EMPLOYMENT TRIBUNALS

Claimant: Mr James Orwin

Respondent: East Riding of Yorkshire Council

Heard at: Hull **On:** 28, 29 and 30 May 2024

Before: Employment Judge Miller
Mr M Brewer
Mr G Harker

Representation
Claimant: In person
Respondent: Mr B Frew – counsel

RESERVED JUDGMENT

Philosophical belief

1. The claimant's gender-critical beliefs are a philosophical belief within the meaning of section 10 Equality Act 2010

Direct discrimination

2. The complaint of direct religion or belief discrimination is not well-founded and is dismissed.

Unfair dismissal

3. The complaint of unfair dismissal is not well-founded and is dismissed.

Wrongful dismissal in breach of contract

4. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as an ICT Project Officer from 26 March 2018 until 26 August 2022. The claimant undertook early conciliation from 25 November 2022 until 22 December 2022 and the claimant submitted the claimant's claim to the Employment Tribunal on 23 December 2022.

2. That claim included claims of unfair dismissal and discrimination on the grounds of religion or belief.

3. There was a preliminary hearing on 20 June 2023 at which the issues were identified by Employment Judge Hunt. They were claims of unfair dismissal and direct discrimination because of the claimant's philosophical belief which was identified as, and which we will refer to as, "gender critical beliefs". We will say more about this later. The precise list of issues is attached to this judgment as Appendix 1.

4. On 1 April 2023 the claimant indicated that the claimant wanted to amend the claim to include a claim of wrongful dismissal and on 26 June 2023 the claimant made an application to amend the claim to include a claim of wrongful dismissal on the basis that the claimant was dismissed without notice in breach of contract. That application was allowed by Employment Judge Brain in an order dated 17 July 2023 and sent to the parties on 18 July 2023.

5. In that order, EJ Brain said that "Time limit issue are not engaged here as this is a relabelling amendment, adding a new cause of action to the pleaded case". However, he went on to add that had the wrongful dismissal claim been brought on 1 April or 26 June as a separate claim it would have been out of time.

6. In our view, therefore, the question of whether the wrongful dismissal claim is in time and whether time should be extended remains an issue for us to determine.

The hearing

7. The case was listed for a 3 day hearing in person in Hull to decide liability only. We had an agreed file of documents of 1160 pages and witness statements from the following people:

    a. The claimant

8. For the respondent:

   a. Stephen Curtis – Digital Lead and investigating officer

   b. Alison Fairfoot – Senior Human Resources Officer

   c. Alan Menzies – Executive Director of Planning and Economic Regeneration (currently interim Chief Executive) and appeal officer

9. All witness attended and gave evidence .The respondent made an application that Mr Menzies be entitled to give evidence remotely on the basis that he was a very busy, senior manager but that application was refused.

10. The claimant also provided written representations in advance of the hearing but which we considered as part of the claimant's submissions. The claimant made representations about the status of the Equal Treatment Bench Book on the basis that the claimant considered it was biased. We made no decisions about that – it was not entirely clear what the claimant wanted us to do about that – but we confirmed that

    a. We would not rely on the Equal Treatment Bench book in making our decision as it is to provide guidance about the conduct of proceedings, not a basis for decision making; and

    b. As requested we would refer to the claimant as either "the claimant" or "Mr Orwin" and not he or his, which we sought to do. If we occasionally referred to the claimant as "he" in the course of proceedings, we apologise.

11. We also had written submissions, supplemented by oral submissions, from the parties which we considered. It is fair to say that the claimant's witness statement contained many references to case law and included statements and assertions that were effectively submissions and we have also considered that.

Facts

12. We make the following findings of fact. Where facts have been disputed, we have made our findings on the balance of probabilities. We have only made such findings as are necessary for our conclusions.

13. We did not hear any evidence about the claimant's job except that the claimant is an ICT Projects Officer. This includes the requirement to communicate with people inside and occasionally outside the respondent. External communications could be with companies such as broadband providers.

Caroline Lacey's email

14. On 13 April 2022, Caroline Lacey, the then Chief Executive of the respondent, sent a global email to the respondent's employees, including the claimant, which asked employees to add a new image to their email signature relating to the respondent's Corporate Priorities. In that email Ms Lacey said

    "In addition, I also want to take the opportunity to invite you to consider adding pronouns to your email signature, should you wish to do so.

    Clearly this is a matter of individual choice, but I am keen to ensure that all staff know that the choice to do so is available to them and that they will be supported in that choice in line with our workforce principles:

    a. everyone matters and should feel valued

    b. we recognise the importance of diversity for our organisation and community

    c. we will seek to understand and minimise any barriers our people face

    d. we will make sure our people policies and approaches encourage and support a diverse workforce"

15. There was then a link to a document or website called "EDI – Attracting a modern workforce" after which the email said

    "If the use of pronouns is something that you are not familiar with already, please take the time to review this information and make your own choice as a result".

16. There was then a link to another document or website called "Why you may choose to use pronouns".

17. The guidance included an explanation of what pronouns means. It says

    "When a person shares their pronouns (/sharing), they are naming the pronouns that they want to be referred to by in the singular third person (when referring to that person while talking to someone else)".

18. The guidance provides four specific examples which are:

    a. She/her;

    b. He/Him;

c. They/Their;

d. Ze/Hir

19. It also says that some people might avoid pronouns altogether and just use a person's name and refers to examples of some other pronouns that people might use: ze/zir, per/pers, ey/em, xe/xem.

20. The guidance also refers to nonbinary, gender neutral titles such as Mx instead of Mr or Ms. The guidance provided a link to further guidance which discussed Neopronouns, which are described as new pronouns developed from the 19th or 20th century. Further guidance in the "Asking " section of the website suggested that people may change the pronouns they wish to use at different times or in different contexts.

21. In our view, the tone and meaning of the guidance was that employees were free to identify by whatever pronoun they felt applied to them.

22. Ms Lacey signed her name Caroline Lacey followed by (she/her/hers).

23. It was agreed that the reason for introducing the policy of allowing employees to include their pronouns in their email footers was to promote inclusion of people who identify their gender in a way that is not necessarily consistent with their biological sex. This includes transgender people and non-binary people. The policy was not introduced simply to avoid confusion or uncertainty for people with names that can be used for men or women like "Sam" or "Jo".

24. We note here that the claimant made distinctions on a number of occasions during the period that we are considering with the respondent referring to transgender and trans people, when the Equality Act 2010 refers to transexual people. "Transgender" is a word in current, common use and that is the word we will use. We are not required to make a decision about this and in our judgment transgender is a more common word that people will more easily understand than transexual.

The claimant's email footer

25. The claimant received the email from Ms Lacey. The claimant read the email and guidance and quickly formed the view that the invitation to provide pronouns was intended to "facilitate self-identification" by which the claimant specifically meant gender self-identification. The claimant said in the claimant's witness statement

"Had the email contained a genuine invitation simply for colleagues to add pronouns to email signatures and not facilitated self-identification I would have chosen the 'Do not show' option not to display pronouns since it is my firm belief that announcing pronouns in emails or before meetings is a

political gesture designed to intimidate anyone who does not embrace the contested ideology of gender identity".

26. The claimant interpreted that guidance as allowing employees to adopt their own pronouns, rather than choosing from a list. We agree that it is not explicit that there is a prescribed list of pronouns from which employees can choose and that the guidance did suggest people might have their own pronouns that are not listed in the guidance. The claimant decided to self-identify by adding the words "XYchromosomeGuy/AdultHumanMale" to the claimant's email footer. However, it is important to also note that the claimant said in the claimant's witness statement:

    "Holding the beliefs that sex is binary and immutable, that gender is a social construct, and that a policy of self-identification—a glaring example of an ad hoc policy hurriedly introduced by the Respondent with inadequate scrutiny and little due diligence or consideration by Council or Cabinet—presents a risk to both the safeguarding of vulnerable people (both adults and children) and the protection of women's spaces, I felt the only way for me to openly challenge the initiative was to adopt a position of critical compliance. In other words, I decided to precisely follow the guidance provided by the Respondent".

27. The respondent's system for adding pronouns included a dropdown menu with options which included the option to not enter pronouns or an option "Other" which prompted employees to write their own pronouns.

28. The claimant contacted Mr Luke Branagan (a more senior manager in the absence on that day of the claimant's line manager) on 14 April 2022 by Teams and said:

    "Sorry, Luke - I think I need to speak with someone about the option to use preferred pronouns in the new email signature. I don't feel I can choose not to state a preferred pronoun, or choose the usual biological he/him, and I'm pretty sure whoever dreamt up this nonsense isn't actually interested in equality, diversion and inclusion, but I'd rather not put you, Stuart or Andy in a difficult position without giving you advanced notice".

29. Mr Branagan asked the claimant if the claimant could not just take the option of not adding pronouns to which the claimant replied

    "Not adding a pronoun would be accepting this garbage, and is not an option I can choose. I think what I will be using is bound to challenge the agenda of those who are implementing it".

30. The claimant then sent an email to Mr Branagan in advance of a meeting they were going to have later that day (14 April 2022) to discuss the claimant's concerns which included the claimant's chosen pronoun. (The respondent has asserted that this does not amount to a pronoun even on a

grammatical basis, but we will refer to it as a pronoun without making a decision about that for convenience).

31. The claimant met with Mr Branagan on Teams and agreed to temporarily remove the email footer. The claimant emailed Mr Branagan after that meeting.

32. We recognise that we have quoted, and continue throughout this judgment to quote, at length from correspondence but in our view it is important to our decision to understand the nuances of the claimant's position. We therefore set out the text of the email the claimant sent to Mr Branagan in full:

"Luke,

As discussed on our call earlier, I have removed what I would choose as my preferred pronouns from my email signature until further notice. I understand (and apologies (sic) for) the difficulty in which this potentially puts my line managers. However, I believe that (even if I'm given the choice not to add one) the corporate policy of providing employees with the option to add preferred pronouns to an email signature, is a political position that the Council has no mandate to adopt; and one that I must dissociate myself from by rejecting.

I accept your point that this is such an unusual issue that you will need to escalate to more senior colleagues.

As I have said, I believe choosing not to add a pronoun, or to use the anodyne biological he/him, is not an option for me. Of course, I understand that some people don't want to go by pronouns with gender associations they reject; but I personally associate pronouns with biological sex, not gender.

I, myself, do not want to go by pronouns with transgender associations (which I believe most pronouns acceptable to the Identity Politics lobby carry); and I feel that complying with this without challenge would be tacit acceptance of the clearly divisive, exclusionary nonsense of identity politics.

To avoid ambiguity, I fully support the rights of biological females to exist without harm being done to them by biological males who self-identify as gender females, or those organisations and institutions that support such individuals and are facilitating this kind of harm. And I also support the right of anyone to adopt any legally acceptable lifestyle they choose.

As history has demonstrated on many occasions, remaining silent when long-standing cultural norms, morals and principles are under threat, facilitates the steady creep of evil. I cannot and will not remain silent on this.

Therefore, in line with East Riding of Yorkshire Council's claimed workforce principle that 'everyone matters and should feel valued', and recognising the importance of diversity, I would like to claim an equal right to diversity by declaring my preferred pronouns to be: (XY-chromosome-guy/adult-human-male).

I hope my departmental colleagues, and the Council more widely, feel they can support me in my choice - to help me feel valued in the workplace.

James Orwin

ICT Project Officer"

33. Having considered the claimant's witness statement, the initial messages to Mr Branagan and this email, we conclude that the real reason that the claimant decided to add "XY-chromosome-guy/adult-human-male" was in protest at what the claimant considered to be an ideological stance taken by the respondent with which the claimant did not agree and which the claimant believed the respondent had no power to adopt. The claimant could have raised a grievance or blown the whistle but decided not to. When asked about this in cross examination, the claimant agreed that that would have been an option but that the claimant believed it would be ineffective. The only way to challenge this policy, the claimant believed, was to adopt deliberately provocative pronouns.

34. In oral evidence the claimant agreed that it was a deliberately provocative sign off that was adopted to challenge the idea of self-identification. This is also consistent with the claimant's statement to Mr Brannagan that the use of the claimant's pronouns was bound to challenge the agenda of those who were implementing it. The claimant agreed the purpose of it was to provoke a reaction from the respondent, and to pressurise the respondent into listening to the claimant with the objective of the claimant persuading the respondent to change its policy about this. The claimant agreed that the pro-nouns were provocative.

35. We have considered the entirety of the email set out above, but in our judgment, the real reason for the claimant's actions (namely, adopting "XY-chromosome-guy/adult-human-male" as the claimant's pronouns and including the pronouns in the claimant's email footers) is set out in the first paragraph of the email. It is further supported by the claimant saying

    "As history has demonstrated on many occasions, remaining silent when long-standing cultural norms, morals and principles are under threat, facilitates the steady creep of evil. I cannot and will not remain silent on this".

