EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102841/2023

Held in Glasgow on 17 – 21 June 2024
Deliberations on 21 June, 1 and 3 July 2024

Employment Judge D Hoey
Members P McColl and W Muir

Mr K McBride	**Claimant** **In Person**
Scottish Ministers	**Respondent** **Represented by:** **Mr C MacNeill KC & Mr K McGuire – Counsel** **[Instructed by Messrs Anderson Strathern]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that each of the complaints is ill founded. The claim is dismissed.

REASONS

1. The claimant raised a number of complaints in connection with his gender critical/sex realist beliefs. The respondent disputed the claim.

2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. While the claimant was not legally represented at the Hearing, he had the benefit of legal advice prior to raising his claim, evidenced by the high quality legal pleadings and

information he had submitted. The claimant was extremely intelligent and articulate and understood the issues arising and the claims he was bringing.

3. The full hearing took place in person with the parties having been given time to prepare written submissions and to speak to them.

4. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality. The rules as to the taking of evidence and how a Tribunal reaches its decision was explained and the parties had finalised a list of issues and were working on a statement of agreed facts which continued during the Hearing.

Case management

5. The parties had worked together to focus the issues in this case which are reproduced at Annex B (and were finalised after the submission stage, following the claimant having been allowed to include a further act of harassment/direct discrimination that had not originally been included in the list of issues but about which fair notice had been given).

6. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time with the parties using one of the days to focus the issues and facts agreed and in dispute.

7. There were a number of preliminary issues that arose in this case.

8. Firstly, an application had been made by Tribunal Tweets to issue live tweets during the Hearing as to what was said and discussed. Open justice is given primacy in Scotland and any derogations require to be in the interest of justice and proportionate. Submissions had been sought in relation to the application and the Tribunal deliberated and issued a decision. Given the importance of the issue, the decision that was issued in this case is found at Annex A to this judgment. This case gave rise to a number of private beliefs of witnesses and

those not present. To reduce the risk of error (and misreporting) which arose by immediate and real time tweeting, reporting was directed to be in the normal way.

9. Given there were a large number of observers, the Tribunal ensured that any production to which reference was made was read out, thereby ensuring everyone was able to follow proceedings and understand the evidence and context.

10. Secondly, the parties had agreed that a person whose name had featured in the productions should not be referred to. It was not necessary to make any order as it had been agreed the name would be removed from the productions (and not referred to during the Hearing).

11. There were a large number of witnesses being called with limited time and so the parties had worked together to agree upon a timetable to ensure the Tribunal's time was used fairly. The parties were able to elicit the evidence they sought in the time available.

12. In passing it is worth noting that in this case evidence in chief had been given by way of written witness statements. This was clearly a case where it was in the interests of justice to do so (and in accordance with the Presidential Guidance and Practice Direction). By having witness evidence in writing, significant savings in time were secured and the parties were able to focus their dispute. Thus there were 2 witnesses whose evidence was able to be agreed with their attendance to give evidence not being needed. The parties were also able to clearly focus their questions to ensure the issues arising were fully and properly addressed.

Issues to be determined

13. The issues to be determined were discussed in detail and focussed by the parties. It was clear from the material the claimant had provided to the Tribunal that he had the benefit of legal advice. That clearly included the framing of the issues in respect of which time and care had been taken. The issues to be determined were agreed and are set out in Annex B. The

respondent had accepted that it was responsible for the actions of the relevant individuals (save for any acts of Pertemps).

Evidence

14. The parties had produced a joint bundle of 1145 pages to which an additional spreadsheet was added of consent.

15. The Tribunal heard oral evidence from Ms Allan, head of diversity and inclusion, (who managed issues arising from the complaints raised by the claimant in connection with the email attachment and Yammer posts), Mr Hope-Jones (who headed up the gender recognition unit and had replied to an email the claimant had sent him), Jonah Coman (learning and development lead specialist who had run a voluntary training event the claimant attended and issued an email about which the claimant complained), Mr McPhail (finance and energy risk lead, who had responded to communications the claimant issued), Mr Howie (HR manager, who considered complaints the claimant had raised), Ms Hunter (deputy head of HR who oversaw some of the claimant's complaints and complaints against the claimant and who assisted Pertemps in their investigation and who decided to terminate the claimant's assignment) and Ms Wallace (HR officer within Transport Scotland who dealt with part of the claimant's complaint).

16. Having read the witness statement of Joanne Streeter (who was head of strategy and compliance in the diversity team who had received an email from the claimant) and Lu Freem (who was an economic and fiscal analyst who had presented an informal awareness raising event which the claimant attended), the claimant stated he accepted their evidence and had no questions. The claimant also gave evidence. The witnesses' evidence in chief was taken from their written witness statement, as supplemented, by oral evidence with each relevant witness being cross examined and asked further relevant questions.

Facts

17. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). There was a large amount of evidence given in this case, both in writing and orally, and the Tribunal only records the facts it had found as necessary to determine the issues in this case. Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time (when viewed in context). The Tribunal is grateful to the parties for focussing the issues and agreeing key facts and making it clear what the disputed position was in relation to such facts.

Background

18. The respondent is the Scottish Government. Pertemps Recruitment Limited (“Pertemps") engaged the claimant with the job title “flexible worker”. The claimant was engaged by Pertemps under written terms of engagement to carry out work for the Pertemps’ clients to whom he may be assigned from time to time.

19. With effect from 6 June 2022 the claimant was assigned by Pertemps to provide services to Transport Scotland (an executive agency which manages transport for the respondent). The agency had around 650 staff with a budget of £3.9 billion. The claimant was a contract worker in terms of section 41 of the Equality Act 2010. The claimant was familiar with temporary work and had been a temporary worker since 2008 until 2015 and then from 2022 onwards.

20. Those who work for the respondent (and its agencies) are civil servants and as such are required to comply with the civil servants code of practice and standards of behaviour. This requires individuals to act impartially and honestly, being respectful of others.

Claimant's beliefs and non-beliefs and desire to test the respondent's position

21. The claimant believes that sex is real, binary and immutable. This is often called being a sex realist or gender critical.

22. The claimant does not believe in gender identity ideology, a concept which he considered difficult to articulate. He believed it was "a belief that the internal self trumps the reality of biological sex". The claimant does not believe that gender ideology is worthy of respect or protection. The claimant also believes that those who believe in gender identity ideology feel uncomfortable when challenged.

23. The claimant was keen to explore and debate with those who do not share his belief their reasons and approach. The claimant is a highly intelligent and articulate person who holds the foregoing belief and non-belief firmly. He keeps up to date with the discussion in this area and is acutely aware as to the conflicts in this area and the fundamental disagreements that exists given the personal nature of the beliefs. He also fully understands the impact challenging one's belief can have upon a person.

24. The claimant believed that gender issues had become "extremely problematic" in many public institutions on Scotland including the Scottish Government. He was aware of the tensions in this area and that the debate was very personal and can cause offence to those on both sides of the divide. The claimant had carefully followed legislation in this area and what elected members (including cabinet ministers) had said about the issues and the debate, including in relation to legislation and social policy. The claimant believed that the respondent (as the Scottish Government) held a view which did not align with his.

25. The claimant wished to identify ways in which he could uncover evidence that supported his belief that the respondent did not share his belief and non-belief. The claimant wanted to see how that would affect civil servant's rights (and in particular their right to hold and manifest the belief and non-belief the claimant had). The claimant purposefully sought out sessions and information and beliefs emanating from the respondent (and any of their staff) which

would allow the claimant to discuss his belief or non-belief and/or provoke discussion as to the position (irrespective of the impact).

26. The respondent sought to create a working environment whereby all workers (irrespective of their religion or belief or non-belief) were welcome and safe,

LGBTI+ event in June 2022

27. On 16 June 2022 the respondent's LGBTI+ Staff Members Network hosted a "LGBT+ Awareness 101" event. The claimant attended the event. The event was not a Scottish Government event nor staff training but a voluntary session to help raise awareness about these issues from those with lived experienced. The sessions were run by the network's committee members on a voluntary basis. Details about the event were included on the respondent's intranet.

28. The target audience was for people interested in ways to support LGBT+ people and to help people understand current terminology. It set out ways to promote inclusion. The event was run remotely and there were around 50 people in attendance and it ran for around an hour. Dr Freem began the event by noting that it was a safe space for people to ask questions but people had to be respectful. It was about how people can be spoken to and interacted with, not their underlying beliefs. The focus was on behaviours (and not beliefs). The sessions were intended to be flexible and to provide a safe space to increase understanding. The respondent supported the sharing of lived experience among colleagues as a key driver in building an inclusive culture.

29. The claimant found the content "trivially problematic at worst". The claimant had not disclosed his beliefs during the session. He had asked a question about how any conflict between trans people and "TERFs" (an acronym the claimant used which he knew to mean (by some) trans exclusionary radical feminist, which is used as a slur by some trans rights activities against gender critical people) would be managed. He asked the question specifically to see what response the claimant's use of the word "TERF" would get. The claimant knew some regarded the term as offensive and chose to use the term himself and was not offended in so doing. Dr Freem, the host of the event, was a committee member of the LGBTI+ network.

30. Dr Freem did not comment on the use of the word and said the respondent wanted people to "bring their whole selves to work" and that people who hold trans exclusionary beliefs should "leave that at home". The intention was that people should respect each other and treat each other kindly to have a safe, inclusive and supportive environment in the workplace. This was Dr Freem explaining the distinction between an individual being entitled to hold and manifest values and beliefs in a home and non-workplace setting and the need for caution and respect for others when manifesting those beliefs in the workplace (or elsewhere). The claimant did not like the response and considered it offensive. The comment had been made at the end of the session (which had itself lasted about an hour) and represented Dr Freem's lived experience and belief.

31. On 20 June 2022 the respondent's LGBTI+ Staff Members Network hosted a "LGBTI+ Awareness 101" event. The claimant did not attend this. The event was hosted by Jonah Coman as a member of the LGBTI+ Network. Jonah Coman was a Lead Specialist in Learning and Development within the Scottish Digital Academy, and a member of staff of the respondent. Both events were voluntary and staff could choose to attend or not.

32. A post-event email was sent to those persons who had booked to attend the event. The email was headed "Pride in SG – Trans 101" and said: "Thank you very much for attending LGBTI+ Network Trans 101 and I hope you found it useful. As I mentioned please fill in the survey. If you want to know more here are some resources you can check out". The email did not direct recipients to any specific link. The email's links were: "SG's Gender Reassignment and Transitioning pathway which includes links to trans employee policy and guidance, the trans language primer, trans in the UK: issues faced by community and radical solutions, Trans rights around the globe – a live document, non-binary people's experience in the UK, the long history of singular 'they', Trans ally toolkit and transwhat and allyship first steps". These were links to websites and sources of information.

33. The link to the document referred to as a "Trans Language Primer" ("TLP") (which was one of the several links that had been included) contained words

that are used in this area with their meaning. The corrected link was sent to all those who had signed up to the event and was sent on 21 June 2022. The TLP is an A-Z glossary of terms with around 200 terms defined. The TLP incudes definitions of TERF, FART, gender critical and biological sex in an inappropriate way. The claimant had seen the TLP before and was aware of it (and knew the way in which it had defined terms). It was not clear when the TLP was drafted and whether or not it is updated as the meaning of terms and their interpretation change in society.

34. The TLP said that "TERF stands for trans exclusionary radical feminist and FART stands for feminism appropriating ridiculous transphobe. Gender critical is what these people call themselves now that they don't like TERF anymore (a term that they were using for themselves within the last decade). TERFs are transphobes loosely organised into a trans hate group. They ally with the conversative religious right to put forth legislation that bars trans people from public and private life. Their current obsession is trans people in sports. While they hate all trans people, they attack trans women especially aggressively as trans women challenge TERF's view of biological essentialism around the identity and experience of womanhood. They also have an unhealthy fascination with trans kids and work especially hard to make the lives of trans kids miserable usually under the guise of protecting cisgender kids." The TLP said that "biological sex was a term set by the medical establishment to reinforce white supremacy and gender oppression".

35. Jonah Coman understood this is a dynamic area and the definitions people use are not rigid and can change with people having different views (and society changing). Some people like to know what terms are and how they are (presently) understood which was why he included the TLP as a link might help raise awareness (for those who wished to open it and consider the terms). The TLP link was to an external site, not connected to the respondent. It would allow people to understand how some people define those terms. The TLP had not been referred to or relied upon during the session. It contained definitions of 201 words which the sender of the email had not checked. The link had been peer reviewed with some endorsements from American

universities and was assumed to contain the meaning of terms in this fast changing area. There is no agreed terminology and the TLP provided a perspective on the varying terminology.

36. The claimant knew about the TLP and had seen it before (and knew what it said). It contained a definition of terms then understood by some in an areas where there were not fixed or settled terms. The claimant was "unsurprised and yet still shocked by the tone and content of the site". The clamant had said he found it "deeply offensive mostly because it's completely false". He had seen the terms before, believed the definitions to be incorrect and had himself used some of the terms. No other issue arose in relation to the training or the other links.

Claimant complains about the material

37. On 15 July 2022, the claimant forwarded a copy of Jonah Coman's email to his manager, Ms Henderson. He stated that just after he started his assignment he "signed up for a couple of training things being run by the LGBTI+ network for Pride month." He noted that although he was unable to attend the second event he did get the links to the materials. He said some of the material was "pretty strange" to him with some parts offensive and he believed unlawful in light of the Forstater employment tribunal decision. He suggested it was not in line with the civil service code or the respondent's values. He said he could not ignore it and said he felt nervous. He said it was offensive to him as he was both Catholic and gender critical. He asked what to do next.

38. On 1 August 2022 Ms Henderson told the claimant the matters raised would be directed to Human Resources, as training resources were collated at corporate level.

39. On 4 August 2022 the claimant emailed Ms Campbell (Pertemps' Civil Services Partner). He said that he had been advised if he wished to raise a grievance he should do so via Pertemps. He asked what to do next. The claimant spoke with Ms Campbell on 9 August 2022.

40. On 22 August 2022 Ms Campbell sent the claimant an email telling him the issues he raised had been passed to Transport Scotland's HR team who were looking into it.

Response to the primer ("TLP") issue

41. In June 2022 the respondent was made aware of an incident following the email with the links about which the clamant had complained. The material had been leaked to a media website and external queries were being received about it. The incident (and the links about which the claimant complained) were taken very seriously by the respondent and the permanent secretary was involved to ensure the matter was properly addressed. The respondent took steps to deal with the matter before the claimant had complained about it.

42. Ms Allan as head of diversity and inclusion considered the material. It was noted that as the training was an informal awareness raising event run by the network, the material had not been quality assessed in the way material for a training event would. The link about which the claimant complained had a glossary of around 200 terms. Ms Allan wished to handle the matter sensitively given there were will being concerns about the individual who had run the session as their photograph had been leaked externally (with contact details). Given the issue gave rise to personal issues and had generated adverse response, the respondent wished to deal with the issue carefully.

43. The respondent made sure the link was not on any of the respondent's materials (and so it did not require to be removed). The diversity and inclusion team attended the awareness session in June to ensure the message being issued was consistent with the corporate position (which was confirmed). Separate reviews of the material were undertaken The material used at the training session were found to be appropriate. The link to the TLP was not

appropriate given some of the definitions. The terms had not been used (by the respondent or the trainer).

44. Discussion took place with the relevant staff networks and it was agreed the link was not appropriate and discussion took place with the individual in question (with a senior member of staff) to remind them of the civil service code and organisational values. It was agreed the individual would step away from training and refresh knowledge. Support was given from the diversity and inclusion team to quality assure materials in future. Support tools were also developed for staff networks and a quality assurance framework was created to ensure appropriate content.

Claimant raises other concerns

45. On 31 August 2022 the claimant emailed Ms Thorpe and Ms Cook of the respondent's Faith and Belief Team with an email entitled "Faith and belief issues in the SG". He referred to comments made by Ministers which he considered hostile to people with gender critical beliefs which he said "some people would regard this as hostility as quite unnerving in the workplace as well as unlikely to be conducive to good policy making". He also referred to "a corporate embrace of Stonewall" and reference to language which is hostile to those with gender critical beliefs which he thought could contribute to a hostile working environment. He concluded by saying "Given the recent outcomes of the Forstater and Bailey employment tribunals and the fact that by some measures gender critical people make up well over half the population I wonder how your team responds to these various issues in policy".

46. The claimant was told in response that Mr Hope-Jones in the Gender Reform Bill team may be able to assist with regard to internal policy and that the faith and belief staff diversity network may be interested in the points the claimant raised. The claimant was told to speak with his trade union if he believed he had been discriminated against. The claimant was also directed to the diversity and inclusion team (which Ms Streeter had headed but was on secondment).

Outcome of investigation

47. On 7 September 2022 Ms Downey of Pertemps emailed the claimant with the outcome of the respondent's investigation into the matters raised by him. He was told that the event was not a corporate training course but an informal awareness raising event run by the LGBTI+ network during Pride month. The context was selected by members of the network and reflected their personal lived experiences. The event had not issued the material referred in the email (about which the claimant had complained). The content of the linked material fell well below the respondent's expectations and had been removed and an apology was issued for any offence caused. Action was being taken to ensure any references material in network events is subject to the same high quality, quality assurance processes that apply to corporate learning events. Work was being done with the LGBTI+ network to test the tools, which network was responsive to lessons learned. The email concluded by hoping the claimant was reassured the matter was taken seriously and active steps had been taken to avoid a recurrence. That communication dealt with the material issues the claimant had raised.

Claimant unhappy with response

48. The claimant replied by email on 7 September 2022 asking for clarity on what the reference being removed meant and noted he received no correction that it should not be taken as gospel. He took issue with the suggestion that it was not part of the respondent's training events given it had been advertised on the intranet and was run by staff during working time. He asked if anybody approved these things in advance and who had done so and if not why not and whether there was disciplinary action. He said "I'm quite sure that if someone had posted an external link to a website referring to the intrinsic badness of "nxxxxxs", some sort of disciplinary action would be considered." He suggested he may need to pursue a formal complaint.

49. Ms Downey (of Pertemps) emailed the claimant on 22 September 2022 communicating the respondent's response to the further issues raised by the claimant. He was told that the reference had been removed from content

send to attendees should a session be run again. He was then assured that the matter had been treated as a complaint and relevant action taken. Lessons had been learned and while the respondent was supportive of network events, content should be appropriate and consistent with the high standards of the civil service. It was accepted that on this occasion greater attention and quality control should have been paid to the linked content for which again an apology was offered.

50. The claimant emailed Ms Downey on 22 September 2022 saying that he did not think this was good enough. He asked further questions about the session and the people who received the link and what training was being offered to ensure openness to gender critical ideas. He believed there was "a fairly hostile environment for people holding gender critical views". He noted that in another session he asked a question about how conflict with trans people and "TERFS" should be handled and he was not told that the term he used was a slur but was told that to allow some people to bring themselves to work, such ideas should be left at home. The claimant was unhappy about the lack of detail on gender critical beliefs and suggested that "in light of the violence gender critical people routinely face from many trans rights activities, it's certainly arguable that the tilt of organisational support towards trans rights and away from diversity of religion and belief is in itself a case of direct discrimination". He was considering making a formal complaint.

Claimant contacts Mr Hope-Jones and Ms Streeter

51. On 20 September 2022 the claimant sent an email to Mr Hope-Jones (who, at the time, was head of the Gender Recognition Unit) headed "Gender reform and SG behaviour". He said Mr Hope-Jones had been copied into correspondence with Ms Thorpe and the Faith and Belief Team and had a number of questions. The claimant said there was clear enthusiasm within the respondent to Pride. The claimant noted pro gender issues are hotly contested and that gender critical beliefs are shared by the majority of Scottish people. He referred to being told that "TERFs" should not bring their beliefs to work because that would prevent others from "bringing their whole selves to work" and said "apparently they didn't understand irony".

52. The claimant asked 4 questions, comprising how much expertise the team had in gender critical beliefs, whether a willingness to engage with gender critical lobby groups had been affected my Ministers who had concerns such beliefs were not valid, what effect such statements were likely to have and whether there was anyone in his team that held gender critical beliefs. The claimant said he had a personal stake in some of the questions and was keen to understand how the Scottish Government thinks about "these problems" so he could "better adapt".

53. Mr Hope-Jones responded the same day suggesting comments about culture, training and networks are best raised with line management or HR and noted the issues appear to be raised in a personal capacity (to which there was a separate email address, which he provided). He also emphasised the civil service code and the need that everyone acts with integrity, honesty, objectivity and impartiality developing policy based on evidence and consultation. Mr Hope-Jones had considered that the claimant had raised personal and policy issues and had sought to respond accordingly. He had advised the claimant that personal views of civil servants were not relevant given their duties under the civil service code to place their personal position to one side and take an evidence based approach.

54. On 29 September 2022 the claimant sent a similar email to the head of diversity and inclusion (who was nominally Ms Streeter) as he had been told the team might be better placed to answer questions about the workings of the Scottish Government around people with gender critical beliefs. The claimant did not mention that he had a personal stake in the questions but noted they were unusual questions and he said "the interaction between corporate body advice to Ministers and the role as employer on this particular issue is quite unusual and merits some consideration". Ms Streeter replied on the same day advising she was seconded out of the team (and referred to another individual within the team who could deal with the matter).

Claimant raises a formal complaint with Pertemps

55. On 4 October 2022 the claimant emailed Pertemps an 8 page formal complaint concerning the Scottish Government headed "Formal complaint of discrimination and harassment on the basis of gender critical belief and the creation of an environment that is hostile to people holding gender critical beliefs". His complaint began by saying the claimant held gender critical beliefs, believing biological sex is real, binary, immutable and important in a wide range of circumstances. Such beliefs are protected under the Equality Act and he noted he was a practising catholic. He noted that when he joined he had "deep concerns over views expressed by the Scottish Government". The document referred to various pronouncements about which the claimant was unhappy and of other issues, such as what he considered to be "more or less explicit encouragement to add pronouns to his email signature" which he considered "to be a kind of profession of faith in gender ideology". He referred to events run by the LGBTI+ Network some of which he attended as he was "curious to hear what was actually taught". He noted a lack of events on faith and belief. He also referred to the events and the linked material, some of which he considered to be "wildly offensive and untrue".

56. He said that his human rights and the law had not been respected or protected and no one was prepared to speak up for "what is right" and that there was "an outright hostility to evidence and honesty inherent in the adoption of trans ideology". He concluded by saying that it was "bizarre and deeply offensive" to admit the linked material was inexcusable but then do nothing about it.

57. Ms Downey, of Pertemps, responded to the complaint of 4 October 2022 noting that the respondent had investigated and provided a response to the initial complaint. She said that she needed to understand what better support the claimant needed from Pertemps or the respondent and asked if there was any concern with the assignment. Pertemps offered to put the claimant in touch with someone from the respondent if the claimant sought further information.

Stonewall event in October 2022

58. The respondent commissioned Stonewall to present a 'First steps to inclusion event' on 6 October 2022. The Stonewall host was not an employee of the respondent. The claimant attended the event remotely. The event considered, among other things, what gender means. The person who delivered the event and was giving information as to their lived experience said that they believed gender was "often expressed in terms of masculinity and femininity" which was largely culturally determined with the assumed sex assigned at birth. and an email address was given to which questions could be sent. The claimant followed up issues with Stonewall after the event to seek more information.

