judgment dated 27 July 2022 constituted a first instance decision it is nevertheless relevant given its high public profile, particularly in the context of those interested in the often vociferously conducted debate, regarding the respective balance between gender self-identification and gender critical views.

<u>Background to the debate regarding gender recognition issues</u>

26. The Tribunal had a relatively high level of awareness of the ongoing debate, to include not just the above mentioned tribunal and EAT judgments, but also the coverage in the media to include, but not limited to, the controversy concerning the Tavistock NHS Trust, Mermaids, the role of Stonewall, proposals to reform gender recognition in both the UK and Scotland, the eligibility of transwomen to participate in female sport categories, arguments regarding the safety of women in the use of toilet facilities, prisons, domestic abuse and rape refuge centres if transwomen use such facilities whilst retaining male bodies, public comments and criticism of those expressing opinions in this area to include JK Rowling,

Labour MP Rosie Duffield and Kathleen Stock, a professor of philosophy at the University of Sussex until 2021.

The Gender Recognition Act 2004

27. Under the GRA a transexual (the term used in the legislation) could obtain a certificate for legal purposes that they had an acquired sex different from that recorded at birth. To get a certificate it had to be shown that they have, or had, gender dysphoria, there must be two medical certificates, one from a specialist in the area discussing details of the diagnosis and treatment; the person must have lived in the acquired gender for two years and made a declaration that they intend to live in the gender for the rest of their life.

28. Under the EQA it is unlawful to discriminate against transexuals. They need not yet have a gender reassignment certificate. The protection is for someone who:

> "Is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".

29. In July 2018 the UK Government consulted formally about reforming the GRA in England. In September 2020 the Government announced no changes would be made. In Scotland legislation making changes has been proposed but is subject to ongoing debate and legal challenge.

30. The debate on reform has been polarised, often uncompromising, and sometimes hostile and abusive.

31. Further, the debate has continued in the months subsequent to the public hearing of this claim, to include the ruling by Lady Haldane at Edinburgh's Court of Session pursuant to a section 35 Order pertaining to the Scottish Government's Gender Recognition Reform Bill, the inquiry into, and subsequent exoneration of Baroness Falkner, following bullying accusations from EHRC employees purportedly on account of their antipathy to her views on gender recognition issues, and the ongoing political debate regarding gender recognition guidance to schools.

Findings of Fact

The Claimant

32. The Claimant is a qualified social worker and commenced employment with the First Respondent on 13 August 2001. She has spent most of her working life in the Health and Social Care sector. In her employment with the First Respondent she has worked within Adult Services. She has worked both in the community and in a hospital setting as a Care Manager and as a Senior Care Manager. She is required as part of her professional registration to adhere to the professional standards as outlined by the Second Respondent.

33. The Claimant says that she is a feminist and holds gender critical views. She has spoken out about, and campaigned over many years for women's rights.

The Second Respondent

34. The Second Respondent is a Regulator for social workers in England and operates in accordance with its statutory obligations as set out in the Children and Social Work Act 2017 (the Act) and Schedule 2 of the Social Workers Regulations 2018 (the Regulations). The Second Respondent is a member of the Employers' Network for Equality and Inclusion (the ENEI) and was a Stonewall Diversity Champion at the relevant time.

Contractual and other relevant documentation

The Second Respondent's Case Examiner Guidance dated 5 February 2020

35. The introduction states that the Second Respondent's primary objective is to protect the public and this is done by:

- Protecting, promoting and maintaining people's health and wellbeing.
- Promoting and maintaining public confidence in social workers in England; and
- Promoting and maintaining professional standards for these social workers.

36. Paragraph 72 provides that at the end of an investigation, Case Examiners must decide whether there is a realistic prospect that the adjudicators would find the social worker's fitness to practise is currently impaired. Impairment is where the protection of the public, or the wider public interest, requires action to be taken on the social worker's registration.

37. Paragraph 90 provides that accepted disposal is likely to be the preferred means of closing a case where there is evidence that the social worker accepts that their fitness to practise is currently impaired. The social worker may also be actively engaged in remedial work.

38. Paragraph 91 provides that a case may only be closed through accepted disposal with the agreement of the social worker.

The Second Respondent's Early Review Guidance dated 6 February 2020

39. This provides that an early review can take place of an Order issued if new evidence becomes available to suggest the current order needs to be varied, replaced or removed.

40. The Second Respondent can request a review at any stage but this does not represent an entitlement of the individual social worker. The Second Respondent's witnesses stated that such a review was only to look at the Order and not the substantive decision.

41. The Respondents quoted from the Health and Care Professional Council (HCPC) 2016 Standards and various versions of the Fitness to Practise Rules.

The Second Respondent's Fitness to Practise Rules dated 9 April 2020

42. This sets out the obligations of a social worker which includes an undertaking to:

- Respect and promote the human rights, views, wishes and feelings of the people I work with, balancing rights and risks and enabling access to advice, advocacy, support and services.

- Recognise differences across diverse communities.

43. As a corollary to the above positive obligations a social worker also undertakes not to undertake various actions including:

- Abuse, neglect, discriminate, exploit or harm anyone, or condone this by others.

- Behave in a way that would bring into question my suitability to work as a social worker while at work, or outside of work.

- Use technology, social media or other forms of electronic communication unlawfully, unethically, or in a way that brings the profession into disrepute.

The First Respondent's Code of Conduct dated November 2020

44. This includes a provision that in exceptional circumstances, a period of suspension, on full pay, may be helpful or necessary, during a disciplinary investigation.

45. The Code also includes details of the First Respondent's media policy and this includes advising employees to be careful about what they say and how it might be interpreted, particularly discussing topics which can be inflammatory, e.g. politics, religion etc, and show respect for others' opinions.

Claimant's Facebook

46. The Claimant's Facebook was set to private and she posted messages to approximately 40 friends, to include 6 or 7 colleagues employed by the First Respondent. Her posts included those expressing her gender critical beliefs.

Complaint raised by Aedan Wolton (Mr Wolton) dated 15 June 2020

47. Mr Wolton is another social worker and was a Facebook friend of the Claimant. His complaint was made to the Second Respondent concerning what he alleged to be the Claimant's transphobic comments on her Facebook account.

Further, he contends that she had signed petitions published by organisations known to harass the trans community and donated money to causes which seek to erode the right of transpeople as enshrined by law in the EQA. He said that the catalyst for his complaint was that the Claimant had posted links to an organisation called Standing for Women which he described as a known hate group. Further, he complained that the Claimant had sought to prevent the award winning charity Mermaids from delivering diversity and awareness training to the police, educators and to any other public services. He went on to complain that the Claimant had shared a post indicating that she had donated funds to provide a "thank you", to Graham Linehan who Mr Wolton contended had repeatedly used his considerable public platform to attempt to erode transpeople's rights. He added that the Claimant had deliberately shared posts containing misinformation about the trans community and had shared images equating trans identity to paedophilia.

48. Graham Lineham is an Irish comedy writer (Mr Lineham). He has a reputation for expressing views which transgender activists, espousing gender self identification, find offensive.

<u>The Second Respondent's Triage Decision Making Group, record of decision dated 3 November 2020</u>

49. This summarised the concerns raised as follows:

- The Claimant has posted and/or shared posts on Facebook that are discriminatory in nature.
- The Claimant has signed petitions by organisations that appear to pursue a discriminatory goal.
- The Claimant has donated money to people and/or organisations who appear to hold and/or have publicised discriminatory views.

50. The Triage Team considered that the following criteria were potentially applicable:

- The seriousness of the concern.
- The likely availability of evidence to support an allegation of impaired fitness to practise.
- Whether the concern suggests the social worker may have breached any relevant publicised professional or ethical guidance, rules, regulations procedures or laws.

<u>The Second Respondent's letter to the Claimant dated 9 November 2020</u>

51. In this letter Jack Aitken, Investigator (Mr Aitken) advised the Claimant that she may be culpable of misconduct. She was asked to provide certain

information by 16 November 2020 and to provide her first written response by 23 November 2020.

Ms Kenny's evidence

52. Ms Kenny says that in her experience an investigation involving social media complaints will typically take around six months. She says that in the Claimant's case the investigation lasted only four months. She says that the Second Respondent is dealing with a backlog of complaints, and that as at the date of her witness statement, there are approximately 740 cases being investigated by 20 investigators.

Claimant's Facebook posts which formed part of the investigations of the First and Second Respondents

53. There was some debate as to the extent of which all the applicable posts were made available at various stages of the investigation. Nevertheless, we consider it relevant to refer to some of those posts at this stage. It is also relevant that the number and specifics of the posts which were regarded as the most serious by the various individuals involved in the respective investigations conducted by the 1st and Second Respondents varied and ranged from a minimum of 2 to a maximum of 70 posts.

54. The posts regarded as potentially offensive by the Respondents included, but were not limited to, the following:

55. A link to a petition to the International Olympic Committee that male athletes should not compete in female sports.

56. A link to a petition that women have the right to maintain their sex-based protections, as set out in the EQA to include female only spaces such as changing rooms, hospital wards, sanitary and sleeping accommodation, refuges, hostels and prisons.

57. A reposting of a tweet from feminist heretics stating that it looks like JK Rowling is soon to be targeted by the Inquisitorial Squad for following the wrong people on Twitter. This included a highly contentious cartoon to include "Ah Crap!!" It's "He Who Must Not Be Deadnamed!" and followed by "I identify as the Nero of this Tale!." For ease of reference subsequently referred to as the JK Rowling post.

58. Reposting a tweet from an organisation called Mayday with a cartoon showing two women prisoners with one asking the other "what are you in for?" and the other saying "for saying that Ian Huntley is a man".

59. Forwarding a post from Fair Play for Women dated 8 December 2018 entitled "meet Karen" and referring to Karen as a male prisoner who had committed sexual assaults against women in prison and asking to sign their petition to get the prison policy changed.

60. Forwarding a post from Fair Play for Women dated 3 October 2018 containing a link to Private Eye and a satirical post stating:

> "Boys that identify as girls to go to Girl Guides.
> Girls that identify as boys to go to Boy Scouts.
> Men that identify as paedophile go to either"

The Respondents contend that this conflated transgenderism with paedophilia. The Claimant says that whilst she had not given great consideration to the post at the time that she considered it was about predatory males seeking to take advantage of any available situations rather than being specific to the transgender community. For ease of reference subsequently referred to as the "Girl Guides/Boy Scouts" post.

This Claimant's response to the complaint dated 23 November 2020

61. The Claimant has said that she was naively unaware that any posts she had shared or liked, any petitions she had signed, or any organisations to whom she had donated, were discriminatory or offensive. She said that she had not fully read or analysed the content some of the articles or links before posting. She acknowledged showing a lack of judgement in her use of social media. The Claimant said that she had removed all posts and unfriended any organisations or friends that may share posts to her Facebook account which may be seen as being critical towards minority groups. She said that she intended to access training around LGBT+ issues.