36. This also reflects the true reason for the claimant adopting the email signature. In our view, the references to claiming an equal right to diversity

by declaring the claimant’s personal pronouns were the claimant implementing the claimant's plan and adopting the respondent’s language to, effectively, mock the respondent’s policy.

37. Mr Branagan escalated the issue raised by the claimant to a Mr Andy Elliott, Corporate Programmes Manager who sought advice from Mr Tom Elliott in Human Resources. Mr Elliott sought further guidance from the respondent’s Equality, Diversity and Inclusion (EDI) team.

38. The claimant met with the claimant’s manager, Mr Stuart Joyce on 19 April 2022 by Teams. It was agreed at this meeting that the claimant would give Mr Branagan and HR some time to respond and for the time being the claimant would wait and let Mr Joyce know before doing anything. The claimant then had a further meeting with Mr Joyce on Friday 22 April 2022. The claimant indicated that as nobody had replied, the claimant was assuming that no one had an issue with the claimant's use of the pronouns. In oral evidence, the claimant confirmed that that had never actually been the claimant's belief. The claimant was aware and understood that the respondent had never explicitly or implicitly agreed to the claimant's email footer.

39. The claimant emailed Mr Branagan the same day on 22 April 2022 and said that as the claimant had not had a reply, and that other people were exercising their rights to state pronouns in emails, the claimant would be adding “the most precise expression of my gender identity” to the claimant's email footer from 4 pm on Monday 25 April 2022. There were further exchanges and Mr Branagan said there had been a delay because of the Easter break, that the claimant would receive a response next week and he asked the claimant to hold off making any changes until the claimant had received a response from HR. The claimant replied to say “I understand your position, Luke, but I’m afraid I can’t do that. Sorry”.

40. The claimant had another Teams meeting with Mr Joyce on Monday 25 April 2022. Mr Joyce told the claimant that the question had been escalated and escalated and was with the head of the EDI team. Mr Joyce advised the claimant that the respondent’s policy was to use one of the listed pronouns or none. The claimant told Mr Joyce that that was not the policy.

41. We find that the communications from Ms Lacey and the accompanying guidance did *not* restrict the pronouns to a prescribed list and *did* give employees the option to add their own pronouns. If the respondent’s managers were now saying that this was the policy, it was different from what had been communicated to the claimant on 13 April 2022.

42. Mr Joyce told the claimant that he believed if the claimant used the claimant's preferred pronouns, the claimant would be seen to be breaking the respondent’s policy. Mr Joyce confirmed that the respondent was taking legal advice and the claimant agreed to give the respondent to the end of the week to respond.

43. The claimant met with Mr Joyce at the end of the week on 29 April 2022. The claimant had not received a reply by then but was still not using the pronouns. Mr Joyce said he would try to chase a response for the claimant by the end of the day.

44. Later that day, the claimant sent an email headed “Misrepresentation of the Law in official Council policy” to Brigitte Giles, the Director of Digital, Change and Technology, and copying in a number of other senior officers including Ms Lacey. Brigette Giles was the head of the claimant's service and a senior manager in the claimant's line management. In that email the claimant took issue with the respondent’s assertion in its training materials that gender is a protected characteristic. The claimant did not sign off the email with the pronouns “XYChromosomeGuy/AdultHumanMale” or any other pronouns. Ms Giles replied on 3 May 2022 stating that she was on leave and would reply to the claimant's concerns in the week beginning 9 May 2022. The claimant replied, taking issue with the proposed timescale and lack of information about how the claimant's concerns will be addressed and indicated that the claimant might consider using the respondent’s Whistleblowing policy to pursue the matter.

45. On 3 May 2022 Mr Elliott emailed the claimant setting out his response to the initial queries raised by the claimant about the claimant's proposed pronouns. We find that in that email Mr Elliott did ask the claimant not to add “XYChromosomeGuy/AdultHumanMale” to the claimant's email footers.

46. The relevant part of that email says

    “As you are aware, I have consulted colleagues in the People Services and Equalities department on the points raised and sought advice and guidance on whether your preferred pronouns would be deemed appropriate. In the meantime, you had agreed not to use these on your email signature.

    It has been determined that the pronouns put forward by you in your email do not form part of the agreed corporate template on the use of pronouns and having considered your suggestions fully and your reasoning, the decision has been made that it would not be deemed acceptable to use these in your corporate email signature and we would therefore ask that you do not add these. While it may not have been your intention, it was noted that to include your preferred pronouns in your email signature may be deemed offensive to others”.

47. Mr Eliott also confirmed that a response to the email the claimant had sent to Ms Giles would be provided in due course. This was the first clear written instruction to the claimant not to use the claimant's pronouns.

48. We were not taken to any “agreed corporate template” and we find that the respondent had no formal policy on what pronouns in what format were and were not at the relevant time acceptable to the respondent.

49. The claimant agreed in cross examination that some people might take the claimant's proposed pronouns as offensive, but said that it didn’t really matter. The claimant said that offense was taken, not given, and what offense actually meant would have to be specifically defined in law. Mr Elliott did not give evidence to the Tribunal and neither Mr Curtis nor Mr Menzies were able to articulate in oral evidence what was or might be offensive about the proposed email footer. Ms Fairfoot gave a very clear explanation that she considered that the proposed footer was mocking the idea of pronouns and, accordingly, those who chose to use them.

50. On 5 May 2022, the claimant sent an email to Ms Giles about Mr Elliott’s email. The claimant said

“On the email signature template provided by the Council (see screen capture), there was the option 'Other', which when selected asked colleagues to 'Enter your own pronouns', which is what I have done. As a courtesy to my managers Stuart Joyce and Luke Branagan, I delayed using my preferred expression of my gender identity until further notice because I believe this initiative is more concerned with political ideology than equality. Andy Elliott's response, on behalf of the Council, would seem to confirm this.

Therefore, I give notice that from this point forward (in pursuit of equality), I will be using the most precise expression of my gender identity - as shown in my email signature below.

At Andy's request, assuming you confirm you will be providing an official 'corporate' reply, all my further responses regarding this and the Council's EDI policy (the email about which I sent to multiple managers to ensure all levels of management were aware of my concerns) will be directed solely to you”.

51. The claimant signed the email

“James Orwin (XYChromosomeGuy/AdultHumanMale)”.

52. We find that this email further reflects the claimant's reasons for including the email footer. Namely, the claimant was making a protest because the claimant believed that the respondent’s policy was not about promoting equality, but about a political ideology.

53. Later that day, around 12.15 pm, Mr Simon Lowe, Strategic Service Manager who oversees equal opportunities policy for the respondent, spoke to the claimant. We find that he told the claimant to remove the footer and said that “it had been deemed potentially transphobic”. We did not hear from Mr Lowe so we do not know what he meant by that, who had decided that the footer was potentially transphobic or in what way it was potentially transphobic. Every time this issue came up in oral evidence, we were

referred to an email dated 6 May 2022 which was referred to as a complaint. We discuss that below, but at this stage that complaint had not been received by the respondent.

54. The claimant asked Mr Lowe to confirm in writing what he had said and Mr Lowe sent the claimant an email on 5 May 2022 at 3.59 pm. Relevant parts of the email say

"As explained in previous email correspondence with Andy Elliott and Brigette Giles, it is considered that, whilst staff have been invited to add their preferred pronouns, the content you have chosen is not deemed acceptable for use in a corporate email signature and you have been asked not to add this.

You have however emailed Brigette Giles today to advise that you have now added your preferred pronouns to your email signature and this prompted my earlier discussion with you during which I requested that the content was removed forthwith.

As both the polite request to remove your chosen footer and my verbal instruction to do so, acting on behalf of Brigitte as her nominated deputy, have not been complied with, I am now issuing you with a management instruction, in writing, to remove the content you have chosen to add to your email footer. I must also advise you that failure to follow this instruction, may, as discussed, result in disciplinary action being taken.

As explained when we spoke, we would be happy to consider any alternative proposals/pronouns that you may wish to suggest so that we can, hopefully, reach a resolution to this matter that is acceptable to all parties".

55. Mr Lowe concluded by confirming that the claimant had asked about the respondent's grievance procedure and requested that the claimant comply with the management instruction pending the outcome of any such grievance. We find that Mr Lowe did instruct the claimant, by email on 5 May 2022, to remove the footer from the claimant's emails. These were the second and third instructions to the claimant to remove the footer.

56. The claimant replied 17 minutes later as follows:

"I do not take this matter lightly, and I have considered if it would be appropriate for me to use alternative wording, but I believe that every other option available to me denies me my right to equality in the workplace.

At the risk of repeating myself, I must point out that in suggesting colleagues might wish to add pronouns to their email signatures, the Council did not offer a prescriptive list of options; and invited employees to 'Enter your own pronouns', which is exactly what I did.

As I indicated on the call, I'm afraid I must decline to amend my email signature or remove what I consider to be the most precise expression of my gender identity. As I've tried to explain in previous emails, in essence this is a matter of Equality".

57. The claimant included the footer "XYChromosomeGuy/AdultHumanMale" in the email.

58. This was the second written instruction to the claimant to stop using the footer and we find that the claimant explicitly refused to do so. Although the claimant explains that the chosen footer represents the most precise expression of the claimant's gender identity, we find that the real reason the claimant continued to include it contrary to the management instructions was because the claimant was using the footer to make a point about what the claimant perceived as the ridiculousness of the policy and in an attempt to persuade the respondent to change its policy about gender self-identification in emails.

59. The claimant met with Mr Joyce on 6 May and the claimant told Mr Joyce that if he did not want the claimant to send external emails with the footer, then he or Mr Branagan could send the relevant emails. Mr Joyce appears to have accepted that as a way forward.

60. The same day, someone at the respondent received an email from a manager about the claimant's email sign off. The email said

"I have members of staff part of the LGBTQ+ community who have also seen this in [redacted] who do feel these pronouns chosen are offensive -

I would be inclined to agree as this did raise an eyebrow when I saw this. I will explain why as I also believe this could be worded in a better way to be inclusive; For example the XY & Guy prelude to the fact a 'Guy must be XY' also the next part 'human male' insinuates potentially that anyone who is otherwise may not be ' human' or 'adult'

Could you please let me know if this wording in the pronoun is in line with policy or something that should be changed- as this person is an ICT project officer I imagine a lot of people need to communicate with them and will see this and may be offended"?

61. The claimant accepted that the claimant's footer could be offensive but did not accept the proposition that it implied that someone who identified as male but did not have XY chromosomes was in some way less than human.

62. In our view, the concern set out in the email is far from explicit and none of the respondent's witnesses were able to explain what offence was being alluded to in the email.

63. However, we find that the respondent and the claimant both accepted that the claimant's email footer could be offensive.

64. This email was repeatedly referred to as a complaint by the respondent. In fact, the respondent's witnesses sometimes referred to complaints, but subsequently confirmed that this was the only one. In our view, this email does not on any objective standard amount to a complaint. It is a query or, at best, the raising of a potential concern, but it was not complaint.

65. On 6 May 2022, Mr Lowe emailed the claimant to inform the claimant that he would be asking IT to remove the claimant's preferred pronouns from the email footer. He warned that if the claimant reinstated the footer, the respondent may take disciplinary action. He concluded that he hoped that a resolution could be found to the matter.

66. The claimant replied on 9 May and said that the way to resolve the matter was for the respondent to allow all employees equal rights to display their preferred pronouns in email signatures. In that email the claimant explained that the council was discriminating against the claimant in the way they were dealing with the claimant's email sign off.

67. That email was copied to Ms Giles who replied on 13 May. Ms Giles said she would respond substantively after taking legal advice, but in the meantime, asked the claimant to remove the footer and said

    "This is a reasonable management instruction to you to remove the footer from your work emails".

68. This was the fourth instruction and third written instruction to the claimant to remove the email footer.

69. In that email Ms Giles said

    "Your chosen footer is not a pronoun which has been provided by the council for individuals to use should they choose to do so".

70. We agree with the claimant that the respondent had not provided a list of pronouns for employees to choose from. They had offered employees the opportunity to use their own preferred pronouns. However, we also find that by this time the claimant had been told formally in writing three times not to use "XYChromosomeGuy/AdultHumanMale" in the claimant's email footer, but the claimant continued to do so. The respondent was, however, willing to discuss with the claimant a form of wording that the respondent would find acceptable. The claimant was not willing to engage with that offer.

71. On the morning of 13 May 2022 the claimant met again with Mr Joyce. The claimant said that although the claimant had agreed not to use the email footer in external emails, this was not an open ended agreement. The

claimant said that Mr Joyce should not be surprised if the claimant did send out an email to an external partner with the footer "because I want this sorting out really quickly". We find that this was the claimant again trying to apply pressure to the respondent for the purposes of persuading the respondent to change its policy.