59. The respondent commissioned Stonewall to present an 'Introduction to Allyship' event on 13 October 2022. The Stonewall host was not an employee of the respondent. Again the claimant attended the event remotely. At the session the claimant questioned discussion of the gender critical narrative. The response was that the host felt there was, on occasion, "fear and perception", transphobia and a desire to create inclusive spaces. The speaker said some workplaces had to catch up with society given there is non-binary and gender fluid staff. It was said to be important to ensure all staff feel valid, valued and included. The speaker had encountered "micro aggression and a barrage of hate" and toxic situations. The claimant did not like what he was told, believing there to be hostility to those with gender critical beliefs.

60. The person that hosted the event had given their own views from their lived experience and beliefs. The answer given to the claimant's question was an honest response. The claimant had not disclosed what his beliefs were. He felt the person who spoke was hostile to those with sex realist beliefs, imputed maligned motives to gender critical activism and was "pro trans activism".

61. A member of the respondent's diversity and inclusion team had attended both Stonewall events and confirmed the discussion was respectful and impartial. The content was about inclusivity and the rights of all workers to be themselves. There was no one particular focus. The session was generic.

Complaints being progressed

62. On 20 October 2022 the claimant emailed Ms Demarco at Transport Scotland and informed her that he had submitted his complaint to the respondent's Central Enquiry Unit. He said he had gender critical beliefs and what they mean to him. He noted that he was "somewhat aware of the Trans Language Primer before" and had thought little about it. He said "it was no more ridiculous or offensive than any number of more immediate issues raised by the spread of gender ideology". He looked at it again when the link had been sent to him and set out why he believed it was offensive, which was a definition of TERF which he believed to be offensive and untrue amounting to harassment against gender critical people. He believed the link was "full of wrong and offensive terms" with false, dangerous and discriminatory terms. He regarded it as "offensive and harassment".

63. In early November 2022 Mr Howie (Human Resources People Advice and Wellbeing Manager) became the point of contact in the respondent for the claimant in relation to the issues he had raised. Mr Howie emailed the claimant on 2 November 2022 advising that given the complexity and nature of the complaint, time was being taken to identify who would progress it. He was asked for patience. On 7 November 2022 Mr Howie advised the claimant that in broad terms his complaint was about policy which was not an employment matter and that part would need to be dealt with by the complaints team. The other matters the claimant had raised had already been dealt with and no further action was needed. The claimant was reassured mistakes had been acknowledged, lessons learned and remedial action taken. Apologies had been given.

64. Mr Howie had considered the claimant's communications at length. Having reviewed matters, he believed the issues the claimant had raised had been dealt with internally and as a result no substantive issues were outstanding. As Mr Howie believed the matters had been addressed, he considered that no further action was necessary.

Claimant not happy how his complaint was being progressed

65. The claimant replied saying that he was "insulted". The issues had not been addressed properly in his view. He believed discussions by Ministers were "examples of how the entire context of discussion around gender ideology had been poisoned" and how difficult it was for people who do not believe in gender ideology to express themselves. He wanted to appeal and said he considered the reassurances that apologies had been given to be gaslighting.

66. On 16 November 2022 the claimant emailed Pertemps (Ms Campbell). In that email he said he was dissatisfied with the response he had received.

67. The claimant raised a complaint against Mr Howie and others on 10 November 2022. He said Mr Howie had been dishonest and believed he had been victimised. The complaint ran to 4 pages. He believed his complaint had not been investigated which he said was victimisation. He said his complaint would have been taken more seriously "if it were not the case that gender critical beliefs are generally unwelcome". He sought a proper assessment and serious investigation.

68. On 22 November 2022 the claimant contacted the complaints team and noted he had submitted his formal complaint and wanted an update. On 29 November 2022 he referred to his complaint and the absence of a response and said he would "like to make a formal complaint about service levels" as the complaint had not been dealt with quickly enough.

69. On 28 November 2022 Mrs Hunter (the respondent's Deputy Head of People and Advice, Wellbeing Team) emailed the claimant in relation to the complaint he had raised against Mr Howie. She had reviewed the actions Mr Howie had taken and concluded they were appropriate and action had been taken in relation to the issues the claimant had raised as Mr Howie had said. She noted that the claimant had raised various complaints about various individuals which were being considered. Much of what was contained in the recent complaint replicated what had already been raised and the suite of complaints would be considered. The claimant had been sending a large number of emails, often repeating the same issues, which could be considered unreasonable given the time and impact of the volume of communications.

70. The claimant replied asking if the issues he had raised were going to be looked into as he claimed it had been a lie that the matters had been investigated and he did not appreciate being gaslit. The claimant said the failure to investigate was "prima facie evidence of victimisation and of a bigoted set of organisational practices".

71. Ms Hunter replied noting that his complaint had not been dismissed and pressure of business resulted in delay. The claimant was not an employee of the respondent and determination of his complaint was a matter for his employer (who had been advised as to the steps that had been taken). There was a clear policy to be followed in respect of complaints by employees (which had specific steps and processes) but there was no clear policy that determined how complaints raised by third parties (such as agency workers) would be handled. The fact the claimant was not an employee of the respondent meant the way his complaint was handled was different to how an employee's complaint would have been handled. Complaints by employees required to be progressed in a specific way but there was no such specificity when the complaint was by a third party.

Claimant raises a grievance

72. On 1 December 2022 the claimant emailed a written grievance notification form to the respondent. The grievance related to the material he had raised and suggested his complaints had not been dealt with seriously enough. He wished his complaints to be properly addressed and regular training on gender critical thought.

73. On 5 December 2022 the claimant emailed Mrs Hunter noting that he had submitted a formal grievance and setting out further concerns he had. He asked for a fair and sympathetic hearing for his pro science and pro equality beliefs.

Claimant posts matters on internal network and follows up posts

74. The respondent had an internal site to allow open debate and discussion. The site is called Yammer and allows staff to post comment and discuss matters.

The site is moderated (and in the event material is found to be inappropriate it can be removed). Comments are not pre-moderated and moderators respond to specific complaints (in line with the moderation policy). If the matter is reported, the discussion would be viewed and could be removed.

75. Yammer provided a level of safety to those who posted as posts were public and moderated and there was safety in numbers in the sense that everyone could see what was said and comment appropriately.

76. Specific Yammer pages exist to cover a variety of issues and interests and the all staff page has the widest reach and is usually reserved for matters affecting all staff. The claimant chose to post his comment on the all staff page. The claimant's post had been reported as a breach but the moderation team did not uphold the complaint.

77. On 5 December 2022 the claimant posted a link to a UK forum for civil servants to share gender critical beliefs on the Yammer site. The forum is an independent staff network committed to sex equality and the belief that biological sex is binary. The claimant said "This is a pretty new gender critical staff network for the UK civil service. It doesn't cover the devolved governments though. Does anyone know if anything similar is in the works here?".

78. A number of the respondent's members of staff, including Mr McPhail, responded on Yammer to the claimant's post. Some of the responses were not favourable to the claimant's post. Mr McPhail noted that "I would suggest some of the views contained could be decidedly at odds with the commitments we all have under our trans and inclusion policy" (which was supported by others who thanked him for being a vocal and active ally). Mr McPhail was expressing his opinion (and his beliefs). One person did not think Yammer was the appropriate place to "try to objectively discuss a belief system that serves to debate and undermine colleagues who are that demographic and who may be reading it and feeling incredibly stressed and threatened as a result".

79. Another said that it "didn't look like a friendly place for those who see beyond the binary. Scotgov actively welcome trans and non-binary friends and family". A respondent said "Thank you. I'm not that long out the binary closet and I really don't want to have to go back in to feel safe at work".

80. Someone noted the network had not met for some time and the claimant asked if it was going to be revived. It was noted that the Forstater case might give weight to the establishment of the network.

81. The claimant chose not to report any of the comments for being a breach of the moderation policy. The comments made on the post were visible for all staff to see and any staff member could have reported the matter to the moderation team. The claimant also had the opportunity to reply to any comments on the Yammer site.

82. The claimant chose not to reply to the comments on the all staff page (or complain) and instead made unsolicited contact by private email to some of the respondent's staff who had responded to his post on Yammer. By contacting people by email, the comments would not be moderated or viewed by others.

83. One of the comments to the claimant's post had been that the "cis world can get confused". The claimant contacted that person noting the comment had been made on Yammer and said he did not understand what the point was that was being made and asked for an explanation. There was no substantive response.

84. In another email the claimant said "I saw you on my Yammer conversation and I was wondering if your non-hostile comments meant you were actually a wee bit gender critical yourself". There was no response.

85. He also asked another "You said you thought some colleagues might be feeling increasingly stressed and threatened by this conversation even existing. Can you expand on that please? I don't want to cause harm to anyone but I really don't understand what that harm could be". There was no reply.

86. The claimant contacted Mr McPhail by email commenting about what had been said on the Yammer post. The claimant wanted to understand what he had meant by some of his posts. A discussion as to the position ensued. The claimant repeatedly replied with further questions, seeking to discuss the issue further. On 7 December 2022 Mr McPhail contacted the claimant's line manager with regard to the way in which the claimant had conducted himself.

87. In another email the claimant sent he noted the comment that had been made and said "I didn't think a public discussion would be very useful". He sought more information about the comments. There was no reply.

88. The respondent became aware that the claimant had contacted members of staff by email concerning his Yammer post because by taking matters offline, there was no ability to moderate the discussion and some of the recipients were not comfortable with the private discussion. Some of the persons whom the claimant had contacted had self-identified as trans or non-binary and some told the respondent they felt unsafe and harassed as a result of the claimant's unsolicited private communication.

89. Ms Allan had considered a complaint that the claimant's original post was against the rules but she did not uphold the claimant. The respondent recognised the right all staff had to their beliefs and manifestation of their beliefs. All protected beliefs and non-beliefs were welcome in the respondent's workplace.

90. Once the respondent became aware the claimant was contacting individuals directly on the thread which had caused distress to some, the moderation team switched off the thread.

Claimant had contacted others about the issue

91. Around the same time the respondent had been told some felt harassed by the claimant having contacted them about their message on the thread, the respondent became aware that the claimant had contacted other members of staff about the awareness events. The respondent had been receiving complaints that the claimant had been contacting people directly.

92. On 29 November 2022 the claimant had contacted the learning and development network and made reference to material that had been discussed at the event and suggested the article to which reference had been made had been "comprehensively debunked and is offensive" and "bad science". He gave links to other articles to read. He was told the event was not part of the respondent's formal training events and was a voluntary awareness session delivered by colleagues with lived experience. The claimant sought to discuss matters further.

93. Similar emails had been sent by the claimant to others about his concerns. The claimant sought to discuss matters at length by email. Some of the recipients felt harassed by the way in which the claimant had contacted them to seek their views.

94. The respondent became aware that the claimant had contacted members of staff concerning the Stonewall events. The claimant contacted Stonewall and then copied the discussion to individuals within the respondent. Ms Allan had discovered a number of the email chains the claimant had initiated which appeared to be of no relevance to his role and go beyond awareness raising. Concern was being raised about the claimant's behaviour.

95. Ms Allen became aware of the claimant's emails to Ms Streeter and Mr Hope-Jones. The claimant had emailed with "a few questions about the working of the Scottish Government around people with gender critical beliefs". He referred to ongoing issues, the Forstater decision and how gender critical beliefs can be supported. He asked about the team's expertise in gender critical beliefs, how the diversity and inclusion policy was dealing with matters, how statements made affected the position and how the link with Stonewall and comments by Ministers created a welcoming or otherwise environment for gender critical people.

96. The respondent noted that the text the claimant had used was similar text the claimant had used in his contact with several teams and from several different angles. There was a concern about the claimant contacting outside contractors and making reference to members of the team. A number of staff

had been uncomfortable with the way in which the claimant had contacted them and the way in which he had done so, repeatedly raising the same issues and seeking to debate matters at length.

97. For example on 6 December 2022 an individual with whom the claimant had been communicating about the issues sent the respondent the email trail which involved the claimant following up emails with further questions and issues. The individual regarded the way in which the claimant had approached matters as harassment.

Decision taken to terminate claimant's assignment due to way he acted

98. On 7 December 2022 the respondent emailed Pertemps instructing it to terminate the claimant's assignment (with the respondent) with immediate effect. The reason for the decision was because of the way in which the claimant had contacted staff, which the respondent considered to amount to harassment.

99. A number of individuals had raised concerns about the amount of material that had been raised. A number of individual employees within the respondent's employment had indicated that they felt harassed by the claimant and his contact of them. There was a concern that a number of colleagues felt unsafe. The respondent had received complaints about the way in which the claimant had acted (by private email). The respondent considered the claimant had engaged upon a "scattergun approach" emailing different staff and training providers which raised wellbeing issues.

100. The main trade union representative had contacted the respondent noting that concerns had been raised by members as a result of the claimant's approach and other unions had raised similar concerns.

101. Having considered matters and taken account of the impact of the way in which the claimant had conducted himself, the respondent decided to terminate his assignment. The respondent considered the claimant had inappropriately directly sought out and emailed employees in a persistent way which resulted in them feeling harassed, intimidated and unsafe. The

respondent did not end the assignment because of the claimant's beliefs but because of their view that the way in which the claimant had acted had been inappropriate and a breach of the civil service code and standard of behaviour. The respondent considered there to be cumulative evidence of the inappropriate behaviour through his direct emails to staff following the Yammer post. The level of concern had been taken into account, with concerns having been raised (independently) by staff and trade union officials. The respondent had no issue with the claimant's post (nor his belief or non-belief) but his decision to identify those who responded and contact them directly to find out their position on the issue was felt to be intimidatory, particularly where it was clear the conversation was, in places, unwanted.

102. At the time in question most staff had been working from home which resulted in the claimant's direct emails having additional impact as they felt intruded at home given the direct and personal nature of the claimant's approach. Some staff had been distressed and some had been so affected by the claimant's behaviour that they had become ill (and at least one member of staff was absent from work). Some trans persons had been offended by being questioned to justify their position which they felt undermined their identity. The fact the claimant had chosen to make it personal by asking individuals, in a private email, questions, not using the public site, had taken away the feeling of safety since comments made on the site could be seen by everyone.

103. The claimant's behaviour was considered to be inappropriate, intimidating and harassment. The respondent balanced the claimant's position with those facing his behaviour who felt harassed by the way in which the claimant had approached them. It was important to the respondent that staff do not feel threatened or harassed in the workplace and that behaviour was appropriate and respectful.

104. The claimant's assignment with the respondent ended on 7 December 2022.

Grievance with Pertemps

105. On 7 December 2022 the claimant was invited to attend a grievance meeting with Pertemps which took place on 13 December 2022. The issues the

claimant had were discussed. The claimant noted comments made by Dr Freem and said "I didn't say anything at first. I didn't think it was a big deal". He referred to the other events and said he did not think the response was good enough.

106. The respondent assisted Pertemps with their investigation into the claimant's complaint. Ms Allan had set out the respondent's position and explained the work that had been done and how serious the respondent took the complaint. She noted that the claimant had been told that lessons had been learned and actions taken. Discussion took place with Pertemps as to the issues and the respondent dealt with questions Pertemps raised as to the claimant's concerns. For example on 6 February 2023 a detailed email was sent by Ms Allan to Pertemps summarising some of the issues the claimant had raised and what was done and decided by the respondent. The respondent confirmed the areas raised by the claimant had been considered and investigated and action identified and taken. Ms Allan wanted to be careful in protecting identity of staff who had raised complaints about the claimant and the way in which he had acted. Ms Allan struck a balance of providing sufficient information to allow the claimant's grievance to be progressed while protecting the individuals in question.

107. The grievance outcome letter was sent to the claimant on 8 February 2023. The claimant was reminded that the training event was not a corporate event but run by the LGBTI+ Network during Pride awareness month run by those with personal lived experience. The material that caused the claimant offense was part of additional reading and steps were taken to ensure improved quality assurance going forward. An apology had been issued.

108. The claimant was unhappy with the grievance outcome and asked 14 questions, including why nothing was done to make it clear the attachment was not gospel, whether his complaints had been investigated and what had been done.

109. On 28 March 2023 the claimant was informed by letter of the outcome of the appeal in a 4 page letter. Pertemps was satisfied all reasonable steps had been taken to progress matters and the matter was concluded.

Observations on the evidence

110. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position and set out the position as they saw it.

111. The claimant had agreed the evidence of Lu Freem and Joanne Streeter whose evidence was accepted. Lu Freem felt that the claimant had been "fishing for responses and using his views to elicit emotion".

112. The Tribunal found that **Ms Allan** answered the questions clearly and cogently. She was credible and reliable. The Tribunal found that she was honest, fair and even handed. Ms Allan had been responsible for dealing with the issues that arose in relation to the claimant and had made the decision to end the claimant's assignment with the respondent. She explained the steps the respondent had taken in dealing with the various complaints the claimant had raised. It was clear that the respondent took the issues raised by the claimant seriously, as seriously it did concerns that had arisen about how the claimant's behaviour had impacted upon staff.

113. Ms Allan had been concerned by the claimant's systematic approach in taking his (and others') comments off line resulting in some staff feeling unsafe and harassed. There was a concern about the amount of time the claimant was spending on the issue and the amount of time taken from other staff to answer the various questions posed by the claimant.

114. Ms Allan had made the respondent's position clear, which the Tribunal accepted, that the respondent sought to make their working environment a place where persons of all (and any or no) religion and belief could work. She had been careful to show respect for the claimant's beliefs and non-beliefs whilst also ensuring those with other beliefs and non-beliefs were equally protected. The claimant's suggestion that Ms Allan had been against what he believed had not been established. For example Ms Allan had refused to

uphold others' complaint that the claimant's original Yammer post was against the rules. Ms Allan understood the claimant's right to have his beliefs (and non-beliefs) and to be able to manifest those. She was "pro equity and fairness" and wanted to be (and was) fair handed in her approach to the workplace issues she faced. Had the claimant complained about any post, his issues would have been treated in the same fair and even handed way. He had not done so.

115. Ms Allan had fairly conceded in cross examination that some of the comments made in response to the claimant's original may have been moderateable. (It was not accurate to suggest, as the claimant does in his submissions, that the position in that regard was without doubt). Ms Allan noted a team would decide whether or on the moderation policy had been breached following upon a report but she fairly noted that the claimant had chosen not to report the matter (and thereby have the discussion closed). In fact the claimant had pursued the discussion. It was clear that the claimant wanted to tease out the views of the respondent's staff. Ms Allan was clear that in relation to the treatment the claimant had received, the same outcome would apply irrespective of the person's belief or non-belief. She was clear that the claimant's belief or non-belief was not a reason for the treatment or connected to it. The sole reason was the way in which the claimant had acted and the effect his behaviour had on staff who had to be protected given the impact the claimant's behaviour had. The Tribunal considered that very carefully in light of the oral and written evidence and found that to be an accurate description of the position.

116. **Mr Hope-Jones** explained his position clearly and his response to the questions the claimant had asked. He had been asked about his position and the work of the respondent. On occasion the claimant was seeking to discuss the policy of the Government and seek to debate the policy and general issues rather than the issues pertaining to his claim. Mr Hope-Jones was clear that civil servants had to ensure impartiality in their role. The respondent's position was clear that individuals were entitled to their beliefs and non-beliefs but required to be impartial and respectful at work. The claimant had sought to

ask Mr Hope-Jones about his views on legislation and policy and general issues relating to the claimant's belief which were not relevant to the issues to be determined in this case. The claimant was seeking to debate high level policy matters rather than focus on the specific treatment and the reasons for it.

117. **Jonah Coman** set out the training delivered and the approach taken to the issues whose evidence was clear and candid. The TLP was not something that had been relied upon during the training event. The TLP provided some definitions (of 201 terms). The link had not been checked as it was assumed the link had contained terms that were used in this area and those wishing to inform themselves of the meaning ascribed to terms by some in this area could do so. The terms used in this area have no rigid meaning and can change. While no formal disciplinary action was taken, it was clear that the respondent had taken the claimant's complaints seriously and reflection had been directed a process found to be harrowing.

118. **Mr McPhail** explained his response to the claimant's communication and why he took the steps he took. Mr McPhail was concerned to ensure all individuals were respected and could feel safe in the workplace. The claimant sought to focus on Mr McPhail's personal beliefs rather than those relating to the issues in this case and the approach the respondent took. Mr McPhail gave his evidence in a fair and even handed way. He believed the claimant had been trying to bait him, to encourage him to raise matters that the claimant knew he would disagree with. The claimant sought to ask Mr McPhail questions of general legislation and policy matters rather than issues germane to the specific complaints and issues in this case.

119. **Mr Howie** explained the steps taken by the respondent in dealing with the claimant's complaints and he explained the concern about the number of complaints that had been raised and the way in which they had been raised. He had taken the claimant at face value and tried to manage the issues and once the claimant complained about him, took a step back. Mr Howie's view was that the claimant's complaint that he had been offended was something to be investigated in the usual way. He genuinely wanted to investigate the

concerns the claimant had to the extent they had not already been dealt with and find the most appropriate way of dealing with the issues. As a result Mr Howie had assumed that as Ms Allan had considered the issues the claimant had raised, the matter had been fully investigated and resolved. The claimant had been unhappy with the extent to which matters had been investigated, but Mr Howie believed the issues had been dealt with internally. Mr Howie had understood the issues the claimant had raised had been dealt with and as a result no substantive issues were outstanding. That was his belief.

120. Mr Howie had approached the matter impartially and in cross examination he was clear that he respected all beliefs and non-beliefs and his approach would have been the same irrespective of what the person's beliefs and non-beliefs were. He approached the matter professionally without judgment. There was no evidence to suggest that was incorrect.

121. **Mrs Hunter** gave evidence about how the claimant's complaints were handled. Mrs Hunter understood, as had Mr Howie, that the issues about which the claimant complained had been dealt with (by Ms Allan and others) such that there were no outstanding matters. No specific enquiries had been made to ascertain precisely what had been done in relation to each specific point which led Mrs Hunter to be unclear as to the specifics of each individual issue. The Tribunal did not doubt that Mrs Hunter believed that the matters the claimant raised had been dealt even if she was unable to explain precisely what had been done.

122. The difficulty arose because the claimant was not an employee of the respondent. As a result, the normal process following a complaint by an employee (and the associated rigour and detail) was absent. There was a lack of clarity as to the specific process followed in such cases (in contrast to the clear approach followed for staff complaints). The same approach would have been taken in relation to any other complaint a temporary worker had raised, irrespective of their belief. Mrs Hunter was clear in stating that the claimant's belief and non-belief was entirely irrelevant to the process, which the Tribunal accepted. Part of the challenge lay in the number of complaints and the way in which they had been raised.

123. Mrs Hunter was concerned in her evidence about the impact on other individuals and on occasion had to be asked to answer a direct question. Whilst there was sensitive and personal information, the questions appeared relevant to the issues in this case. Mrs Hunter did her best to recall matters and treated the claimant in a fair and even handed way.

124. **Ms Wallace** gave a clear account of what she had done in relation to the claimant's complaints. Ms Wallace noted that the respondent had assisted Pertemps in dealing with the concerns the claimant raised. She also noted the lack of clarity that existed (as seen when Mrs Hunter gave evidence) in relation to complaints by temporary workers in relation to the respondent (given the respondent was not the claimant's employer).