62. Attached to the response was a statement from Jackie Gilroy, the Claimant's Team Manager (Ms Gilroy), to say that she was confident that the Claimant had never practised in a discriminatory way and that her work with minority groups was exemplary. Ms Gilroy said that the Claimant had readily and unprompted acknowledged that she now realised that her posts on Facebook were ill considered, but she understood that she was taking part in a wider debate and it was never her intention to discriminate against any group. Ms Gilroy said that the Claimant had now assured her that she had removed these posts and that her profile does not reveal her profession in any way.

Claimant attends training

63. On 19 January 2021 the Claimant attended training on working with gender diverse and transpeople. In her feedback report following this training she acknowledged a lack of insight around this area. She stated that she had always been a feminist and that on reflection she may have been swayed by the mistaken view of other prominent feminists who felt that promoting transgender rights would impact on women's rights.

The Second Respondent's Fitness to Practise Case Investigation Report dated 19 April 2021

64. As there is much repetition between the various stages of the processes it is not necessary for us to set out in full the contents of this subsequent report.

However, it is relevant to set out the evidence which was considered of particular relevance to include:

- A petition to prevent transgender women competing in women's sport at the Olympics.

- A petition to stop Mermaids from providing training to the police, schools and public services.

- A petition to review rules allowing "male prisoners who identify as female, in women's prisons".

- The Claimant sharing a fundraiser on Facebook titled "thank you to Glinner." This relates to Mr Linehan.

- That when addressing the first regulatory concern (sharing posts that were discriminatory in nature), the CIR cited in evidence 'a large number of screenshots from the Claimant's Facebook page and stated, 'several of these could be considered transphobic in nature'.

- The fundraiser 'raising campaign funds for Fair Play for Women'.

Claimant's response of 19 April 2021

65. In this she admitted the Regulatory concern that she accepted that she had shared posts on social media, that whilst she considered to be furthering a feminist ideal, it did not occur to her that the posts might be deemed "discriminatory in nature".

Claimant's position

66. In evidence the Claimant said that she felt helpless, it was lock down, she was working in a busy hospital and there was lots going on in her family life. She had encountered difficulties in getting support from her union. The Claimant said that she just wanted to carry on with her job. She felt under duress from the Second Respondent, as they as her Regulator were saying that the posts were discriminatory, and that was a position she was reluctant to challenge at the time and simply wanted the process to be over. She said that soon afterwards she regretted her decision.

67. In her evidence she described feeling bullied by the whole process. She felt that something worse could happen if she did not accept the sanctions. She was concerned that this could include losing her registration and job.

68. The Claimant did not consider that articles that she had forwarded from newspapers or other media publications/organisations could be discriminatory. The Claimant said that she had recently seen on the Second Respondent's website that the Evidence Based Social Work Alliance had written an open letter to the Chief Executives of all for UK Social Work Regulators around exploring

evidence on sex and gender identity to inform professional discussion, policy review and practice guidance. She said that she considered this very helpful in attempting to clarify and address concerns and issues in this area. The Claimant mentioned the Evidence Based Social Work Alliance letter in her response of 19 April 2021.

69. We find that the Claimant never believed that any of her individual posts were discriminatory.

Ms Martin's email to Mr Noyce of 10 June 2021

70. Ms Martin attached a file entitled Meade R misconduct transphobia.

Decision of the EAT in Forstater

71. The EAT's judgment, overturning the original employment tribunal decision, was promulgated on 10 June 2021.

Letter from the Second Respondent to the Claimant dated 28 June 2021

72. Mr Eduardo-Whittaker notified the Claimant that the Case Examiners had decided that there was a realistic prospect that her Fitness to Practise would be found currently impaired. The Claimant received with the 28 June 2021 letter the preliminary Case Examiners' decision, a response form and further information about accepted disposal. However, it had been decided that it was not in the public interest for the case to proceed to a hearing. He said that the Second Respondent had decided that an appropriate sanction would be a one year warning. The Claimant was given until 12 July 2021 to accept this proposal, propose amendments to it or reject it. She was advised that if she rejected the proposal her case would be referred to a hearing.

73. The Claimant was advised that there were 3 options available to her:

- Accept
- Propose amendments; or
- Reject.

74. She was advised that if she accepted, the Case Examiners will determine if it is still appropriate for the case to be closed without a hearing. If so, the proposed sanction will come into effect and it will be published on the register. She was informed that if she rejected the proposal her case will be referred to a hearing.

75. The further information about the accepted disposal set out the sanctions available and stated that the Case Examiners cannot propose removal from the Register.

76. There were various versions of the Case Examiners' decision. We note that in the decision summary, in the version of the document which appears at page 507 in the bundle, that against the section asking, "is there a realistic prospect of the adjudicators finding the social worker's fitness to practise is impaired?" that Mr Noyce added a side note that the original entry of no needs changing to yes? Further, where the initial draft stated that "the Case Examiners found no realistic prospect that the social worker's fitness to practise could be found impaired" he added a side note "needs changing to impairment". This

The Second Respondent's Case Examiners' Decision dated 8 July 2021

77. The report identified the lay case examiner as Ms Martin and the professional case examiner as Mr Noyce. The report referred to the Case Examiners applying the "realistic prospect" test. As part of their role, the Case Examiners will consider whether there is a realistic prospect:

- The facts alleged could be found proven by adjudicators.
- Adjudicators could find that one of statutory grounds for impairment is engaged.
- Adjudicators could find that the social worker's fitness to practise is currently impaired.

78. The relevant chronology is that there was a preliminary decision, which the Claimant had to accept. Once she accepted this, the decision was finalised on 8 July 2021 and it is called the final decision in the chronology. This clarifies why the response form was dated 7 July 2021.

79. The report referred to multiple posts which could be considered discriminatory.

80. The report summarised the regulatory concerns regarding the Claimant as follows:

- You shared posts on Facebook that discriminatory nature.
- You shared petitions on Facebook that pursue a discriminatory goal.
- You shared links on Facebook to fundraising pages for people and/or organisations which appear to hold and/or have publicised discriminatory views.

You failed to confront and resolve issues of inequality and inclusion in that:

- You signed petitions that pursue a discriminatory goal.
- You donated money to organisations which appear to hold discriminatory views.

81. The report said that misconduct has two aspects:

- Serious misconduct in the exercise of professional practice.

- Conduct of a morally culpable or other disgraceful kind which may occur outside the course of professional practice but could bring disgrace on the reputation of the profession.

82. The Case Examiners expressed the view that a social worker sharing more than 70 posts which could be considered discriminatory is a serious matter. The report stated that the posts included those:

- The Claimant supporting a petition to stop Mermaids delivering training to the police, schools and public services.

- The Claimant sharing fake news that Ian Huntley was seeking gender reassignment.

- The Claimant sharing the link to the Girl Guides/Boy Scouts post.

- The Claimant sharing a fundraiser entitled “thank you to Glinner”.

83. The Case Examiners noted that it is unusual for social workers who hold discriminatory views to be able to put these aside while undertaking their professional duties. In the decision the Case Examiners noted no evidence had been offered that the Claimant had acted in a transphobic manner whilst at work so they focused on her conduct outside her professional practice.

84. The report referred to the Claimant engaging in a pattern of discriminatory behaviour which persisted over an extended period.

85. The Case Examiners concluded that there was a realistic prospect that the Claimant’s fitness to practise is impaired on the public interest grounds. Nevertheless, they did not consider it fell into the category of seriousness that would require a public hearing to maintain public confidence in the regulation of social workers. They were satisfied that the public interest could be addressed by their decision, and the reasons for that decision being published on the Second Respondent’s public register on its website, and that this would provide an example to other members of the profession.

<u>Accepted Disposal Response Form dated 7 July 2021 (but signed on 6 July and returned later).</u>

86. The Claimant signified that she had understood the terms of the proposed disposal of her fitness to practise case and accepted them in full together with the terms of the enclosed draft report.

<u>Ms Poole’s evidence</u>

87. Ms Poole says at paragraph 7 in her witness statement that the Claimant's case was unique in that it was the first case in which a social worker had agreed to an accepted disposal and subsequently rescinded their agreement.

Mr Noyce's evidence

88. At paragraph 10 in his witness statement he says that Case Examiners do not make findings of fact but instead apply the "realistic prospect" test. At paragraph 12 he said that they took account of the fact that the complaint itself demonstrated that the Claimant's social media posts had caused offence to that individual (Mr Wolton).

89. In response to a question in cross examination Mr Noyce appeared to accept that Jack Aitken, investigator (Mr Aitken) and Mr Wolton were known to each other and had a shared social history but he made it clear that this was not known to him at the time. He retracted this statement during re-examination. Nevertheless, we consider that the initial response given would appear to indicate a level of awareness by Mr Noyce that there was more than a mere professional acquaintance between Mr Aitken and Mr Wolton.

90. In response to a question in cross examination Mr Noyce stated that he and Ms Martin had not discussed the Forstater case as their role was to examine the Claimant's beliefs in relation to this case.

91. He suggested that a particular concern regarding the Claimant's Facebook posts was that it included the Claimant's children's school. However, we consider that this represented a significant and inappropriate heightened concern regarding the nature of the Claimant's posts. It should have been apparent given the limited number of the Claimant's Facebook friends that the communications were solely in respect of her children's schooling rather than any intent by her to proselytize her gender critical views to schools more widely.

92. Mr Noyce said that there was no evidence that Mr Wolton was a trans activist. However, we consider that this represented a failure by Mr Noyce and others to undertake an appropriately balanced and objective assessment of the complainant's motivations, in the context of the offence he claimed to have experienced, in respect of the Claimant's own posts. For example, no research been undertaken online as to Mr Wolton's social media posts.

93. Mr Noyce indicated in response to a question in cross examination, to a question about the paedophile post and safeguarding risks, that you have to turn the question on its head and consider whether a member of the trans community would find the Claimant's post offensive and discriminatory.

Mr Eduardo-Whittaker's evidence

94. He says that investigations tend to take 12 months. He says that his responsibility is to facilitate the smooth running of investigations and this includes

his being aware of cases coming through and the potential for media attention or operational significance.

The First Respondent becomes aware and concerned

95. On 22 July 2021 Ms Gruska, who had replaced Ms Gilroy as the Claimant's manager, sent Ms Barry the Second Respondent's letter confirming that the Claimant's case had been closed without a hearing with a warning apply to her registration, and attaching the decision and the investigation report. Later that day at 16:06 Ms Barry sent the investigation report to Senel Arkut, Director of Health Partnerships (Ms Arkut) with a covering email indicating that the Claimant's immediate managers had no concerns about her practice. Ms Arkut forwarded the email at 16:07, without comment, to Ms Flaherty and Ms Ffrench. The Claimant was asked to attend a Teams meeting that afternoon and suspended on gross misconduct charges.