72. On 19 May 2022 Ms Giles sent her formal response to the claimant's email of 5 May 2022. Ms Giles said she had obtained legal advice. Ms Giles said that the pronouns that had been adopted (He/him/his, she/her/hers and they/them/theirs) are in line with the respondent's equality duties and guidance had been provided to staff about the use of pronouns in email signatures.

73. She said the wording the claimant had chosen was offensive to transgender persons (without explaining how or why) and that, although the claimant is entitled to hold the claimant's beliefs, the claimant was required forthwith to remove the wording "XYChromosomeGuy/AdultHumanMale" from the claimant's email footers.

74. We note again that the statement that the respondent had adopted a prescribed list of acceptable pronouns was not accurate. Or at least, no such policy decision had been communicated to the claimant or shown to us.

75. Ms Giles also replied the same day to the claimant's email about "Misrepresentation of the Law in official Council policy". We do not need to address that except to state that Ms Giles referred to the Whistleblowing policy and that the claimant had not raised any concerns explicitly under that policy.

Suspension

76. The next day, the claimant was instructed, by a Mr Rob McInroy in a Teams Call at around 10.10am, to attend County Hall that afternoon at 2pm. Mr McInroy did not tell the claimant what the meeting was about, nor inform the claimant that the claimant could bring a trade union representative or colleague. When the claimant asked what it was about Mr McInroy said "I think you probably realise what it is about. I do need to speak to you". We find that Mr McInroy wanted the claimant to attend the meeting to discuss the email footer or the removal of it.

77. The claimant refused to attend the meeting on the basis that the claimant would feel intimidated and bullied.

78. Mr McInroy then suspended the claimant in a letter attached to an email on 20 May 2022. The claimant was informed that there would be an investigation into the following allegation:

"Serious insubordination in that you have failed to follow a reasonable management instruction, on multiple occasions, to remove the wording (XY ChromosoneGuy/AdultHumanMale) from your Council email footer".

79. Although we have not heard from Mr McInroy, it was not suggested that the reason set out in the letter was not the real reason for suspending the claimant and we find that it was.

Investigation

80. Mr Stephen Curtis was appointed as Investigating Officer. Mr Curtis was, at the relevant time, line managed by Ms Giles. Mr Curtis is employed by the respondent as Digital Lead which is a Group Manager role. He reports to Brigette Giles and is more senior than the claimant. Although he worked in the same area as the claimant, Mr Curtis did not previously know the claimant. Mr Curtiss said in oral evidence that he has substantial experience and training in respect of disciplinary investigations and particularly on the importance of impartiality, having worked in other Local Government Settings and in Parliament and the Civil service. We accept that evidence.

81. The claimant was on leave from 30 May to 13 June 2022 so on 16 June 2022 the claimant was invited to an investigatory meeting.

82. The claimant was unhappy with the proposal for the respondent to record the investigation meeting but without allowing the claimant to keep a separate recording. It was therefore agreed that the claimant would answer questions in writing and the claimant provided answers to questions on 14 July 2022 as requested.

83. The claimant's answers are detailed and set out clearly the claimant's views on the lawfulness of the council's decision to prevent the claimant from using the pronouns. It is not proportionate to set out the questions and answers in detail.

84. It is clearly the claimant's view at this point that the council has acted unlawfully in preventing the claimant from using the pronouns when other people have been able to use their pronouns. The claimant's case is very clearly that the management instruction to require the claimant to remove the footer was not a reasonable management instruction because it was unlawful discrimination for the respondent to require the claimant to remove the pronouns. The claimant refers to statue and case law in the claimant's responses.

85. We do note, however, that in one of his questions Mr Curtis asked the claimant the following questions:

"The Code of Conduct for Employees is referred to in your contract of employment. Section 9 of the Code of Conduct for Employees (a copy is enclosed with the questions) states "You must follow the policies of the Council and must not allow your own personal or political opinions to interfere with your work."

You subsequently sent emails that included the pronoun.

Do you have any further comment to make as to why you continued to use the pronoun, when considering the position set out by your line management and contained in the Code of Conduct?"

86. The claimant's response was

"The Council clearly felt that asking employees to add pronouns to their email signatures was non-political and compatible with Section 9 and did not constitute an interference of personal or political opinions with those employees' work. No justification was given for why expressing non-gender critical views was held not to be in violation of Section 9 while expressing gender critical views was held to be in violation of Section 9"

87. Mr Curtis conducted two further investigatory interviews, one with Simon Lowe on 31 May 2022 and one with Andrew Elliott on 1 June 2022. Mr Curtis did not interview Ms Giles, who had issued or been responsible for the management instructions.

88. Mr Curtis did not, as part of his investigation, assess whether the process by which employees could choose their own pronouns was appropriate, and he did not consider independently whether the instruction to the claimant to remove the pronouns was unlawful or discriminatory. Mr Curtis said that he gave some consideration to the lawfulness of the policies but he discovered that the respondent had taken legal advice and that satisfied him that sufficient consideration had been given to that question. We did not see the legal advice on the basis that it was privileged.

89. Mr Curtis confirmed that it was his view that he did not have to investigate whether it was appropriate for the claimant to use the pronouns, but whether the instruction to remove it was reasonable.

90. Mr Curtis was unable to explain how the claimant's footer presented a risk to the transgender community (or any other community) or in what way the footer was offensive of transphobic. He said that he took advice from the equalities team who said (as recorded in his presentation to the disciplinary hearing) that they

"…consider the tone of the initial email and the pronouns to be transphobic, and there is therefore a serious risk that the continued use of James's

pronouns cause offense to the transgender community, who are a protected characteristic".

91. We make the following findings about the investigation:

92. Mr Curtis did not make any enquiries of Ms Giles as to the reason for the management instruction. He considered that it was clear from the document trail.

93. Mr Curtis was unable to say whether or why the footer was offensive or transphobic and did not give any independent consideration to that question. He followed, apparently uncritically, the legal advice and the advice from the equalities team. In his interview Mr Lowe said that the footer had been deemed to be offensive but did not explain to Mr Curtiss in what way. Mr Lowe did tell Mr Curtis that he believed that claimant was trenchant and had no intention of removing the footer. This view of the claimant is consistent with the evidence we have seen and heard. The claimant was at the time and continued in the tribunal hearing to assert that the claimant would not remove the footers.

94. He did ask Mr Lowe to comment on the claimant's assertion that the policy was a politically ideological one. Mr Lowe said that that was in effect not something for him to comment on as the decision about the email footers had been taken by Councillors or senior Officers.

95. Mr Curtis did ask Mr Lowe about the option for staff to put in their own pronouns. Mr Lowe said it would be inappropriate to prescribe what people can or should put in their email footer because that would be inherently contradictory in terms of self-identification but it was implicit that people would not put anything offensive and the respondent would have the right to say that something was not acceptable. We observe that the respondent has been inconsistent in this point. The original email and guidance from Ms Lacey did not prescribe what pronouns people could use. Mr Lowe was apparently aware of this. Other communications to the claimant have asserted that the claimant's choice of pronouns was outside the acceptable pronouns These are obviously two contradictory positions

96. Mr Lowe said that the claimant's footer rebutted the right for people to transition – it was about making a provocative biological and anatomical statement and that could be considered transphobic.

97. Mr Lowe's overall view was that the claimant's footer was not in accordance with the idea of equality and inclusion that the policy was designed to promote and that it was unreasonable to expect an unfettered freedom to put whatever the claimant liked as an email footer. It would also make the respondent look bad and be very controversial if it was revealed in the local media.

98. Mr Elliott, in his interview with Mr Curtis, set out the chronology in broadly the same terms as we have explained. It is clear that while Mr Elliott had concerns about the email footer, he was taking and following advice from HR and Ms Giles when instructing the claimant to remove the footer.

99. Mr Curtis produced a summary of the outcome of his investigation. This was not used in the investigation or shared with the disciplinary officer. He said, and we have no evidence to the contrary so we find, that it was only sent to Mr Denman in HR.

100. His conclusions were:

    a. Three management instructions were issued and the claimant refused to follow them

    b. The corporate equalities team considered the tone of the initial email (we assume the one from 14 April) and the pronouns were transphobic and there was therefore a serious risk of causing offense to the transgender community who are (sic) a protected characteristic.

    c. Section 9 of the Code of Conduct for Employees states "You must follow the policies of the Council and must not allow your own personal or political opinions to interfere with your work." It is recorded that the claimant's view was

       "It was unclear to me what basis the Council had for allowing employees to express one philosophical belief (that sex is mutable) while prohibiting me from expressing an equally valid view (that my sex is immutable). Absent of any such justification, I had (and have) reason to believe that the instruction was in violation or the Council's Public Sector Equality Duty and potentially discriminatory."

    d. Failure to follow the management instruction with the serious risk that carries to both the transgender community and the reputation of the Council amounts to serious insubordination and therefore Gross Misconduct.

101. Mr Curtis also produced a detailed presentation for use at the disciplinary hearing. That sets out the chronology we have already discussed. However, we note that the following points were included in the presentation:

    a. Mr Curtis said that the corporate equalities team considered the pronouns to be transphobic (as mentioned above).

    b. The claimant's role is public facing, so there is the potential for a serious wider reputational risk for the organisation which was considered by those who both asked and instructed the claimant to remove the pronouns from the email footer.

c. The respondent accepted the right of the claimant to have gender-critical views.

d. The claimant's pronouns would be difficult to use practically in place of he/his or she/hers for example.

e. Mr Curits did give consideration to the question of whether the management instruction discriminated against the claimant because of the claimant's asserted beliefs. Mr Curtis set out the claimant's arguments, and said

"This essentially raises the question of whether the management instruction is reasonable. To this end, Consideration needs to be given to whether the risk of the pronoun causing offense to the transgender community (a protected characteristic) should take precedent over James' beliefs / views. Legal advice was sought in the action outlined above by James' line management.

In this context, James has been provided with a reasonable choice and rationale behind the choice. Thereafter James has possibly taken that choice as an opportunity to raise political issues within the workplace. He has been provided with a managerial instruction to stop doing as he chooses, and with a rationale and clear explanation as to how the policy has come about. James has also been afforded the opportunity to not engage with the policy (it is not mandatory to use pronouns) and has demonstrated no consequential impact of not using pronouns, or not using his chosen pronoun. It is therefore unclear that there are any possible grounds for harassment, victimisation or direct discrimination".

f. Mr Curtis concluded that the respondent's position was reasonable as they had given the claimant an opportunity to seek an alternative approach to the claimant's chosen pronouns, but the claimant had rejected that offer.

g. In summary, Mr Curtis concluded that

"Failure to follow the management instruction with the serious risk that carries to both the transgender community and the reputation of the Council is as set out in the allegation felt to amount to serious insubordination".

102. In respect of point (e), we agree with Mr Curtis' view that the claimant has used the option to provide pronouns in email footers as an opportunity to raise political issues in the workplace. However, we also find that the respondent first raised the political issue of pronouns in the workplace by allowing employees to self-identify in their emails. We rely on our judicial

knowledge of the fact that transgender status and gender critical ideology are currently political and highly contentious issues.

103. On 12 August 2022, the claimant was required to attend a disciplinary hearing on 19 August 2022. The letter was sent by Ms Giles. The claimant was informed that the claimant had the right to bring a trade union representative or work colleague. Copies of relevant documents would be provided to the claimant 48 hours before the hearing.

Disciplinary hearing

104. The claimant attended the disciplinary hearing without representation. The hearing was chaired by Ms Myers and she was accompanied by Ms Alison Fairfoot, a senior HR officer. Mr Curtis attended to present the case. Ms Myers did not attend the tribunal or provide a witness statement. The reason given was that Ms Myers had left the respondent's employment, although it seems that she would have been aware of these proceedings before leaving so that if itself is not a complete explanation for the respondent's decision not to call her to give evidence.

105. Ms Fairfoot said that she was part of the decision making process but she is described in the transcript of the meeting as an advisor and confirmed in evidence that the final decision was in fact down to Ms Myers. Ms Fairfoot did, however, discuss Ms Myers' decision with her at the time and we find that she was able to give evidence of what she understood Ms Myers' reasoning to be.

106. Mr Curtis presented the management case, the panel and the claimant had the opportunity to ask Mr Curtis questions, then the claimant presented the claimant's case and the panel and Mr Curtis had the opportunity to ask the claimant questions.

107. The claimant does not take any issue with the proceedings per se. The claimant's two complaints about the disciplinary process are that the claimant believes that Ms Myers was involved in the decision to implement the policy allowing staff to declare their pronouns so was conflicted, and the outcome. The claimant said in evidence that the claimant also had issues with Mr Curtis' report. However, this referred to the report sent to Mr Denham and which was not used as part of the disciplinary decision. The claimant's concerns at first seemed to be that the report was not in the standard format for formal council decision making. We prefer the respondent's evidence that this is not the same sort of report as would be prepared for a decision to be made by the respondent as a local authority (i.e. elected councillors) or a committee of it.