125. **The claimant** did his best to answer the questions put to him and often wanted to focus on points he considered relevant and necessary rather than the carefully crafted questions that were put to him. On occasion the Tribunal found the claimant to be evasive, seeking to focus the issue solely in relation to his beliefs rather than upon the impact his behaviour had upon others. Overall the Tribunal found the claimant to be disingenuous in places and lacking in objectivity. That was in part because the claimant was keen to find evidence to support his (erroneous) belief that the respondent had a belief and that it was contrary to his. The claimant repeatedly wanted to engage in a general debate as to his strongly held belief and non-belief irrespective of the impact upon others (particularly those who do not share his beliefs).

126. During his cross examination of many of the respondent's witnesses, the claimant sought to engage in a debate as to the legislation and policy in this area. The claimant knew that it was controversial and hotly contested on each side of the debate. He also tried to elicit the personal views of witnesses. The claimant had to be reminded the Tribunal had to focus upon the specific issues it had to determine and not general matters of social policy. Moreover the respondent's witnesses were civil servants who were bound to place their views to one side and act impartially. While the claimant believed that did not happen, it was clear each of the respondent's witnesses had sought to remain impartial and respect the claimant's position and that of those who disagreed.

The claimant believed that because he felt he had been treated adversely, it must have been because of or related to his belief or non-belief but in reality the respondent had gone to great lengths to recognise and respect the claimant's position (and that of others).

127. The claimant denied that he had been disingenuous in his approach but the Tribunal found, in places, that to be accurate. The claimant had clearly sought to engage with individuals specifically with the purpose of encouraging debate and discussion on an issue about which the claimant fervently believed. The claimant said he was anxious about the respondent as he believed the corporate approach displayed by the respondent was not to support his beliefs. However, the claimant had focussed on pronouncements by Ministers and others, rather than upon the approach the respondent (as an employer) had taken. The respondent's approach, objectively viewed, was to seek to be inclusive and respectful of all individuals irrespective of belief.

128. The claimant argued that in seeking to take the Yammer discussion off line into private emails he was following the grievance process by raising the matter with the relevant person to secure an informal outcome. However, the claimant was unable to explain what outcome he was seeking by raising the matter with the individuals given he knew full well what their position in relation to the questions he was raising would be (and their views were unlikely to align with the claimant's). He said it was "arguable" that this was his intention. He was disingenuous in suggesting that was why he was contacting the individuals, when in reality his purpose was to seek evidence as to their views, with which the claimant knew he would disagree, which he would consider as supporting his belief that the respondent had a belief that was contrary to his own.

129. The claimant had sought to downplay the amount of time the claimant had caused those within the respondent's employment to deal with the issues he was raising (which were issues not pertaining to the work of the individuals, the claimant or the respondent). For example the claimant suggested that following the training sessions he "began to ask a few questions elsewhere". This was a massive understatement given the claimant had in reality sought

out as many opportunities as possible to seek the views of individuals and teams within the respondent as to their position. The claimant sought to engage in lengthy debates and discussion as to the issue, despite on occasion it being obvious that such individuals did not wish to engage with him. This was evidence of the claimant's poor ability to see the impact his conduct had upon others. On occasion the claimant knew full well the impact his approach had taken and yet continued regardless. For example the claimant believed those who believed in gender ideology would be offended by being asked questions. The claimant sought out those who could well have such beliefs and asked repeated questions about their position.

130. It was regrettable that the claimant was unable to see matters from any other perspective. The respondent had been seeking to deal with the issues the claimant had raised in a respectful and measured way. The claimant wished to raise his beliefs with as many people as he could and spent a large amount of time raising the issues and attending sessions to provoke discussion and debate, and to seek out views and comments with which he disagreed.

131. The claimant was purposefully seeking out views of those whom the claimant considered would hold views with which he would disagree and he sought to elicit their beliefs in an attempt to evidence the belief he had that the respondent did not agree with his position. That endeavour prevented the claimant from seeing the objective reality and also prevented the claimant from seeing the impact his behaviour had on individuals. When the claimant was asked if he was seeking to provoke debate and reaction by asking Lu Freem the question he did, the claimant argued he was not provoking a reaction but instead was "testing attitudes". Again the claimant was disingenuous since he was clearly seeking to engage in debate that would result in evidence to support his position.

132. While the claimant was clearly able to articulate the offence he felt, he repeatedly failed to see the significant offence and harm his approach had created. Thus the claimant wanted the Tribunal to find that those who believed in gender ideology did not have a belief that was worthy of his respect in his view (and he was comfortable misgendering an individual, believing there to

be no merit in their beliefs). When asked about having misgendered someone (which the claimant admitted having done) he initially said it was accidental and then said in fact he was "using natural accurate language". The claim was well aware of what he was doing and was not respectful of those who did not share his beliefs. It is possible to disagree with someone who has opposing views and still maintain respect. The claimant had not done so.

133. The Tribunal had no doubt that the claimant's belief was genuinely and firmly held but the claimant had poor self-awareness and was unable to view matters objectively. This was seen when the claimant had misgendered an individual. The claimant did so as he did not believe in that individual's position and believed that his position was more deserving of respect (despite the obvious impact his comments could have). Another example of this was the claimant seeking to rely on the grievance policy's reference to an informal resolution by speaking with the individual in question. He argued that was what he was doing by approaching the individuals by email but was unable to explain how his direct emails would in reality resolve the dispute given he knew the individuals had a different view to his.

134. One of the issues in this case that had led to the claimant believing that his position had not been respected was because of the lack of clarity with regard to how his complaints were to be investigated. This had arisen because the claimant was a temporary worker, employed by a third party, and not an employee of the respondent. There was no clear policy the respondent had that dealt with complaints by temporary workers engaged via a third party who wished to complain about issues arising within the respondent (which contrasted with the position vis a vis employees of the respondent). The respondent sought to deal with the complaint in a proportionate manner, with due regard to its employees and the impact upon them. The claimant had failed to see the distinction between being an employee of the respondent and a temporary worker. For employees there was a clear and well known policy and approach that would be taken. That was not the position in relation to temporary workers and had created uncertainty. The claimant had sought to compare his position to that of an employee of the respondent but that was

not a sound comparison since the claimant was not an employee and the procedure that would have been followed, had the claimant been an employee of the respondent would have been fundamentally different.

135. The claimant believed that Mrs Hunter had treated him differently because of his belief and non-belief in how she managed his complaints (along with Ms Allan) but in reality the difference in approach was because the claimant was not an employee and the rigid policies that applied to employees did not require to be followed. Mrs Hunter believed Ms Allan and others had dealt with the issues the claimant had raised, which had in part been done, but not the claimant's satisfaction (and not in the way a complaint would have been dealt with if it had come from an employee). The claimant's belief that it was his belief or non-belief that had motivated the difference in approach which he saw was not at all motivated or influenced by his beliefs but rather by his employment status and the different legal relationship he had with the respondent. This was not something the claimant was able to see and he viewed matters through the prism of believing the respondent had a particular belief and a desire to treat him adversely whereas in reality the respondent sought to create a diverse and inclusive environment where everyone was treated fairly.

136. With regard to factual matters in dispute, the key issues related to the reason why the claimant had been treated in the way he had. He had maintained that his belief or non-belief was in some way a reason for the treatment. The Tribunal, as set out below, carefully considered the evidence and applied the law. The Tribunal was satisfied that the claimant's view was incorrect. The claimant's beliefs were in no sense whatsoever a reason for the respondent's treatment of the claimant. The claimant had believed that the respondent had created a working environment where people with the claimant's beliefs would be treated adversely and tried to seek out people and situations that would support the claimant in that belief but the respondent sought to balance the rights all workers had. An example as to the approach the respondent took was in relation to the action following the respondent's approach to the material Jonah Coman had issued. The respondent took action well before

the claimant raised his complaint. The respondent respected the claimant's beliefs (and non-beliefs) as much as others' and sought to achieve a fair balance to create an inclusive working environment.

Law

Burden of proof

137. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(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."*

138. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

139. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

140. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International Plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

141. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

142. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a Tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

143. The Tribunal took into account **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901. The Tribunal was able to make findings in light of the facts found in light of the absence of any reference by the parties to burden of proof. The Tribunal found clear evidence as to the reason why the respondent acted.

Religion and belief as a protected characteristic

144. Section 10 of the Equality Act 2010 provides:

> ***"10 Religion or belief***
>
> *(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*
>
> *(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."*

145. In the case of **Forstater v CGD Europe** 2022 ICR 1 the Employment Appeal Tribunal held that gender-critical beliefs are protected beliefs but that the protection of gender-critical beliefs "does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person." (para 4)

146. Section 3(1) of the Human Right Act 1998 provides:

> *"(1) so far as 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".*

147. Article 9 of the European Convention on Human Rights ("ECHR") states:

> *"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"* (emphasis added).

148. Article 10 ECHR states:

> *"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."*

149. Therefore, whilst the freedom to hold gender-critical beliefs is protected under section 10(2) as set out in the **Forstater** case, the freedom to express or manifest the belief is qualified under Articles 9(2) and 10(2) ECHR.

Manifestation of religion or belief

150. In **Eweida and others v United Kingdom** [2013] ECHR 37 the European Court of Human Rights stated that to count as a manifestation within Article 9 ECHR, there must be a sufficiently close and direct nexus between the act and the underlying belief. In a direct discrimination case, an employer will not be found to have discriminated if the reason for its actions was not the belief but the inappropriate manner in which it was manifested by the employee.

151. In **Page v NHS Trust Development Authority [**2021] EWCA Civ 255, Underhill LJ approved the distinction from earlier case law, between:

a. those cases where the reason for less favourable treatment is the fact that the claimant holds or manifests a protected belief. This would amount to direct discrimination because of belief, and.

b. those cases where the reason for less favourable treatment is that the claimant has manifested that belief in some particular way to which objection could justifiably be taken. In these cases, it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the treatment complained of. However, if the consequences of the objectionable manifestation are not such as to justify the action taken against the employee, this cannot sensibly be treated as separate from an objection to the belief itself. Whether an individual's manifestation of their belief is inappropriate should be tested by reference to Article 9(2) of the ECHR. This was described in **Page** as a proportionality test, balancing the claimant's freedom against the legitimate interests set out in Article 9(2).

Proportionality assessment

152. The broad approach to proportionality in cases involving ECHR rights is set out in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700, where four questions were identified by the Supreme Court:

a. Is the objective of the measure sufficiently important to justify the limitation of a protected right?

b. Is the measure rationally connected to the objective?

c. Could a less intrusive measure have been used without unacceptably compromising the achievement of the objective?

d. Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

153. In **Higgs v Farmor's School** [2023] ICR 1072, the Employment Appeal Tribunal laid down five basic principles that should "underpin the approach" taken when assessing the proportionality of any interference with Article 9 and Article 10 rights:

(i) The freedom to manifest belief (religious or otherwise) and to express views relating to that belief are "foundational" and "essential rights in any democracy", whether or not the belief is popular or mainstream or might cause offence.

(ii) These rights are qualified. The manifestation can be restricted to the extent necessary for the protection of the rights and freedoms of others.

(iii) Whether a limitation is justified "will always be context specific", which means that the nature of the employment will be relevant.

(iv) It will always be necessary to ask: (i) whether the employer's objective is sufficiently important to justify the limitation, (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 employee concerned against the importance of the objective, the former outweighs the latter.

(v) In answering those questions, regard should be had to: the content, tone and extent of the manifestation; who the employee thought their likely audience would be; the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's business; whether the views were expressed as personal or could be seen as representing the views of the employer, and any related reputational risk; any potential power imbalance given the employee's role and the roles of those whose rights are intruded upon; the nature of the employer's business, in particular where there is a potential impact on vulnerable service users, and whether the limitation is the least intrusive option for the employer.

Harassment

154. In terms of section 26 of the Equality Act 2010:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

155. It is important to consider the conduct with regard to each element of the statutory test. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily

determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. In that case the Employment Appeal Tribunal held it is a matter for the Tribunal to determine making a finding of fact drawing on all the evidence before it. There must be some feature of the factual matrix identified by the Tribunal which leads it to the conclusion conduct is related to the protected characteristic and the Tribunal should articulate clearly what feature of the evidence leads it to that conclusion. The Tribunal should consider the matter objectively.

156. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses *"will not readily volunteer"* that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic "cannot be conclusive of that question".

157. **Warby v Wunda Group Plc** EAT 0434/11 is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic. The then President of the Employment Appeal Tribunal, Mr Justice Langstaff, upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct "related to" her sex within the meaning of the sex discrimination provisions then in force. Langstaff P held that context was

important and that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was an emphatic complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a miscarriage. While that case considered the predecessor legislation, the issue was whether the conduct was "related to" the protected characteristic.

158. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338 an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company's business and risks the employer's explanation for the conduct was accepted and the conduct was not related to race or national origins.

159. In **UNITE the Union v Nailard** [2018] IRLR 730 the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to *sex "because of the background of harassment related to sex".* The Court of Appeal considered that went too far. There had been no findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination. The Court of Appeal noted that the previous potential liability for third party harassment under the Equality Act 2010, section 40 had been repealed and there was no automatic liability on the part of the union for harassment by third parties (if that was how the elected officials were to be characterised). The union could be (vicariously) liable for acts of discrimination by its employees but there would need to be a finding that the employees in question were themselves guilty of discrimination. An important point of this case was the reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related

to the protected characteristic). If the action (or inaction) is because of illness or incompetence it may not relate to the protected characteristic.

160. Even if the conduct is not related to belief or non-belief *per se*, the Tribunal should also consider whether the conduct was related to a relevant manifestation of the protected belief (or non-belief) pursuant to the position set out above.

161. At paragraph 7.10 of the Code the breadth of the words "related to" is noted and some examples are provided. It gives the example of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

162. At paragraph 7.11 the Code states that in the examples there was *"a connection with the protected characteristic".*

163. The question of whether the conduct in question *"relates to"* the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906). In **Bakkali** the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was not as it related to a previous conversation. The Employment Appeal Tribunal emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

164. In **Raj v Capita** 2019 UKEAT 0074/2019 the Employment Appeal Tribunal upheld a Tribunal which had found that the massage at his desk by a manager

was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

165. Section 26(4) of the Act provides that:

> *"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect."*

166. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill: *"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."*

167. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus, something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

168. In relation to the effect of the conduct, intention is not a prerequisite and the effect is to be considered from the perception of the claimant. The Code (at paragraph 8.20) gives the example of a club manager at a meeting making derogatory comments and jokes about women to a mixed sex audience. It is not that person's intention to offend or humiliate anyone, however the contact may amount to harassment if the effect of it is to create a humiliating or offensive environment for a man or woman in the audience.

169. Relevant circumstances include the claimant's personal circumstances, cultural norms and previous experience of harassment. The perpetrator being in a position of trust or seniority over the recipient is also a relevant factor.

170. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (Lindsay v LSE 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words *"intimidating, hostile, degrading, humiliating and offensive" and said "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".*

171. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Direct discrimination

172. Discrimination is defined in section 13(1) as follows: "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. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: "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."

174. In other words, the relevant circumstances must not be materially different between the claimant and the comparators, so the comparator must be in the same position as the claimant save in relation to the protected characteristic.

175. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

176. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed** 2009 IRLR 884, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

177. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council** 1990 IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 1999 IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed **in R (on the application of E) v Governing Body of the Jewish Free School and another** 2009 UKSC 15. The burden of establishing less favourable treatment is on the claimant.

178. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** 2001 IRLR 377.

179. In **Glasgow City Council v Zafar** 1998 IRLR 36, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

180. In **Shamoon v Chief Constable of the RUC** 2003 IRLR 285, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

181. The Equality and Human Rights Commission Code notes at paragraph 3.4 that it is more likely an employer's treatment will be less favourable where the treatment puts the worker's at a "clear disadvantage", which could involve being deprived of a choice or excluded from an opportunity. At paragraph 3.5 the Code notes that the worker does not need to experience actual disadvantage (economic or otherwise) as it is enough the worker can reasonably say they would prefer not to be treated differently from the way they were treated. The example given is of a worker who loses their appraisal duties which could be less favourable treatment.

182. It is also important to note that the treatment would be "because of the protected characteristic" if it was "a substantial or effective though not necessarily the sole or intended reason for the treatment" (**R v Commission for Racial Equality** 1984 IRLR 230).

183. Even if the conduct is not because of the belief or non-belief *per se*, the Tribunal should also consider whether the conduct was because of a relevant manifestation of the protected belief (or non-belief) pursuant to the position set out above (with particular reference to the approach set out in **Higgs**).

184. Chapter 3 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

185. Section 212(1) of the Equality Act 2010 states that "detriment does not, subject to subsection (5) include conduct which amounts to harassment." Section 212(5) states:

"Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."

186. This means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Victimisation

187. Victimisation in this context has a specific legal meaning defined by section 27:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

188. In terms of section 27(2)(d), namely the making of an allegation (whether or not express) that A or someone else has contravened the Equality Act, an issue has arisen as to whether an allegation of conduct for which the respondent could not be liable could still amount to a protected act. This issue was considered in **Waters v Commissioner of Police of the Metropolis** 1997 ICR 1073. In this case a woman police officer accused a male colleague of sexually assaulting her. Following this accusation, she was subjected to various forms of harassment and other unfair treatment at work. The Court of Appeal held that, on the officer's own version of events, her colleague had not committed the assault "in the course of his employment" and so the Commissioner of Police could not be held liable. It followed that she was not entitled to rely on her allegation of assault for the purpose of a victimisation claim as she had not alleged that her employer had committed an act which would amount to a contravention of the Act.

189. Waite LJ said: *"All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b). The facts alleged by the complaint in this case were incapable in law of amounting to an act of discrimination by the Commissioner because they were not done by him, and they cannot (because the alleged perpetrator was not acting in the course of his employment) be treated as done by him for the purposes of section 41 of the Act."*

190. That was a decision made in relation to the predecessor legislation to the Equality Act 2010 but there is no authority that suggests the position is otherwise to that set out by the Court of Appeal.

191. In **Page v Lord Chancellor** UKEAT/0304/18/LA, the claimant, a lay magistrate sitting on family cases involving adoption decisions, gave an interview to the BBC in which he expressed his Christian faith based view that it was *"not normal"* for a child to be adopted by a single-parent or a same-sex couple. The BBC report explained that the claimant had been suspended and disciplined. The Employment Appeal Tribunal held that it could not be inferred that there had been any specific allegation made by the claimant against the respondent so as to have amounted to a protected act. In the relevant interview, the claimant had done no more than explain his position and why he had done what he had done that had led to his reprimand. In doing so, he had made no reference to his Christian beliefs or that they had formed part of the reason for him being suspended and disciplined. Accordingly, the Employment Appeal Tribunal held that the Tribunal had not erred in finding that the comments made by the claimant in the interview had not constituted a protected act given that he had made no allegation of discrimination.

192. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337. It is an objective test focussed on the perception of the reasonable worker in all the circumstances of the case. Detriment is, accordingly, treatment which a reasonable worker would or might regard as being to their disadvantage. It is not necessary for the claimant to demonstrate some physical or economic consequence.

193. The (then) House of Lords confirmed the position in **Derbyshire v St Helens Metropolitan Borough Council** 2007 ICR 841. Lord Neuberger opined that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. In assessing whether there is a detriment therefore

consideration needs to be given to both subjective and objective elements, looking at matters from the claimant's point of view but his or her perception must be *'reasonable'* in the circumstances.

194. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why". In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal cause. The Tribunal is concerned with establishing what the real reason (conscious or subconscious motivation) or reasons for the treatment is.

195. In determining whether a detriment was because of a protected act, it is important that the protected act is identified with precision and that the relationship between the detriment and that act specifically is examined. In **JJ Food Service Ltd v Mohamud** EAT 0310/15 the claimant went to work in jeans in breach of his employer's dress code. When challenged about this he alleged that the dress code was discriminatory as it was applied differently in relation to women. He was dismissed, ostensibly for breaching the dress code and disobeying management instructions, but he brought proceedings alleging that he had been victimised. A Tribunal upheld his claim on the basis that the fact that he had questioned the application of the dress code policy was a significant contributory factor in the decision to dismiss him. However, the Employment Appeal Tribunal allowed the employer's appeal on the basis that the tribunal should have asked itself whether the allegations of sex discrimination amounted to such a factor. While in some cases the Tribunal's language might have been acceptable short-hand, in this case it was significant that the Tribunal did not ask itself the right question because there were other grounds on which M was challenging the application of the dress code. In addition, this was a case where it might have been open to the Tribunal to conclude that it was, for example, the manner or persistence of his complaints rather than the content of them which had led to his dismissal.

196. The Tribunal has to consider not just whether or not the protected acts themselves were the reason but whether or not there are any other factors

relating to the protected acts which were in the respondents' mind when taking decisions. For example, employees may lose the protection of the anti-victimisation provisions because the detriment is inflicted not because they have carried out a protected act but because of the manner in which they have carried it out.

197. An approach that distinguishes between a protected act and the manner of doing that act was endorsed by Mr Justice Underhill, in **Martin v Devonshires Solicitors** 2011 ICR 352. In his view, there were cases where the reason for the dismissal (or any other detriment) was not the protected act as such but some feature of it which could properly be treated as separable — such as the manner in which the protected act was carried out.

Time limits

198. Section 123 EqA 2010, so far as relevant, states:

> *"(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable*
>
> …
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period ..."*

199. In the recent decision of **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, the Court of Appeal held that tribunals should not treat the 'Keeble factors' (**British Coal Corporation v Keeble** [1997] ICR 336) as the starting point for the tribunal's approach to the just and equitable extension. The best approach for a tribunal in exercising its

discretion is to assess all the factors in the case that it considers relevant including in particular the length of, and the reasons for, the delay.

200. In **Commissioner of Police of the Metropolis v Hendricks** 2003 ICR 530, it was held by the Court of Appeal that in determining whether there is a 'continuing act', a tribunal should look at the substance of the allegations and where there are a series of connected acts that may suggest a continuing state of affairs that could amount to a continuing act. In **South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR 168, the EAT (Choudhury P sitting alone) held that that where a claimant wishes to assert that there is a continuing act or an act extending over a period of time, there must be findings made that there have been discriminatory acts committed by the respondent in order to form part of an act to extend over a period of time or a continuing state of affairs.

Submissions

201. The parties had both provided written submissions which the parties were able to supplement orally, deal with issues arising from each other's submissions and answer questions. The submissions have been fully taken into account.

The protected belief

202. The claimant presented his case on the basis that the belief that he had were to be described as gender critical or sex realist beliefs which is belief that sex is immutable and is not to be distinguished from gender. The respondent accepted that the claimant's gender critical beliefs amounted to a philosophical belief in terms of section 10(2) of the Equality Act 2010. It was accepted that the claimant does not hold gender identity beliefs defined as the belief that gender prevails over identity and that "trans women are women" and that "trans men are men".

203. The respondent submitted that the claimant had not established that the "respondent holds 'gender identity' beliefs" as such. That submission was meritorious as the respondent did not, per se, hold any beliefs and sought to

be respectful of all persons who worked for the respondent, seeking to be inclusive.

204. The claimant accepted at the submissions stage that his case was predicated upon his having sex realist/gender critical beliefs. He had initially submitted that there was in fact another belief (or absence of belief) on which his case was based, but following discussion he confirmed such a belief was background and the reason why he had done things he had done while employed.

205. The claimant's case as had been put to the relevant witnesses was that it was his gender critical (or sex realist) beliefs that had been the reason for the adverse treatment. In his submissions the claimant stated that he did "not accept that gender identity beliefs merit protection under the Equality Act". He was arguing "there was obvious extreme hostility to any dissent from the mantra that "trans women are women and trans men are men."" He was arguing the approach he had faced was part of the ideology in that when challenged or questioned, an adverse result ensued.