The First Respondent's risk assessment of the Claimant at time of her suspension on 22 July 2021

96. The assessment was undertaken by Ms Arkut, The following questions were answered by the Second Respondent in the affirmative:

- As result of the nature and seriousness of the offence does it breach the Code of Conduct?
- If substantiated could the allegation be gross misconduct?
- Is there an element of bullying or harassment?
- Is the employee at risk of harm from others?
- Is there continued risk to children or adults?

97. She went on to state that the level of risk, the likelihood of an incident occurring and the severity of the consequences of any such incidents were all high.

The Claimant's letter of suspension dated 22 July 2021

98. Mr Arkut advised the Claimant that she had been suspended with immediate effect pending the outcome of the disciplinary investigation under the Council's Disciplinary Code. The Claimant was advised that the serious allegations could, if substantiated, constitute gross misconduct under the Council's Disciplinary Code on the grounds of:

- Bringing the Council into serious dispute.
- A breach of trust and confidence.

The suspension letter echoed the charges brought by the Second Respondent. Ms Barry was also suspended that day.

The Claimant's email to Mr Eduardo-Whittaker dated 6 August 2021

99. The Claimant referred to her suspension by the First Respondent, and said that she would like to enquire how she could appeal the Second Respondent's decision.

100. Mr Eduardo-Whittaker responded that day to state that there was no scope under the Regulations for a case closed by the Case Examiners to be reconsidered or reopened. In addition, there was no route of appeal for case examiner decisions. The Claimant was told that the only route open to her would be a judicial review in the High Court.

The Claimant's email to Mr Eduardo-Whittaker dated 11 August 2022

101. She requested an early review based on having new evidence.

Letter from Nicky Crouch, Director of Family Service (Ms Crouch) of the First Respondent to the Claimant dated 16 August 2021

102. Ms Crouch advised that she had been asked to undertake the investigation under the Council's Disciplinary Code.

Letter from Ms Farrell to the Claimant dated 20 August 2021

103. Ms Farrell advised the Claimant that she had been appointed to undertake the investigation instead of Ms Crouch.

Letter from Holly Bontoft, Head of Legal of the Second Respondent, to the Case Examiners dated 24 August 2021

104. Ms Bontoft referred to the Second Respondent having become aware of a factual inaccuracy in the decision document 8 July 2021. This related to Mr Lineham being stated to have received a police caution and cease and desist order relating to his alleged harassment of a trans-woman online. As a matter of fact Mr Lineham had been given verbal advice only. Ms Bontoft said that this was regarded as constituting a "fundamental mistake of fact".

Second Respondent's Case Examiners' decision dated 25 August 2021

105. This document concluded that the Case Examiners remained of the view that an accepted disposal by way of a warning order is a fair and proportionate outcome which will protect the public and serve the wider public interest. However, in reaching this conclusion the Case Examiners were not aware that the Claimant was seeking to challenge her original acceptance of the disposal.

Claimant's detailed request for review dated 6 September 2021

106. In this document the Claimant stated that she would like to submit new evidence to refute the allegations made and demonstrate that she had not acted in a discriminatory manner. The Claimant made it clear at this point her Facebook account was private.

107. In an email of 7 September 2021 Mr Eduardo-Whittaker said that a decision would be made about whether to call a review in the coming weeks.

Letter from Ms Poole of the Second Respondent to the Claimant dated 29 September 2021

108. Ms Poole advised the Claimant that the Second Respondent had decided to agree to a review by the adjudicators.

109. Ms Poole referred to the fact that under Paragraph 15(2) of the Second Respondent's Fitness to Practise Rules, an early review can only take place if new evidence becomes available after the decision is made. Whilst the Second Respondent considered that the majority of the information the Claimant had provided was available before she accepted the Case Examiners' proposed order and therefore would not amount to new evidence she nevertheless considered that the Case Examiners' decision to amend their original decision had been exceptional, and noted that she had not been involved in that process. It is for this reason that the Second Respondent decided to allow an early review by the adjudicators in the case.

Disciplinary investigation report of Ms Farrell dated 5 November 2021 on behalf of the First Respondent

110. Ms Farrell stated that she had not been able to review the 70 Facebook posts Mr Wolton had submitted to the Second Respondent as these had not been shared with the First Respondent as result of the GPDR.

111. At 5.10 of her report Ms Farrell considered that the Claimant's statement that everyone had the right to freedom of speech lacked understanding about her responsibilities and duties as both a social worker and council employee. She went on to state her view that the Claimant demonstrated limited insight or self-reflection.

112. At paragraph 5.14 Ms Farrell considered that the Claimant signing the petition entitled "stop Mermaids" had at best been ill considered and that the Claimant had failed to consider that in signing this petition others may interpret that as her holding transphobic beliefs.

113. At paragraph 6.3 Ms Farrell expressed the view that the Claimant had acted in a discriminatory manner. She said that it was of concern that the claimant did not now accept that her posts were discriminatory, inflammatory or that they could cause offence given that she had originally accepted all of the Second Respondent's findings. Ms Farrell's report included: 'whilst there is not evidence that the Claimant has been overtly transphobic in the workplace, holding discriminatory beliefs is of significant concern given her position of trust as a

social worker". She recommended that the findings of her investigation be reported to the Second Respondent since they may wish to review their outcome in light of the Claimant's current position and evidence given during this investigation.

114. In her conclusions Ms Farrell considered that there was a case to answer in that the Claimant had used social media to share posts that were discriminatory in nature, had signed petitions and donated funds to organisations that discriminate against specific groups and had acted in a discriminatory manner.

Ms Farrell's witness statement

115. In her witness statement Ms Farrell said that she went into the investigation with an open mind and did not know the Claimant prior to the process.

Letter from Hannah Appleyard of the Second Respondent to the Claimant dated 19 November 2021

116. Ms Appleyard advised the Claimant that the Second Respondent was reviewing its position with respect to the Claimant's request for early review and seeking further legal advice.

Letter from Katia Vandenbrucke, Senior Fitness to Practise Lawyer of the Second Respondent, to the Claimant dated 14 December 2021

117. Ms Vandenbrucke advised the Claimant that as at the date of 25 August 2021 decision the Case Examiners were proceeding on a mistake of fact as to the Claimant's continuing consent to the accepted disposal. She considered that this constituted a fundamental mistake of fact. As such the Second Respondent would write to the Case Examiners and invite them to consider revisiting their decision.

Letter from Ms Vandenbrucke to Ms Martin and Mr Noyce dated 22 December 2021

118. Ms Vandenbrucke advised them of what had been considered to be a fundamental mistake of fact and asked them to reconsider their decision and what action to be taken if it could no longer be disposed of by way of an accepted disposal to include whether any sanction should be imposed. There would also be the possibility of the case being referred to a hearing.

Joint conflict of interest declaration of Ms Martin and Mr Noyce dated 12 January 2022

119. The Case Examiners decided they were conflicted from making further decisions in the case and asked to be recused, citing the public scrutiny and their work-based and personal circumstances. Nevertheless they were asked to proceed and did revisit their decision. Whilst they referred to "ongoing conflicts of interest" we do not consider that any such conflict existed, but rather that as a

result of the high media profile of the case, and the potential for this profile to increase, that they were reluctant to have their names involved in the matter going forward.

The Claimant's concern about her continuing suspension

120. The Claimant's letter dated 20 January 2021 to the First Respondent threatened an application for an injunction against her suspension to which the First Respondent replied later that day.

Ms Farrell receives the full set of the Claimant's Facebook posts

121. It was not until 24 January 2022 that Ms Farrell received the full set of the Claimant's Facebook posts from her solicitor. Ms Farrell was of the opinion, as set out in the addendum report dated 3 February 2020, that some of the Claimant's post went beyond the gender critical debate, could cause offence and could be interpreted that she held transphobic views. She made particular reference to transgender people being dead named and the satirical post from Private Eye to the effect that boys that identify as girls go to Girl Guides.

The Second Respondent's Case Examiners' decision dated 28 January 2022

122. This stated that the Case Examiners had decided to revisit the original decision and now consider it to be in the public interest for these matters to be referred to a final hearing where they will determine whether, based on the evidence presented, the facts of the regulatory concerns are made out, whether the Claimant's fitness to practise is found impaired and, if so, whether any sanction should be imposed. They decided that at the time of the 25 August 2021 decision, the Case Examiners were proceeding on the mistake of fact as to the Claimant's continuing consent to the accepted disposal. It also provided that the Second Respondent was required to remove the warning against the Claimant from the Register.

Addendum to the First Respondent's disciplinary investigation report dated 3 February 2022

123. Ms Farrell stated that she had taken account of the EAT's decision in Forstater. She went on to state that the Claimant posted articles and petitions on Facebook that she did not personally agree with. She said that she personally rejected the Claimant's contentions that transgender woman should not have access to protected female only spaces such as toilets, prisons and refuges. She also did not agree with the Claimant's post that transgender woman should be banned from competing in sports with natal females.

124. Ms Farrell considered that there were some of the Claimant's posts that crossed the line and were transphobic and discriminatory and would amount to gross misconduct. She said they included the posts concerning:

- Stopping Mermaids delivering training to public bodies.

- The JK Rowling post.

- The Girl Guides/Boy Scouts post.

- Good Morning Britain on Twitter. She said that this television clip posits that children cannot be transgender and that transgender is an "adult political ideology" pushed by adults onto children. The woman being interviewed is from an organisation called "Transgender Trend", its name asserting the idea that being transgender is a trend.

Further disciplinary risk assessments/review dated 24 February 2022

125. This review was undertaken by Rachel Soni and largely repeated the conclusions of the review undertaken by Ms Arkut.

126. A letter dated 25 February 2022 from the First Respondent to the Claimant confirmed her continuing suspension.

Lifting of the suspensions of Ms Gilroy and Ms Barry by the First Respondent

127. Ms Barry, who have been suspended on 11 November 2021 and Ms Gilroy, who have been suspended on 2 November 2021, on the grounds that they had failed to report concerns regarding the Claimant's allegedly discriminatory posts, were informed that their suspensions would be lifted and that Ms Barry could return to work on 2 February 2022 and Ms Gilroy on 10 March 2022.

Claimant's response to the First Respondent's disciplinary investigation dated 20 May 2022

128. The Claimant produced a detailed rebuttal document running to 84 paragraphs with statements and other documents appended. The Claimant produced a supplementary response to this document on 23 June 2022.