108. The claimant also took issue with the fact that the report for Mr Denham said that the legal framework for which the policy was being enacted had been set out to the claimant previously. We agree with the claimant that there had been no explanation of the legal framework sent to the claimant,

but that is not, in our view, material to any of the decisions that respondent made.

109. The claimant's evidence about Ms Myers’ alleged conflict of interest is that at a meeting of the respondent (the People Board) on 1 April 2022

“it is recorded under Corporate Approach to Transgender guidance and use of Pronouns, in a discussion regarding schools 'asking the Local Authority to develop Transgender guidance around use of Pronouns', that it was Deborah Myers who asked the Board 'whether we are looking to do something similar for the organisation'. Considering the global email introducing the policy of self-identification (circulated by Caroline Lacey) followed on 13 April (just 12 days later), the Tribunal might think it appropriate to consider whether Deborah Myers should have recused herself from Chairing any disciplinary hearing of an employee challenging the policy she had suggested might be considered for introduction across the organisation. The minutes record: 'It was confirmed that pronouns can be added to email signatures but won't mandate the use of pronouns'.”

110. Ms Myers was the Director of Children and Young People, Education and Schools. She was part of the senior leadership team.

111. The claimant did not raise this at the time because the claimant was not aware of Ms Myers’ role. We note also that Ms Giles was present at that meeting. We did not hear any evidence about the constitution of the People Board or its remit. However, we find on the basis of the minutes that this was the meeting at which the policy to allow employees to add pronouns to emails was confirmed, that Ms Myers had an interest in the use of pronouns in email signatures in the respondent, and we conclude from the limited context of the minutes that Ms Myers was broadly in favour of that policy.

112. The claimant does not take any other issue with the disciplinary hearing and agrees that the notes are an accurate reflection of what was discussed. We make the following findings about it:

113. In his presentation, Mr Curtis set out the chronology as already explained and said

“The corporate equalities team consider the tone of the initial email and the pronouns to be Transphobic and there is therefore a serious risk that the continued use of Jim’s pronouns cause offence to the Transgender community, who are a protected characteristics”.

114. He also said

“Jim’s role is public facing so there is potential for a serious wider reputational risk for the organisation, which was considered by those who

both asked and instructed Jim to remove the pronouns from his email footer".

115. Mr Curtis said that

"Jim may not agree with the position, and it has been acknowledged that he is entitled to his opinion, however, the position has been made clear to him, and subsequent emails set out that the requirement to stop using the pronoun is a reasonable management instruction".

116. Mr Curtis also explains that it would be difficult to put the claimant's pronouns into a sentence - to actually use them as pronouns. They did not he said, work on a practical level.

117. Mr Curtis also explained the claimant's position that the refusal to allow the claimant to use the pronouns was discriminatory. He set out the claimant's argument that employees have a right to manifest their gender-critical philosophical beliefs and employers must balance that right against the rights of transgender people not to be harassed. He concluded

"This essentially raises the question of whether the management instruction is reasonable. To this end, consideration needs to be given to whether the risk of the pronoun causing offence to the transgender community, a protected characteristic, should take precedent over Jim's beliefs and views".

118. Mr Curtis referred to the email of 6 May 2022 that we have discussed above as "evidence of impact offence from a member of the LGBTQ+ community within the council".

119. He concluded

"So my investigation has shown that the Council has followed an acceptable approach to putting its policy in place, and as I have previously stated the position, and therefore that the management instruction appears to be reasonable. Jim's position is that he does not agree with that view, and he is entitled to his belief. However, the way he has decided to manifest his belief is by failing to follow a management instruction, raising the real risk of serious impact on the LGBGT+ community and the reputation of the Council".

120. Effectively, Mr Curtis presented the presentation that we have discussed above and we find that the matters we set out in the presentation were before Ms Myers when making her decision.

121. The claimant's case was succinct. The claimant said

"I am not disputing that I refused to follow a management instruction to remove this wording on multiple occasions. However, it is my contention that the management instruction I was given breached my rights under Article 9 and 10 of the European Convention on Human Rights, and the Equality Act 210, to freedom of thought, belief and religion and freedom of expression, and specifically in relation to the Equality Act 2010, the provision under Section 149 - page 23 of the Hearing Pack, the Public Sector Equality Duty, which the Council is obliged to comply with, and which relates to equality in the workplace".

122. The claimant added that it was wrong to suggest that the claimant's choice of pronouns was a political act and the respondent's decision to allow self-identification was not a political act. In effect, the claimant said they were two sides of the same issue. The respondent said that the claimant had breached the code of conduct by expressing the claimant's personal political opinions but in fact the claimant was doing the same as the respondent had done when it invited people to self-identify.

123. Mr Curtis asked the claimant if the claimant had considered raising the issues under the Whistle Blowing or Grievance policies. The claimant said

"I didn't, because I believe it's insidious in HR departments and local councils all over the place, so I didn't feel it was appropriate because I wouldn't get any kind of consideration".

124. Ms Fairfoot also asked the claimant to clarify and explain the claimant's beliefs. The claimant said

"It matters to me because I've always been - words have always mattered to me, and the meaning of words and the manipulation of words and politics, the way words can be manipulated to push a political agenda and when this invitation was sent out by Caroline Lacey, if there had been no other option for me to put in, another, I would probably have just walked away from that and not put anything in, you know, because I believe putting he/him was - as I say in my closing statement, the usual pronouns are acceptable by transgender activists and the idea that a transgender activist could tell anybody what is acceptable and what isn't acceptable is wrong, for me, and I felt that what the Council was doing - the Council and the HR department, whoever introduced this, was relying on the apathy of employees to leave it blank, so if people leave it blank then there's no argument against, there's no resistance to it".

125. In oral evidence, the claimant said that the phrase transgender activists referred to elected councillors, rather than any specific activist group.

126. The claimant confirmed that the claimant had not expressed gender critical views before, but that the claimant had a strong gender critical belief. The claimant made it clear that the claimant at that time expected the issue to end up in an Employment Tribunal. We find that the claimant was expecting

to be dismissed at least from the point at which the claimant was asked to attend a disciplinary hearing. The claimant was unwilling to remove the pronouns and would not do so and was unwilling to compromise. There was an exchange between the claimant (JO) and Ms Fairfoot (AF) about this:

"JO: I said to my wife right from the beginning, because she said to me, how far do you want to take it? I said, well, I'll say now that in a year's time I won't be employed by the Council, and I'm aware of that. So yes, I understand what you're saying, I'm aware of it.

AF: You understand what I'm saying, yes, and at no point you've thought, maybe if I do back down?

JO: No, for me it's all about principles".

127. After the hearing the claimant checked and confirmed the transcript. Ms Myers and Ms Fairfoot discussed the issue and Ms Myers sent the claimant her outcome decision on 26 August 2022.

128. The outcome letter addresses the claimant's points under three headings, and mitigation and the appropriate sanction under a fourth heading.

129. The first heading was "Serious insubordination in that you have failed to follow a reasonable management instruction, on multiple occasions, to remove the wording (XYchromosomeGuy/Adult-Human-Male) from your Council email footer".

130. Ms Myers' findings and conclusion are that the claimant was aware that the claimant had been informed on three occasions that the claimant's email footer was not acceptable. She said "This email footer was used in both inward facing and external facing communications, in effect in your professional role as a representative of this Council". The claimant disputes that the email was used in external communications, and we agree that it was not. However, the claimant's manager took steps to ensure that the footer was removed, otherwise it would have been used in external communications.

131. The claimant had no intention of removing the footer, even by the time of the disciplinary hearing. Ms Myers therefore upheld the allegation. Ms Myers said that the claimant's footer was not in accordance with Ms Lacey's instructions. We agree with the claimant that this is incorrect, however, it was made clear to the claimant subsequently, on a number of occasions, that the footer was not acceptable to the respondent.

132. The second heading was the reasonableness of the management instruction.

133. Ms Myers set out a clear explanation why the claimant's proposed footer was not in accordance with the respondent's stated Equality and Diversity aims. She said

"The use of your pronouns demonstrates prejudice and has the potential to affect human dignity and conflict with the rights of others with a protected characteristic. Your assertion that this is a 'sick religion' which 'facilitates the steady creep of evil' [which the claimant said in the disciplinary hearing] supports the view that this is your intention. It was explained to you why the Council did not wish you to use the pronouns and you were given the opportunity to change them and discuss alternatives".

134. She referred to the "complaint" which we have discussed and conclude that.

"As an employee it is your responsibility to act in such a way so as to be an ambassador for the organisation and represent the council in a professional manner" and that he management instructions were reasonable.

135. The third heading was "Consideration of the reasonableness of your refusal to comply".

136. Ms Myers agreed that the claimant had a genuine belief that sex is immutable. She recognised that the claimant accepted he could have left the footer blank, but that the claimant instead sought to *"challenge the Council as you believe that the management instruction breached your rights under Article 9 and 10 of the European Convention on Human Rights and the Equality Act 2010, to freedom of thought, belief and religion and freedom of expression".* Ms Myers said that the council did not agree with the claimant's interpretation of the law, and that the claimant knew that the claimant could have chosen to put in a grievance or other complaint rather than refuse to comply with the reasonable management instruction. She concluded *"You are entitled to hold your own belief, but as an employee of this council you are bound by an implied term of your contract to follow a reasonable management instruction. For this reason, I conclude that your refusal was unreasonable".*

137. The fourth heading was "Consideration of sanction".

138. Ms Myers considered the following points:

   a. That the claimant's behaviour over a short period of time was serious insubordination and gross misconduct

   b. That there had been a full investigation

   c. That the claimant had been given opportunities to comply and had refused, and would take the same action again and had indicated an intention to continue using the same pronouns

d. That there was therefore a breakdown of trust and confidence between the claimant and the respondent as the claimant would not comply with the management instruction even were the claimant not dismissed

139. Ms Myers took into account the claimant’s service since 2018 with no previous conduct issues but considered that that did not amount to sufficient mitigation to avoid dismissal.

140. Finally, Ms Myers said

“I would also wish to note that regardless of your statement `that ‘I, myself, do not want to go by pronouns with transgender associations, ’ and not being able to use the pronoun ‘XYchromosomeguy/Adult-Human-Male’ is subjecting you ‘to a detriment for your belief in gender critical protected characteristic,’ I do not believe that you have been subject to a detriment as you were not compelled in any way to choose to use a pronoun. There is also no evidence that the treatment by your managers has amounted to bullying or harassment in relation to their management instructions”.

141. The claimant did not challenge the genuineness of this letter. We find that it reflected the real reasons for the decision to dismiss the claimant. We find that Ms Myers considered all of the claimant’s arguments including the reasonableness of the management instruction and came to a decision.

Appeal against dismissal

142. The claimant was given the right to appeal which the claimant did on 7 September 2022. The grounds for the claimant's appeal were:

143. That the claimant had been discriminated against because of the claimant's gender-critical beliefs n that the claimant was not permitted to self-identify while other employees were

a. That the claimant had acted in accordance with Ms Lacey’s email and guidance in choosing the pronouns

b. That the management instructions were unreasonable because they were discriminatory

c. That Ms Myers had misinterpreted the European Convention on Human Rights and the Equality Act 2010

144. There was an appeal hearing on 27 October 2022 before Mr Alan Menzies, who was supported by Mis Jane Simpson (HR). The claimant was given the opportunity to be accompanied but attended alone. Ms Myers attended to present the management case.

145. The hearing was recorded and the claimant agreed that the transcript is accurate. In oral evidence, the claimant agreed that the claimant had no issue with the appeal hearing itself or the process. The claimant's complaint is solely about the outcome.

146. Mr Menzies sent the claimant a brief letter dismissing the appeal accompanied by more detailed reasons on 9 November 2022. Mr Menzies gave detailed consideration to the claimant's appeal and the claimant's assertions about the claimant's rights as discussed at length. In our judgment, Mr Menzies has considered the claimant's arguments in detail and come to reasoned conclusions about them. He engaged with and addressed the claimant's arguments about the claimant's beliefs and set out clear, detailed conclusions about the respondent's position.

147. The claimant took issue with particular parts of Mr Menzies' reasons.

148. The claimant says that the respondent's response was disproportionate They deliberately decided to punish the claimant for challenging the policy of self-identification. The claimant also says Mr Menzies has misunderstood that the claimant's decision to create the pronouns was a response to the respondent's decision to introduce a *"policy of self-identification to raise and promote the contested ideology of gender identity".* In effect, the claimant says that it was the respondent's own fault for allowing the claimant to create the claimant's own pronouns rather than limiting the selection. Rather than dismissing the claimant, the respondent, the claimant says, ought to have just restricted to pronouns that were available for employees to use.

149. The claimant also criticises Mr Menzies for distinguishing between the claimant holding a belief and the manner in which the claimant chooses to manifest it. The claimant says Mr Menzies was not entitled to take potential offence into account, referring to the case of *Forstater v CGD Europe and others* UKEAT/0105/20/JOJ. People, the claimant says, have no right to be protected from offence.