206. In his written submission the claimant said "I don't think it is reasonable that in order to be protected under the Equality Act, I must accept that the belief I do not share is in full concordance with the Grainger criteria. I know this is an extreme analogy, but it surely cannot be the case that a neo-Nazi could sack me for not hating Jews enough and not be liable under the Equality Act. I think the multiple definitions of gender we've seen in evidence, none of which can objectively be said to mean anything…. I think some of the witnesses' evidence brings into question that coherence, and even the seriousness of the ideology. And as described in my evidence and in some of my cross examination, I see gender ideology as fundamentally undermining the rights of others, particularly women. It seems to me that an ideology that continually undermines the rights of women to the single sex spaces, services and sports in the Equality Act cannot then be protected by that same Act. That is what the final Grainger criterion exists to guard against."

207. At the submissions stage and following discussion, the claimant accepted that his case was fundamentally based upon his sex realism/gender critical beliefs (and in fact the outcome would be the same if his other proposition was accepted) and it was agreed that the claimant's other position was background and an explanation as to why the claimant had acted as he had.

208. There was therefore no doubt that the claimant's belief was a protected belief for the purposes of his claim. For the avoidance of doubt, the outcome of this case would have been the same, even if the alternative position suggested by the claimant had also been progressed, for the same reasons set out below. In assessing each of the issues in this case, the Tribunal considered both the claimant (in being a sex realist and gender critical as well as his non-belief in gender ideology).

Manifestations of belief

209. The claimant relied upon nine separate manifestations of his beliefs. The respondent accepted the first 3 constituted a manifestation of the claimant's beliefs. It was argued there was not a sufficiently close and direct nexus between the acts relied upon by the claimant and his underlying belief in respect of the remaining acts.

(i) The claimant's representations during the event on 16 June 2022.

210. This relates to the claimant having asked a question about how any conflict between "trans people and TERFS" should be handled. The respondent's agent argued that it is extremely difficult to see how such a question has a sufficiently close and direct nexus with his beliefs. The question was not 'about' his gender-critical beliefs and does not, on the face of it, relate to those beliefs. His deliberate use of the term TERF, if anything, was designed to disguise his gender-critical beliefs.

211. The claimant argued that it was highly unlikely a gender identity believer would ask the question he did (and even if the act itself was not protected, it still prompted an act of direct discrimination).

212. The Tribunal considered that the act did not have a sufficiently close and direct connection with his beliefs given the evidence and context.

(ii) The claimant's email of 15 July 2022 to Ms Henderson.

213. The email refers to the claimant being catholic and gender-critical. The respondent accepted that amounted to a manifestation of the claimant's gender-critical beliefs.

(iii) The claimant's email of 31 August 2022 to Ms Thorpe and Ms Cook.

214. It was accepted this amounted to a manifestation of the claimant's gender-critical beliefs.

(iv) The claimant's email to Mr Hope-Jones on 20 September 2022.

215. The email refers to gender-critical beliefs and states, for example, that they are shared by a majority of people in Scotland. The email raises a number of other points and contains a list of questions for Mr Hope-Jones. It states that the claimant has a personal stake in some of the (many) issues raised, but does not identify which. There is not a sufficiently close and direct nexus between the claimant's beliefs and the email. It is not a manifestation of his beliefs in light of the context of his communication and what he says.

(v) The claimant's email to Ms Streeter on 29 September 2022.

216. This email is the same as the email to Mr Hope-Jones on 20 September and the same analysis applies, albeit in this email the claimant does not say he has a personal stake in any of the issues raised. For the same reasons set out above, this is not a manifestation of the claimant's beliefs.

(vi) The claimant's grievance on 4 October 2022.

217. The grievance was sent to Ms Downey at Pertemps (the claimant's employer) and as such cannot amount to a manifestation of the claimant's beliefs as regards the respondent.

(vii) The claimant's presentation of his complaints on 20 October 2022.

218. The claimant states that he has gender-critical beliefs and explains what they mean to him. It was accepted that this amounted to a manifestation of the claimant's gender-critical beliefs.

(viii) The claimant's complaints on 10 and 29 November 2022.

219. The complaint of 10 November 2022 is a complaint of victimisation against Mr Howie. Given the context of the complaint, it is submitted that it does not amount to a manifestation of the claimant's beliefs. However the complaint specifically stated that the claimant believed the outcome would have been different had he not had gender critical beliefs. On that basis the complaint of 10 November 2022 did amount to a manifestation of the claimant's gender critical beliefs.

220. The complaint of 29 November however is a complaint about "service levels" and is not a manifestation of the claimant's protected beliefs.

(ix) The claimant's link [posted on Yammer] on 5 December 2022 to the Network and subsequent exchanges

221. The respondent's agent note that the claimant's link is an enquiry about whether there is anything similar to the network in Scotland. It is asking a question. There is not a sufficiently close and direct nexus between this post and the claimant's gender-critical beliefs for the post to amount to a manifestation of his beliefs. The Tribunal considered that simply asking whether or not a network exists per se does not create a sufficiently close nexus between the belief and the comment. Anyone with an interest (with any or no belief) could ask the question. The claimant's initial post is not therefore a manifestation of belief. However, the subsequent posts of the individuals which relate clearly to belief and their position is clearly a manifestation of their beliefs.

222. Notwithstanding the foregoing analysis, the Tribunal considered it appropriate to assess each of the acts relied upon as against the legal principles (and assuming, for the purposes of his claim, that each act was a legitimate

manifestation of the claimant's belief where appropriate), bearing in mind not all of the above acts were expressly relied upon in the complaints.

Harassment

223. The Tribunal considered each of the nine separate allegations of harassment individually.

(i) Arranging and/or facilitating the training on 16 and 20 June 2022.

224. On 16 June 2022 the LGBTI+ staff network hosted an "LGBT+ Awareness 101 event". This was a 'network event' which was organised and hosted by a staff network. It was not a corporate event in the sense of being organised by the respondent. The event was framed as an informal awareness raising event and covered the full spectrum of LGBTI+ lived experience. There was no trans-specific material produced for or at the event. A further event took place on 20 June 2022.

225. The respondent did not arrange the network events on 16 and 20 June, but it was accepted that the organisers were acting in the course of their employment for the purposes of section 109(1) of the Equality Act 2010.

226. The claimant in his submission said that "These events were perhaps not harassment in and of themselves, but the event on 16/06/22 was the scene of Lu Freem's offensive remarks, and the latter event precipitated the sending of Jonah Coman's problematic email".

227. The complaint is about the arranging or facilitating of the events and the respondent argued that the "arranging and/or facilitating" of the events was not "unwanted conduct". The claimant chose to attend the event on 16 June and intended to attend the event on 20 June (both events were remote).

228. The act of harassment was carefully framed by the claimant; it was the "arranging or facilitating the training". It is important in assessing harassment complaints to focus on the act itself (since it is the act which must be unwanted – not the consequences of the act, which are considered separately). From the facts, it was clear the act itself was not unwanted. The claimant did wish

the training and wished to attend it. What the claimant did not like was the material sent following the training (which is a different point). Arranging and/or facilitating the training was not unwanted conduct.

229. If the conduct had been unwanted, the next issue was whether it related to the claimant's beliefs. The respondent argued the network events were not "related to" the claimant's beliefs (even in a broad sense). The events were arranged to discuss and explore matters of 'LGBTI+ awareness' and 'Trans awareness'. The Tribunal accepted that submission. The arranging and/or facilitating the events were not related to the claimant's belief at all. The arranging and facilitating the events were to raise awareness from those with lived experience of the matters in question and did not relate to the claimant's belief or non-belief.

230. If the Tribunal was wrong in that conclusion, it then considered what the purpose of the event was. The purpose was not to violate the claimant's dignity or create an intimidating or offensive. environment for him. The purpose of the event was to raise awareness. In no sense was the purpose to treat the claimant in any way adversely.

231. Next the Tribunal considered the effect of the arranging and/or facilitating the event. The Tribunal agreed with the respondent's submission that it the arrangement or facilitation of the events had the effect of violating the claimant's dignity or creating an intimidating or other adverse. environment for him. The claimant cannot legitimately complain about staff network events arranged and/or facilitated in the areas of "LGBTI+ awareness" or "trans inclusiveness". The claimant may not be happy that the events took place, but his unhappiness is not unlawful harassment. The Tribunal would have found that even if the events did have the proscribed effect, it was not reasonable for them to have done so. The respondent wished to increase awareness and create an inclusive environment. Those who wished to learn more could attend the event. Those who did not wish to learn more need not attend.

232. The Tribunal noted, in passing, that even if the arranging or facilitating of the training had been unlawful, the claim would have been dismissed as being time barred for the reasons set out below.

233. This complaint is ill founded.

234. Had the complaint been in respect of the training events themselves and not the arranging and facilitating thereof, the complaint would still have been ill founded. The claimant chose to attend the events to seek out views with which he disagreed. He asked a question to provoke a discussion, knowing that the answer was likely to be unwanted. The claimant knew what the sessions were about and what they would cover. It cannot be said the events themselves were unwanted for those reasons. The events themselves did not also create the proscribed effects and it would not have been reasonable for those effects to exist given the context.

(ii) The alleged comments of Dr Freem that people who hold "those kinds of beliefs" should leave them at home whereas trans people should be able to "bring their whole selves to work".

235. The claimant asserted that during the event on 16 June 2022 he asked Dr Freem how the conflict between "TERFS and trans people" could be addressed and that he was told (by Dr Freem) that because the respondent wanted people to "bring their whole selves to work" people who hold "those kinds of beliefs" should "leave them at home". Dr Freem's position (which was not challenged by the claimant) was that they do not remember the question being asked or giving the response as stated by the claimant.

236. The claimant's position was that saying that "TERF" views are best kept at home was "a clear example of harassment".

237. The Tribunal considered the comments which the claimant maintained were made and assessed his complaint in light of that. The comments were made in the context of a staff network event. The claimant chose to attend the event voluntarily. It was not organised by the respondent and it was an event

delivered by those with lived experience. The claimant knew what the discussion was about and who was leading it and what the aim was.

238. When assessing whether the response to the claimant's question was unwanted, the Tribunal noted that the claimant had asked Dr Freem a question deliberately using what he believed (rightly or wrongly) was a pejorative term ("TERF"). The claimant expected an answer to that question (otherwise he would not have asked it in the terms that he did). The Tribunal upholds the respondent's agent's submission that the answer given cannot be "unwanted" given the context. The claimant had deliberately used the phrase to provoke a response. The conduct is not unwanted.

239. Even if the conduct was unwanted, the Tribunal would not have found the answer was "related to" the claimant's beliefs. It was an answer given to a deliberately provocative question asked by the claimant answered about lived experience, the claimant not having disclosed his beliefs or non-beliefs.

240. The Tribunal would also have been satisfied that the purpose of the comment was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The sole purpose was to answer the question that had been asked in a truthful way in the context of a session about lived experiences. The claimant deliberately asked a provocative question using what he thought was a pejorative term. The Tribunal would have upheld the respondent's submission that Dr Freem's position was that they were expressing a view that there should be respect for gender-critical beliefs and gender identity beliefs and that those holding one set of beliefs should not be criticised or subjected to adverse comments or treatment by those holding another set of beliefs in the workplace (or elsewhere). On this basis the comment cannot be considered to have had the proscribed purpose or effect.

241. The Tribunal did not doubt that the claimant did not like the answer he had been given. However, in context, it was not reasonable for the effect to have been to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is relevant

that the claimant told Pertemps on 13 December 2022 that he did not consider what Dr Freem to have said to be a 'big deal' at the time.

242. This complaint is ill founded.

243. The Tribunal noted, in passing, that even if the comments had been unlawful, the claim would have been dismissed as being time barred for the reasons set out below.

(iii) The distribution of the Trans Language Primer ("TLP") by Mr Coman.

244. The respondent accepted that the sending the link amounted to "unwanted conduct related to" the claimant's beliefs.

245. The issue was whether or not the distribution of the link had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose of sending the link was not in any way to harm or offend the claimant but solely to provide background to what had been discussed in the session. It was to give more information to those who wished it about definitions some use for the terms that can be referred to, despite there being no rigidity of approach in a changing environment.

246. Finally the Tribunal considered whether the distribution of the link had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

247. The claimant said he found the material within the link offensive and inappropriate. However, the claimant had himself used the TERF term when he asked a question at the earlier event. The claimant had deliberately used that term in the event knowing that some considered it offensive. The claimant knew about the terms in this area and was prepared to use them.

248. The claimant said he had been "unsurprised and yet still shocked by the tone and content of the site". The clamant had said he found it "deeply offensive mostly because it's completely false" and set out why he considered the definition to be factually inaccurate.

249. The Tribunal considered that the issue the claimant had was with part of the content when he chose to open the link rather than the distribution of the link itself. The claimant was unhappy the link had been distributed but what the claimant was more unhappy about was not the distribution of the link (which is how the issue in this complaint was framed by him) but rather the content of the link itself. The distribution of the link (the act the Tribunal is considering) did not (of itself) violate the claimant's dignity or create an intimidating, offensive or degrading environment for him. The Tribunal accepted that the phraseology used within the link did have the proscribed effects and claimant knew that they did since he had seen the TLP before and knew the terms in question.

250. Even if the claimant had considered the distribution of the link to have had the proscribed effects (and even if the issue had been the content of the link and not the distribution of it, which was offensive to the claimant), the Tribunal would have found that on the facts of this case it was not reasonable for the claimant to have concluded the effect of sending the link (or its content) was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

251. The content was known by the claimant and he was prepared to use some of the terms to which reference was made. The claimant had wanted to attend the session to increase his awareness as to the position. The claimant knew the type of language that was used, and the pejorative terms and approach taken by some persons. The link was one of several and contained terms 201 terms and a definition some had used (which was clearly offensive to some).

252. The session and the link was aimed at increasing awareness and was specifically aimed at increasing awareness around the topic which included awareness of offensive terms used in society in this area. Those attending would know that there are offensive terms used by some in this area. The TLP was increasing awareness as to the terms used by some. The terms relied upon formed a small part of TLP (which was part of other links in an email sent after an event which made no mention to the TLP). The claimant knew

the link had such terms within it and could have chosen not to open it or view it and yet he chose to do so.

253. The link had been sent for those who wished to increase their awareness of how some define terms and the claimant was well aware what the content was and, despite that, chose to open it. He knew that if he opened it he would find the terms which were offensive to him. The claimant had purposefully opened the link to seek out such terms as he believed the respondent had adopted a position that was adverse to his beliefs (whereas in reality the respondent had sought to include workers of all and no beliefs and be as inclusive as possible). The content was clearly inappropriate but given the claimant's approach and context of this case, not such as to reasonably result in the proscribed effects.

254. The complaint is ill founded.

255. The Tribunal noted, in passing, that even if the distribution (or content) of the link had been unlawful, the claim would have been dismissed as being time barred for the reasons set out below.

(iv) Arranging and/or facilitating the Stonewall training on 6 and 13 October 2022.

256. The next act relied upon was the act of arranging for Stonewall to carry out the remote events.

257. The respondent argued this does not amount to unwanted conduct related to the claimant's beliefs. The claimant was not required to attend the events and could have chosen to ignore them and carry out his work. Arranging or facilitating the events was not "related to" to the claimant's protected beliefs.

258. The Tribunal found that the arranging and/or facilitating of the events were not unwanted. They were training events which were voluntary and awareness raising. The claimant attended the event as he wished to do so. It could not be said that he attended an event that was unwanted, given it was a voluntary event and the claimant knew what the training related to. The claimant may have been unhappy with what was said at the event (with some comments made which he found offensive), the issue that forms the harassment

complaint was the arranging and/or facilitating the event itself. That had been carefully framed by the claimant and was the basis upon which the case was advanced and responded to. The arranging or facilitating the voluntary event that the claimant voluntary chose to attend was not unwanted conduct.

259. The Tribunal was satisfied that the arranging and/or facilitating the event did not have the purpose to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The sole purpose was to increase awareness.

260. There was no evidence that the arranging or facilitating the event itself had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. While the claimant argued part of the training involved comments that he found offensive, he attended the event voluntarily. The act of arranging or facilitating the event (the conduct relied upon as being unlawful) did not by itself have the proscribed effects.

261. This complaint is ill founded.

262. Had the issue in this complaint been about the content of the training events (and not the arranging or facilitation of the events as the claimant had set out) the complaint would still have been ill founded. The claimant did not like the content and was offended by some of the discussion but the context was such that the claimant knew what the discussion was about. He knew it would give rise to a discussion that was diametrically opposite to what he believed in. It was about lived experience. The respondent's diversity team had attended both events to ensure the content was appropriate and no issues arose. The content was about inclusivity and the rights of all workers to be themselves. The claimant knew the content was going to fundamentally conflict with his belief and non-belief and it would not have been reasonable for the events themselves (and the content thereof) to have had the proscribed effects.

263. The Tribunal noted, in passing, that even if the arranging or facilitating of the training had been unlawful, the claim would have been dismissed as being time barred for the reasons set out below.

(v) The failure to take timely and/or meaningful action in response to the claimant's grievances thereby adopting the conduct and/or beliefs of others including Stonewall as a third party by (a) failing to respond to the claimant's emails of 20 and 29 September 2022; (b) failing to adequately address the TLP; (c) failing to answer the claimant's questions on 7 September 2022; (d) failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022; (e) failing to provide clarity as to who was investigating his grievances; and (f) Mr Howie's response of 7 November 2022 which did not reach factual findings and failed to identify "lessons learned and remedial action".

264. This complaint gives rise to a number of specific and standalone incidents. The respondent denied the factual basis for this issue. The Tribunal considered each issue in turn.

(a) The claimant's email to Mr Hope-Jones on 20 September 2022 and email to Ms Streeter of 29 September 2022

265. The first way the claimant said the respondent failed to take timely and/or meaningful action in response to his grievances was by Mr Hope-Jones and Ms Streeter failing to respond to his emails. That was not established in evidence since the claimant did receive a response to both emails and no further action was taken. That complaint is therefore ill founded. It was not accurate to say that Mr Hope-Jones and Ms Streeter had failed to respond to the emails. A response had been issued. While the claimant may have been unhappy with the content of the response, a response was issued and the issue (which was that there was a failure to respond) had not been established in evidence.

266. The response may have therefore been unwanted, as it did not contain the detail the claimant sought, the response was in no way related to belief (or lack of belief). The response was Mr Hope-Jones view as to what the complaints related to and Ms Streeter simply stated she was on secondment.

267. The purpose of the response was clearly to deal with the issue and was in no way intended to violate the claimant's dignity or create an intimidating, hostile,

degrading, humiliating or offensive environment for him. Even if the claimant did not like the response, there was no basis to say the effect was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him and it would not have been reasonable for that to have been the effect. The content of the response was a reasonable and genuine attempt to deal with the matters in a fair and even handed way.

(b) Failing to take steps to deal with the TLP issue

268. Steps were taken in relation to the TLP issue once the respondent learned of the issue, in June 2022. The respondent took this issue very seriously. Jonah Coman had been spoken to be a senior civil servant about the matter and reminded of the Civil Service Code and the respondent's organisational values (a process found to be "harrowing"). The basis for this complaint had not been established in evidence since there was no failure as alleged.

269. Even if the conduct had been unwanted, the conduct was not related to belief or non-belief. The belief of the claimant was entirely irrelevant to the action that was taken. The respondent balanced the rights of the claimant and took action to prevent any repetition. The conduct was not related to belief.

270. The purpose underpinning the steps that were taken to deal with the TLP issue was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose was to take a balanced approach, respecting the claimant's beliefs and create a diverse and inclusive workforce with appropriate awareness training.

271. The effect was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. He was upset that more action had not been taken but the effects were not such as to amount to unlawful harassment and it would not have been reasonable for that to have been the case. While the claimant wanted severe disciplinary action, that was because he believed what had been sent fundamentally breached his beliefs but the respondent took into account all the facts and acted in a proportionate and fair way. Given the context and response, it would not have been reasonable for the act to have been found to violate the

claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him.

(c) Failing to answer the claimant's questions on 7 September 2022 (which were asked of Pertemps)

272. On 7 September Ms Downey of Pertemps emailed the claimant with a response to concerns he had raised about the respondent. The claimant had been told the respondent had taken care to ensure that "referenced material in network events is subject to the same high-quality assurance as [we] apply to our corporate learning events". The respondent also apologised for any offence caused to the claimant.

273. The claimant was given a response by Pertemps as to the issues raised. While this was not a detailed and reasoned position, the claimant was told what Pertemps' position was.

274. The response was unwanted in that the claimant clearly wanted more substance but the response was not related to belief or absence of belief. The response was clearly what the agency believed the position to be. He had been told the respondent had dealt with matters internally and action had been taken. The response, as the claimant saw it, the failure to answer questions, was not related to belief at all.

275. In any event the failure to provide the detail the claimant wanted did not have its purpose to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose was to provide an update as to the position. Further help was offered if the claimant needed it.

276. The Tribunal also found that the effect of the response was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant was unhappy matters had not gone in his favour and he wanted a large scale investigation and serious action taken. However, the response did not have the effect of being

harassment and it would have been unreasonable for it to have done so given the context.

(d) Failing to address (whether adequately or at all) the claimant's grievance (to Pertemps) of 4 October 2022

277. The claimant submitted a grievance to Pertemps on 4 October 2022. The respondent noted that the responsibility for addressing that grievance rested with Pertemps and it could not reasonably be said this was a matter for which the respondent was liable. The claimant did not respond to that submission. There was no basis set out as to why the respondent would be responsible for the actions of a third party in this way.

278. The conduct was unwanted, but there was no evidence before the Tribunal to show that the failure to address the grievance was in any way related to belief (or lack of belief) or the claimant's manifestation of belief or non-belief. It was also clear that the purpose of the response was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him but to give the claimant the up to date position (which was that Pertemps believed the respondent had dealt with matters).

279. The Tribunal would also not have found that the effect was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him or that it would have been reasonable for that to have such an effect. The response given was what Pertemps had been told by the respondent and it would not have been reasonable for the claimant to have found the response to have created the proscribed effects given the context.

(e) Failing to provide clarity as to who was investigating his grievances

280. The respondent disputed that this was an accurate or fair characterisation as to what happened as it argued it properly dealt with the complaints raised by the claimant. The Tribunal found that the claimant did get a response to the complaints he raised. It was clear, however, that the claimant was unhappy with what he had been told.

281. To the extent the act was unwanted, the act was not related to belief or lack thereof or any manifestation of belief or non-belief. The respondent provided their response to the points the claimant raised as best they could. The response was in no sense related to any belief or lack of belief (or manifestation). It was the content of the complaint that related to belief rather than the failure to provide clarity as to who was investigating matters. The response was given as it was what the respondent believed was sufficient to deal with the matters asked.

282. To the extent there was a lack of clarity provided to the claimant, the purpose of so doing was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him but instead to provide what the respondent knew the position to be. The Tribunal found no evidence that the respondent was seeking to mislead or hide anything from the claimant.

283. The effect was also not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant may have been unhappy but the effect was not such as to be considered unlawful harassment and it would not have been reasonable for the effect to have been to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Objectively viewed, a reasonable response had been given in general terms and the conduct was not of a severity that a reasonable person would have found the effect to have violated their dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

(f) Mr Howie's response of 7 November 2022 failing to reach factual findings and identify lessons learned and remedial action.