The Claimant's disciplinary hearing on 28 June 2022

129. This was conducted by Ms Best who was assisted by Daphne Clarke, Employee Relations Specialist. Ms Farrell and Ms Ffrench were also in attendance following their earlier investigation. The Claimant was accompanied by Neil Humphries, of Unison and Tricia Evans a work colleague.

130. Ms Farrell stated that there was a difference between holding a belief and expressing or manifesting a belief. She said that it was manifesting her beliefs as a social worker that was central to the First Respondent's case against the Claimant. She added that it was the public expression of the Claimant's beliefs that caused concern. She said that the Claimant, in expressing her beliefs constitutes, gross misconduct under the category of "a breach of trust and confidence".

131. Ms Flaherty said that the findings of the Second Respondent did not lead to a rubber stamping by the First Respondent but that in appointing Mr Farrell as an

experienced manager with a good reputation that matters were appropriately considered.

Mr Eduardo-Whittaker's email to the Claimant of 1 July 2022

132. In an email from Mr Eduardo-Whittaker to the Claimant of 1 July 2022 he advised her that the warning was no longer available to the public. He explained that there had been an error in failing to remove the warning from the Second Respondent's website on 3 September 2021 following the Case Examiners' decision to refer her case to a hearing.

The Second Respondent's statement of case dated 6 July 2022 (and sent to the Claimant on about 18 July 2022)

133. This 102 paragraph document was prepared by Capsticks Solicitors LLP on behalf of the Second Respondent. The 6 July statement of case contained reformulated charges. This document contained an extremely detailed discussion of numerous posts from the Claimant's Facebook account. Particular reference was made to the following:

- The emphasis on child sexual abuse and other sexual offences in the context of the risk argued to be presented by transpeople may be considered to be offensive.

- The characterisation of being transgender as a "desire to prance about in lacy pants" may be considered to be offensive as well as the inference that the transition of transwoman is a manifestation of a sexual fetish.

- Mr Wolton's evidence is clear that he was of the view that the post could, and in fact did, undermine public confidence in the profession.

Letter from Ms Best of the First Respondent to the Claimant dated 8 July 2022

134. Ms Best advised the Claimant that she would be issued with a final written warning under the Council's Disciplinary Code which would apply for a period of 24 months. She only made reference to the Claimant's Facebook posts concerning JK Rowling and Girl Guides/Boy Scouts as being of concern. In evidence she said that someone with mental health issues may not understand this is a satirical cartoon. She stated that the First Respondent expected to see an immediate and sustained improvement in the Claimant's conduct. The Claimant was warned that the likely consequence of further similar misconduct could result in disciplinary action that may lead to dismissal from the Council's service.

135. In a letter dated 12 July 2022 the Claimant was advised that her suspension had been lifted with immediate effect and she was free to return to work.

Email from Ms Barry to Ms Ffrench of 15 July 2022

136. Ms Barry said that she had outlined the First Respondent's expectations of behaviour to the Claimant both in work and outside and that any infringements would mean an escalation. She stated that she had discussed with the Claimant that she should refrain from entering into any discussions on the topic i.e. the Claimant's gender critical views, with colleagues.

Letter from Claimant to Ms Best dated 19 July 2022

137. The Claimant complained that the decision to issue a 24 month warning was excessive, oppressive and a further act of unlawful discrimination, harassment and victimisation. She therefore wished to appeal the decision.

138. The Claimant contended that the disciplinary process was flawed and procedurally unfair, and that there had been an ongoing failure to deal with and to address representations she had made throughout the process. Further, that there was a continuous failure to respect her beliefs and right to freedom of expression.

Claimant's return to work interview with Ms Harris and Ms Barry on 25 July 2022

139. During this meeting there was discussion that boundaries around behaviours would need to be maintained and Ms Harris would be carefully monitoring the Claimant and the situation between her and her team. The Claimant was informed that the expectation was that she would not be discussing her views with team members who may not previously have been aware of this issue but now are. This represented a clear reference to the Claimant's gender critical beliefs.

Letter from Capsticks Solicitors on behalf of the Second Respondent to the Claimant dated 7 October 2022

140. Capsticks advised the Claimant that there was no longer a realistic prospect of a determination of impairment in relation to the case. As such there would be an application to discontinue in full.

141. In the statement of case for the Discontinuance Application on behalf of the Second Respondent it was stated at paragraph 35 that the adjudicators had not previously been provided with the full content of the Claimant's Facebook posts. Reference was made to the fact that whilst Mr Wolton had complained that there had been no other complaints. Further, it was suggested that the Claimant had made clear that her Facebook was set to private and that she only had 40 followers. The Claimant provided additional testimonials.

142. At paragaraph 39 it was stated that the Claimant's Facebook friends only amounted to approximately 40. Further, that there was no evidence that the Claimant identified herself as a social worker on Facebook. This was referred to as "new evidence". However, we consider that this evidence was, or at least should have been, known to the Second Respondent at the time of the initial triage investigation. The Claimant had made no secret of the status of her Facebook account and it would have been a very straightforward and obvious

question for the original Case Examiners to have asked the Claimant, given the nature of the concerns expressed in the context of her professional status.

The Claimant's response to the Second Respondent in a document dated 12 October 2022

143. At paragraph 5(a) the Claimant referred to the Second Respondent having a pre-existing position that gender critical belief is necessarily bigoted and transphobic. She says that this submission is supported by the July 2022 Statement of Case prepared on behalf the Second Respondent.

144. At paragraph 6(e) she complains that the Second Respondent has failed to acknowledge that Mr Wolton was clearly not a disinterested member of the public, but an active proponent of gender identity ideology, who had over the years made a number of derogatory and accusatory public postings on Twitter, including referring to woman as "terfs" or akin to terrorists.

Claimant's statement of case for Fitness To Practice hearing dated 17-18 October 2022

145. At paragraph 66 the Claimant complained that the investigator had made no attempt to establish the veracity or otherwise of Mr Woolton's narrative.

146. At paragraph 67 she complained that the investigator just took Mr Woolton's word for it that the Claimant's posts were discriminatory and transphobic.

147. At paragraph 78 she referred to Mr Woolton being very active on social media and at paragraph 82 that he used the word "terf", which is widely accepted as derogatory and used as a slur against many gender critical women and that he refers to gender critical arguments as "hate" or "terrorism".

The Second Respondent's discontinuation in full hearing document dated 17-18 October 2022

148. At paragraph 60 the panel considered that the full content of the posts (considered after the Case Examiners' determination on 28 January 2022) did not contain slurs, or profane language, did not target individuals and did not incite violence, harassment or other concerning or illegal activities. Further, a large proportion of the material was reposted from mainstream media sources, such as The Times, The Daily Mail, The Economist and The Telegraph. As such, this undermines the suggestion that the posts may cause offence (of sufficient seriousness to go to the Claimant's fitness to practice), or that they could, or did in fact, undermine public confidence in the profession.

149. At paragraph 65 it was stated that the panel was satisfied that the approach taken by the Second Respondent to offer no evidence and discontinue in full the Regulatory concerns against the Claimant was appropriate.

150. At paragraph 67 it was concluded that the panel finds that the Claimant's fitness to practise is not impaired.

The Claimant's disciplinary appeal hearing with the First Respondent on 8 November 2022

151. The Claimant attended a disciplinary appeal hearing with the First Respondent on 8 November 2022. This was conducted by Mr Wrobel. Also in attendance were Ms Weeks, Ms Ffrench, Ms Best, Ms Gilroy, Mr Humphries and Tracey Fuller, minute taker.

Letter from Mr Wrobel of the First Respondent to the Claimant dated 15 November 2022

152. Mr Wrobel advised the Claimant that having considered all of the evidence, and her grounds of appeal, she had concluded that a final written warning was not appropriate or proportionate in those circumstance and should be removed. No formal sanction should be applied. He did not, however, revisit whether the allegation of misconduct was appropriate but merely addressed, and lifted, the sanction imposed. He said that the position had changed substantially and concluded that there was no impairment to the Claimant's ability to practise. However, this appeared to simply be that the Second Respondent had changed its position.

Overall assessment of the Respondents' witness evidence

153. Whilst we accept that at the Respondents' witnesses would have felt uncomfortable responding to hypotheticals, and expressing their own views regarding the gender identity/gender critical debate, we nevertheless consider that overall they were extremely reluctant to provide answers to hypothetical scenarios put to them by Ms Cunningham or by the Tribunal. The invariable response to such hypotheticals was that it would depend on the context. Even when it was then explained that the context was the exact equivalent of the situation which actually applied to the investigation concerning the Claimant's use of social media there was a reluctance to engage in the questions postulated.

154. We also consider it surprising that virtually all of the witnesses were reluctant to express any opinions, either personally or in the context of the organisation by which they were employed, regarding the status of gender critical beliefs and whether there was discussion and debate on the issue in their organisation. We consider this surprising given the topicality of the issue and consider that there would be a reasonable expectation that those engaged in social work, or the regulation of social workers, would have a heightened level of awareness on what has been a high profile and ongoing public debate.

The Law

Direct discrimination on account of religion or belief

155. Under S 10 (2) of the EQA belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

156. Under S 13 (1) of the EQA read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

157. Discrimination includes subjecting a worker to a detriment (S.39 EQA).

158. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

159. We directed ourselves as to relevant case law including what constitutes less favourable treatment being an objective matter, the difference in treatment alone is not less favourable without more as per the decision in Chief Constable of West Yorkshire v Khan [2001] ICR 1065. We looked at what constitutes less favourable treatment both in the context of a hypothetical comparator and that such treatment would need to be on the grounds of the claimant's protected characteristic.

Conscious or unconscious thoughts of the alleged discriminator

160. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that in answering the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin. per Lord Nicholls:

> "In every case…it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job. Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

161. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E H:

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes, and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the Tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

Harassment on the grounds of belief under S 26 of the EQA

162. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to age, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

163. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

> "An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

164. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Harassment and detriment claims

165. Under S 212 of the EQA "detriment" does not…… include conduct which amounts to harassment".

166. The effect of S 212 (1) is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose one or run alternative claims.

167. In cases such as the present, where harassment and direct discrimination are relied on as alternative causes of action based on the same facts, Tribunals will often consider the complaint of harassment first. The reason for this is that under that cause of action, the acts complained of need only be "related to" the protected characteristic, as opposed to being "because of" the protected characteristic as required for direct discrimination.

The burden of proof

168. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless a respondent can show that it did not contravene the provision.

169. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.) The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., race) and a difference in treatment. LJ Mummery stated at paragraph 56:

> "Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

170. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR.

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Drawing of inferences

171. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

172. The process of drawing inferences is a demanding task. If a tribunal is to make a finding of discrimination on the basis of inference, per Mummery J in Qureshi v Victoria University of Manchester [2001] ICR 863:

> "It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion."