150. The claimant says that Mr Menzies is inconsistent, by saying that *"inviting employees to add pronouns to their email signature was not 'to allow a platform for people to express their views on the matter of gender/gender critical and provide an opportunity to make other staff from protected characteristics not feel valued by the choice of pronouns' [when] Claire Watts representing the LGBT+ employee network at the Council's EDI Forum on 14 March 2022, encouraged colleagues to add pronouns to email signatures 'not really for any other reason' than to make 'other people feel comfortable' to do so, thereby, as Mr Menzies puts it, 'allowing a platform for people to express their views on the matter of gender'"*.

151. In summary, the claimant says that the appeal was the opportunity for the respondent to address their mistakes but they failed to take the opportunity to do so.

152. We find that Mr Menzies understood and addressed all the points that the claimant raised, including explaining that

"I do not believe that you have suffered direct discrimination because of your philosophical belief and no one within the Council has disputed that you are free to have that. It is the way in which you have chosen to manifest it in the workplace as an employee representing this Council. Several reasonable requests were made to you to consider altering your chosen pronouns using guidance or to remove these entirely. You were given options, and several conversations took place with you to explain the Council's position."

He concluded that

"In summary I believe you were given a reasonable management instruction, that was explained to you on several occasions. You were provided with the freedom of choice in relation to the signature on your email, which you have maintained to date without the use of pronouns until recently. There has not been a challenge to your philosophical belief, but there has been serious concerns and consideration to your conduct as an employee. You are bound by an implied term of your contract to obey a reasonable managerial instruction, and you have chosen to reject this and choose a different course of action in contravention to this".

153. We find that the reasons set out in the appeal outcome and accompanying reasons were the actual reasons for not upholding the claimant's appeal.

The claimant's belief

154. In the list of issues, the claimant's belief is referred to as "gender-critical beliefs". The claimant has explained in the claimant's witness statement exactly what that means. It is a clear explanation but, in our view it would not do it justice to seek to summarise it. The relevant extract from the claimant's witness statement at paragraphs 77 to 90 is attached as appendix 2 to this judgment.

155. When the claimant was asked in evidence about how the claimant would refer to someone whose chosen pronouns did not necessarily reflect their biological sex, the claimant said the claimant would avoid using pronouns and refer to them by name. The claimant was reluctant to agree in cross examination that the claimant would use a person's chosen pronouns if the claimant did not consider that they were consistent with the person's biological sex.

156. We find that the claimant would have taken steps to avoid referring to people by their chosen pronouns if the claimant did not consider that they were consistent with the person's biological sex. However, we also find that the claimant would not have been deliberately offensive to or deliberately

misgendered transgender people. The evidence the claimant gave in cross examination is not, in our judgment, inconsistent with the claimant's evidence in the claimant's witness statement at paragraphs 83 and 84 that

"While I believe that everyone has the right to live and to present as they choose under the law and to be treated with respect and dignity, and I endeavour at all times to be polite and courteous, I believe that it is unreasonable for any person to expect others to automatically refer to them by the pronoun associated with their chosen socially constructed gender.

I believe that even if a person declares that they identify as (or declares themselves to be) a member of the opposite sex (or both sexes, or neither) and asks others to go along with this, it does not change their actual sex, no matter how many other people choose to accept or affirm this declaration".

157. We find that the claimant held these beliefs and we prefer the claimant's evidence that the claimant has the beliefs as set out in appendix 2.

The law

Religion or belief

158. The claimant claims that the claimant's gender critical belief is a philosophical belief within the meaning of section 10 (2) Equality Act 2010. It is not suggested that the claimant's beliefs are a religion within the meaning of section 10 (1). Section 10 says, as far as is relevant:

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

159. The leading case on whether a belief falls within section 10 is *Grainger (Grainger Plc) v Nicholson* [2010] IRLR 4. The Employment Appeal Tribunal provided the following criteria to be applied by Tribunals in deciding whether a belief fell wihtin section 10:

(i) The belief must be genuinely held.

(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

160. In *Forstater v CGD Europe and others* UKEAT/0105/20, the claimant, Ms Forstater, held "gender critical beliefs". Extracts from Ms Forstater's witness statement explaining her beliefs are set out in the body of the EAT judgment. They bear a striking similarity to the beliefs set out in the claimant's witness statement and appended to this judgment. In fact, the claimant refers to this case in the claimant's witness statement.

161. In our judgment, the beliefs explained by the claimant are materially the same as the beliefs considered by the EAT in *Forstater*.

162. In *Forstater*, the only issue before the Tribunal was whether the belief was a protected belief wihtin the meaning of section 10 of the Equality Act 2010. The Tribunal at first instance found that Ms Forstater's beliefs satisfied all but the last of the *Grainger* criteria in that it was not "worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others".

163. The EAT considered the European Convention on Human Rights and case law under it. The EAT said that a belief would only fail to meet the fifth *Grainger* criteria where the beliefs themselves (rather than the manifestation of them) are of an extreme nature, such as Nazism or totalitarianism or other iterations of the gravest form of hate speech. This is a separate question from whether a person should be permitted to manifest any belief that falls short of the most extreme case regardless of the offence they cause or how objectionable they are.

164. In assessing whether a belief is worthy of protection, the Tribunal must not evaluate the claimant's belief (beyond whether it represents a serious violation of other people's convention rights as discussed in *Forstater*).

165. In that case the EAT said that

"the Claimant's belief does 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 ECHR). That is reason enough on its own to find that Grainger V is satisfied. The Claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the Tribunal was that she believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of

people who identify as transgender": see para 39.2 of the Judgment. That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether".

166. The reference to the potential for offence reflects the consideration the EAT gave to arguments that Ms Forstater had and would misgender people. They found that in fact the evidence was that Ms Forstater would not seek to deliberately misgender transgender people or seek to be offensive to them. However, even if a person with Gender Critical beliefs did deliberately misgender transgender people, that would not of itself be enough to take the belief out of protection, even if that was a manifestation of the belief. Whether the manifestation of the belief is protected in law is a separate question from whether the right to hold the belief is protected. We address that below.

167. Mr Frew said, during the hearing and in the course of submissions, that prior to the hearing, it had been the respondent's intention to concede that the claimant's Gender Critical beliefs were a protected belief wihtin the meaning of section 10 Equality Act 2010. However, in oral submissions, Mr Frew said that the claimant's evidence in relation to having no issues with members of staff using pronouns that did not obviously accord with their biological sex "flies in the face" of the claimant's alleged belief.

168. In reality, the only oral evidence we heard about the claimant's alleged belief was in relation to the genuineness of that belief.

169. In *R (on the application of Williamson) and others v Secretary of State for Education and Employment and others* [2005] UKHL 15, Lord Nicholls held

"When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest v Amselem (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion".

170. The question for us, then, is whether the claimant genuinely holds the beliefs set out in the appendix to this judgment, it is not for us to consider whether those beliefs are valid.

171. The respondent does not challenge the applicability of the other Grainger criteria and we therefore say no more about them. As in *Williamson*, the issue in this case is really about manifestation (which we will discuss below).

Direct discrimination under section 13 Equality Act 2010, the European Convention on Human Rights and manifestation

Direct discrimination

172. Section 13 of the Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

173. By virtue of section 10 of the Equality Act 2010, religion or belief (as discussed above) is a protected characteristic.

174. Section 3 of the Human Rights Act 1998 says

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

175. This means that we must interpret the law as far as possible in a way that is compatible with the European Convention on Human Rights. The claimant says that the respondent breached the claimant's rights under articles 9 and 10 of the convention, so we must consider those when interpreting section 13 Equality Act 2010. Although in this case, the respondent happens to be a public authority, in *Eweida and ors v United Kingdom* (2013) 57 EHRR 8, the ECHR said at paragraph 84

"Where…the acts complained of were carried out by private companies and were not therefore directly attributable to the respondent State, the Court

must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction" articles 9 and 10 of the Convention".

176. We do not need, therefore, to consider the respondent's status and whether they were acting as a public authority on respect of their treatment of the claimant or in a private capacity as an employer. Either way, we must consider whether the respondent has breached the claimant's Human Rights.

European convention on Human Rights

177. The claimant seeks to rely on Articles 9 and 10 of the European Convention on Human Rights as incorporated into domestic law in the Human Rights Act 1998.

178. Article 9 says

Freedom of thought, conscience and religion

1. 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.

2. 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 interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

179. Article 10 says

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests 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 reputation or rights of others, for preventing

the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

180. The relationship between the ECHR and s 13 of the Equality Act 2010 is as follows.

181. There are two protections under article 9:

    a. the right to hold a belief which is an absolute right. It is a breach of Article 9 for the state to interfere with the holding of a belief. The prohibition on less favourable treatment because of a religion or belief is wholly consistent with article 9.1.

    b. the right to manifest a belief. This is a qualified right. This interacts with section 13 Equality Act 2010 in the following way. Less favourable treatment because of the manifestation of a religion or belief amounts to less favourable treatment because of the religion or belief when the manifestation is protected from interference by the state in accordance with article 9.2 of the European convention on Human rights.

182. It is the claimant's case that the claimant's email signature is a manifestation of the claimant's gender critical beliefs that is so inherently linked to the claimant's gender critical beliefs that the manifestation qualifies for protection within article 9.2 and any less favourable treatment that the claimant was subject to was therefore because of the claimant's gender critical beliefs.

183. In so far as it is pleaded, it is also the claimant's case that the claimant's email signature is the exercise of the claimant's right to freedom of expression that qualifies for protection under article 10.2.

184. The cases referred to by both parties have focussed on article 9. There was little reference to Article 10. In *Higgs v Farmor's School and others [2023] EAT 89* HHJ Eady P said

    "There are clear similarities between the approach to be taken in relation to complaints of infringement of rights protected by articles 9 and 10 ECHR. Both require first that the essential nature of those rights must be recognised. Both rights are, however, then qualified, with articles 9(2) and 10(2) setting out the circumstances under which the right to religion or belief, or to freedom of expression, can be limited or restricted: (i) it must be prescribed by law; (ii) it must be in pursuit of one of the legitimate aims identified; and (iii) it must be necessary in a democratic society".

185. The issue in respect of the application of Article 10 is similarly whether the claimant's qualified right to freedom of expression satisfies the requirements of Article 10.2. If it does then the claimant's rights to freedom of expression

will fall within the protection of section 13 in so far as the claimant is legitimately expressing the claimant's philosophical beliefs. If not, it will not.

186. We therefore set out our understanding of the law on this point.

187. Both parties sought to rely on the case of *Page v NHS Trust Development Authority* [2021] EWCA 225. The claimant also relies on *Eweida and others v United Kingdom* (2013) 57 EHRR.

188. The claimant has cited numerous other cases, including cases at first instance. This is an area in which matters have been considered by the EAT and above on a number of occasions so it is not therefore necessary to consider the first instance cases. We have considered other relevant cases as necessary but it is not proportionate to cite them all.

189. In our view, the questions we need to ask ourselves in respect of Article 9 are these:

   a. What was the reason for the alleged less favourable treatment – was it the claimant's belief or the manifestation of a belief?

   b. If the reason is that the claimant held the belief, we do not need to go any further. That is both infringement of an unqualified right under the ECHR and less favourable treatment because of protected belief (assuming the belief is protected) under the EQA 2010.

   c. If the reason is the manifestation of a protected belief, we must determine whether there was a sufficiently close causal nexus between the act complained of the by the respondent (the asserted manifestation) and the claimant's gender critical beliefs. It is worth setting out paragraph 82 of *Eweida* as cited in *Page* which explains this

   "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1. In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the

applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question"

The assessment of the sufficiency of the nexus between belief and manifestation is a matter for the assessment of the Tribunal on the evidence we have heard.

d. If the required link between the act complained of and the belief is not found, the act complained of does not amount to a manifestation within article 9.2. This will mean that any less favourable treatment because of the act will not be protected by Article 9.2 and consequently not by section 13 Equality Act 2010.

e. If the required link is found, at that stage we need to consider the qualification under article 9.2. At this point, we also consider Article 10. There is no requirement under Article 10 for there to be a close link between the claimant's beliefs and the expression of an idea. In *De Haas and Gijsels v Belgium* [1997] 25 EHRR 1, (cited in *Higgs*) The ECHR said

"freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community".

f. The freedom is subject only to the qualification in article 10.2. In the employment context generally, and in this case particularly, the factors to be considered under Articles 9.2 and 10.2 are the same (*Higgs).*

g. Firstly it is a requirement in articles 9.2 and 10.2 for any interference to be prescribed by law.