284. The respondent's position was that Mr Howie's response did set out clearly how the respondent would deal with the claimant's complaint. The Tribunal found that Mr Howie had set out what he believed and did his best. There was no obligation to set out detailed factual findings or provide a reasoned

outcome. Mr Howie explained the position and that matters had been dealt with internally.

285. To the extent the response was unwanted, the response was not related to belief or non-belief or manifestation of belief or non-belief. The response was Mr Howie's response to the complaint the claimant made. The sole purpose of the response was to tell the claimant matters had been dealt with.

286. The effect of Mr Howie's response did not violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant was unhappy but that was as far as it went. It would not have been reasonable for such effects to have occurred given the respondent had dealt with matters and the claimant had been told, albeit in general terms, but he had been told nonetheless, that matters had been dealt with and he could move on.

Taking a step back in relation to this issue

287. Taking a step back the Tribunal did not find that the respondent had failed to take timely or meaningful action in response to the claimant's grievances in the manner alleged. The factual basis for this complaint had not been established. In any event properly analysed the conduct in question did not amount to unlawful harassment and the complaint is ill founded.

(vi) The response of the respondent's employees to the claimant's posts on Yammer.

288. The claimant issued a post on 5 December 2022. Posts were made in reply by a number of persons.

289. The claimant's position was that Ms Allan noted the network was monitored and moderated. She had said some of the comments were "moderateable" which the claimant said should have alerted her to a problem. The claimant believed a group of people ganged up on him and nobody stopped it. Instead, the respondent took the side of the bullies, who used their influence to have him punished because he then confronted them.

290. The respondent argued none of the posts relied on by the claimant amounted to harassment. The individuals were posting in a personal capacity. The posts were not "unwanted conduct related to" the claimant's beliefs. The claimant made a post expecting it to be responded to and he received what he had asked for – a response.

291. The claimant's post was: "Does anyone know if anything similar is in the works here?". There was no doubt therefore that the claimant was seeking a discussion about the network and its application in Scotland.

292. The claimant thereafter directly contacted by email a number of the persons who responded. The respondent argued that the claimant's actions showed he wanted to have a debate or discussion about the issue. The Tribunal considered this issue very carefully and the responses in question. Having analysed the evidence the Tribunal concluded the posts were, on balance, not unwanted. The claimant did not like some of the responses he received but he knew (and intended) by raising the issue, he would provoke debate and discussion and he knew those who did not agree with him would feel uncomfortable and disagree. One response was that the network mentioned by the claimant appeared to be at odds with inclusivity and another felt threatened and unsafe at work. That was precisely the type of response the claimant was seeking and his post would naturally elicit such views. The claimant chose not to complain about any of the posts, despite knowing there was a moderation policy (and any inappropriate posts would be dealt with).

293. Had the conduct been unwanted, the Tribunal would have found that the conduct did "relate to belief" or manifestation of belief. That was the point of the discussion.

294. The purpose of the responses was in no sense to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose of the response was to reply to what the claimant had asked and contribute to the discussion. It was the personal view of those who responded. Those responding did not wish to create ill-will but

wished their position (and identities) to be respected (understanding that different beliefs exist).

295. The Tribunal did not find the effect of the response was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant did feel that a number of staff had "ganged up" on him and that those with opposing views to his had vocalised their position. That was, however, part of the debate, a debate the claimant clearly wished to have (evidenced by his follow up messages following the external posts). From the evidence before the Tribunal, the Tribunal found that by asking the question and engaging in the discussion the claimant knew what some comments would be and while he may not like the response, the responses did not in fact violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant had purposefully sought out such views and the discussion and chose not to raise any concerns about the issues but engage with them.

296. In light of the context and the fact the claimant had engaged in the debate, it was not reasonable for the claimant to find the effect of the posts to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant knew full well there were individuals who did not share his views. He specifically sought out those views and wished to engage further with those positions and provoke discussion.

297. The claimant is an intelligent and articulate person and fully understood the impact his views had upon others as much as such as he understood the impact the views others had upon him. It was more likely than not that he knew full well the consequence of his actions and what views would arise. That was why he had issued the post and followed the matter up (and not complained).

298. Looking at the context, the Tribunal did not consider it reasonable for the effects of the personal responses from those who replied to the claimant to have violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant knew

that those who did not agree with him (and who had an equally permissible view) would respond. He knew, however, their view would be diametrically opposite to the claimant's view. The claimant knew what the opposing views were and despite that (or in fact because of that) sought out discussion about those very issues, which he then sought to argue created the proscribed effects. The claimant's belief is protected as much as the belief of those who do not agree with the claimant. Both views are protected and those involved (including the claimant) were entitled to manifest their beliefs and non-beliefs. It was not reasonable for the effects to be regarded as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him given the facts and context of this issue.

(vii) The fact of the claimant's dismissal and/or the removal from employment

299. The claimant's case is that he was forced out his assignment because he confronted bullies. The Tribunal considered this issue carefully in light of the evidence led.

300. The ending of the claimant's assignment was unwanted conduct.

301. The reasons why the respondent decided to terminate the claimant's engagement were clearly set out by Ms Allan and Ms Hunter which the Tribunal accepted. The claimant had by his conduct acted in a way that the respondent was not prepared to tolerate. The respondent argued the reasons for the termination of the claimant's assignment were not "related to" his beliefs. The claimant argued his assignment ended because of his beliefs.

302. The Tribunal carefully assessed the evidence on this point and found that Ms Allen and Ms Hunter were credible and reliable. The Tribunal accepted their evidence that the sole reason for the ending of the claimant's assignment was his behaviour and in no way his beliefs. On the facts of this case and given what the claimant had done, the conduct did not in any sense relate to belief (or lack of belief) or his manifestation of his belief or non-belief.

303. The purpose in ending his assignment was solely to end the impact the claimant's behaviour had on colleagues. The way in which the claimant had

behaved created serious concerns for the respondent. The sole purpose of the ending of his assignment was to end the impact his behaviour had upon colleagues (which was a proportionate interference with the claimant's rights).

304. The effect of the decision was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant was unhappy and shocked with the decision and its impact but the purpose was not to create the proscribed effects on the facts. It would not have been reasonable for the claimant to have found that the decision to end his engagement was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The context was such that the way in which the claimant conducted himself resulted in the reasonable decision on the facts to end his assignment. Objectively viewed, the decision was reasonable. The issue was not the claimant's beliefs (which the respondent respected as much as it did others who held different beliefs) or his manifestation of his beliefs but the behaviour of the claimant and the impact this had upon others).

305. Given the reason for the treatment was his conduct, it could be said that related to the manifestation of his beliefs. The Tribunal would have found the reason was the objectionable manifestation of those beliefs by the claimant. It was inappropriate and objectionable for the claimant directly to email the respondent's employees during working hours following his post. The claimant's behaviour was not acceptable to the respondent and they reasonably concluded that it was not appropriate that he remain a contract worker. It was for this reason that it would not have been reasonable for the claimant to have considered the conduct to have the proscribed effects.

306. Applying the principles set out in **Higgs**, the employer's objective was sufficiently important to justify the limitation which was rationally connected to the objective. Dismissal was necessary to protect others who had felt harassed by the conduct. No less intrusive limitation would be effective since the claimant had shown this was how he dealt with such matters. In balancing the severity of the limitation on the rights of the claimant against the importance of the objective, taking account of the relevant factors, the

respondent's position outweighs the impact upon the claimant. The interference with the claimant's rights was proportionate. The respondent required to create an inclusive environment where workers of all beliefs and non-beliefs could feel safe and each protected belief and non-belief was respected.

307. The claimant was seeking to raise issues about beliefs, to allow him to enter into debate and discussion. He was seeking to encourage debate which he knew would result in comments being made that were comments he would find offensive. He was not prepared to let the issue be dealt with formally and instead wished to have lengthy discussion during working hours.

308. The respondent's actions were a proportionate means of achieving the aims of protecting the safety and security of its employees and protecting the rights and freedoms of its employees to work safely in the workplace. It would not have been reasonable to have considered the effect of his dismissal to amount to unlawful harassment.

309. This complaint is without merit.

(viii) The manner of the claimant's dismissal including the absence of clear reasons, a letter of dismissal and/or a right of appeal.

310. The claimant argues that "the whole process leading to his dismissal was extraordinary and indefensible". He argued no consideration was given to his wellbeing nor the motives of the complainers and that no reasonableness test was applied to the complaints. Given the claimant was an agency worker, there was no entitlement to reasons for ending an assignment. In any event, as the respondent's agent submitted, there was no other steps that the respondent was required to take in relation to the termination of his assignment and none was suggested by the claimant. The manner of the dismissal, including the absence of clear reasons and letter of dismissal and right of appeal, is the norm for the ending of assignments of agency workers. There is no merit in this complaint.

311. The manner of dismissal was in no way related to the belief or non-belief. The manner of dismissal was the manner of dismissal all such workers had when their assignment ended. Belief or absence of belief was entirely unrelated to the manner of dismissal.

312. The purpose of the manner of dismissal was solely to follow the normal approach and not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The effect of the manner of the dismissal did not have the proscribed effects. The issue that affected the claimant was his removal. While he did not like the lack of process as he saw it, the manner of dismissal did not result in the claimant's dignity being violated nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for him. It would not have been reasonable given this was the approach taken when assignments ended and was the norm.

313. This complaint is without merit.

(ix) The refusal by the respondent to assist Pertemps in the investigation of the claimant's grievances.

314. The Tribunal considered the evidence that had been led and found no evidence to support the claimant's assertion. It was clear that the respondent did assist Pertemps in dealing with the complaint the claimant had. As is evident from the outcome of the original hearing and appeal, the points the claimant raised were dealt with. While the claimant was unhappy, the issues he raised had been considered and responded to. There is accordingly no merit in this complaint.

315. To the extent the claimant was unhappy with the assistance the respondent did provide Pertemps, which clearly was unwanted, the conduct had in no sense its purpose or effect violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Given the context and the respondent's balance of protecting the rights of those who had complained about him and the nature of the claimant's

assignment (and the norm in ending such assignments) it would not have been reasonable for the conduct to have had the proscribed effects.

316. There was no refusal to assist Pertemps and this complaint is ill founded.

Taking a step back in relation to the harassment complaints generally

317. The Tribunal carefully assessed the purpose of the relevant acts and the effect, including the actual effect upon the clamant and whether it was reasonable on the facts for those effects to have been found. Having carried out the assessment of all the evidence before it and applied the law, the Tribunal unanimously concluded that, aside from the Yammer posts, none of the unwanted acts relied upon by the claimant related to belief (or lack of belief). Even if they did, the proscribed effects had not resulted from the conduct (and it would not have been reasonable for that to have been the effect from the evidence). None of the conduct relied upon related to a legitimate or unobjectionable manifestation of his beliefs. The respondent's actions that were consequent upon the claimant's manifestation of his beliefs were a proportionate interference with his rights, having carried out the required balance. The harassment complaint is accordingly dismissed.

Direct discrimination

318. The Tribunal next considered the direct discrimination complaint, considering each of the acts to assess firstly whether the acts amounted to less favourable treatment and secondly whether the acts (or omissions) occurred because of religion and belief. The acts relied upon were the same acts relied upon in relation to harassment. The Tribunal considered them individually.

I Arranging and/or facilitating the training on 16 and 20 June 2022.

319. The first act was the arranging and/or facilitating of the training events on 16 and 20 June 2022. These were 'network events' organised and hosted by a staff network. It was not a corporate event in the sense of being organised by the respondent. The event was framed as an informal awareness raising event and covered the full spectrum of LGBTI+ lived experience. There was

no trans-specific material produced for or at the event. The events took place during 'Pride month'.

320. The first issue was whether the arranging and/or facilitating of the events was less favourable treatment.

321. In determining whether the treatment was less favourable treatment the Tribunal considered how a hypothetical person, who had a different belief but whose circumstances were not materially different to the claimant's, would have been treated.

322. The claimant's case was that the Tribunal should look at how the admittedly offensive email that was sent was handled compared to the way the claimant's admittedly inoffensive emails were handled and the attitude shown in relation to his complaint and approach. His submissions, however, do not apply to the arranging and/or facilitating of the training event, which is the issue relied upon by the claimant in this complaint. The respondent would have arranged and facilitated the event irrespective of the claimant's belief. It was an informal awareness raising event delivered by persons with lived experience. The arranging and/or facilitating the event was in no sense less favourable treatment. The respondent would have arranged or facilitated the same event irrespective of belief. There was therefore no less favourable treatment.

323. The Tribunal was in any event satisfied the reason for the treatment – the arranging or facilitating of the event - was entirely unconnected to belief and/or manifestation of belief which played no part whatsoever in the reason why the event was facilitated or arranged. The event was arranged to increase awareness for those who wish to increase their awareness.

324. The reason for the treatment (as had been established) was in no sense whatsoever because of belief or absence of belief which was entirely irrelevant as to the reason for the treatment in this regard. The sole reason was to increase awareness.

325. For the avoidance of doubt, even if the issue had been the content of the training events, the Tribunal would have found the complaint to be ill founded

since the training would have been the same irrespective of belief or non-belief as it was an awareness raising event from a lived experience.

Ii The alleged comments of Dr Freem that people who hold "those kinds of beliefs" should leave them at home whereas trans people should be able to "bring their whole selves to work".

326. The Tribunal proceeded on the basis that the comment had been made. The first issue was therefore whether or not saying that persons who hold "those kinds of beliefs" should leave them at home (with "trans persons bringing their whole selves to work").

327. The claimant's position was that saying that "TERF" views are best kept at home is a clear example of less favourable treatment because of belief.

328. The Tribunal considered the comments which the claimant maintained were made and assessed his complaint in light of that. The comments were made in the context of a staff network event. The claimant chose to attend the event voluntarily. It was not organised by the respondent.

329. When assessing whether the response to the claimant's question was less favourable treatment, the Tribunal noted that the claimant had asked Dr Freem a question deliberately using what he believed (rightly or wrongly) was a pejorative term ("TERF"). The claimant wanted an answer.

330. In assessing whether the treatment was less favourable treatment the Tribunal considered whether the comment would have been said to a hypothetical comparator, someone with a different belief who circumstances were not materially different to the claimant's. It is notable that the claimant did not say what his beliefs (or non-beliefs) were at all during the session.

331. The same response that Dr Freem gave to the claimant would have been made to anyone else who had asked the same question. Belief or non-belief was entirely irrelevant to this issue. The treatment was no in sense less favourable treatment.

332. The reason for the treatment, the answer, was in no sense whatsoever connected to or related to the claimant's belief. The reason for the answer was solely because it was what the person answering the question believed. There was no basis from the evidence upon which it could be said the reason for the treatment was because of belief.

333. This complaint is ill founded.

Iii The distribution of the Trans Language Primer ("TLP") by Mr Coman.

334. This is similar to the foregoing act. The distribution of the link within the email was sent to everyone who attended the training event. It could not be said that the claimant was treated less favourably. He was treated precisely the same as everyone else and as such the complaint is ill founded. That would be the same position even if the issue is the content of the link and not just its distribution.

335. As with the foregoing act, the reason for the treatment - the sending of the link - was entirely unconnected with and unrelated to belief or non-belief. The link was sent because it was to provide background to the training. The same link would have been sent to a hypothetical comparator.

336. This complaint is ill founded.

Iv Arranging and/or facilitating the Stonewall training on 6 and 13 October 2022.

337. The respondent argued that the same position exists here as applicable to the internal network events. The claimant chose to attend the training event voluntarily. He was treated in the same way as everyone else who attended the training.

338. The arranging or facilitating the training (the issue to be determined) was not less favourable treatment. The claimant was treated in precisely the same way as everyone else who chose to attend the event. A hypothetical comparator would have been treated as the claimant was.

339. The reason for arranging or facilitating the training was not the claimant's belief. The reason was to increase awareness generally. As such the complaint is ill founded.

340. Even if the complaint was the content of the training, the nature of the training and the comments made the complaint would still be without merit as the treatment would have been identical irrespective of belief or non-belief. The session and its content was for everyone.

V The failure to take timely and/or meaningful action in response to the claimant's grievances thereby adopting the conduct and/or beliefs of others including Stonewall as a third party by (a) failing to respond to the claimant's emails of 20 and 29 September 2022; (b) failing to adequately address the TLP; (c) failing to answer the claimant's questions on 7 September 2022; (d) failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022; (e) failing to provide clarity as to who was investigating his grievances; and (f) Mr Howie's response of 7 November 2022 which did not reach factual findings and failed to identify the "lessons learned and remedial action".

341. This issue gives rise to a number of separate acts which are considered in turn.

(a) The email to Mr Hope-Jones on 20 September 2022 and the email to Ms Streeter on 29 September 2022 and the alleged failure to reply.

342. The first way the claimant said the respondent failed to take timely and/or meaningful action in response to his grievances was by Mr Hope-Jones and Ms Streeter failing to respond to his emails. That was not established in evidence since the claimant did receive a response to both emails and no further action was taken. The issue upon which this complaint was based (the failure to respond to the email) had not been established in evidence. A response had been given, just not the response the claimant wished. The complaint is therefore ill founded.

343. In any event, the claimant would have been treated in precisely the same way in terms of the response to the email irrespective of belief. A hypothetical comparator (whose circumstances were not materially different to the claimant except with regard to belief or non-belief) would have been treated in precisely the same way. The treatment was not less favourable treatment.

344. The Tribunal was also satisfied that the reason for the treatment was in no sense whatsoever because of belief. Mr Hope-Jones and Ms Streeter replied in the way they did as that was their position. That was entirely separate from belief. This complaint is ill founded.

(b) The alleged failure to adequately deal with the TLP issue

345. The second act relied upon to show that the respondent failed to take timely and/or meaningful action in response to his grievances was the failure to take action taken in relation to the link attached to the email that was issued. The Tribunal is satisfied adequate action was taken. The author of the email was spoken to by a senior civil servant and steps were introduced to ensure quality assurance applied to network events (in addition to training events). The treatment relied upon had not therefore been established in evidence as the TLP issue had been dealt with (just not as the claimant wished it had been dealt with).

346. The Tribunal considered whether the action taken in relation to the link was less favourable treatment. The claimant believes that more should have been done and that it was not done because of his beliefs (and compares his treatment to that of the author of the email). The issue is whether the action that was taken in relation to the link was less favourable treatment. The same treatment would have been taken irrespective of belief since the respondent concluded the link was not aligned to its standards and took appropriate action. The same action would have been taken irrespective of belief. The comparator has to be someone whose circumstances are not materially different but who has a different belief. Such a person would have been treated in precisely the same way as the claimant was in this case.

347. The treatment (the alleged failure to adequately deal with the link) was not less favourable treatment. The treatment would have been the same irrespective of who had raised the complaint. A hypothetical comparator would have received the same treatment. The respondent considered that some of the language used was inappropriate and once the respondent's attention was drawn to the link, the same action would have been taken irrespective of what the belief of the complainer (or anyone else) was.

348. The reason for the actions taken by the respondent were entirely unrelated to belief. The sole reason was because inappropriate language had been used which was inconsistent with the respondent's standards. The same approach would have been taken whatever the belief or non-belief had been in relation to inappropriate content.

349. The complaint is ill founded.

(c) Pertemps failing to answer questions on 7 September 2022

350. The respondent argued that the questions asked by the claimant were answered. The material issues about which the claimant complained were responded to. The claimant was clearly unhappy that he had not been given full details in the response.

351. The claimant argued the failing to answer the questions was an act of less favourable treatment because of belief. There was no facts to which the claimant pointed that suggested belief or lack thereof could be a reason for the treatment.

352. The Tribunal found that a comparator whose circumstances were the same as the claimant (but with a different belief) would have been treated in precisely the same as the claimant was. The treatment was not less favourable treatment. It was open to the recipients of the email not to answer in direct terms and the same response would have been given irrespective of belief. To the extent there was a failure to answer the points the claimant raised, that was because Pertemps believed the matter had been dealt with and did not require to provide more detail. That would have been the response

to anyone who had sent the communication. There was no less favourable treatment.

353. The reason why the questions were not answered was solely because the recipient did not wish to answer the questions. It was believed that the material issues had been dealt with and nothing further was needed. That was entirely unconnected to belief and the complaint is ill founded.

(d) failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022

354. This was the grievance the claimant submitted to Pertemps on 4 October 2022. The respondent noted that responsibility for addressing that grievance rested with Pertemps and not the respondent. The claimant had provided no basis as to why the respondent would be responsible for the actions or inactions of Pertemps.

355. The clamant had not pointed to any facts which suggested the failure to address the grievance by Pertemps could be because of his belief or non-belief. The response issued was based on what Pertemps believed at the time. There was no basis to consider that the claimant's belief was a reason for the treatment. On that basis the complaint must fail.

(e) failing to provide clarity as to who was dealing with the grievance

356. The respondent's position was that reasonable clarity was provided to the claimant.

357. The Tribunal found that while there was some lack of clarity as to precisely what the investigation entailed, the claimant had been told an investigation was being undertaken. He raised a number of different issues and the respondent was trying to disentangle each issue. The respondent had not provided absolute clarity but the claimant had been told what was happening.

358. The first issue therefore was whether the failing to make the position clear was less favourable treatment. The Tribunal concluded that the response as to who was dealing with the matter (and how the grievances were being

progressed) would have been identical irrespective of belief. The response was because of the nature of the queries. The treatment was not less favourable treatment. Belief or non-belief was entirely irrelevant as to the amount of clarity given as to who was dealing with the grievances (and the same outcome would have been given irrespective of belief or non-belief). The treatment was not less favourable treatment because a hypothetical comparator would have received the same outcome.

359. The sole reason for the treatment was because of the complexity of the emails and the number of issues arising. The claimant's belief was in no sense whatsoever a reason for the treatment. The Tribunal found no evidence to support the claimant's position and was satisfied from the evidence that the sole reason for the response was because that was what they understood the position to be (and no further detail was needed).

(f) The failure of Mr Howie's response of 7 November 2022 to set out clearly how the respondent would deal with the claimant's complaint.

360. The respondent argued that Mr Howie had set out his position and no further information was required. The respondent was responding to a wide variety of matters raised by the claimant on an evolving basis and did so.

361. The Tribunal found that the respondent's submissions had merit. Mr Howie did his best to consider matters. His approach in dealing with the points the claimant raised would have been exactly the same irrespective of the claimant's belief or non-belief. In other words the treatment was not less favourable treatment. The response from Mr Howie would have been the same irrespective of the belief. Mr Howie set out the information he considered relevant in response to the points arising. A hypothetical comparator would have received the same response as that was Mr Howie's general approach to dealing with such issues.

362. The sole reason for Mr Howie's decision to communicate the response he did was because he did not consider he required to set out any further information. He responded to the points the claimant raised. The decision not

to provide more detail was in no sense whatsoever related to belief or manifestation therefore and the complaint is ill founded.

Taking a step back in relation to this issue

363. The Tribunal took a step back to consider whether the respondent had failed to take timely or meaningful action in response to the claimant's grievances thereby adopting the conduct and/or beliefs of others. The claimant had not established this in evidence. The respondent had tried to deal with the issues the claimant raised and had sought to do so in a balanced and proportionate manner. While the claimant was unhappy with the response he received and the action taken, the treatment would have been the same irrespective of belief or non-belief. The treatment was not less favourable treatment. On the facts and from the evidence presented, the respondent had brought evidence to show that the reason for the treatment was in no sense whatsoever because of belief or non-belief. On that basis the complaint is ill founded.