173. In determining whether a claimant has established a prima facie case, the Tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

174. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across the board approach" when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

175. The less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably in accordance with the guidance in Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Distinction between holding a protected belief and the manifestation of it

176. The Tribunal understands the distinction sought to be drawn by the Respondents is between the holding of the protected belief and the manifestation of that belief in a way to which objection could not be justifiably taken on the one hand, versus the manifestation of the belief in a way to which objection could justifiably be taken on the other.

177. S 3(1) of the Human Rights Act 1998 provides that, so far as it is possible to do so, primary and subordinate legislation must be read in a way which is compatible with the rights arising under the European Convention on Human

Rights (the ECHR). Article 9.2 of the ECHR is of particular relevance to the issue.

Article 9

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Article 10(1) everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 17

Article 17 nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity, or perform any act, aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The exercises 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, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputational rights of others, preventing the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary.

Higgs v Farmor's School

178. Mr Cheetham referred us to paragraph 94 of the judgment of the EAT in Higgs v Farmor's School [2023] EAT 89 which provides guidance as to the principles that underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and freedom of expression. The relevant paragraphs read as follows:

> "First, the foundational nature of the rights must be recognised: the freedom to manifest belief, (religious or otherwise) and to express views relating to that belief are essential rights in a democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.

Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitational restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.

Whether a limitation or restriction is objectively justified will also be context specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of the employment.

It will always be necessary to ask:

(i) Whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question;
(ii) Whether the limitation is rationally connected to that objective;
(iii) Whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and
(iv) Whether, balancing the severity of limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

179. In answering those questions, within the context of the relationship of employment, the considerations identified by the intervener are likely to be relevant, such that regard should be had to:

(i) The content of the manifestation;
(ii) The tone used;
(iii) The extent of the manifestation;
(iv) The worker's understanding of the likely audience;
(v) The extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business;
(vi) Whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk;
(vii) Whether there is a potential power imbalance given the nature of the worker's positional role and that of those who rights are intruded upon;
(viii) The nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; and
(ix) Whether the limitation imposed is the least intrusive measure open to the employer.

180. The question whether a restriction is necessary for the prescribed purposes is to be considered by reference to the test set out in Bank Mellat v HM Treasury (No 2) [2014] AC 700, SC by Lord Sumption at paragaraph 20. What is required is:

An exacting analysis of the factual case advanced in defence of the measure, in order to determine:

(i) Whether its objective is sufficiently important to justify the limitation of a fundamental right;
(ii) Whether it is rationally connected to the objective;
(iii) Whether a less intrusive measure could have been used;
(iv) Whether, having regard to these matters and to the severity of the consequences, a fair balance is being struck between the rights of the individual and the interest of the community.

181. As such the protection afforded to a belief attaches also to manifestations of the belief, except in so far as those manifestations are in themselves objectional. Manifestations will not be found objectionable unless the restriction can be justified by reference to the tests at Articles 9(2) and 10(2), including in the case of "necessity" the four-stage Bank Mallet test.

182. We reminded ourselves that it would be an error to treat a mere statement of the Claimant's protected belief as inherently unreasonable or inappropriate: see, for example, the observation of Choudhury P in the EAT's judgment in Forstater that:

> "Beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society".

183. The assessment must be undertaken in respect of the beliefs held by the Claimant, not as to how those beliefs might have been interpreted or understood by the Respondents (see paragraph 49 of the judgment of Underhill LJ in Page v NHS Trust Development Authority [2021] DWCA Civ 254.

184. Further, at paragraph 68 of his judgment in Page, Underhill LJ whilst exploring the questions arising in a claim involving the holding, or manifestation, of the belief stated as follows:

> "In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or to put the same thing another way, whether the protected characteristic was the reason for it…… it is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case law has recognised a distinction between (1) the case where the reason is the fact that the Claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the Claimant manifested that belief in some particular way to which an objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief

> itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.
>
> Thus, in establishing the reason why the relevant decision-maker acted as they did (a question requiring an investigation into that person's subjective mental processes or motivation albeit not motive), which may be conscious or unconscious; see paragraph 29, it will not be possible to rely on a distinction between an objectional manifestation of a belief and the holding or manifestation of the belief itself if the action taken is not a proportionate means of achieving illegitimate aims. If, however, the action or response can be justified and is found by reason of the objection or manner of the manifestation, then, as was noted in Page.
>
> In such a case the "mental processes, which cause the Respondent to act do not involve the belief but only its objectionable manifestation…. also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in Article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it".

The parties' submissions

Respondents

185. Mr Cheetham argues that the right to manifest those beliefs was not an automatic shield from any liability, for example, the harassment of a trans person through misgendering them.

186. He does not seek to argue that all 70 posts, are or could be discriminatory, and says that the focus should therefore be on three or four of those posts.

Claimant

187. Ms Cunningham says that none of the Claimant's posts were abusive, incited hatred or violence or defamed any individual.

188. She argues that self-evidently the manifestations of the Claimant's belief were the reason for the entirety of both the Second Respondent's Regulatory and the First Respondent's disciplinary processes.

189. She argues that both Respondents' belated and ill-explained attempts at reformatting the charges against the Claimant do not come near to the standard of cogent evidence required to discharge the burden of proof.

Conclusions and discussion

The list of issues and our conclusions

190. Whilst our findings were considered, and are set out below, against the list of issues we nevertheless considered it to be necessary to first consider more generic questions regarding whether the Claimant's Facebook posts went beyond the manifestation of her protected beliefs, thereby vitiating the statutory protection. Further whether under s136, there are facts from which the Tribunal could decide, in the absence of any other explanation, that a respondent has contravened the provision concerned, and in respect of which the Tribunal must hold that the contravention occurred, unless a respondent can show that it did not contravene the provision.

The Claimant's Facebook posts, the manifestation of her gender critical protected belief and whether any of her posts went beyond the manifestation of her belief

191. We carefully considered those of the 70 posts which the Respondents had primarily focussed on. Whilst this represented a shifting position, given that they did not all refer to the same posts, there was a large element of recurrence as to the posts primarily focussed on. Nevertheless, had it been the Respondents' intention to argue that the Claimant's Facebook posts were accepted as a legitimate manifestation of her beliefs, but certain posts had overstepped the mark to go beyond a mere manifestation of her beliefs, and thereby constituted offensive material outside the legitimate expression of her right to freedom of speech, we consider that the Respondents would have focussed on these posts, and identified why it was considered that they were not protected but constituted offensive material vitiating the protection otherwise enjoyed.

192. We acknowledged that the Claimant's manifestation of her beliefs is subject to the qualifications as set out in the judgment of the EAT in Higgs. We took account of the criteria set out by the EAT in Higgs to include, the content of the manifestation, the tone used, the Claimant's understanding of the likely audience, the fact that the Claimant's Facebook was private and no suggestion was made that the views she expressed represented the views of the First Respondent, the extent and nature of the intrusion on the rights of others and any other consequential impact on the First Respondent's service users or more generally from the Second Respondent's perspective the reputation of the social work profession.

193. We consider that all of the Claimant's Facebook posts and other communications fell within her protected rights for freedom of thought and freedom to manifest her beliefs as protected under Articles 9 and 10.

194. We do not consider that any of her manifestations of her beliefs were of a nature that they aimed at the destruction of any of the rights and freedoms of others contrary to Article 17.

195. We do not consider that any of the posts can reasonably be regarded as offensive thereby vitiating the protection provided to the Claimant in the manifestation of her protected belief. Whilst some people may have been offended by them, that is not the same as saying that the Claimant's right to

freedom of speech was lost. Freedom of speech inevitably will involve the right, to on occasion, cause offence to some people but it is clear that that does not preclude an individual's ability to express such views.

196. We do not consider that any of the 70 posts were abusive, incited hatred or violence or defamed any individual.

197. We consider it significant that many of the post complained of did not constitute the Claimant articulating her own views but rather forwarding links to articles or comments on television programmes pertaining to the gender critical debate.

198. We accept the entirety of the Claimant's posts had the necessary close and direct connection to her protected belief to be properly understood as manifestations of that belief.

199. We do not consider that the First or Second Respondent has established that a restriction on the Claimant's manifestation of her beliefs was required in accordance with the criteria set out by Lord Sumption at paragraph 20 in Bank Mellat. In particular we do not consider that the Respondents struck a fair balance between the Claimant's right to freedom of expression and the interests of those who they perceived may be offended by her Facebook posts. In reality it was only Mr Woolton, who we have found to have a direct interest in the gender identification/gender critical debate, who was offended and there was no evidence that the Claimant's views had been expressed in the context of her professional duties.

200. Looked at carefully we consider that the posts, to which the majority of citations were made, were not outside the reasonable bounds of the legitimate manifestation of the Claimant's beliefs. Whilst it was argued that the Girl Guides/Boy Scouts post had the effect of equating transgenderism with paedophilia we do not accept this proposition. We consider that the post constituted a reasonable satire, and went to a legitimate safeguarding concern that some transwomen, retaining male bodies, could exploit their position as self-identified women to have access to young and vulnerable girls. This therefore formed a legitimate concern of the Claimant based on her gender critical views and not something which went beyond the reasonable manifestation of those beliefs.

201. We consider that the views expressed by the Claimant were in accordance with the right to freedom of expression pursuant to Article 10 (1) of the Convention and not aimed at the destruction of any of the rights and freedoms within the Convention pursuant to which her right to freedom of expression was lost pursuant to Article 17.

202. In reaching this decision we took account of the criteria set out in Higgs v Farmor's School as follows:

- the content of the manifestation was not an objectionable manifestation of the Claimant's views;

- the tone used was not of a level of inappropriateness to vitiate the protection for the manifestation of her beliefs;

- the Claimant understood that the likely audience would comprise approximately 40 of her Facebook friends;

- the extent and nature of the intrusion on the rights of others was by definition limited given the small audience, the Claimant's Facebook setting being private and there being no realistic grounds for the First Respondent to perceive that there was likely to be any consequential impact on its [business];

- the views expressed by the Claimant were personal and not representing the views of her employer and therefore there was no reputational risk to her employer; and

- whilst the First Respondent referred to the potential impact on vulnerable service users this was not in our view justified given that the Claimant's views were expressed solely in a personal capacity to a limited and private audience and further that her manifestation of her views was not objectionable.

203. We took account of how the beliefs expressed by the Claimant were interpreted by her and not as understood by the Respondents in accordance with the judgment of Underhill LJ in Page v NHS Trust Development Authority.

204. Further, we found that the actions of the Respondents, in respect of their perception of the Claimant's manifestation of her beliefs, would not have been a proportionate means of achieving a legitimate aim. However, the question of proportionality did not apply given our finding that the manifestation of the Claimant's beliefs was not objectionable.