"it is well established that "law" in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law" (*Higgs paragraph 52)*

h. Both parties have referred to the public sector equality duty under the Equality Act 2010. This is set out in section 149 Equality Act 2010 and says:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

i. If the interference is prescribed by law, we must then go on to consider whether the interference is proportionate. That requires us to balance the "interference with the fundamental rights of the claimant against the legitimate interest arising in respect of the rights, freedoms and/or reputations of others" (*Higgs paragraph 88*).

j. If the interference with the claimant's rights is disproportionate then the act complained of will amount to a protected manifestation within article 9.2 or a protected expression under 10.2. This means that we would then be required to find that, assuming the necessary causal link in section 13 Equality Act 2010 was made out (see below) the less favourable treatment was because of the claimant's gender critical beliefs. If the interference is proportionate, the less favourable treatment would not have been because of the claimant's gender critical beliefs.

190. The guidance given in paragraph 94 of *Higgs* on the proportionality of interference with rights under articles 9.2 and 10.2 says:

"(1) 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 any democracy, whether or not

the belief in question is popular or mainstream and even if its expression may offend.

(2) 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 limitation or 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.

(3) Whether a limitation or restriction is objectively justified will always 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 that employment.

(4) It will always be necessary to ask (per Bank Mellat):

(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 the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervenor 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 position or role and that of those whose 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;

(ix) whether the limitation imposed is the least intrusive measure open to the employer".

191. Finally, in respect of this part, we refer to three specific paragraphs form *Page* relating to the balancing in that case. It is necessary to note briefly the facts in that case. The claimant in that case, Mr Page, was (amongst other things) non-executive director of an NHS Trust that was responsible for the delivery of Mental Health Services. Mr Page appeared on national television and expressed his *"views: that 'homosexual activity' was wrong, like all sexual acts outside marriage; that he did not agree with same-sex marriage; and that same-sex adoption could never be best for the child".* (From the IRLR headnote).

192. Mr Page was not permitted to be reappointed as a non-executive director of the NHS Trust. The courts were asked to consider whether his treatment amounted to an unjustified interference with his Human Rights and we have referred to the principles the court explained. However, on the particular facts, when assessing proportionality, the court made the following observations when agreeing that the Tribunal was entitled to find that the claimant's rights had not been infringed:

"60. First, the Appellant's expressed views about homosexuality went beyond what [claimant's counsel] somewhat blandly characterises at para 31 of the skeleton argument as 'a sceptical opinion on same-sex adoptions'. ... they included opinions also on same-sex marriage and 'homosexual activity' and were accordingly the more likely to cause offence or invite misinterpretation. I do not say that that is by itself sufficient to justify the Trust or the Authority objecting to his expressing them in public: after all, they reflect the traditional teaching of Christianity and indeed other religions. But it is important to identify from the start what the views were.

61. Secondly, this was not … a case where the justification advanced is merely that some or many members of the public, or members of the Trust's staff, both gay and straight, might find the Appellant's views about homosexuality offensive or disturbing; nor is it based on some generalised perceived reputational damage to the Trust. On the contrary, it is based specifically on the risk that the fact that a member of its board held the views that the Appellant did about homosexuality might deter mentally ill gay people in the Trust's catchment area from engaging with its services.

That risk relates directly to the ability of the Trust to perform its core healthcare functions.

62. Third, the Appellant's conduct made it in practice impossible to try to find a way forward that might have respected both parties' interests. One approach that might have been considered would have been for the Trust and the Authority to accept the legitimacy of the Appellant expressing his views about same-sex adoption, but for him to acknowledge the sensitivities and the consequent potential for damage of the kind noted above, and to engage with the Trust about how to best to address those sensitivities. But it is clear from the history that neither the Trust nor the Authority could have any confidence that the Appellant would reliably co-operate in that way".

193. These comments provide helpful context against which we can undertake the balancing exercise.

Comparators under the Equality Act 2010

194. Section 23 (1) provides

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

195. We were referred to the case of *London Borough of Islington v Ladele (Liberty Intervening)* 2009 ICR 387 in the EAT (confirmed on this point by the Court of Appeal). Elias P explains the difficulties in identifying an actual or hypothetical comparator and refers to paragraph 11 of the judgment in *Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland*) [2003] UKHL 11. Lord Nicholls sets out an explanation of the process for first identifying a comparator and then assessing if the claimant was treated less favourably than the comparator. He then says

"This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others".

196. In our judgment, this is the crux of the decision we have to make, as set out further below. What was the reason for the alleged treatment of the claimant? It is not helpful, in this case, to seek to identify an actual or

hypothetical comparator before then going on to identify the reason for any different treatment.

197. The reason, in this case, means whether the reason for the treatment was because of the claimant's philosophical belief – whether it was a conscious or subconscious reason for the treatment. It is not a requirement of section 13 that the alleged discriminator be motivated by the claimant's philosophical belief or that they had an intention, because of the belief, to treat the claimant less favourably. (*Nagarajan v London Regional Transport* [1999] IRLR 572).

Burden of proof and reason for treatment

198. Section 136 provides

    (1) This section applies to any proceedings relating to a contravention of this Act.

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

199. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude, in the absence of another explanation, that the respondent has discriminated against the claimant. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

200. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of his philosophical beliefs.

201. However, in *Martin v Devonshires Solicitors* UKEAT/86/10 Underhill P said about the burden of proof provisions

    "Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man" (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law".

202. In *Madarassy v Nomura International* [2007] IRLR 246, the Court of Appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, philosophical belief) and a difference in treatment. 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.

203. This means that there must be something more than just unfavourable treatment and a difference in status.

204. In reality in respect of the burden of proof and the reason, in this case and in light of the evidence we have heard, the question for us will be what was the real reason why the claimant was subjected to any detriment or other unfavourable treatment. Answering this question will, in practice, address the question of comparators, the burden of proof and the reason why.

Unfair dismissal

205. A person has the right not to be unfairly dismissed. Section 98 Employment Rights Act 1996 provides (as far as is relevant) that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

206. In respect of the reason under section 98(1), *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee". Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323:

207. In terms of reasonableness in relation to a dismissal on the grounds of conduct, *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303, provides valuable and regularly used guidelines:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further".

208. It is trite law that the tribunal must not substitute its own decision as to whether the decision of the employer to dismiss the employee was fair, but must decide whether the actions of the employer in dismissing the employee were within the range of reasonable responses of a reasonable employer. This test applies to each part of the process leading to dismissal.

209. In this case, the real question is whether the claimant was fairly dismissed for failing to follow a reasonable management instruction. The respondent must consider, when deciding whether to dismiss the claimant, whether the claimant was acting reasonably or unreasonably in failing to follow the management instruction. If an instruction is unlawful, an employee cannot be acting unreasonably in failing to follow it, but even if it is lawful the employer should consider all the circumstances as to whether there are factors that make it reasonable for the employee to fail to follow it. (*Brighton & Sussex University Hospitals NHS Trust v (1) Mr J Akinwunmi (2) Mr J Norris & 4 Others* UKEAT/0345/16/BA).

210. Put another way, the fact that an instruction is unlawful will make it reasonable for an employee to fail to follow it , but the fact that it is lawful does not necessarily make to reasonable for the employee to follow it. We must, as with all other aspects of the unfair dismissal claim, consider

whether a reasonable employer could reasonably consider that it was reasonable for the claimant to follow the instruction.

211. This is, of course, inherently bound up with whether the respondent infringed the claimant’s Human Rights and/or discriminated against the claimant. If the management instructions were discriminatory and/or in breach of the claimant's rights under Articles 9 or 10, it is very likely that any failure by the claimant to follow the instruction would have been reasonable and the instruction itself unreasonable.

212. In considering the reasonableness of the investigation, we refer to *Burchell* and the ACAS code. *Burchell* says that the employer should carry out as much investigation into that matter as was reasonable in the circumstances.

213. The code says

“5.It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6.In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing”.

214. It is a matter for our judgment applying the test of what would be within the band of reasonable responses of a reasonable employer and principles of natural justice whether the investigation was reasonable in all the circumstances. In respect of our findings that Ms Giles was Mr Curtis’ line manager, and he was being asked to investigate (or perhaps potentially ought to have been asked to investigate) the reasonableness of the management instruction she issued, we have been unable to find any authority directly on this point. However, we note that the EAT gives a wide discretion to employers to conduct a reasonable investigation having regard to all the facts of the case and the size and resources of the employers. For example in small businesses it has been held to be acceptable for the manager deciding the allegations to also undertake the investigation. In our view therefore, we should apply normal principles of fairness and the band of reasonable responses test when determining that question.

Breach of Contract

215. In respect of the claim of breach of contract by way of failure to pay notice pay, the question for the tribunal is whether the claimant acted in repudiatory breach of contract such that the respondent was entitled to dismiss the claimant without notice. A repudiatory breach means a breach that is so serious that the respondent is entitled to treat the claimant as

having abandoned or rejected the contract of employment. A deliberate refusal to follow a management instruction is capable of amounting to a repudiatory breach of contract, but it would normally require an element of intention, or wilfulness. (*Laws v London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W.L.R. 698).

216. We must, therefore, decide whether the claimant did fail to follow a reasonable management instruction, including whether the instruction was reasonable (as discussed above and having regard to the matters discussed in respect of discrimination) and, if so, whether the claimant's actions amounted to a fundamental breach of contract going to the heart of the contract.

Conclusions

Belief

217. We consider first the question of whether the claimant's gender critical beliefs as set out in Appendix 2 to this judgment are protected under section 10 Equality Act 2010.

218. As discussed above, the respondent does not take any issue with any of the *Grainger* criteria except whether the claimant genuinely holds the belief. This was on the basis of evidence the claimant gave in the hearing that the claimant would not take issue with individuals self-identifying as any gender. Having considered and analysed the claimant’s evidence as set out above, we find that the claimant's written evidence and oral evidence was not inconsistent. We have little difficulty in finding that the claimant does hold genuinely hold the beliefs as set out in the claimants witness statement.

219. As there were no representations about the other *Grainger* criteria, we address them briefly:

a. It is clear that the beliefs *are* a belief rather than an opinion or view point. This is clear from paragraph 86 of the claimant's witness statement where the claimant explains that the claimant is unpersuaded by the possibility of changes in scientific research. It is in our view a fixed belief.

b. The belief is as to a weighty and substantial aspect of human life and behaviour – the claimant referred in oral evidence to a case in which a biologically male reconvicted rapist self-identified as a woman and there was a controversy as to where they should be imprisoned. The claimant’s belief covers important aspects of life including the way that individuals interact with each other.

c. The belief is internally cogent and consistent, and it is about a serious and important matter. That is amply demonstrated by the continuing

controversy about gender self-identity that is evident not just on social media but in traditional media and political arenas.

d. The EAT in *Forstater* have confirmed that gender critical beliefs of the type explained by the claimant (as opposed to the manifestation of them) are worthy of respect in a democratic society and do not conflict with the fundamental rights of others.

220. In our judgment, therefore, the claimant's gender critical belief is a philosophical belief wihtin the meaning of section 10 Equality Act 2010.

Allegations of direct discrimination

221. There are seven allegations that the claimant was treated less favourably than someone who does not hold the claimant's gender critical beliefs. We do not address them individually because they stand or fall together. In reality, all of the alleged acts of the respondent arose because the claimant created and adopted, or expressed the intention to adopt the email footer/pronoun “XYchromosomeGuy/AdultHumanMale” and then refused to refrain from using it when instructed to do so.

222. In respect of the specific allegations, however, we have found as a fact that all the allegations of “treatment” happened.

223. We also find that the reason for each of those acts by the respondent were because the claimant created and adopted, or expressed the intention to adopt the email footer/pronoun “XYchromosomeGuy/AdultHumanMale” and refused to refrain from using the footer when instructed to do so.

224. We therefore find firstly that the reason for the treatment of the claimant was not because of the claimant's protected belief within the meaning of article 9.1 as described in paragraph 181(a) of this judgment.

225. The real questions for us to consider are those set out from paragraphs 189(c) of this judgment and we address those questions now:

226. Was there a sufficiently close causal nexus between the act complained of by the respondent and the claimant's gender critical beliefs?

227. In our judgment there was not for the following reasons. In *Eweida*, the court gave the example of an act of devotion as something that is inherently linked to a religious belief, but there is no obligation for the claimant to show that the claimant was acting on a tenet of the claimant’s belief.

228. In our judgment, this question is answered in this case by asking “why did the claimant create the email footer?” The simple answer, as we have found above, is as an act pf protest. The claimant knew that it was a deliberately

provocative act and the purpose of doing the deliberately provocative act was to try to persuade the respondent to change their policy. The claimant said that the use of the footer was bound to challenge the agenda of those who are implementing it. It was not, as a matter of fact on the findings we have made, done out of a need to adhere to the claimant's gender critical beliefs or "as the most precise expression of the claimant's gender identity". The claimant was, in our judgment, mocking the idea of gender self-identification.

229. That was entirely consistent with the claimant's gender critical beliefs and was in the very broadest sense a manifestation of those beliefs. But it was not a manifestation in sense referred to in Article 9.2 or in *Eweida*. It was not intimately linked to the claimant's gender critical beliefs.