Vi The response of the respondent's employees to the claimant's posts on Yammer.

364. The claimant issued a post on 5 December 2022. A number of individuals replied.

365. It was submitted by the respondent that the claimant's actions demonstrated that he wanted to have a debate or discussion. The claimant's position was that Ms Allan noted the network was monitored and moderated. She had said some of the comments were "moderateable" which the claimant suggested should have alerted her to a problem. The claimant believed a group of people ganged up on him and nobody stopped it and the respondent took the side of the bullies, who used their influence to have him punished because he then confronted them.

366. The claimant's post was: "Does anyone know if anything similar is in the works here?". There was no doubt therefore that the claimant was seeking a discussion about the network and its application in Scotland. The claimant thereafter directly contacted by email a number of the persons who responded

and sought to provoke discussion about his (and the individual's) belief and non-belief. The Tribunal considered the communications carefully.

367. The respondent argued that the claimant's actions showed he wanted to have a debate or discussion about the issue. The Tribunal considered this issue very carefully. Having analysed the evidence the Tribunal concluded the posts were not less favourable treatment. The posts would have been the same irrespective of what the belief of the person was. If the same comments had been made about someone with a different belief, the responses would have been identical. This was not a post about the claimant's beliefs (which he had not disclosed) but rather about the issue in general terms as part of a discussion and the posts could have been made by someone of any belief and the outcome would have been no different.

368. The treatment would have been the same irrespective of belief and a hypothetical comparator (whose circumstances were not materially different to the claimant's, who had a different belief) would have been treated in precisely the same way. The hypothetical comparator would have asked the same questions (which were general questions and not explicitly questions about the claimant's beliefs or non-beliefs *per se*) and the same discussion would have ensued.

369. The responses were not less favourable treatment since the same treatment would have been received by anyone who had posted the same comments, irrespective of their beliefs.

370. Even if the comments were less favourable treatment, the reason why they were said was not because of the belief or non-belief relied upon. The claimant felt staff had "ganged up" on him and that those with opposing views to his had vocalised their position and treated him badly because of his belief or non-belief. The discussion was a debate the claimant wished to have (evidenced by his follow up messages following the external posts). The claimant wished to enter discussion about the issues and knew that the views discussed would not be the same views everyone held. The claimant knew

there were individuals who did not share his views. He specifically sought out those views and wished to engage further with that.

371. The claimant is an intelligent and articulate person and fully understood the impact his views had. He knew the consequence of his post and what views would arise. That was part of the reason why he had issued the post and followed the matter up.

372. The Tribunal was satisfied from the evidence that the reason for the posts by the respondent's employees was in no sense because of the belief or non-belief relied upon by the claimant. The posts were issued as part of a discussion about these issues provoked by the claimant. They were posts about the need to be inclusive to all, irrespective of their beliefs or non-beliefs. The claimant had his views and others responded. The sole reason for the posts was not because of the claimant's belief (or manifestation thereof) but the desire to create a workplace all staff can be themselves and feel safe (which was in no sense whatsoever connected to the claimant's belief or non-belief, nor indeed the individuals' belief but rather the desire to have a workplace in which all staff can feel welcome and valued). The complaint is ill founded. Any interference with the claimant's rights was proportionate given the context. Those involved were discussing matters at a general level (the claimant not having disclosed his beliefs). Those who responded did so not because of their (or other's) beliefs but because of the requirement (and desire) the respondent facilitates a workplace that is a place that welcomes all staff, irrespective of belief (and non-belief) such that all staff (irrespective of belief) can feel safe at work. The reason for the comments was not therefore belief or non-belief.

Vii The fact of the claimant's dismissal and/or the removal.

373. The claimant's case is that he was forced out his assignment because he confronted bullies. The Tribunal considered this issue carefully in light of the evidence led.

374. The first issue is whether his dismissal was an act of less favourable treatment. The Tribunal considered what the outcome would have been had

the person not had the claimant's belief, whose circumstances were not materially different. A relevant comparator who had acted as the claimant acted would have been treated in precisely the same way. His dismissal or removal was not therefore an act of less favourable treatment. A hypothetical comparator who acted in the same way the claimant acted would have been removed in the same way.

375. If the Tribunal was wrong in its analysis, the Tribunal considered whether the reason for the dismissal was belief or non-belief. The evidence in this regard was clear.

376. The reasons why the respondent decided to terminate the claimant's engagement were clearly set out by Ms Allan and Mrs Hunter and accepted by the Tribunal. The claimant had acted in a way that the respondent was not prepared to tolerate. The Tribunal found that Ms Allen and Mrs Hunter were credible and reliable. The Tribunal accepted their evidence that the sole reason for the ending of the claimant's assignment was his behaviour and in no way his beliefs. The respondent had shown that in no sense whatsoever was the claimant's beliefs or lack of beliefs a reason for his dismissal or removal.

377. The reason was solely to end the impact the claimant's behaviour had on colleagues. The way in which the claimant had behaved created serious concerns for the respondent. The sole purpose of the ending of his assignment was to end the impact his behaviour had upon colleagues. Any person with different beliefs whose position was identical to the claimant would have been treated in precisely the same.

378. Given the reason for the treatment was his conduct, it could be said that related to the manifestation of his beliefs (even if not the beliefs themselves). The Tribunal would have found the reason was the objectionable manifestation of those beliefs by the claimant. It was inappropriate and objectionable for the claimant directly to email the respondent's employees during working hours following his post. The claimant's behaviour was not

acceptable to the respondent and they reasonably concluded that it was not appropriate that he remain a contract worker.

379. The Tribunal found that the claimant was seeking to raise issues about beliefs, to allow him to enter into debate and discussion. He was seeking to encourage debate which he knew would result in comments being made that were comments he would find offensive. He was not prepared to let the issue be dealt with formally (and chose not to raise a complaint) and instead wished to have lengthy discussion with those he saw as potentially disagreeing with his view by private email.

380. The Tribunal would have found that the respondent's actions were a proportionate means of achieving the aims of protecting the safety and security of its employees and protecting the rights and freedoms of its employees to work safely in the workplace. The decision to terminate the claimant's assignment was a proportionate response to the claimant's actions.

381. Applying the principles set out in **Higgs**, the employer's objective was sufficiently important to justify the limitation which was rationally connected to the objective. Dismissal was necessary to protect others who had felt harassed by the conduct. No less intrusive limitation would be effective since the claimant had shown this was how he dealt with such matters. In balancing the severity of the limitation on the rights of the claimant against the importance of the objective, taking account of the relevant factors, the respondent's position outweighs the impact upon the claimant and the interference with the claimant's rights was proportionate. The respondent wished to create an inclusive environment where workers of all beliefs and non-beliefs could feel safe and all protected beliefs respected.

382. This complaint is without merit.

lix The manner of the claimant's dismissal including the absence of clear reasons, a letter of dismissal and/or a right of appeal.

383. The claimant argued that "the whole process leading to his dismissal was extraordinary and indefensible". He argued no consideration was given to his wellbeing nor the motives of the complainers and that no reasonableness test was applied to the complaints. The respondent's agent submitted there was no other steps that the respondent was required to take in relation to the termination of his assignment and none was suggested by the claimant. The manner of the dismissal, including the absence of clear reasons and letter of dismissal and right of appeal, is the norm for the ending of assignments of agency workers. There was no evidence at all that the manner of the claimant's dismissal differed in any way to any other agency worker. The treatment would have been the same irrespective of belief or non-belief. The reason why the manner of the claimant's dismissal was as it was solely because that was how agency worker's assignments ended. There is no merit in this complaint.

Ix The refusal by the respondent to assist Pertemps in the investigation of the claimant's grievances.

384. As set out above, there was no evidence to support the claimant's assertion. It was clear that the respondent did assist Pertemps in dealing with the complaint the claimant had. As is evident from the outcome of the original hearing and appeal, the points the claimant raised were dealt with. While the claimant was unhappy, the issues he raised had been considered and responded to. The respondent had shown in evidence that the sole reason why they provided Pertemps with the information they had was to protect the rights of those who had complained (while balancing the claimant's position). The reason was entirely unrelated to the claimant's belief or non-belief. There is accordingly no merit in this complaint.

Taking a step back in relation to the direct discrimination complaint

385. The Tribunal took a step back to consider the evidence and the treatment the claimant had received. The Tribunal recognised the claimant had firm beliefs and was of the view that a reason for the treatment he received was in some way connected with his beliefs (or the manifestation of them). The claimant

believed that the respondent was not favourably disposed towards his position and sought opportunities to evidence that belief. The claimant attended events aimed at increasing awareness and inclusivity and asked questions and made comments with the purpose of identifying whether his beliefs would be challenged. Given the nature of his beliefs and the questions he asked, and the nature of the issue in question, there were colleagues who disagreed with him. The claimant had asserted the reason for the treatment he received was because of his beliefs or the manifestation of them. That was not, however, the reality of the situation.

386. While the claimant believed that his belief or non-belief or the manifestation thereof was a reason for the treatment, the Tribunal found no link whatsoever between the claimant's belief (or non-belief) and the treatment. This applied to each of the areas in respect of which evidence was led. His belief (and non-belief) was entirely unconnected and irrelevant to the decisions taken. The respondent had shown that the reason for the treatment was entirely unconnected to his belief or non-belief.

387. The respondent had also shown that the action they had taken was a proportionate interference with the claimant's belief, the Tribunal having carried out the necessary balance required in this area.

388. The Tribunal was mindful that persons rarely accept a protected characteristic operates in their mind when making decisions. In this case, however, there was no evidence whatsoever to support the claimant's belief that his belief was in some way a factor that operated in the mind of the person responsible for each act in question. For each of the decisions made which the claimant considered adverse, the claimant's belief was entirely irrelevant and unconnected. In each case the claimant's belief was in no sense a substantial or effective reason for the treatment and any interference with the claimant's rights was proportionate.

389. To the extent the treatment arose as a result of the claimant's manifestation of his belief or non-belief, the Tribunal carried out the required balancing act

and concluded that any interference with the claimant's rights was proportionate given the context and reason for the treatment on the facts.

Victimisation

390. The claimant relies on 7 separate protected acts and 4 detriments (one of which contains 7 separate acts). The respondent noted that the claimant had not set out which provisions of section 27(2) the claimant was relying upon to establish that he did a protected act, disputed that most of the acts were protected acts and said the complaint should be dismissed as the claimant had not established he suffered any of the detriments because he did a protected act.

391. The claimant's very short submission noted the law is complex and said he regarded the failure to investigate his complaint was "arguably also a kind of victimisation". He said that "however, it is clear that the fact of my complaints seems to have put a black mark against my name. Having complained about the TLP, I then had this pseudo-investigation and pseudo-disciplinary procedure used to deflect later, more serious and wide-ranging complaints. This is evident in what we heard from Ms Allan and Ms Hunter".

392. Neither party fully engaged with the legal provisions in this area with regard to the facts relying upon their position in relation to the earlier complaints but the Tribunal considered each of the protected acts and detriments, taking each detriment in turn to assess whether any of the protected acts were a reason for the treatment.

Protected acts

393. The Tribunal first considered each of the acts in turn to determine whether they amount to protected acts in terms of section 27 of the Equality Act 2010.

394. The **first protected act** is the email from the claimant to Ms Henderson on 15 July 2022. That email explained that the claimant had attended the training event and had later received a link in an email to a site he said was "pretty strange" and "quite offensive" and he said was "probably unlawful". He said he felt he could not ignore it as he thought it was offensive as a catholic and

gender critical. It made him feel “extremely nervous”. He asked for an idea as to what to do next.

395. The respondent said this was not a protected act. There is no allegation that the respondent (or other person) has contravened the terms of the Equality Act 2010.

396. The Tribunal considered that, objectively viewed, the claimant was saying that he considered the link to be offensive and thereby amount to unlawful harassment. The email was in essence the claimant saying that he believed the respondent had breached the Equality Act. It was therefore a protected act.

397. The **second protected act** is the email by the claimant to Ms Thorpe and Ms Cooke on 31 August 2022.

398. It was not accepted that this was a protected act. It was an email the claimant sent which was headed “Faith and Belief issues in SG”. His email was to have someone “answer a couple of questions”. He made comments about Ministerial comments which he said some people could regard as hostile and unnerving in the workplace. He also referred to “corporate embrace” of Stonewall and corporate encouragement to use preferred pronouns and links to websites which include material some may regard as hostile to those with gender critical beliefs. He said “this could all be seen to contribute to a hostile working environment for people with gender critical beliefs”. He then referred to the recent outcomes of the Forstater and Bailey employment tribunals and that half of the Scottish population was gender critical and asked how gender critical voices were to be valued within the business of government and treated fairly and decently in the workplace.

399. When viewed in context the claimant was asking information. He was not saying that he had been subject to harassment in the workplace, or any other breach of the Equality Act. That was not therefore a protected act.

400. The **third protected act** is the claimant’s email to Mr Hope-Jones on 20 September 2022. In the email which was headed “Gender Reform and SG

behaviour" the claimant referred to pro gender material which he had seen. He said that position was hotly contested and that gender critical beliefs should be considered. He noted at one training session he had been told certain individuals should not bring their beliefs to work as that would deter others from bringing their whole selves to work. That was background to the 4 questions the claimant asked, which were about expertise in dealing with gender critical beliefs, how ministerial comments affected engaging with such groups, how statements affected the culture and whether anyone held such belies in the relevant team. He said he had a personal stake in some of the issues.

401. It was not accepted that this was a protected act. The Tribunal did not consider this email to fairly be viewed as the claimant making an allegation express or implied that the Act had been broken. Instead his focus was on understanding how the respondent dealt with those holding gender critical beliefs. He was seeking information. That was not therefore a protected act.

402. The **fourth protected act** is the email from the claimant to Ms Streeter on 29 September 2022. This email is similar in terms to the email sent to Mr Hope-Jones on 20 September. In the email which was headed "Gender critical beliefs and SCS" the claimant referred to pro gender material which he had seen. He said that position was hotly contested and that gender critical beliefs should be considered. He noted at one training session he had been told certain individuals should not being their beliefs to work as that would deter others from bringing their whole selves to work. That was background to asking 4 questions, which were about expertise in dealing with gender critical beliefs, how ministerial comments affected engaging with such grounds, how statements affected the culture and whether anyone held such belies in the relevant team. He said the questions were unusual but the interaction with advice to ministers and the role as employer was unusual.

403. He then referred to the recent outcomes of the Forstater and Bailey employment tribunals and that half of the Scottish population was gender critical and how were gender critical voices to be valued within the business of government and treated fairly and decently in the workplace.

404. It was not accepted that this was a protected act. When viewed in context, the claimant was asking information. He was not saying that he had been subject to harassment in the workplace, a breach of the Equality Act. That was not therefore a protected act.

405. The **fifth protected act** is the grievance presented by the claimant to Ms Downey of Pertemps on 4 October 2022. The claimant alleged he suffered direct discrimination and harassment because of his beliefs. It was accepted this constitutes a protected act.

406. The **sixth protected act** is the complaint presented by the claimant to the respondent's Central Enquiry Unit on 20 October 2022. That complaint is in similar terms to the one presented to Pertemps on 4 October. It was accepted this amounted to a protected act.

407. The **seventh protected act** is the claimant's complaint of victimisation against Mr Howie. The complaint was mainly about the difficulties the claimant says he had in relation to other issues he had raised with the respondent. It was not accepted that this is a protected act.

408. The email is a complaint by the claimant that the respondent had not properly dealt with his complaint. He said that he considered the failure to deal with the matter to be victimisation. He said that he would not have been treated so poorly if it were not the case that gender critical beliefs were generally unwelcome. The claimant is asserting that the respondent unlawfully breached the Equality Act. The email does amount to a protected act for the purposes of the Equality Act 2010.

Detriments and the connection with a protected act

409. The Tribunal took each (alleged) detriment in turn and then assessed whether any of the protected acts was in any sense a reason for the treatment. While the Tribunal had not accepted that each of the acts relied upon were protected acts, the Tribunal considered each of the acts in any event, from the evidence, to assess whether or not any of the acts relied upon by the claimant were in any sense a reason for the treatment in the sense required by law.

410. The **first detriment** relied upon was *"The failure to take timely and/or meaningful action in response to the claimant's grievances thereby adopting the conduct and/or beliefs of others including Stonewall as a third party by (a) failing to respond to the claimant's emails of 20 and 29 September 2022; (b) failing to adequately address the TLP; (c) failing to answer the claimant's questions on 7 September 2022; (d) failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022; (e) failing to provide clarity as to who was investigating his grievances; and (f) Mr Howie's response of 7 November 2022 which did not reach factual findings and failed to identify the "lessons learned and remedial action"."*

411. These individual incidents were analysed above and not all of the acts had been established in evidence.

412. The **first detriment in this heading** was the claimant's email to Mr Hope-Jones on 20 September 2022 and Ms Streeter on 29 September 2022. Both individuals replied to the claimant. The assertion therefore that either Mr Hope-Jones or Ms Streeter had not responded to the claimant had not been established. The detriment had not therefore been made out. The emails were in any event not detrimental treatment. There was no detriment.

413. Had it been made out, the Tribunal considered whether any of the detriments were in some way influenced by the protected acts. It is obviously not possible for a detriment to have been influenced by something that had not happened. For this reason the fourth to seventh protected acts could not have influenced the treatment since they postdated it. The third and fourth protected acts are the detriments relied upon. It is not possible for the same act to be both protected act and detriment.

414. The first protected act was the email to Ms Henderson. There was no evidence to suggest Ms Henderson had any contact with Mr Hope-Jones or Ms Streeter and there was no evidence that the first protected act was in any way at all connected or related to the issuing of the response to the claimant's communications.

415. The second protected act, the email to Ms Thorpe and Ms Cooke, was similarly entirely unconnected to the communications to Mr Hope-Jones and Ms Streeter. There was no evidence at all to connect the protected act and the detriment.

416. There is no basis to suggest that the detriment was or could have been in some way caused or influenced by the protected acts. There was no basis to support the claimant's contention that any of the protected acts were in any sense a reason for Mr Hope-Jones's or Ms Streeter's approach. Both individuals replied to the claimant in the way they saw fit. There was no evidence to suggest any of the protected acts was connected at all.

417. This complaint is therefore ill founded.

418. The **second detriment in this heading** was the alleged failure to take action in relation to the attachment to the email (which was the TLP). As set out above, the Tribunal considered the respondent did take action in relation to the email. The individual was spoken to and remedial action taken. It was not correct to assert that the respondent had failed to take action. While the action may not have been as severe as the claimant had wished, action was taken. To the extent the action taken was not as severe as the claimant had wished, the treatment could be considered detrimental.

419. The Tribunal considered whether the treatment had, in any relevant sense, been influenced or caused by the protected acts.

420. The respondent learned of the issue with the TLP in June 2022 and dealt with the matter with some alacrity. From the evidence it appeared that the response to the issue had been dealt with prior to each of the protected acts. In other words, from the evidence, it appears the protected acts post-date the detriment (and as such could not be in any sense a reason for the treatment).

421. In the event the Tribunal was wrong, it considered whether any of the relevant acts could have been a reason for the treatment from the evidence that had been led.

422. The first protected act was the email to Ms Henderson of 15 July 2022. There was no evidence to suggest Ms Henderson had any relevant contact with Ms Allan or others who had been managing the process in relation to the respondent's response to the TLP. There was no evidence at all to suggest the first protected act was in any way at all connected or related to the response to the TLP issue.

423. The second protected act, the email to Ms Thorpe and Ms Cooke of 31 August 2022, was entirely unconnected to the respondent's response to the TLP issue. There was no evidence at all to connect the protected act and the detriment.

424. The third protected act, was the email to Mr Hope-Jones of 20 September 2022. There was no suggestion Mr Hope-Jones was involved at all in relation to the TLP response. There was no basis to link what Mr Hope-Jones had done and the respondent's response to the TLP issue. They were entirely unconnected and there was no evidential basis to support the assertion this protected act in any way influenced the response to the TLP issue.

425. The same position applied for the fourth protected act, the email to Ms Streeter on 29 September 2022, as the claimant's email to Mr Hope-Jones. There was no evidence to link Ms Streeter and the response to the TLP issue. It cannot be said from the evidence that the email Ms Streeter sent was in any way a reason for the respondent's response to the TLP issue.

426. The fifth protected act was the grievance to Ms Downey of Pertemps on 4 October 2022. There was no evidence to support the assertion the claimant's grievance to Pertemps was in any way at all a reason for the respondent's approach to the TLP issue. There was no suggestion Pertemps had any involvement in the respondent's response.

427. The sixth protected act was the email of 20 October 2022 which was similar to the grievance the claimant submitted to Pertemps. The Tribunal considered the evidence and found no link to the complaint the claimant made and how the respondent dealt with the TLP issue. There was no basis to allege the

email of 20 October 2022 was in any way a reason for the respondent's response to the TLP issue.

428. The final protected act was the claimant's complaint about Mr Howie. There was no evidence that suggested Mr Howie was in any way linked to how the respondent dealt with the TLP issue. Mr Howie's actions were not related at all to how the respondent dealt with the TLP issue from the evidence.

429. The Tribunal found no evidence to support the assertion that any of the protected acts were in any way a reason for the treatment. This complaint must fail.

430. The **third detriment under this heading** was the allegation that the claimant's questions of 7 September 2022 were not answered. From the evidence the only reason why the questions were not answered was because the recipient did not consider it appropriate to answer each of the questions. There was no evidence that any of the protected acts were a reason in any way for the questions not being answered.

431. Given the detriment was said to have occurred on or around 7 September 2022, the treatment could not have been caused by acts occurring after this time. Thus the third to seventh protected acts could not have influenced the treatment since they post-date the treatment. There was no evidence before the Tribunal to link the failure to answer the questions of 7 September 2022 with those acts.

432. The first protected act was the email to Ms Henderson of 15 July 2022. There was no evidence to suggest Ms Henderson had any relevant contact with Pertemps (of whom questions had been asked). There was no suggestion that Ms Henderson had been any way connected to the person who had not answered the questions. There was no evidence at all to suggest the first protected act was in any way at all connected or related to the failure to answer the questions asked on 7 September 2022.

433. The second protected act, the email to Ms Thorpe and Ms Cooke of 31 August 2022. was similarly entirely unconnected to the failure to answer the questions

asked on 7 September 2022. There was no evidence at all to connect the protected act and the detriment.

434. Having carefully considered the evidence, there was no basis at all to support the claimant's assertion that any of the protected acts were in any way a reason for the treatment. On that basis the complaint must fail.

435. The **fourth detriment under this heading** was the grievance of 4 October 2022. This is described as "failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022". The detriment relied upon is the (alleged) failure of Pertemps to progress the grievance. The claimant's complaint was noted and it was stated that the matter had been progressed and if the claimant sought further information a contact within the respondent could be provided.

436. The decision not to respond substantively to the grievance was mid October 2022. It could not be said that the sixth or seventh protected acts influenced the detriment since they postdated it. There was no evidence to suggest the claimant's complaint to the respondent on 20 October or the complaint about Mr Howie were in any way linked or connected to the complaint of 4 October 2022 and as such those acts could not be a reason for the treatment.

437. The Tribunal considered the evidence and found no evidence to suggest Ms Henderson had any connection with the grievance of 4 October. She could not therefore have influenced the outcome in any way. The first protected act was entirely unconnected to the detriment. Similarly there was no evidence Ms Thorpe or Ms Cooke had any link with the grievance. They could not therefore have influenced the outcome.