205. We find that the Respondents' contemporaneous state of mind was that the beliefs expressed by the Claimant were inherently discriminatory and transphobic and therefore unacceptable. We find that the Respondents' attempt to draw a line of demarcation between the Claimant's protected expression of her beliefs, and those posts which fell outside the protection on the basis that they were offensive, to be artificial and inconsistent with the contemporaneous documentation.

<u>The burden of proof</u>

206. We are satisfied that for both Respondents there are facts from which we can infer that they discriminated against the Claimant on the grounds of her protected belief. We find that both Respondents failed to adduce sufficiently cogent evidence to rebut that inference.

<u>The individual allegations against the Respondents in the list of issues</u>

207. In relation to the individual allegations set out below the Tribunal has adopted the lettering from the list of issues and the reason that certain letters are missing is that specific allegations were withdrawn during the hearing but the list of issues was not updated.

208. Whilst we have set out the totality of the list of issues (in bold), as amended during the hearing, we have set out our conclusions in some instances in respect of a group of related allegations with a view to avoiding unnecessary repetition.

Claims against the First Respondent

209. Whilst we set out our findings in the same order as the allegations appear in the list of issues it would have been more logical, given the chronology of events, for the allegations against the Second Respondent to have been set out first. There are some instances where we make references to our findings against the Second Respondent, in respect of the allegations against the First Respondent, given that we have found that the First Respondent's actions were consequential on the actions/decisions of the Second Respondent.

210. We find that in relation to all of the allegations the burden of proof shifted to First Respondent given a clear inference that all of the treatment complained of related to, or was because of, the Claimant's protected belief.

The alleged treatment

Was the Claimant, as a matter of fact, subjected to the following treatment:

(a) Being suspended from work on 22 July 2021.

211. We find that this did not relate to the Claimant's protected belief but rather was the reaction of the First Respondent to its belated awareness that the Claimant was subject to proceedings by the Second Respondent. The First Respondent had not had the opportunity to carry out its own investigation and review the Facebook posts, petitions and donations which had given arise to the Second Respondent's investigation. We find that the First Respondent would have acted in exactly the same way in the case of a hypothetical employee, who was subject to an investigatory process conducted by the Second Respondent, which did not in any way relate to the Claimant's protected beliefs, and therefore we do not find that this constituted conduct related to her gender critical beliefs. As such we find that the First Respondent has rebutted the inference of discrimination in accordance with the burden of proof.

(b) Being subjected to a disciplinary process.

212. We find that the disciplinary process when looked at in its totality was related to the Claimant's protected belief. At the time of Ms Farrell's investigatory report dated 6 November 2021 at no point did she, or any of the other representatives of the First Respondent who were involved in the disciplinary process, draw a distinction between those posts, petitions or donations made by

the Claimant which fell outside the legitimate expression of her gender critical beliefs and those which constituted unacceptable conduct going beyond a mere manifestation of those beliefs.

213. We therefore have no doubt that the basis of the disciplinary process at the time the disciplinary investigation report was produced by Ms Farrell on 6 November 2021 was as a result of the Claimant's protected belief. At this stage it can no longer be said that the First Respondent was simply reacting to the knowledge that the Second Respondent had serious concerns regarding the Claimant's professional conduct. By this time the First Respondent had formed its own view, or at least should have formed its own view, on the potential seriousness of the Claimant's conduct, and that was then reflected in her ongoing suspension and the disciplinary process.

214. It is necessary for us to consider whether the Claimant's Facebook posts went beyond the manifestation of her beliefs, and were of a sufficiently offensive nature to warrant disciplinary action, for the potential offence they may cause. In our view, as set out in more detail above, none of the posts crosses the threshold to constitute offensive material which would thereby fall outside the general manifestation of the Claimant's beliefs. It is significant that the Respondents were frequently inconsistent as to the number of the Claimant's posts which were considered to be offensive. For example at one point Ms Farrell referred to 70 posts.

215. We consider that it was incumbent on the Respondents to clearly identify the posts which they are considered went beyond a manifestation of the Claimant's protected beliefs and why they considered this to be the case.

(d) The on-going refusal to lift the Claimant's suspension in August and September 2021, in January 2022 and in February 2022 or at any time thereafter and despite requests from the Claimant to do so.

216. There can be no dispute that the Claimant was as a matter of fact subject to being suspended from work on 22 July 2021, being subject to a disciplinary process and that her suspension was ongoing between August 2021 and February 2022.

(e) A hostile disciplinary interview on 4 October 2021.

217. We do not accept that the disciplinary interview on 4 October 2021 was hostile to the Claimant. Whilst we accept that the Claimant may subjectively have found the meeting uncomfortable, and her evidence is that she became emotional during that meeting, the transcript does not provide any evidence to support the proposition that Ms Farrell conducted the investigatory meeting in a hostile manner. The Claimant accepted in cross examination that she did not raise a complaint regarding hostility during that meeting, and nor did Mr Humphries, her Trade Union representative. She says that unofficially he said to her that it was hostile but we have no contemporaneous evidence in that respect. Further, we take account of the witness evidence of Ms Ffrench that the meeting was conducted in calm and professional manner. Therefore on the balance of

probabilities we reject this allegation. As such we find that the First Respondent has rebutted the inference of discrimination in accordance with the burden of proof.

(f) An investigation report which was hostile in tone and content served on the Claimant on 6 December 2021.

218. We have carefully considered the transcript of the 6 December 2021 investigation report. Whilst we do not consider that the overall tone crosses the threshold to be regarded as hostile there are certain elements which we consider do. We took into account the following excerpts from the document.

219. At 5.8 the comment made by Ms Farrell that the change of position of the Claimant raised serious concerns regarding her integrity and honesty since she has been dishonest with the Second Respondent, as her profession's regulatory body, in stating that she accepted the facts and findings of their case, including demonstrating remorse for her own actions and a willingness to commit to continuing her personal learning about transgender discrimination.

220. At paragraph 5.10 Ms Farrell's comment that the Claimant had demonstrated a limited insight or self-reflection regarding the Second Respondent's findings at interview.

221. At 6.3 the concern expressed by Ms Farrell that the Claimant does not accept that her posts were discriminatory, inflammatory or that they could cause offence. Also in this section she recommended that the findings of her investigation are reported to the Second Respondent since they may wish to review their outcome in light of the Claimant's current position and evidence given during this investigation.

222. We therefore find that certain elements of the document were hostile in content and specifically the recommendation that there should be a referral of the Claimant to her regulator, on the basis that her, in effect change in position, constituted grounds to question her honesty and integrity. We accept that the Claimant would have regarded that as a hostile act, and one which would have caused her, both from a subjective perspective, but also looked at objectively, real distress.

(g) Being instructed to attend a disciplinary hearing on 6 January 2021.

223. As a matter of fact this took place and we find that it was on account of the Claimant's protected beliefs.

(i) A letter dated 20 January 2022 in which it:

Refused to lift the Claimant's suspension.

Suggested that if the Claimant were permitted to return to work, she might pose a threat to vulnerable clients or seek to interfere with the course of an ongoing investigation.

Criticised the publicity surrounding the Claimant's crowdfunding to meet her legal costs.

224. As a matter of fact the allegations above occurred and there is no need for us to add anything further.

Maintained a restraint on the Claimant's freedom of expression.

225. We find that the letter dated 20 January 2022 constituted a restraint on the Claimant's freedom of expression. First, it is an inevitable byproduct of a suspension, in the context of a disciplinary process, that the employee will have a reluctance to make continuing comments, which could result in further disciplinary action, or a higher sanction being imposed, in the existing disciplinary process. We specifically refer to the reference under the section heading Media Attention which read: "In light of any future cross undertakings to be given, we would ask that your client indicates her willingness to cooperate without making any further comments to media or other external organisations until the conclusion of the disciplinary proceedings". This would inevitably preclude, or at least make it highly unlikely, that the Claimant would feel able to make any further comments in respect of her gender critical beliefs. Had she done so it would have constituted a breach of that unequivocal warning and therefore we find that her freedom of expression was curtailed.

(j) An addendum dated 3 February 2022 to Ms Farrell's investigation report which maintained that four of the Claimant's Facebook posts were "transphobic".

226. We consider it surprising that Ms Farrell considered it appropriate to set out her personal views on these highly contentious issues. We consider that this would give rise to an understandable concern from the Claimant's perspective that she was not considering matters from an objective perspective but rather from a pre-ordained view, that the views espoused by the Claimant were less worthy of respect than the opposite side of the debate i.e. an employee promoting gender self-identification rights.

227. We considered that this is arguably indicative of bias in relation to how she handled the investigation. It gives the impression of that Ms. Farrell had reached a decision on the Claimant being guilty of gross misconduct at this stage. Further, her reference to the Claimant being transphobic could potentially inappropriately influence the disciplinary officer.

(k) A suspension risk assessment dated 24 February 2022.

(l) A letter of 25 February 2022 confirming the continuation of the Claimant's suspension.

(m) A disciplinary hearing on 28 June 2022.

(n) A two-year final written warning issued on 8 July 2022.

228. As a matter of fact we find that (k), (l), (m) and (n) the above took place and we will return to consider these in our findings regarding whether they constituted acts of harassment on account of the Claimant's gender critical beliefs.

(o) A continuing restraint on her freedom of expression at return to work meetings on 14 and 25 July 2022.

229. We find that the email from Ms Barry to Ms Ffrench of 15 July 2022 did include matters which constituted a restriction on the Claimant's freedom of expression. In particular Ms Barry referred to the fact that she had outlined the First Respondent's expectations of the Claimant's behaviour, both in work and outside of work, and advised her that any infringements will mean an escalation. She went on to refer to having discussed with the Claimant that she should refrain from entering into any discussions on the topic with colleagues.

230. Ms Harris didn't speak to the whole team re being careful expressing their views, but only to the Claimant, and as such failed to apply appropriate impartiality and objectivity to both sides of the debate.

231. Further we find that the Claimant's return to work interview on 25 July 2022 with Ms Harris and Ms Barry contained a clear restriction on her freedom of expression and this included reference to their discussion with her regarding boundaries around behaviours needing to be maintained and that Ms Harris would be carefully monitoring the Claimant and her interactions within the team. The expectation was outlined that the Claimant would not be discussing her views with team members who may not previously have been aware of her views but who now are. There can be no doubt that the Claimant would have interpreted this as a warning that any expression of her opinions on gender critical issues would constitute a contravention of the unequivocal guidance provided by the First Respondent.

(p) A letter of 15 November 2022 withdrawing the final written warning but implying continuing disapproval of her conduct and continuing the restraint on her freedom of expression.