230. The real reason was set out, as we have explained above, in the very first email the claimant sent about it and confirmed in the claimant's various statements about the respondent's policy, the fact that the respondent had in the claimant's view, acted inappropriately, and was facilitating the "steady creep of evil".

231. This means that the respondent did not treat the claimant in the way that they did because of the claimant's protected belief. They did what they did because of the inappropriate manifestation of that belief which fell outside the protection of article 9.2

232. This addresses the claimant's rights under article 9. However, there is no such requirement for a casual nexus between the claimant's footer and the claimant's gender critical belief under article 10.

233. Under article 10, the claimant is entitled to freedom of expression free from interference by the state unless that interference falls within article 10.2 as explained in *Page* and *Higgs*. We therefore consider the remaining criteria as discussed above:

234. Is the interference prescribed by law? In our judgment, the respondent was seeking to comply with its public sector equality duties under section 149 Equality Act 2010. That is a broad provision that means that the respondent should have due regard to the need to foster good relations between people with and without various protected characteristics.

235. In our judgment, the respondent had a genuine intention in introducing the policy allowing self-identification in email footers of encouraging inclusion and feelings of inclusion amongst staff and service users who identified as a gender that was not consistent with their biological sex. This is clear from the policy, the email, the guidance and the meeting minutes were the policy was discussed. This is in accordance with the respondent's duties under section 149 Equality Act 2010.

236. In our judgment, the implementation of the policy was poorly thought through and badly executed. The guidance was vague and allowed the claimant to adopt the position the claimant did. However, this does not detract from our conclusion that the purpose and intention of the policy was to comply with the respondent’s public sector equality duty.

237. We know that the claimant was aware of the public sector equality duty and the respondent’s obligations to comply with it because the claimant raised it in the course of the disciplinary proceedings. The claimant had an appreciation of the need for the respondent to ensure that it considered people with different protected characteristics when making its decisions.

238. The claimant was also perfectly well aware that the footer was potentially offensive and would therefore cause the respondent to have regard to its public sector equality duties.

239. The claimant clearly disagreed with the way the respondent did this in this case, but in our judgment, this demonstrates that the low threshold of “prescribed by law” as explained by Judge Eady is met in this case. The law was accessible to the claimant and the claimant could (and in fact did by the time of the disciplinary hearing) foresee the consequences of the claimant's actions in the context of this law.

240. The next test is whether the interference with the claimant’s right to freedom of expression, or to manifest the claimant’s belief if we are wrong about the casual nexus is proportionate. To consider this we address the guidance provided in *Higgs*:

241. We accept that the claimant’s right to have and express the claimant’s beliefs are important and that the right to express views or beliefs, regardless of how popular or unpopular they may be, is essential in a democracy. We have addressed the question of whether the interference with those right is prescribed by law.

242. In our judgement, the interference with the claimant’s article 10 rights was not because of the claimant’s expression of the claimant’s views, but the way in which the claimant sought to express them. The claimant accepted that the email footer was provocative and could cause offence. The claimant adopted the footer not to express the claimant’s views, but to make a point to try to persuade the respondent to change its policy.

243. By reference, therefore, to the second paragraphs of the *Higgs* guidance, the action taken was not because of the claimant’s exercise of the rights but by reason of the objectionable manifestation of them. The footer was designed to provoke and, we think given the claimant’s acceptance of possible offence, was designed to offend.

244. We address each of the *Bank Mellat* questions and then consider the question more broadly.

245. (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question;

246. The objective the respondent seeks to rely on is upholding its public sector equality duties towards transgender and non-binary people and, more specifically, taking steps to encourage good relations between people who share protected characteristics and those who do not. In this case, between people who self-identify as transgender and people who hold gender critical beliefs. This is obvious from the disciplinary and appeal outcomes. We recognise the claimant's points that "transgender" and "gender self-identification" might not be protected characteristics within the meaning in the Equality Act 2010 (although the claimant referred to the ET case of Taylor v Jaguar Landover which casts doubt on that assertion), but in our view fostering inclusivity towards people who might consider themselves protected is certainly in keeping with the aims of the public sector equality duty. Encouraging inclusion (and thereby discouraging exclusion) is an important aim.

247. We take judicial notice of the divisive nature of the public debate about gender identity and gender criticality and refer to Lady Hale's comments on the difficulties transgender people face *in R (on the application of C) (Appellant) v Secretary of State for Work and Pensions (Respondent)* [2017] UKSC 72.

248. The respondent is a local authority that must provide services to all members of the area it serves. It is therefore, in our view, taking all these factors into account obvious that seeking to present as inclusive of all members of its area so as to facilitate access to its services and not add to feelings of exclusion or isolation of any residents of its area is a very important objective.

249. (ii) whether the limitation is rationally connected to that objective;

250. The limitation is rationally connect to the objective. In our judgment, the claimant's email footers were seeking to make a point that mocked and derided the suggestion that people could identify their own gender regardless of their physiology. Had the claimant's email footer come to public attention – whether by sending an external email or through the press - it would have the effect of presenting the idea to people in the respondent's area that the respondent accepted that it was permissible for its employees to use its resources and its platform to mock people who the respondent served.

251. Removing that risk, by removing the footer, was obviously a way of preventing that. When the claimant resolutely refused to comply with the instruction not to remove it, the claimant's dismissal was an effective way of

removing the risk of exclusion of a group of residents in the respondent's area arising by reason of by the claimant's email.

252. (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question;

253. A less intrusive limitation could have been imposed. Namely, an agreed moderation of the way in which the claimant expressed the claimant's views or manifested (if it were a manifestation) the claimant's belief. This would meet the claimant's rights to freedom of expression and manifestation of a belief without excluding the respondent's client group.

254. The respondent invited the claimant to discuss options with them to enable the claimant to express the claimant's opinions or beliefs, or express the claimant's gender identity in a way consistent with the claimant's beliefs, in a way that was acceptable to the respondent and in a way that would not have been so exclusionary. However, the claimant refused to do so.

255. We also note that the claimant was perfectly aware of the ability to raise a grievance or make a complaint as a council tax payer. The claimant decided not to do this, but instead to take the most extreme approach to protesting the respondent's policy. As already discussed, this supports our conclusions about the separation between belief and manifestation and the difference between expressing an opinion and the manner of that expression. However, the existence of these policies indicates that inviting the claimant to raise a complaint and then consider it would have been an alternative way of agreeing a more proportionate interference with the claimant's rights had the claimant agreed to pursue these options.

256. The respondent removed the email signature remotely, but it was apparent that this would not prevent the claimant reinstating it, as the claimant was explicitly informed not to reinstate it. In reality, therefore, in the face of the claimant's refusal to discuss options with the respondent, the respondent was left with no choice but to discipline the claimant. Even in the course of the disciplinary, the claimant continued to assert that the claimant would not desist from using the footer. The respondent therefore had no choice but to dismiss the claimant.

257. (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

258. In our judgment, the impact on the claimant's rights was limited, at least in part because the claimant refused to consider whether there was any less offensive or les impactful way in which the claimant could express the claimant's views or beliefs.

259. We have considered the fact that the claimant was using the claimant's employer's platform to make a point and to challenge the employer's policy. As already stated, the respondent is a public authority that provides services to all members of its area.

260. Fostering inclusion and ensuring that its services are accessible to all people in the area is an important part of the respondent's role. In reality, the claimant was prevented from expressing the claimant's views in one particular forum in one particular way. The claimant refused to consider moderating that expression to account for the respondent's duties and the claimant was not prevented from expressing those beliefs in other forums or from having the beliefs.

261. This is not like the cases (*Page* for example) where there is an overlap between private and work life, where the employer takes issue with something an employee has done wholly outside of their working environment. In this case the claimant was, in effect, using the claimant's employer's resources and platform to make the claimants point.

262. The claimant knew full well this was what the claimant was doing and the claimant was, as we have already said, seeking to be deliberately provocative.

263. For these reasons, in our view, when considering the potential impact on the respondent and the exclusionary and offensive basis of the claimant's email footer, the balance falls in favour of the respondent preventing the claimant from using the email footer.

264. We are mindful of treating this as a checklist, so we have stepped back and considered the matter in the round and we have also considered the three matters considered by the court in *Page* (set out at paragraph 192 - 194above). Like in that case, the claimant's views were, if not extreme then dogmatic, and were bluntly and potentially offensively expressed. The claimant also made it impossible for the respondent to find a way forward. However, the respondent was less clearly able to express the offense and the specific people who would or could be affected than was the case in *Page*. Conversely, we think it is relevant that the claimant as we have said above, was using the respondent's resources and email system as a platform for expressing the views. This means that the risk of reputational damage and the impact on potential service users was much higher in this case than in cases where an employee has made their views known through their own social media or otherwise.

265. The link between the claimant's views and the respondent was much stronger and created the impression that the respondent held, or condoned, the claimant's views.

266. While we recognise and agree with the claimant's assertion that the respondent adopted a political position by introducing the policy, they had

set out their stance. We make no comment about the lawfulness of the way in which the respondent's policy was adopted, but the respondent's adopted policy was that they accepted the legitimacy of gender self-identification. The claimant's email directly contradicted that and acted directly against the respondent's attempts at being inclusive in accordance with its public sector equality duties.

267. In conclusion, the claimant was deprived of the claimant's rights to express an opinion or the claimant's beliefs in limited circumstances – namely through the claimant's employer's email system. The claimant was not prevented from expressing the claimant's beliefs outside the claimant's employment, or from holding the beliefs. Weighed against that, the respondent attempted to agree a more moderate approach with the claimant in pursuit of its obligations under the public sector equality duty, gave the claimant at least four chances to change the footer and only as a last resort dismissed the claimant.

268. Overall, therefore, the balance fell in favour of the respondent being able to legitimately interfere with the claimant's article 9 and 10 rights (in so far as it was an interference with the claimant's article 9 rights).

269. In the broadest of terms however, and as explained above, this was about the objectionable way in which the claimant expressed the claimant's views or beliefs, not about the fact of the expression of the views or the holding or legitimate manifestation of the beliefs.

270. Having considered the provisions of articles 9 and 10 of the ECHR, we now consider section 13 Equality Act 2010.

271. We can deal with this relatively briefly. For the claimant's claim to succeed, the treatment complained of by the claimant (as set out in Appendix 1) must have been because of the claimant's protected belief.

272. We have already said that none of the treatment was because the claimant held gender critical beliefs. The claimant says the treatment was because of the legitimate manifestation of those beliefs in accordance with Article 9 or because of the claimant legitimately expressing those beliefs in accordance with Article 10.

273. We have set out at some length why we do not agree with that. None of the treatment the claimant experienced was because of the claimant's beliefs (or expression of beliefs). The treatment – all arising from the claimant's refusal to remove the email signature – was because the claimant used a provocative email sign off that was not acceptable to the respondent. This was not because of the claimant's belief or expression of that belief.

274. It is not, in our view, necessary or helpful in these circumstances to consider a comparator or to apply the burden of proof provisions. The

straightforward answer to the question of why the claimant was treated as the claimant was is "because the claimant used an unacceptable email signature and then refused to remove it".

275. It was not because of the claimant's beliefs.

276. For these reasons, therefore, the claimant's claims of direct discrimination are all unsuccessful and are dismissed.

Unfair dismissal

277. We consider first the reason for the claimant's dismissal and whether it was a reason falling within section 98 (1) or (2) of the Employment Rights Act 1996.

278. We find that the real reason for the claimant's dismissal was conduct. This is a low threshold and we have found that Ms Myers genuinely believed that the reason she made the decision to dismiss the claimant was that the claimant had failed to follow a reasonable management instruction and that this amounted to misconduct. We recognise that we did not hear from Ms Myers directly, but the evidence we have seen and heard persuaded us that the reasons set out in the dismissal letter were the real reasons for the claimant's dismissal.

279. We consider the reasonableness of the dismissal and apply the tests in *Burchell*.

280. Was there a reasonable investigation?

281. In our view there was. Firstly, the respondent was required to investigate the reasonableness of the management instruction and the reasonableness or otherwise of the claimant's failure to comply with it.

282. We considered the fact that Mr Curtis was subordinate to Ms Giles, who was the person behind the instructions to remove the email footer, and that Mr Curtis did not interview Ms Giles about that.

283. On balance although it would be best practice for someone who did not report to Ms Giles to have investigated the reasonableness of the instruction she gave, and it would have been best practice for the investigating officer to have spoken to her, the decisions to the contrary were not outside the band of reasonable responses of a reasonable employer.

284. We have found that Mr Curtis was very experienced, was aware of the importance of impartiality and was in fact impartial. He concluded, and we agree, that it was not necessary to interview Ms Giles as the reasoning for

her decisions was set out clearly in the correspondence and it has never been asserted that that was not genuine.

285. Mr Curtis' independence was amply demonstrated by the fair way in which he set out the claimant's arguments in the disciplinary hearing.