438. There was no suggestion either that Mr Hope-Jones or Ms Streeter had any link to the grievance of 4 October 2022 and the action taken (or not taken) and there was no evidence linking those acts and the approach taken to the grievance. Obviously the grievance itself, which is the fifth protected act, cannot be both a protected act and the same detriment.

439. Having carefully considered the evidence, there was no basis at all to support the claimant's assertion that any of the protected acts were in any way a reason for the treatment. On that basis the complaint must fail.

440. The **fifth detriment under this heading** was the alleged failure to provide clarity as to who was investigating the grievances. This had not been made out on the evidence. Mr Howie had done his best to set out the position. The claimant had been told that the issues had been considered. Different and complex issues had been raised and it was not obvious that an employment related complaint had been raised, given the complaint appeared to deal with policy issues and Ministerial comments.

441. There was no evidence before the Tribunal to suggest that any of the protected acts were in any way a reason or connected to the way Mr Howie acted. The Tribunal accepted his evidence as to why he acted as he did and there was no connected at all to any of the protected acts. It had not been suggested to any of the authors of the protected acts that they had in some way been connected to the decision not to provide the clarity the claimant sought as to who was investigating the matter. Mr Howie had advised the claimant that his complaint had already been dealt with and no further action was needed.

442. The failure to provide the clarity the claimant sought appears to have taken place in October 2022. That means the seventh act could not be a reason for the treatment (and there was no evidence suggesting the complaint against Mr Howie was in any sense a reason not to provide the lack of clarity).

443. The Tribunal considered the evidence and found no evidence to suggest Ms Henderson had any connection with the failure to provide clarity sought by the claimant. She could not therefore have influenced the outcome in any way. The first protected act was entirely unconnected to the detriment. Similarly there was no evidence Ms Thorpe or Ms Cooke had any link to the decision to provide the clamant relevant information. They could not therefore have influenced the outcome. There was no suggestion either that Mr Hope-Jones

or Ms Streeter had any relevant link to or connection with the respondent's response.

444. The fifth protected act, the grievance to Pertemps of 4 October 2022, was in no sense connected to the decision not to provide information as to who was investigating the claimant's grievances. A response had been given explaining Pertemps' position in relation to the grievance and there was no evidence suggesting that grievance had any connection with why the claimant was told what he was told about the investigation.

445. The Tribunal considered the sixth protected act, the complaint provided on 20 October 2022, and again found no evidence to suggest the complaint was in any sense a reason for the failure to tell the claimant about who was investigating the grievances or that it was in any way related to that decision.

446. Having carefully considered the evidence, there was no basis at all to support the claimant's assertion that any of the protected acts were in any way a reason for the treatment. Mr Howie had responded in the manner he did solely because that was his belief. He believed the matters about which the claimant had complained had been properly dealt with and resolved and that no further action was needed. His decision was his alone and not influenced by any of the protected acts. On that basis the complaint must fail.

447. The **sixth detriment under this heading** was Mr Howie's response of 7 November 2022 which was said to fail to reach factual findings and identify lessons learned and remedial action was in any way connected to the protected acts. Mr Howie had advised the claimant his complaint was about policy and any action had already been taken. The claimant wanted more information and was unhappy more action had not been taken.

448. The Tribunal considered the evidence and found no evidence to suggest Ms Henderson had any connection with Mr Howie's decision not to provide the claimant with more information in his communication. She could not therefore have influenced his decision in any way. The first protected act was entirely unconnected to the detriment. Similarly there was no evidence Ms Thorpe or Ms Cooke had any link to Mr Howie's response. They could not therefore have

influenced the outcome. There was no suggestion either that Mr Hope-Jones or Ms Streeter had any link to Mr Howie and how he approached this issue and there was no evidence linking those acts and the approach taken to the outcome.

449. The fifth protected act, the grievance to Pertemps of 4 October 2022, was in no sense connected to Mr Howie's decision not to provide more information.

450. The Tribunal considered the sixth protected act, the complaint provided on 20 October 2022, and again found no evidence to suggest the complaint was in any sense a reason for the failure to tell the claimant more.

451. Finally the Tribunal considered the seventh protected act, the complaint against Mr Howie. The complaint was made on 10 November 2022. Obviously anything that occurred after 7 November could not have been a reason for the treatment and so this protected act could not have been a reason for the treatment.

452. Having carefully considered the evidence, there was no basis at all to support the claimant's assertion that any of the protected acts were in any way a reason for the treatment. Mr Howie had responded in the manner he did solely because that was his belief. He believed the matters about which the claimant had complained had been properly dealt with and resolved and that no further action was needed. His decision was his alone and not influenced by any of the protected acts. On that basis the complaint must fail.

Taking a step back in relation to this issue

453. The Tribunal took a step back to consider whether there was any merit in the claimant's assertion that any of the protected acts had been in some way connected to the first detriment, which was that the respondent had not (the claimant believed) taken meaningful and timely action in relation to his grievance. The factual basis for the complaint had not been made out. The respondent (and Pertemps) had taken action in relation to the claimant's complaint. While he did not like what they had done, action had been taken. Given the claimant did not like what had been done, the treatment could be

said to be detrimental and so the Tribunal assessed whether from the evidence any of the protected acts were a reason for the treatment relied upon. Having carefully assessed the evidence, none of the protected acts was in any sense a reason for the treatment. The protected acts had no influence (in a more then minor or trivial way) upon the treatment. The complaint is ill founded.

454. The **second detriment** was the fact of the claimant's dismissal.

455. The Tribunal considered each of the protected acts in turn to determine whether they were a reason for the detriment.

456. The Tribunal found no evidence to suggest Ms Henderson had any connection with the removal of the claimant. She could not therefore have influenced the decision in any way. The first protected act was entirely unconnected to the detriment and not a reason for it.

457. Similarly there was no evidence Ms Thorpe or Ms Cooke had any link to the decision to remove the clamant. They could not therefore have influenced the outcome. There was no suggestion either that Mr Hope-Jones or Ms Streeter had any link to the decision to end the claimant's assignment and so that protected act was not a reason for the treatment.

458. The fifth protected act, the grievance to Pertemps of 4 October 2022, was in no sense connected to the decision to terminate the claimant's assignment with the respondent. There was no evidence that suggested the fact the claimant had raised a grievance with Pertemps was in any way connected to the decision to end the assignment. The assignment was terminated because of the claimant's behaviour (and for that reason alone).

459. The Tribunal considered the sixth protected act, the complaint provided on 20 October 2022, and again found no evidence to suggest the complaint was in any sense a reason for the decision to end the claimant's assignment. The Tribunal accepted the evidence of Ms Allen and Mrs Hunter. The claimant's grievance was in no sense whatsoever a reason for the decision. The Tribunal was satisfied the sole reason for the ending of his assignment was solely

because of the way in which the claimant had conducted himself and in no sense connected to or influenced by the complaint the claimant had made.

460. Finally the Tribunal considered the seventh protected act, the complaint against Mr Howie. The complaint was unconnected to the decision to end his assignment. The only reason why the claimant had been removed from the respondent was because of his behaviour and the decision was in no way influenced by any of the complaints the claimant had raised, including his complaint about Mr Howie. The complaint against Mr Howie was considered by the respondent and responded to. The complaint was in no sense whatsoever related to the detriment in this instance.

461. The Tribunal was satisfied from the evidence that the reasons given for the respondent's decision to end the assignment were the only reasons. They were because of the inappropriate way in which the claimant's conduct was viewed. As set out above that was a legitimate and proportionate response. The protected acts were in no sense related to the treatment.

462. The **third detriment** was the manner of dismissal including absence of clear reasons, letter of dismissal and right of appeal. The Tribunal was satisfied the sole reason for the way in which the claimant was dismissed was because that was the norm for ending an assignment of an agency worker. In other words the protected acts relied upon in no sense whatsoever influenced the manner of dismissal.

463. The Tribunal reviewed each of the protected acts and was satisfied none of the protected acts was in any way a reason for the manner of dismissal. There was no connection at all between the acts and the manner of dismissal and the protected acts were entirely unconnected to (and in no sense a reason for) the detriment.

464. The **fourth and final detriment** was the alleged refusal of the respondent to assist Pertemps in investigating the claimant's grievance. This had not been made out on the facts since the Tribunal found that the respondent had provided reasonable assistance to the claimant's agency.

Taking a step back in relation to the victimisation complaint

465. In reaching its decision with regard to the victimisation complaint, the Tribunal carefully assessed the evidence that had been led to assess what, if any, influence each protected act relied upon had upon the detriments relied upon. That took time and involved assessing the oral evidence together with the documentary evidence and submissions. The Tribunal recognised witnesses rarely readily agree that protected acts did influence their decision in some way. The Tribunal also recognised that there can be more than one reason for an action and it is possible for a protected act to influence a decision in more than a minor or trivial way along with other acts. The Tribunal therefore took care to assess each detriment and each protected act in light of the evidence and applicable law. The Tribunal analysed and assessed the evidence to determine whether the protected acts were a reason (in a more than minor or trivial way) for the treatment.

466. This took a great deal of time and involved assessing the written and oral evidence and the context. The claimant had not set out which detriment had been caused by which protected act and his submissions on this complaint in total ran to one paragraph. Notwithstanding that brevity, the Tribunal carefully analysed each of the detriments and considered whether any of the protected acts was in any way connected to the treatment. The Tribunal decided to look at each of the protected acts (even although some of the acts were not protected acts in terms of the legislation). In carrying out the assessment the Tribunal carefully analysed the reason for each of the detriments relied upon and surrounding facts.

467. The Tribunal did not accept the submission that any of the protected acts caused in some way (or influenced (in more than a minor or trivial way)) the detriments relied upon. The reasons for the treatment were entirely unrelated to the protected acts and were in no sense whatsoever a reason for the treatment.

468. The claimant had said in his submissions that he believed it was clear that the fact he had made complaints led to a “black mark” being put against his name.

The Tribunal did not accept that as a proper characterisation as to what happened. The claimant raised a complaint and made it clear he was unhappy with how matters were being dealt with. His concerns were taken on board and a response was issued. While the claimant did not like the response, action had been taken. There was no factual basis to find that the reason more serious action was not taken was somehow because of or related to any of the protected acts. There was no evidential basis for that proposition.

469. The claimant also said that having complained about the TLP he had a "pseudo investigation and pseudo disciplinary procedure used to deflect later more serious and wife ranging complaints". The Tribunal does not accept that to be a fair representation of the evidence. The claimant suggested the evidence of Ms Allan and Ms Hunter supported his assertion but that was not correct. While there was a lack of clarity in places as to precisely what action had been taken, the Tribunal was clear that the action taken towards the claimant was entirely unconnected with any of the protected acts. The respondent took the claimant's concerns seriously and took appropriate action. The protected acts relied upon by the claimant were entirely unrelated to the detrimental treatment on which the claimant relied.

470. In reaching its decision the Tribunal looked at all the evidence and the points raised by the claimant. The Tribunal carefully assessed the evidence. Applying the legal tests, the Tribunal found that none of the protected acts in any way influenced the treatment relied upon. On that basis the victimisation complaint is ill founded and is dismissed.

Jurisdiction

471. As none of the complaints has been upheld it is not necessary to consider jurisdiction. The claimant accepted that had it been necessary to do so, his complaints so far as out of time, would fall to be dismissed as being out of time, there being no evidence relied upon by the claimant to support the assertion it was just and equitable to allow the claims to proceed.

472. The Tribunal found no evidence of an act extending over a period such as to allow any extension of time. There was no evidence of a culture or approach

that would allow the claimant to group together any of the complaints. The complaints were standalone acts of alleged discrimination.

473. Early conciliation commenced on 16 February 2023 and ended on 30 March 2023 (42 days) with the claim being raised on 28 April 2023. Complaints in relation to acts occurring before November 2022 would be out of time.

474. The first four acts relied upon (namely the June 2022 training events, comments of Dr Freem, distribution of the TLP link and the October 2022 training event), had they been established as unlawful treatment, would have been out of time and would have been dismissed, of consent, there being no basis to find that the claims in respect of those matters were raised within such period as was just and equitable.

475. The parties understood time bar was an issue in this case. The claimant had been reminded of the need to lead any evidence he wished to lead in relation to why the claims that were late were raised when they were (and not within 3 months) in the event that a time bar issue arose. The claimant understood the importance of that requirement and chose to focus on his assertion the relevant acts were not time barred as there was a general culture or act extending over a period, notwithstanding having been warned that it would only be acts found to be unlawful which could be taken into account with regard to extending time and the claimant should explain why claims had not been raised within the time limit. The claimant chose not to lead any evidence in respect of time bar and conceded at the submission stage the claims that were raised outwith the 3 month period would fall to be dismissed if the time limit was not extended.

476. The only basis he was asserting the claims could proceed was because they formed part of an act extending over a period. He conceded in that event the Tribunal found there was no act extending over a period that that there were complaints which were time barred, the out of time claims would be dismissed by reason of time bar.

477. The claimant was very intelligent and articulate and understood the legal provisions and had indeed referred to other Employment Tribunal claims. He

understood Tribunal procedure and was advised of the position in relation to time bar. He chose not to lead any evidence in relation to whether or not it would have been just and equitable to extend the time limit in the event his principal submission was not upheld and the respondent was accordingly not able to cross examine the claimant in relation to the position as to why his claims were not raised in time.

478. Consequently, had it been necessary to do so the Tribunal would not have found it just and equitable to have allowed the complaints that were lodged late to proceed.

Observations

479. The Tribunal recognised the importance of the claimant's beliefs (and non-beliefs) to him and his belief that they had in some way influenced the treatment but, objectively viewed, the claimant was mistaken. The respondent had balanced the claimant's views with those of others, who had equally valid views. This created challenges as the claimant wished to provoke discussion on matters which he knew would be contentious and personal. He wanted to test his beliefs and he wished to see how the respondent reacted, given the position adopted in relation to diversity and inclusion.

480. In reaching its unanimous decision, the Tribunal was able to rely upon the industrial expertise of the non-legal members whose input was important and material in assessing the facts and applying the legal tests in context.

481. The above complaints were assessed as against each of the beliefs (and non-beliefs) the claimant had. The outcome was the same, irrespective of the way in which the claimant framed his belief (or non-belief). The claims were ill founded in respect of the claimant's gender critical belief and his lack of a gender identity belief. The Tribunal was satisfied any interference with the claimant's rights was proportionate and lawful.

482. The Tribunal wishes to thank both parties for the skilful way in which their respective cases were put, for their professionalism and for working together to assist the Tribunal thereby achieving the overriding objective.

D Hoey
_____
Employment Judge

18 July 2024
_____
Date

Date sent to parties **19 July 2024**
_____

Annex A: Decision in relation to Tribunal Tweets' application

CASE MANAGEMENT ORDER

The application by Tribunal Tweets made under cover of email dated 16 June 2024, to be able to issue real time communications on the internet during the Hearing as to what was said during the Hearing, which would deviate from the default position in Scotland, was refused, it being necessary and proportionate not to allow the application. Accordingly the standard position that applies in Scotland as to reporting of proceedings applies to this case.

Discussion and reasons

1. The claimant had raised a number of complex complaints in this case pertaining to gender critical/sex realist beliefs which had arisen during his engagement (indirectly) with the respondent.
2. The case gives rise to the complex interplay between strongly held beliefs and is a matter of considerable importance, both to the parties and to society generally. It is also a case that could involve discussion about a number of individuals (including some who are not witnesses) and their personal beliefs. Those individuals include civil servants (who are subject to strict neutrality rules).
3. The case is heard amidst considerable publicity that was given to a case heard in Edinburgh involving similar beliefs and similar issues. There are important legal and social issues arising in connection with the interplay of such rights and this is a developing area of law, which is of interest to large sections of society.
4. Tribunal Tweets is a "citizen journalist" collective whose purpose is the accurate reporting by way of "live tweeting" of court and tribunal hearings relating to freedom of belief and speech, particularly but not exclusively in the areas of sex and gender.
5. Tribunal Tweets is a private association of approximately 15 volunteers with 3 members acting as coordinators. Those carrying out the work are not journalists but private individuals. All of its work is freely available and completely archived and has reported on more than 40 hearings over a total

number of separate hearing days which must number 500 or more. Permission to live tweet had not been refused.

6. Only one of the cases Tribunal Tweets covered was heard in Scotland (which was the case referred to above giving rise to similar issues). The Tribunal was told that Tribunal Tweets had received "favourable judicial comment on several occasions, including in the Employment Appeal Tribunal" and that it had been "praised in The Lawyer (22 April 2022) for "sterling work" in reporting on hearings of public interest".

7. Tribunal Tweets wished to "live-tweet" these proceedings. It became clear at the hearing that this means Tribunal Tweets wished to have someone (and possibly two individuals) present throughout the hearing to post, in real time, what was said at the Hearing. That included questions asked of witnesses, their answers, discussions and interpretation and comment in relation to the proceedings.

8. Tribunal Tweets sought permission to do so. The Tribunal sought the views of the parties given this differed from what was ordinarily permitted in Scotland and gave Tribunal tweets the chance to make formal submissions, which were summarised for the parties. The parties and Tribunal Tweets' counsel were then given the opportunity at the start of the Hearing to set out their position to allow the Tribunal to make a decision which it did, issuing oral reasons.

9. A witness statement had also been provided by Tribunal Tweets which set out how the application, if granted, would take place, which was fully taken into account.

The law

10. Counsel for Tribunal Tweets had set out the law said to be applicable in this area which was as follows.

11. Article 10(1) of the European Convention on Human Rights, to which the Tribunal is bound to give effect both directly by virtue of section 6 of the Human Rights Act 1998 ("Acts of public authorities"), and by section 3 in its interpretation of any relevant legislation, provides: 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.

12. Section 9 of the Contempt of Court Ac 1981 as it applies in Scotland provides:

9.— Use of tape recorders.

(1) Subject to subsection (4) below, it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(d) to publish or dispose of any recording in contravention of any conditions of leave granted under subsection (1A).

13. Rule 50 of the Employment Tribunals Rules of Procedure at schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 empowers the Tribunal to make an order preventing or restricting the public disclosure of any aspect of proceedings "so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person". By rule 50(2), a tribunal considering whether to make such an order must give full weight to the principle of open justice and to the Convention right to freedom of expression, which includes the right to receive and impart information.

14. The principles that apply when a court or tribunal is considering whether a derogation from open justice is necessary are set out in the (English and Welsh) Practice Guidance (Interim Non- disclosure Orders) [2012] 1WLR 1003:

[9] Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see art.6.1 of the Convention, CPR r. 39.2 and Scott v Scott [1913] A.C.

417. This applies to applications for interim non-disclosure orders: Micallef v Malta (2009) 50 EHRR 920 [75]ff; Donald v Ntuli (Guardian News & Media Ltd intervening) [2011] 1 W.L.R. 294 [50].

[10] Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: R. v Chief Registrar of Friendly Societies Ex p. New Cross Building Society [1984] Q.B. 227, 235; Donald v Ntuli [52]–[53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.

[11] The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: M v W [2010] EWHC 2457 (QB) [34].

[12] There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: Ambrosiadou v Coward [2011] E.M.L.R. 419 [50]–[54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.

[13] The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: Scott v Scott (above) 438–439, 463, 477; Lord Browne of Madingley v Associated Newspapers Ltd [2008] Q.B. 103 [2]–[3]; Secretary of State for the Home Department v AP (No.2) [2010] 1 W.L.R. 1652 [7]; Gray v W [2010] EWHC 2367 (QB) [6]– [8]; and H v News Group Newspapers Ltd (Practice Note) [2011] W.L.R. 1645 [21].

[14] When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of art.8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their art.8 Convention right is entitled. The proper approach is set out in H's case.

15. In **H v News Group Newspapers Ltd** [2011] 1WLR 1651, Lord Neuberger of Abbostbury said:

"Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions."

16. Counsel also drew the Tribunal's attention to paragraph 13 of the 2020 Practice Direction on the Fixing and Conduct of Remote Hearings:

"[C]ommenting upon a hearing during its course using live text based communications (including by social media), without permission, will be a breach of this Direction."

17. There were no authorities presented to the Tribunal setting out the position from a Scots law perspective. This was significant given the way in which Tribunals in Scotland hear evidence (and certain procedural rules and indeed legal provisions) differ in Scotland to that in England and Wales and the material referred to be Counsel referred to the position in England and Wales. An obvious material difference is that in England and Wales witnesses in a case are permitted to hear evidence and attend the Hearing prior to the giving of their own evidence. In Scotland the default position is that witnesses must

not do so without leave of the court. That is an important distinction and is aimed to ensure witness evidence is independent (and not influenced by what has been said or discussed prior to the giving of evidence).

18. There is no doubt that the principle of open justice is given equal primacy in Scotland – See **MH v Mental Health Tribunal** 2019 SLT 411 and its application in practice (see **Cherry v AG for Scotland** 2020 SC 37).

19. It is also important to apply the Tribunal Rules in determining this application.

20. The overriding objective found in rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Proceudre0 Regulations 2013 requires the Tribunal to ensure that any decision that is taken is just and fair in all the circumstances. That includes a requirement to avoid dealing with matters in an unnecessarily formal way and seeking flexibility in proceedings. It is also important to avoid delay and save expense.

21. Rule 41 is also relevant and states that the Tribunal shall regulate its own procedure and conduct the hearing in a manner it considers fair having regard to the principles contained within the overriding objective. The Tribunal is to avoid undue formality.

22. Open justice is not an absolute principle and appropriate safeguards should be applied. Hence in **A v British Broadcasting Corporation** 2014 UKSC 25 the Supreme Court held that courts have inherent jurisdiction to determine how the common law open justice principle should be applied, and in the later case of **Millicom Services UK Ltd v Clifford** 2023 ICR 663, this was explained by the Court of Appeal as amounting to an inherent power to withhold information where it is necessary in the interests of justice to do so.

23. Similarly, the right to a fair trial under Article 6 ECHR is a qualified one: the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

24. The Practice Direction on written witness statements in The Employment Tribunal in Scotland (of 3 August 2022) reminds Tribunal users in Scotland at paragraph 11 that witnesses remain outside the Tribunal room (actual or

virtual) until their evidence has been heard and at paragraph 24 it is noted that a witness statement should not be seen by another witness until after their evidence. The Presidential Guidance in relation to witness statements in Scotland (also of 3 August 2022) at paragraph 4 reminds Tribunal users in Scotland of the need to avoid collusion of witness evidence (and the desire to avoid witnesses learning of evidence prior to giving their evidence).

Position advanced by Tribunal tweets

25. The claimant's position was that he was content to adopt the position set out by Tribunal Tweets. Counsel for the respondent was "neutral" and left the matter to be determined by the Tribunal.

26. Counsel for Tribunal tweets noted that section 9 of the Contempt of Court Act 1981 is confined to audio recording, and had no application in this case. It was said that absent audio recording, the default position is that a reporter is free to take a shorthand note of a public hearing and report on it in as much detail and with as much speed as he or she wishes. It was said that to the extent the If and to the extent that the 2020 Practice Direction purports to put the onus on a person wishing to produce a contemporaneous report of public proceedings to apply for permission to do so, it is submitted that it exceeds what a Practice Direction can do (including the obligation on Courts and Tribunals under s.6 HRA.