232. We find that the letter of 15 November 2022 implied ongoing disapproval of the Claimant's conduct and continued the restraint on her freedom of expression. It is notable that whilst Mr Wrobel withdrew the sanction, he did not reach the decision that her conduct was not a matter of concern. Further, in cross examination he was still unable to confirm that the Claimant had done nothing wrong in the posts she had made. In those circumstances we consider that the Claimant would understandably have formed the view that there was a continuing expectation from the First Respondent that she would desist from any public expression of her gender critical beliefs and that any continuation of such views being publicly expressed could result in further disciplinary proceedings.

233. We find that the appeal process was inherently flawed. In particular it is incontrovertible that Mr Wrobel, and the First Respondent more generally, were beholden to the conclusion reached by the Second Respondent, and failed to carry out a genuinely separate and impartial review. The failure by Mr Wrobel to

consider whether the Claimant had as a matter of fact been guilty of misconduct, but only to decide that the sanction should be lifted, could understandably be construed by the Claimant as constituting continuing disapproval of her conduct and a continuing restraint on her freedom of expression.

Harassment (s. 26 EQA)

Was the treatment unwanted by the Claimant?

234. We find that all of the treatment was from the Claimant's subjective, and objectively reasonable perspective, unwanted.

Was it conduct related to the Claimant's protected belief or perceived belief?

Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

235. In relation to whether the conduct related to the Claimant's protected belief, and if so whether it had the purpose or effect of violating her dignity, we consider it necessary to address the individual alleged detriments.

236. To avoid unnecessary repetition we have referred to more generic categories of the process than those set out in the alleged treatment within the list of issues. Given our findings that the claimant's Facebook posts did not fall outside the illegitimate manifestation of her protected beliefs, and further that as a matter of fact the majority of the alleged treatment took place, we consider that it would be inconsistent to find that certain elements of the disciplinary process were discreet and severable from the process in its totality, which we have found to be on account of the Claimant's protected beliefs.

This

237. We consider that the continuation of the disciplinary process from 6 November 2021 onwards constituted harassment of the Claimant, given that the overarching view taken by the First Respondent and its representatives, was that the Claimant, in the expression of her gender critical beliefs, had behaved in a manner which warranted a suspension and a disciplinary process.

238. We find that the overall disciplinary process, which was of significant duration, constituted harassment. It is undoubtedly the case that the Claimant subjectively perceived the overall process to constitute harassment and we consider that objectively she was entitled to perceive the process in this light. The overall effect of the disciplinary process was clearly more than minor or trivial. Further, we consider that the element of harassment was exacerbated by pejorative comments made by Ms Farrell which went to the core of the Claimant's beliefs. For example, her labelling the Claimant's Facebook posts as being transphobic was clearly something the Claimant found deeply offensive and in itself would be sufficient, in our opinion, to constitute harassment.

Duration of the Claimant's suspension to include the failure to review the grounds for and necessity of suspension (allegations (a), (d), 1st bullet point in (i) and (l).

239. Given our findings above the fact of the Claimant's initial suspension from work on 22 July 2021 is not capable of constituting an act of harassment.

240. However, we find that the overall duration of the Claimant's suspension from 22 July 2021 until 12 July 2022 was wholly excessive and undoubtedly constituted an act of harassment. We find that it should have been apparent to the First Respondent relatively early within this 12 month period that her continuing suspension was disproportionate and unnecessary. We accept the Claimant's evidence that the fact and duration of her suspension had a very profound effect on her, and would inevitably have fundamentally eroded her dignity, given that her career was very important to her. We accept that she would have felt ostracised and stigmatised. Further, she was precluded from having any contact with her colleagues and thereby increasing her sense of isolation. Whilst the First Respondent's guidelines refer to a period of suspension, it is wholly outside the scope of what could reasonably be construed as a legitimate duration of suspension, for it to last for nearly 12 months.

241. Whilst we acknowledge that the First Respondent's position was that they considered suspension should remain, whilst the process was ongoing with the Second Respondent, we do not accept that the First Respondent was beholden to the Second Respondent to this extent. The Claimant made several requests for her suspension to be ended. There was no mandated requirement on the First Respondent from the Second Respondent to suspend the Claimant and further to continue it throughout the process. It therefore constituted their own decision and one which they had a discretion to review and lift at any stage in the process.

242. Whilst we acknowledge that that there were occasions when the Claimant asked for deferrals in the disciplinary process it did not automatically follow that her suspension should be continued. The Claimant, as per paragraph 85 of her witness statement, made it clear that she wanted to return to work and serve the community. This was always refused by the First Respondent who cited the front line nature of her work meaning that she was a potential safeguarding risk as she worked with vulnerable people.

Suggestion that the Claimant may pose a threat to vulnerable clients if she returned to work (2nd bullet point in allegation (i)

243. We find the suggestion that the Claimant might pose a threat to vulnerable clients was an act of harassment. Understandably the Claimant would have been genuinely upset at any suggestion that the service users, for whom she had spent her career working, would be at risk from her as a result of her beliefs.

Suggestion that the Claimant may interfere with an ongoing investigation (2nd bullet point in allegation (i)

244. We do not, however, consider that the reference to interfering with an ongoing investigation would in itself be sufficient to amount to harassment. This represents a normal provision in any suspension, and whilst we found that the duration of the suspension overall constituted harassment, the mere reference to suspension being for a partial purpose of avoiding any interference, or perception of interference, with the investigation would not in itself cross the necessary threshold.

Criticism of the publicity surrounding the Claimant's crowd funding to meet her legal costs (3rd bullet point in allegation (i)

245. We do not consider that the criticism surrounding the Claimant's crowd funding to meet her legal costs crosses the threshold to constitute harassment. We consider that the First Respondent had a reasonable expectation that the Claimant would not generate media attention concerning an internal issue whilst the disciplinary process continued. This remains the case notwithstanding our finding that the duration of suspension constituted an act of harassment. Further, we do not consider that the effect on the Claimant of this criticism would be something more than minor or trivial to render it sufficient to constitute an act of harassment.

Maintained a restraint on the Claimant's freedom of expression (3rd bullet point in allegation (l), (o) and (p)

246. We have carefully considered the contents of the letter of 20 January 2022 and we do not consider it sufficient to constitute harassment. Whilst we found that it imposed a restriction on the Claimant's freedom of expression, it does not automatically follow that this in itself would constitute harassment, as it did not have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

247. We do, however, consider that the Claimant's return to work meetings on 14 and 15 July 2022 constituted harassment given the circumstances, the evident disapproval expressed, or at least implied, as to the Claimant's expression of her gender critical views in the workplace and what we consider to have been the lack of objectivity within what was a contentious and ongoing debate between those espousing gender self-identification and those with gender critical views such as the Claimant's.

248. Further, we consider that the letter of 15 November 2022 withdrawing the final written warning constituted part of the overall disciplinary process which we have already found, when looked at in its totality, to constitute an act of harassment. This was the final element of that process and represented a failure by the First Respondent to give a clear acknowledgement that the Claimant was entitled, without fear of adverse repercussions, to express her gender critical views.

The Claimant's risk assessment dated 24 February 2022 (allegation (k))

249. The risk assessment undertaken by Ms Soni represented a replication of that originally undertaken by Ms Alcott. We find that certain references in that assessment would be capable of constituting harassment, in particular that the Claimant posed a continued risk to children or adults. There is no evidence that this document was provided to the Claimant at the time and therefore the document on a stand alone basis could not have constituted harassment.

A letter of 25 February 2022 confirming the continuation of the Claimant's suspension (allegation (i))

250. We find that the letter sent the following day to the Claimant by Ms Ffrench was undoubtedly predicated on that risk assessment done the previous day by Ms Soni in so far as it justifies the continuing suspension on the basis of a review having been undertaken. We refer specifically to paragraph 2 of that letter in which she states that the Claimant's social media posts, could be construed as discriminatory and could impact on her duties with vulnerable adults who may have these protected characteristics, or might reasonably lead others to conclude, that the Claimant holds wholly unacceptable views. We consider that the Claimant would be justified in construing that reference as being sufficient to have the effect of violating her dignity.

Summary of the conclusions on harassment allegations against the First Respondent

251. We therefore find that with the exception of allegation (a), the 2nd, 3rd and 4th bullet points in allegation (i) and allegation (k) that all other allegations of harassment against the First Respondent succeed.

Direct discrimination (s.19 EQA)

To the extent that any of the treatment was not harassment within the meaning of s. 26 EQA, was the Claimant treated less favourably than a person not having her protected belief would have been treated?

252. Given that we have found that, with the exception of allegation (a), the 2nd, 3rd and 4th bullet points in allegation (i) and allegation (k) the allegations from the list of issues constitute harassment of the Claimant by the First Respondent, it is not strictly necessary for us to consider whether they would also have constituted direct discrimination. Nevertheless, for completeness we find that notwithstanding that the requirement for direct discrimination is that the acts complained of need to be "because of" the protected characteristic, as opposed to "related to" for harassment, and that this represents a higher threshold, we would have found that those acts which we have found constituted harassment would in the alternative have constituted direct discrimination on account of the Claimant's protected beliefs.

253. Given that the higher threshold for direct discrimination, as opposed to harassment, applies we do not find that those allegations which we did not find constituted harassment constituted direct discrimination under S 19 of the EQA.

Claims against the Second Respondent

254. We find that in relation to all of the allegations the burden of proof shifted to Second Respondent given a clear inference that all of the treatment complained of related to, or was because of, the Claimant's protected belief.

General observations

255. We acknowledge that the Second Respondent's statutory "over-arching" objective is the protection of the public in accordance with s.37(1) of the Children and Social Work Act 2017. Nevertheless, we consider that this statutory objective remains subject to the protection enjoyed by the Claimant pursuant to s.10 of the EQA and Articles 10 and 17.

256. The Second Respondent's failure to check if Mr Woolton's complaint could be malicious, and not checking his previous social media history, is indicative of a lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate. For example, Mr Woolton had described Standing for Women as a known "hate group" and referred to feminists arguing for gender critical views as "terfs".

257. Context is important and merely accepting at face value a complainant's subjective perception of offence is not the appropriate test, but rather that an objective evaluation should be undertaken, as to whether a social worker's social media posts had over stepped the line in terms of their content and potentially offensive nature.

258. Mr Noyce's response to a question in cross examination that you have to turn the question on its head and consider whether a member of the trans community would find the Claimant's post offensive and discriminatory involves giving preference to one side of the debate. Given the vitriolic nature of the debate, the fact that offence is taken, is not the same as a remark being objectively considered to be offensive. Therefore, allowing the subjective belief of one party to determine where the benchmark for offence should be taken involves a potential abdication of responsibility for assessing whether a social worker has breached applicable guidelines.