286. We also considered whether Mr Curtis gave adequate consideration to the claimant's arguments and the basis on which the email footer was potentially offensive. In our view it was reasonable for Mr Curtis to rely on the advice of the EDI team and associated legal advice. The alternative was Mr Curtis stating whether <u>he</u> felt the email was offensive or not and this is, in our view, a less independent and less robust approach than the EDI and legal teams giving their advice. In any event, it was certainly not outside the band of reasonable decisions for an employer to rely on its dedicated EDI team for advice and guidance as to the offensiveness or propriety of the email footer.

287. Further, in any event, it was not for Mr Curtis to make a decision on whether the email footer was offensive or unacceptable – that was a decision for Ms Myers. Mr Curtis had therefore gathered evidence about whether the footer was acceptable or unacceptable and this was a reasonable way of approaching the investigation.

288. In our view Mr Curtis did a thorough and independent investigation.

289. The next question is whether Ms Myers was entitled to reach the conclusion to dismiss the claimant on the basis of the investigation.

290. In our view she was. Together with Ms Fairfoot, there was a detailed exploration of the claimant's arguments in the disciplinary hearing. The claimant's arguments were that the management instruction was unlawful. It can be seen from the detailed outcome letter that Ms Myers gave detailed consideration to the claimant's arguments about the claimant's rights under the Equality Act 2010 and the ECHR and in our judgment reached a conclusion that she was entitled to reach. In considering this, Ms Myers also considered the reasonableness of Ms Giles' management instruction. Ms Myers gave consideration to this and, in our judgment, in addressing the claimant's arguments and coming to her conclusion, she decided that the management instruction was reasonable.

291. In rejecting the claimant's arguments about the Equality Act 2010 and the ECHR, Ms Myers conversely concluded that the claimant's failure to follow the management instruction was unreasonable.

292. We considered whether Ms Myers was biased because of her involvement in the adoption of the pronouns policy. In our judgment, there was no evidence to suggest any bias or predetermination by Ms Myers. It is the role of a senior manager to be part of the adoption of the respondent's policies.

However the adoption of the policy was removed from the issue to be determined – whether Ms Giles had issued a reasonable management instruction and, if so, whether the claimant had unreasonably failed to comply with it. We find that a fair minded observer would not conclude that Ms Myer's limited views on the policy to adopt pronouns in emails generally would impact on her ability to make a fair decision in the claimant's case and we find there was no evidence to suggest it did.

293. The disciplinary hearing was not unfair in that way.

294. The claimant has not taken any issue with the actual conduct of the hearing and in our judgment the claimant had a fair hearing.

295. The claimant was given the right to appeal and exercised that right. In our view, Mr Menzies conducted a fair appeal and if there was any possibility of basis on the part of Ms Myers, (which we do not think there was) this was remedied by Mr Menzies' careful consideration of the claimant's arguments as set out in his decision.

296. Finally, in terms of the sanction, it was perfectly clear that the claimant would not change the email or moderate the claimant's approach. Even in the disciplinary hearing the claimant was given a chance to do so and refused. In reality, therefore, the respondent was left with no choice but to dismiss the claimant in the light of a deliberate refusal to comply with a reasonable (and lawful) management instruction and the claimant's clear statement that the claimant would continue to do so. This decision in these circumstances was well within the band of reasonable responses of a reasonable employer.

297. The claimant's claim of unfair dismissal is therefore dismissed.

Wrongful dismissal

298. Finally, we consider wrongful dismissal. We must decide whether the claimant actually committed gross misconduct.

299. We can deal with this shortly by saying that we agree with the findings of the disciplinary hearing. The claimant did fail to follow a reasonable management instruction. The instruction was reasonable because the email footer was inappropriate. It was mocking and derisory of people who self-identify their gender and its continued use would have made the respondent look like they condoned the claimant's actions which were divisive and exclusionary and, as discussed above, in direct opposition to the respondent's adopted position that gender self-identification is acceptable. We have considered at great length above the claimant's rights under the EQA and ECHR and find that they were not engaged and/or that the interference with them was proportionate.

300. Had the claimant been willing to moderate the footer or engage with the respondent the claimant's actions might not have amounted to gross misconduct. However, the fact that the claimant stated very clearly that the claimant would not remove the footer and would not comply with a management instruction indicated that the claimant had decided to no longer consider himself bound by the contract of employment. It is an obvious implied term of contracts of employment that employees will follow reasonable management instructions. That term is important – it goes to the heart of the employment relationship.

301. Consequently, by the claimant's repeated assertion that the claimant would refuse to do as asked by the respondent the claimant was in repudiatory breach of contract and the respondent was entitled to summarily dismiss the claimant.

302. The claimant's claim of wrongful dismissal in breach of contract is therefore not well founded and is dismissed.

Employment Judge **Miller**

Date: 28 June 2024

Appendix 1 – the issues

The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 August may not have been brought in time. The respondent accepts that any complaint about the dismissal is in time but contends that any earlier discrimination claims are out of time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period? The claimant relies on conduct over a period as clarified in the further information provided in an extract from paragraph 14 of the document dated 7 March 2023 and now set out in the appendix to this order, which includes a table of acts relied on as forming a continuing act. The respondent confirms that whilst it is accepted by the respondent that the claimant relies on the further information and table as appended, insofar as this is the claimant's wording, this is not agreed.

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the claim for wrongful dismissal/breach of contract made within the time limit in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?

The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2 Unfair dismissal

2.1 Was the claimant dismissed?

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was gross misconduct of 'serious insubordination' for refusal to obey a reasonable management instruction.

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in categorising the claimant's conduct as gross misconduct?

2.5 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2.6 The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed gross misconduct. The Tribunal will usually decide, in particular, whether:

2.6.1 there were reasonable grounds for that belief;

2.6.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.6.3 the respondent otherwise acted in a procedurally fair manner (the claimant does not challenge the procedure followed);

2.6.4 dismissal was within the range of reasonable responses.

3 – Issues relating to remedy for unfair dismissal are omitted as this is judgment on liability only.

4. Wrongful dismissal / Notice pay

4.1. What was the claimant’s notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, was the claimant guilty of gross misconduct?

5. Direct religion and belief discrimination (Equality Act 2010 section 10 and 13)

5.1. The claimant holds gender-critical beliefs and he compares himself with colleagues who do not share his gender-critical beliefs.

5.2 This point is in issue, the respondent does not accept that the claimant's gender-critical belief is a belief within the meaning of section 10 of the Equality Act 2010. The respondent contends that it is an opinion or viewpoint and is not a belief as to a weighty and substantial aspect of human life and behaviour and that it does not attain the necessary level of cogency, seriousness, cohesion and importance and is not worthy of respect in a democratic society and has the potential to conflict with the fundamental rights of others.

5.3. The Tribunal will decide whether the claimant’s belief is a belief within the meaning of section 10 of the Equality Act 2010.

5.4 If so, did the respondent do the following things (including the matters relied on and clarified by the further information set out in the Table in the appendix attached to this order):

5.4.1. Prevent the claimant from using his chosen wording of self- identification pronouns in his email footer, in the manner he chose from the available options, following the instructions and recommended guidance of the respondent?

5.4.2 Subject the claimant to a disciplinary process including an appeal?

5.4.3 Dismiss the claimant.

5.5 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than colleagues who do not share his gender-critical beliefs (e.g. Caroline Lacey, Brigette Giles and Andy Swalwell) and who were permitted to add their preferred pronouns to their email signatures following the same instructions and recommended guidance provided in the Chief Executive's email of 13 April 2022, whereas the claimant says he was denied that right and was subjected to a disciplinary process and dismissed.

5.6 If so, was it because of the Claimant's gender-critical beliefs?

5.7 Did the respondent's treatment amount to a detriment?

6 – Issues relating to remedy for discrimination are omitted as this is judgment on liability only.

Allegations of direct discrimination

Date	Act	Perpetrator	Position/Role
3 May 2022	Email asking 'that [I] do not add' my chosen wording of self-identification to my email footer.	Andrew Elliott	Corporate Programmes Manager
5 May 2022	Verbal instruction(Teams call) to remove my email footer.	Simon Lowe	Strategic Services Manager
5 May 2022	Email instruction to remove my email footer.	Simon Lowe	Strategic Services Manager
20 May 2022	Verbal instruction(Teams call) at approximately 11am for me to attend (with less than 3 hours notice provided) a meeting at County Hall.	Rob McInroy	Business Change and Corporate Programmes Manager

	This was followed by an email instruction at 12:41.		
20 May 2022	Letter (email attachment) notifying me of my 'precautionary suspension from my post and that my access to the Council's IT systems 'will be disabled'.	Rob Mcinroy	Business Change and Corporate Programmes Manager
26 Aug 2022	Following a Disciplinary Hearing held on 19 August 2022, I was notified by letter (email attachment) that I had been 'summarily dismissed without notice' with my last day of service being 26 August 2022.	Deborah Myers	Director of Children and Young People, Education and Schools
9 Nov 2022	Following an Appeal Hearing held on 27 October 2022, I was notified by letter that my Appeal had been dismissed and that that decision was final.	Alan Menzies	Executive Director of Planning and Economic Development

Appendix 2 – the claimant's belief

77. It is my believe that sex is biologically immutable, that there are only two sexes in human beings, that this is fundamentally linked to reproductive biology, and that human beings cannot change sex. This belief is consistent with current UK legislation, as confirmed in June 2021 when the Employment Appeal Tribunal (EAT) judgement (UKEAT/0105/20/JOJ), in the Maya Forstater gender-critical discrimination case, held that: 'belief that sex is immutable and binary is, as the Tribunal itself correctly concluded, consistent with the law' [114]. Further, in the same EAT [115]:

...the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament, not a court or tribunal considering whether a belief is protected under s.10, EqA, to declare otherwise.

78. I believe that males are people with the type of body which, in the absence of defects, disorders or anomalies, is able to produce male gametes (sperm);

females have the type of body which, in the absence of defects, disorders or anomalies, is able to produce female gametes (ova) and to gestate a pregnancy.

79. I believe that women are adult human females and men are adult human males.

80. I believe that in the absence of genetic disorders, each cell of the human body has 23 pairs of chromosomes, with the 23rd pair determining biological sex; so that if the 23rd pair of chromosomes is XX the person is a female, and if XY the person is a male. Within each pair of human chromosomes—except for this one pair in males—the same genes appear in the same order on each structure.

81. I believe that to naturally perpetuate the human species (that is, excluding medical interventions), fertilization must occur between a male and a female. In the fertilization event, where the male gamete (the sperm) fuses with the female gamete (the ovum), a zygote containing 46 chromosomes is formed. That zygote contains all the genetic information required to produce a new individual organism, and following fertilization starts to divide and eventually becomes an embryo, which develops into a baby.

82. I believe that it is impossible to change sex or to lose your sex: girls grow up to be women and boys grow up to be men, and no change of appearance, physiology, psychology, medicalisation, social conditioning, or declaration, can turn a female person into a male, or a male person into a female; and that no such biological transition has ever occurred.

83. While I believe that everyone has the right to live and to present as they choose under the law and to be treated with respect and dignity, and I endeavour at all times to be polite and courteous, I believe that it is unreasonable for any person to expect others to automatically refer to them by the pronoun associated with their chosen socially constructed gender.

84. I believe that even if a person declares that they identify as (or declares themselves to be) a member of the opposite sex (or both sexes, or neither) and asks others to go along with this, it does not change their actual sex, no matter how many other people choose to accept or affirm this declaration.

85. I accept that some women have conditions which mean they are unable to produce ova or cannot conceive or sustain a pregnancy. Similarly, some men are unable to produce viable sperm. These people are still women and men.

86. Notwithstanding that there may still be areas of scientific discovery about the pathways of sexual development, including chromosomal and other disorders of sexual development (so called ‘intersex’ conditions), and about the psychological factors underlying transgender identification and gender dysphoria, I believe that no such research will disprove the basic reality that there are only two sexes.

87. I believe that if a biological male claims to be a woman that is fundamentally untrue, even if that person has obtained a Gender Recognition Certificate (GRC); that there is no spectrum in sex and there are no circumstances whatsoever in which a person can change from one sex to the other, or to being of neither sex.

A person is either one or the other, there is nothing in between and it is impossible to change from one sex to the other.

88. I believe that losing reproductive organs or hormone levels through illness or surgery does not stop someone being a woman or a man.

89. I associate and have always associated social gender with binary biological sex; and I believe that the Gender Recognition Act 2004 (GRA) construes social gender as biological sex, referring, as it does, to gender in binary terms: ‘either gender’, ‘living in the other gender’, ‘if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman’.

90. I believe that until transgender persons and their more radical gender-identity activist supporters formulate and agree a definition that unequivocally excludes predatory males from any general definition of trans-identifying men, transgender persons will continue to be politically exploited by extreme trans activists, and women’s single-sex spaces will remain compromised.