27. It was submitted that if the Tribunal wished to prohibit contemporaneous reporting on these proceedings, its power to do so must be found at rule 50. Exercise of that power will be a derogation to open justice and an interference with the article 10 rights, and is accordingly impermissible unless it is necessary in the interests of justice or to protect the Convention rights of any person. The making of an order under rule 50 in this context is not a matter of judicial discretion: it will either be necessary, or it will be unlawful: *M v W*.

28. With regard to integrity of witness evidence, witnesses in Scotland are excluded from the hearing room (and the virtual hearing room, in the event that remote access is permitted) until after they have given their evidence, so that they do not hear the evidence of the witnesses who precede them. witnesses may be forewarned of the questioning which they may face, and

may be tempted — consciously or otherwise — to adjust their own evidence in response.

29. It was submitted that witnesses will not be admitted to the hearing room before they have given their evidence, but where a hearing is taking place in public, there is (and there could be) no effective mechanism in place to ensure that details of one witness's evidence are not reported to a subsequent witness. There are numerous ways in practice in which the rule could be evaded, and no doubt sometimes it is. Witnesses for the same party may debrief to each other after giving evidence, or pass on specific warnings. A witness may persuade a friend or colleague to attend the hearing and report back to him on the questioning of earlier witnesses, or may read a detailed report of yesterday's evidence in the newspaper over breakfast the day he is due to give his own evidence.

30. In short, this is a rule whose observance is in every case is substantially a matter of trust. It is suggested that the proportionate approach to managing the risk of breach is — much as courts and tribunals habitually warn witnesses whose evidence is to continue after an adjournment that they must not discuss their evidence with anyone in the interim — for the Tribunal to direct witnesses through the parties' representatives not to read anything from Tribunal tweets, and preferably not to go on Twitter at all, until after they have finished giving evidence. This is a less onerous means of achieving the legitimate aim identified above. The use of rule 50 to impose more onerous restrictions must be justified by establishing that the ordinary practice of instructing witnesses is insufficient.

31. It was conceded that live-tweeting provides a further route — in addition to many others already available — by which the rule may be evaded. It was submitted that there was no good reason to think that its activity, if not prohibited under rule 50, would make a substantial difference in practice to the integrity of the process and the observance of this rule. Any benefit to the operation of the rule that might be secured by a rule 50 order is uncertain and unquantifiable, and the "clear and cogent evidence" required to justify such an interference with the open justice and the article 10 rights is absent.

Further submissions

32. The claimant accepted during the discussion that while it may be easier to fix a mistake that has arisen (unlike hard copy reports which are printed and cannot be easily changed), an error made online first has to be identified and if not identified would remain in place until removed and even once removed could well have taken hold and be used by those who had seen the initial communication. It was accepted that there was no one checking what was issued on a line by line basis, other than those present issuing the communications.

33. Senior counsel for the respondent was unsure as to what steps could be taken with regard to witnesses to minimise the risk of their identifying any issues being reported in the way sought prior to their giving evidence.

34. Counsel for Tribunal Tweets noted that those involved in the reporting for Tribunal Tweets are not registered journalists nor subject to any rules of reporting, but they are directed by a board which does, it is believed, involved a journalist. Tribunal Tweets has a good reputation for responsible and accurate reporting.

35. It was noted that the application was to issue direct communications on an immediate and real time basis but this was in no sense intended to be a transcript of precisely what was said. Those issuing the communications would summarise the evidence and discussion in real time which would immediately be posted on the internet for the public to view in real time.

36. When asked how errors were identified, it was noted that errors can and do arise as those issuing the communication are human and it was not a recording or a transcript. One such error had occurred in the last Scottish case. Once this was identified, it was immediately rectified. The error in communication had been in relation to an important witness and had misinterpreted the evidence that was given. That attracted considerable attention. An application to have the communication stop was refused as the Tribunal had, in that case, been satisfied as to how the matter had been dealt with.

37. Ordinarily there would be more than 1 person issuing communications and checking what is issued reporting as best they could and as accurately as

they could. They are not journalists but have an exemplary record as to seeing out the detail of evidence and discussion.

38. There was no process whereby the information communicated during a hearing was checked precisely against what was said. Reliance was placed upon those present on an ongoing basis (and anyone who identifies errors could contact Tribunal Tweets). It was not suggested that any of the parties would be required to check the veracity of what was being said, although obviously errors could have a material effect upon the parties (or the individuals referred to in the Hearing).

39. It was emphasised that what was being sought was to have Tribunal Tweets use their best efforts to report in real time proceedings on the internet, a matter that anyone else could do by taking shorthand and issuing reports outside the Hearing. The difference was the immediacy of the communication during the Hearing, which is was contended did not by itself justify a derogation from open justice and article 10 rights. Witnesses should be told simply not to view anything around the Hearing to avoid any issue arising.

40. The final point senior counsel for respondent raised was to note that if the application was granted witnesses would require to be told about what to do as nothing had been done as of yet and that could require a further adjournment (and there was limited time available for the Hearing and a large number of witnesses to be heard).

Decision – summary of decision and reason

41. The Tribunal considered the submissions that had been made and the authorities in this area in Scotland and beyond in light of the overriding objective and the position in this case. The Tribunal issues its decision orally and confirmed that more detailed written reasons would be issued. These are those reasons.

42. The Tribunal began by ensuring that it gave primacy to open justice in its deliberations. This can mean different things to different people but it is important the public can see justice operating and be able to understand the Tribunal process and how employment disputes in Scotland are argued and determined. Open justice goes beyond simply issuing a judgment which is in

public. It includes the right members of the public have to see how decisions are taken, which includes the taking of evidence and legal discussion. It is recognised that in a digital age, open justice does require to take into account developments in society generally. Open justice is a dynamic term and requires to adjust, as Tribunals must, with time and technology.

43. Open justice is not, however, an absolute principle in the sense that the proceedings must be open whatever the cost. It is important to ensure the interests of justice are considered in deciding how proceedings in a particular case are managed with regard to how real time reporting is done and the impact in each individual case. Limitations can be placed upon open justice where it is necessary and proportionate to do so.

44. It cannot be said that a member of the public is entitled to broadcast the proceedings as they wish without any restriction. If that were so, there would be no need for permission, for example, for cameras or other broadcasting. The Rules allow the Tribunal to manage its procedure and it is important that a fair hearing can take place, while freedom of expression is maintained. A balance requires to be struck. No direct authority was presented that directs how the matter is determined, but the parties agreed that open justice is given primacy together with the interests of justice. A key consideration is to balance the freedom to report (and receive information as to proceedings) with the impact upon the evidence to be led in this case.

What the application is not about

45. It is important firstly to set out what the application is <u>not</u> about.

46. The application is not about preventing public access to the Hearing since it is not in dispute any member of the public who wishes to observe the proceedings is entitled to do so directly (and that can be done remotely in this case).

47. The application is also not about stopping journalists reporting what occurred during the Hearing in the usual way which remains the position. The application is not about members of the public being able to comment about the proceedings in the usual way (outside the Hearing).

48. This is also not an application to broadcast what is happening (whether by video or audio) or an application to provide a real time accurate verbatim transcript of what is said.

49. There is no prohibition on Tribunal Tweets or others properly reporting what was said and discussed during the Hearing outside the Hearing.

What the application is about

50. The application is from an unregulated group of professionals (in the sense that they are not professional journalists) wishing to report, as best they can, what they believe is said during the Hearing (in terms of evidence led and discussion) in real time with their interpretation placed upon it which would be done during a complex Hearing. The communications would be sent in real time, posted on the internet and become permanent (in the sense that a permanent digital footprint would exist, even if subsequently deleted).

51. The organisation provides an important public service and allows those who are not present at a hearing to see in real time what is said as it is said in the course of a hearing. If an error is discovered and brought to the attention of the group, it is fixed, and if necessary, an apology would be issued. The application has been granted in many cases, with one in Scotland.

What is the Tribunal taking into account

52. The Tribunal recognised the importance of the service that is provided and considered the issues arising in this Hearing, taking account of the complaints that have been made, the evidence that is likely to be led, the information that is likely to be communicated (including in relation to witnesses and others) and the type of detail that will be disclosed.

53. The Tribunal's starting point was that the application ought to be granted unless there were powerful reasons that the interests of justice demanded a restriction be placed upon the open justice principle that would require the application not to be granted in full or in part (provided any derogation from open justice was necessary and proportionate).

54. A key issue in this case which the Tribunal took into account was whether real time reporting in the manner was in the interests of justice. The application

was considered against the backdrop that members of the public were encouraged to (and could freely) view proceedings (whether in person or remotely). Members of the public also were able to read reports made by journalists or others which were issued in the usual way (ordinarily from a considered perspective outwith the immediacy of a fast paced hearing).

55. The differentiating factor in this case related to the consequences in this case of real time reporting on the internet by those who were not journalists (and thereby subject to same rules as registered journalists) in a fast paced hearing involving personal beliefs of witnesses and others whose details would be referred to. A number of concerns arose if the application were granted in that context in this particular case.

Concerns as to the impact if the application were granted

56. Firstly the Tribunal considered that there was a risk the reporting in real time of what is said by a witness or discussed could be seen, directly or indirectly, by a witness before their giving of evidence and thereby affect cogency of evidence. That is a clear concern as noted in the practice direction and guidance referred to given the way in which evidence is taken in Scotland. The personal beliefs of individuals and comments made was a significant issue in this case and what others had said or believed and commented upon would be led in evidence. Having that information communicated in real time on the internet, thereby creating a permanent digital record, was a consideration. Such personal (and ordinarily private) information would ordinarily not routinely be available.

57. While steps could be taken to minimise the risk or misreporting such personal and private information, it was a risk nonetheless a risk that could be avoided by not permitting real time reporting and reporting in the normal way (from a considered position outwith the fast paced environment of a hearing involving complex, personal and private issues of different individuals). That would ensure any reporting was done in context and having considered matters (and not reporting done in the midst of the Hearing when the intention was to report each issue being discussed as it was discussed). The risk of such private and personal information being incorrectly noted and issued in public on the

internet was an important concern. Once any such information has been posted, even if deleted, the information could still be obtained.

58. Secondly the Tribunal had a concern that by reporting in real time on a line by line basis on the internet (with the interpretation and commentary of those making the communication placed upon it) there was a risk the particular issue at the time was raised could, reasonably, be taken out of context and unfairly prejudice those involved. The concern related to issues pertaining to private and personal beliefs of individuals or concerns they had. If a specific question was answered in a specific way which required to be clarified, for example, by re-examination, it was possible the real time communication of the initial point could be relied upon with the clarification that was subsequently made omitted. That was unlikely to be an issue if the clarification took place close to the issue arising but it was possible for example that the re-examination might take place some hours later or even by the following day by which time original real time communication has been relied upon and the clarification of less effect. Such concerns were significantly less where reports were made outwith the Hearing.

59. The Tribunal noted the professionalism with which Tribunal tweets had operated and understood their value to society. Reference had been made to an error that had been made in a previous case which appeared to have arisen as a result of an error in reporting in real time. Once the error was raised, it was immediately removed and corrected. Those making the posts are doing so in a busy hearing and do their best to record what is said (with a further individual checking what is said as best as possible. The Tribunal also took into account what was said by Tribunal Tweets and the way in which the risk can be managed.

60. The concern the Tribunal had was that error could not be avoided. The reporting was by individuals who are not journalists (even if they are professional people) and was done quickly given the pace of the evidence and discussion.

61. Once the real time communication was issued, a permanent digital record was created and that issue could be taken up by others, irrespective of what remedial action was taken. It also assumed remedial action was taken which

was not certain. For example, the respondent would not be monitoring what was said and it was possible any error would not be discovered until some time after the communication was made, given the other complex and contentious issues that arise.

62. While Tribunal tweets had measures in places to deal with this, such as by having a second person present, it was possible an error in reporting or commenting upon something could be issued immediately into the digital environment which was either not identified or not identified until the matter had been widely reported. Any apology or retraction may not be so widely reported and that could impact upon witness evidence.

63. The Tribunal was concerned publicity could be generated on this issue which fell within the knowledge of a witness yet to provide their evidence. The immediacy of real time reporting on the internet created a different risk to the reporting in the usual way. The Tribunal was also concerned that a member of the public could be given information which was incorrect or taken out of context. While members of the public can be assumed to be well informed and capable of assessing matters from an informed position, there is an increased risk of error when reporting in real time under pressure of time in a fast paced case where a number of issues are being made and important matters are being discussed. While remedial action would be taken, there was a risk damage could be occasioned which was avoidable. By reporting from a considered perspective, out with the presence of a fast paced hearing and from a considered position, the risk was significantly reduced.

64. It was possible witnesses would be disinclined to speak fully and freely in answering questions if they knew each answer they gave was being reported in real time on the internet. The position would have been different if the application was to provide a verbatim report (where the risk of error was nil). The evidence in this case related to personal and private beliefs of individuals (who may be civil servants).

65. If the application was to issue occasional and considered real time communications, the position would have been different but by wishing to report real time evidence and discussion in the way proposed, the time pressure and amount of material generated increased the risk. This was

important given the person issues about individuals that was being discussed in this case. The risk was of error (whether by omission or commission) or that matters discussed were misinterpreted (because of the pressure of reporting in a real time way). The focus would necessarily be on reporting on each issue as it arose, rather than considering the particular matter which is being commented upon from a considered perspective. That gives rise to the risk of error particularly where reliance was being placed on what was heard and typed and what was understood. There was a risk of mistyping and a risk of misinterpreting. Given the highly personal nature of the evidence in this particular case and the number of individuals whose personal and private information could be referred to, this was something that had to be carefully considered, taking account of reasonably well informed members of the public who would be considering the material.

66. A further concern the Tribunal had was that any issues that arise by way of real time communication could impact upon the efficient disposal of this case. There were a large number of witnesses whose evidence had to be heard with detailed submissions in relation to a large number of complaints. There was little time available to deal with ongoing applications and disputes. It was noted that in a previous case where an error had occurred, time had to be spent dealing with the issue. This was not a case where the Tribunal had the luxury of time. Equally the Tribunal took into account the importance of "moving with the times" and ensuring open justice is within the new digital environment in which Tribunals exist.

67. The Tribunal had no issue with Tribunal Tweets and their ability to do their best to capture what was said and seek to report this but the risk of repetition of what had occurred before, by way of an error, could obviously not be guaranteed and the issues arising in this case, the personal nature of the issues of a number of witnesses and others being discussed and the limited time available were important issues in considering the application given the impact upon the interests of justice and open justice.

68. The Tribunal took full account of what counsel for Tribunal Tweets had said and their submission and the legal principles in this area. The Tribunal's starting point was to seek to grant the application.

69. The Tribunal noted that what was sought was the ability to issue what the organisation considered to be a summary of what the witness said and what was discussed generally in the course of the Hearing. The Tribunal considered that doing so during a fast paced Hearing involving personal issues of a number of people (which included persons who were not witnesses) was an important consideration given the risk of error at the time and the time needed to resolve, if it could be resolved.

70. This was not an application to issue an occasional communication (nor an application to issue a verbatim report) but rather an application to issue real time communication on the internet as to all matters being discussed and the evidence that was being given as filtered through the mind of those issuing the communications.

71. The communications were not being prepared and issued by journalists but individuals with interest in the issues arising.

72. The time the Tribunal had to deal with issues was limited and the public were able to attend proceedings and see themselves, in context, the evidence and discussion or read reports issued (which would be issued outwith the fast paced Hearing and when time could be taken to think and assess what is being issued).

73. In dealing with the issue at the start of the Hearing, 1.5 hours had already been taken up (which was time that had been scheduled for the hearing of evidence). The issues arising were not straightforward and there was the risk further time could be taken in dealing with ongoing issues if they were discovered and raised as a consequence of granting the application.

Tribunal balances the above factors in giving primacy to open justice

74. The Tribunal balanced all the relevant factors in considering the application, starting from the basis that open justice would ordinarily favour granting the application and compelling reasons would be needed to justify refusing the application. The Tribunal considered that any derogation from open justice required to be based on cogent and compelling grounds and any such derogation done in a proportionate and fair way.

75. The Tribunal considered the position in Scotland to differ from that in England and Wales. The guidance and authorities referred to by counsel for Tribunal tweets were persuasive but not binding in Scotland and the authorities and guidance were issues from the perspective of the English and Welsh approach to witness evidence (and not at all issued with Scottish procedure in mind). The risk of witnesses becoming aware of key issues prior to giving evidence was a concern (which was unlikely to be a concern in England and Wales). That was often a concern in the normal way. The risk of real time reporting added to that concern which was less easy to police. The Tribunal considered that the position in light of the issues arising in this particular case had to be considered in light of the approach in Scotland to the taking of evidence and protecting witnesses and the evidence to be given in this particular case given the nature of the issues and evidence in this case.

76. The guidance that applies in England and Wales was prepared with the approach to the hearing of evidence that exists in that jurisdiction. That differs from the position in Scotland and no specific Scottish authorities were relied upon. Nevertheless the Tribunal applied the principle of open justice and the principles deriving from the authorities referred to, seeking to ensure public access to justice in the digital age.

77. The Tribunal applied the law as set out above and considered the primacy of open justice and whether it was in the interests of justice (in the sense of necessary and proportionate) to derogate from open justice by not granting the application. The Tribunal recognised the importance of open justice and members of the public being able to see how the case was presented and how the evidence developed. That could be achieved by attending the Hearing and observing the witness evidence and discussion that took place. The live reporting would result in immediate reporting, in public, of something that had been typed during the fast paced hearing. The Tribunal considered that had the potential to result in error or an issue being taken out of context, particularly given the report was not intended to amount to a verbatim transcript of what was said. That would have an impact upon witness evidence and had to be balanced. Witness evidence in this case would relate to witness's and others' personal and private beliefs.

78. The fact that there was an unavoidable risk of error and its impact upon witness evidence was an important concern, taking account of what had been submitted as to ways to minimise this risk.

79. It is important to apply the overriding objective to ensure that the decision is made is just and fair to all parties, including the claimant and respondent and also that there is no unduly adverse impact upon the evidence and proceedings in this case.

Taking a step back and the Tribunal's decision

80. Having considered the facts of this case and the issues arising and evidence and issues, the Tribunal unanimously decided that it was in interest of justice to derogate from open justice and refuse real time reporting of what is said in the course of the hearing.

81. The Tribunal took full account of the submissions of counsel for Tribunal Tweets but was not satisfied the increased risk that arose if the application were granted was not material or such as to entitle the Tribunal to derogate from the primacy of open justice. It was not in the interests of justice in this particular case to allow such a risk given the personal and private nature of the evidence (which could include individuals who are not witnesses). The real term reporting on the internet of such evidence and discussion and the risks arising by the way in which the matter is reported (given it is not a verbatim report) justified a derogation from open justice. Open justice can be achieved by the reporting of the proceedings in the usual way.

82. The Tribunal decided the normal position in Scotland as to the reporting of the proceedings should apply. It was necessary and proportionate (and in the interests of the overriding objective) to limit open justice by refusing real time reporting for the reasons given above.

83. The decision was reached with the benefit of the non-legal members and took account of the importance (and primacy) of open justice and the digital environment in which society (and Tribunals) operate with due regard to the interests of justice in this particular case. As stated at the Hearing, the public (and journalists) were encouraged to view proceedings. There is nothing preventing the reporting of the proceedings in the usual way in Scotland.

Annex B – List of Issues (as revised)

Claims against "Transport Scotland" and "Scottish Government" are pursued solely against the Scottish Ministers (hereby SM, the respondent).

Jurisdiction

1. Does the Tribunal have jurisdiction to hear the claimant's complaints when factoring the applicable time limits?

The protected belief

2. The claimant's belief discrimination and harassment claim is thus framed in the following alternative ways: His actual and/or perceived gender critical beliefs and/or the claimant's lack of a gender identity belief.

Manifestations of belief

3. Did the claimant's conduct including the following amount to manifestations of the claimant's belief and, if so, did the conduct amount to legitimate or unobjectionable manifestations of the claimant's belief:
   i. The claimant's representations during "LGBT+" event on 16 June 2022;
   ii. The claimant's email of 15 July 2022 to Ms Henderson;
   iii. The claimant's email of 31 August 2022 to Ms Thorpe and Ms Cook;
   iv. The claimant's email to Mr Hope-Jones on 20 September 2022;
   v. The claimant's email to Ms Streeter on 29 September;
   vi. The claimant's grievance on 4 October 2022;
   vii. The claimant's presentation of his complaints on 20 October 2022;
   viii. The claimant's complaints on 10 and 29 November 2022;
   ix. The claimant's link on 5 December 2022 to the Network and exchanges.

4. Was there a sufficiently close and direct nexus between the matters set out at [3] and the claimant's asserted protected belief, such as the matters set out at [3] amounted to a manifestation of the claimant's protected belief?

Harassment

5. The claimant relies upon the following conduct:
   i. Arranging and/or facilitating the Trans 101 training on 16 and 20 June 2022;
   ii. The alleged comments of Lu Freem that people who hold "those kinds of beliefs" should leave them at home whereas trans people should be able to "bring their whole selves to work";
   iii. The distribution of the TLP by Mr Coman;
   iv. Arranging and/or facilitating the Stonewall training on 6 October 2022;
   v. The failure to take timely and/or meaningful action in response to the claimant's grievances thereby adopting the conduct and/or beliefs of others including Stonewall as a third party by (a) failing to respond to the claimant's emails of 20 and 29 September 2022; (b) failing to adequately address the TLP; (c) failing to answer the claimant's questions on 7 September 2022; (d) failing to address (whether adequately or at all) the claimant's grievance of 4 October 2022; (e) failing to provide clarity as to who was investigating his grievances; and (f) Mr Howie's response of 7 November 2022 which did not reach factual findings and failed to identify the "lessons learned and remedial action";
   vi. The response of employees of SM to the claimant's posts;
   vii. The fact of the claimant's dismissal and/or removal from employment;
   viii. The manner of dismissal including the absence of clear reasons, a letter of dismissal and/or a right of appeal;
   ix. The refusal by SM to assist Pertemps in the investigation of the claimant's grievances; and
   x. The dismissal of the claimant's grievances and associated appeal.

6. Was the claimant subject to any of the treatment set out at [5] above and if so, was any of the treatment carried out or done by the respondent for the purposes of the Equality Act 2010 (which was conceded by the respondent except in relation to the acts of Pertemps)?

7. Was the conduct unwanted? If so, did it have the purpose or effect proscribed by section 26 Equality Act 2010? If so, was that conduct related to belief (including legitimate and unobjectionable manifestations of that belief) as set out at [3]?

Direct Discrimination

8. To the extent that the allegations at [5] are well-founded – and in the event that the threshold of harassment is not met – was the claimant treated less favourably in respect of each act/omission at [5] identified than it did or would have treated a hypothetical comparator (being and individual who did not hold the relevant belief as framed above but whose circumstances were otherwise not materially different from those of the claimant)?

9. If so, was the claimant subject to that treatment because of belief as framed above or a legitimate manifestation of belief? If so, was any of the treatment carried out or done by the respondent for the purposes of the Equality Act 2010?

Victimisation

10. Do the matters set out at in the ET1 paper apart described as 7 protected acts constitute protected acts?

11. Was the treatment as alleged at 5(v) and (vii)-(x)] subject the claimant to a detriment? If so, was any of the treatment carried out or done by the respondent for the purposes of the Equality Act 2010?

12. If so, was this because of the prior protected acts referred to at [11] or a belief that the claimant had made or may make a protected act?