259. We consider that the Case Examiners initial investigation was defective in various ways to include:

a) Their failure to ascertain whether the Claimant's Facebook was private and assumed it was not.

b) Their use of up to 70 of the Claimant's Facebook posts in the decision without appropriate and consistent differentiation of those which were

considered to go beyond the mere manifestation of the Claimant's gender critical beliefs.

c) They continuing inclusion of references to the petitions the Claimant had signed even though they did not form part of the decision.

d) There are implicit acceptance of the complainant's position because he was a social worker.

e) The title of the investigation a document as "transphobic".

f) Their reformulation of the charges at Statement of Case stage.

The alleged treatment

Was the Claimant, as a matter of fact, subjected to the following treatment:

(a) Being the subject of a prolonged investigation into her beliefs from November 2020 to June 2021 .

(b) Being sanctioned by the 2nd Respondent's Case Examiners on 8 July 2021.

(c) The Case Examiners' failure to reconsider their decision when producing the amended decision on 25 August 2021.

(e) Failing to inform the Case Examiners, when referring the matter back to the Case Examiners, on 14 December 2021, that they, the Case Examiners, had discriminated against the Claimant and had failed to pay any regard to the fact that her gender critical beliefs were protected and that they had sanctioned her for the manifestation of this belief.

(h) The Second Respondent referring the complaint against the Claimant to a Fitness to Practice hearing, communicated to her on 31 January 2022.

(i) The Second Respondent putting forward a statement of case dated 6 July for the Fitness to Practice hearing.

(j) The Second Respondent asserting that its decision of 17 October 2022 to discontinue the complaint was justified by new evidence.

260. We find that all of the alleged treatment as set out above was treatment unwanted by the Claimant and was conduct related to her protected belief. The requirement that the conduct related to the Claimant's protected belief is a relatively low threshold and we are satisfied that it was met. Had it not been for the Claimant's protected belief, and manifestation thereof, the overall process would not have taken place, or alternatively after an initial investigation would have been discontinued. We consider that it would be wholly artificial to

compartmentalise different stages of the process on the basis that certain stages were, or were not, related to the Claimant's protected belief.

Harassment (s. 26 EQA)

Was the treatment unwanted by the Claimant?

Was it conduct related to the Claimant's protected belief?

Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

261. We do, however, need to consider whether the individual treatment was sufficient to constitute harassment within section 26 of the EQA. We find that a, b, h and i from the list of issues as set out above constituted harassment. We find that c, e and j did not constitute harassment.

262. In relation to a, we have no doubt that the prolonged investigation was such that it created an intimidating and hostile environment for the Claimant. We do not consider that all elements of s.26 are met, in that we do not consider that the Claimant's dignity was necessarily violated and nor that a degrading environment was created. We do not, however, consider this necessary as s.26 does not require all elements to be met for harassment to be made out as the wording is disjunctive and not conjunctive. We find that the Second Respondent's treatment of the Claimant was of a magnitude, that both subjectively and objectively, it created an intimidating, hostile and offensive environment for her.

263. In relation b, we take account of the fact that the Claimant felt under significant duress when she agreed to a sanction which would appear on the Second Respondent's website. We accept the Claimant's evidence that she felt powerless and uncomfortable. Further, we acknowledge that the Claimant perceived that if she challenged the decision, a Fitness to Practice hearing would take place, which could have a more serious outcome. In theses circumstances we consider that the Claimant felt that she was subject to an intimidating and hostile environment and this impacted on her decision making. We consider that this intimidation and hostility was more than trivial and sufficient to constitute harassment under s.26.

264. In relation to h and i, we consider that these formed part of the overall process and that it would be perverse to separate them from our overall finding that the prolonged investigation arose from the Claimant's manifestation of her protected belief. We find that the Claimant found the various stages of the process, up to and including the Second Respondent putting forward its Statement of Case dated 6 July 2022 for the Fitness to Practice hearing, as being intimidating, hostile and of sufficient magnitude to constitute harassment pursuant to s.26.

265. We do not, however, find that c constituted an act of harassment. We take note of the fact that the Second Respondent is process driven and accept their

evidence that the Claimant's wish to withdraw an accepted disposal was highly unusual. In any event the Second Respondent did not know that the Claimant had withdrawn her agreement to the accepted disposal at the time of the Case Examiners' amended decision on 25 August 2021. We accept that the amended decision arose because of a mistake fact regarding what had been said about Graham Linehan.

266. In relation to e we accept that there had been an accepted disposal of the case. Further, the Claimant's letter dated 14 December 2021 only addressed the issues raised by the Case Examiners being unaware of her request for an early review.

267. Further in her witness statement the claimant does not make any reference to a feeling harassed in respect of the Second Respondent's letter dated 14 December 2021. We therefore do not consider that this element of the treatment was sufficient to constitute harassment under s.26.

268. In relation to j, whilst we acknowledge that the Claimant may reasonably consider that the Second Respondent was disingenuous to justify the discontinuation of the complaint based on "new" evidence we do not consider that this constituted an act of harassment. Further, we consider that the Claimant was relieved by the discontinuation and as such would not consider that she had been harassed at this juncture.

269. With the exception of allegations c, e and allegation j the claims of harassment against the Second Respondent succeed.

Direct discrimination (s.19 EQA)

To the extent that any of the treatment was not harassment within the meaning of s. 26 EQA, was the Claimant treated less favourably than a person not having her protected belief would have been treated?

270. Given that we have found that, with the exception of c, e and j, the above allegations from the list of issues constitute harassment, it is not strictly necessary for us to consider whether they would also have constituted direct discrimination. Nevertheless, for completeness, we find that a, b, h, and i, would in the alternative have constituted acts of direct discrimination. Given the requirement for direct discrimination is that the acts complained of need to be "because of" the protected characteristic, as opposed to "related to" for harassment, that represents a higher bar and one which we do not consider was met in respect of allegations c, e and j given our findings above.

Final conclusions

271. We do not consider that any of the acts which we have found constitute harassment can be characterised as pertaining to matters which were trivial or transitory in accordance with the guidance given by Mr Justice Underhill in

Richmond Pharmacology. Further, we consider that the acts relied upon, whether considered singularly or collectively, do not relate to a single incident as per the guidance in General Municipal and Boilermakers Union v Henderson. In any event, we consider that the acts formed a series of conduct, and any attempt to compartmentalise them would be wholly artificial, and inconsistent with the overarching chronology and the experience of the Claimant of the processes to which she was subject.

272. With the exception of allegation (a), the 2nd, 3rd and 4th bullet points in allegation (i) and allegation (k) the claims of harassment against the First Respondent succeed.

273. With the exception of allegations c, e and allegation j the claims of harassment against the Second Respondent succeed.

274. The claims for direct discrimination on account of the Claimant's protected beliefs are largely rendered redundant as a result of our findings that her claims for harassment in respect of the same issues succeed, and in the case of those claims which did not succeed on the grounds of harassment, they fail on the grounds of direct discrimination.

<u>Overarching observations pertaining to both Respondents</u>

275. In reaching our conclusions we consider it to be self-evident from the contemporaneous documentation, chronology and other evidence that the Respondents considered that the Claimant's gender critical views were unacceptable, and did not constitute beliefs that she was entitled to manifest whether in the workplace, in respect of which there is no evidence that that she did, or in a personal capacity. We consider that the Respondents very belated acceptance that the Claimant's gender critical views were protected beliefs, and beliefs she was entitled to manifest, but not in a way which caused an inappropriate level of offence, represented an attempt to circumvent the EAT's judgment in Forstater.

276. Whilst we acknowledge that there are limitations on the right to freedom of speech, and the manifestation of protected beliefs, we do not consider that the threshold was reached in this case. Further, we consider that the Respondents' defence of the claim was compromised by the contemporaneous concerns and decision-making process being principally predicated on the view that the beliefs/views expressed were unacceptable, rather than on the basis of an acknowledgement that the Claimant was entitled to her beliefs and the manifestation of them, but that certain Facebook posts were unacceptable with the reasons why those individual posts, but not others, were unacceptable being clearly and consistently set out. As we have set out above there was no such analysis and consistency. Whilst the Respondents selectively highlighted certain posts, and the interpretation placed on them, this was not in our opinion, the primary basis for the decision-making at the time, but rather individual examples given by the Respondents at different stages of the respective procedures of concerning posts e.g. the JK Rowling and this this "Girl Guides/Boy Scouts" posts.

277. At the conclusion of this judgment we also consider it relevant to revert back to the outline summary in the introductory sections regarding the high-profile public debate between those espousing gender self-identification as opposed to those with gender critical views. Given that this is a debate taking place both within and between political parties in Westminster and Holyrood, and more generally in the media and other forums of public debate, it is self-evident that there is no settled societal, political or legislative position regarding the rights of those seeking gender self-identification. It is significant that a number of the Facebook post for which the Claimant was criticised by the Respondents, for example, her opposition to trans women, who retain male appendages, being housed in female prisons, and trans women participating in female sporting categories, have now seen a reversion of government policy regarding prisons and in respect of sports participation from most governing bodies.

278. In view of this situation it is apparent that the views expressed by the Claimant were not extreme but rather represented her expressing her opinion in an ongoing public debate. The fact that the debate can often be vociferous, and on occasion toxic, does not mean that the right to freedom of expression in a democratic society should be restricted. An analogy was given during the hearing was to the divisive position of Brexit in the period up to and beyond the 2016 referendum, to which the Respondents both acknowledged that an employee/social worker would have been entitled to post their opinions, and we consider that the same entitlement should have existed to another contentious area of debate.

279. We consider it wholly inappropriate that an individual such as the Claimant espousing one side of the debate should be labelled discriminatory, transphobic and to pose a potential risk to vulnerable service users. That in effect equates her views as being equivalent to an employee/social worker espousing racially discriminatory or homophobic views. The opinions expressed by the Claimant could not sensibly be viewed as being transphobic when properly considered in their full context from an objective perspective, but rather her expressing an opinion contrary to the interpretation of legislation, or perhaps more accurately the amendment to existing legislation, advocated for by trans lobbying groups to include, but not limited to, Stonewall.

Remedy

280. The parties are invited to consider whether the issue of remedy can be resolved between them but if not the Tribunal has provisionally listed, subject to the parties' availability, a 2 day hearing on 12 and 13 February 2024. The parties are asked to advise as to whether this hearing is required, whether it is convenient and if so whether they wish it to be in person.

Employment Judge Nicolle

Case Numbers: 2200179/2022
2211483/2022

Dated: **4 January 2024 (as corrected on 11 January 2024 in accordance with rule 69 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 to correct the inadvertent omission of paragraphs 201-204 and 271 now inserted.)**

Sent to the parties on:

11/01/2024

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For the Tribunal Office