



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 8001497/2024

Held in Edinburgh on 1, 2, 3 and 22 October 2025

10

Employment Judge M Sutherland

B M Kelly

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Leonardo UK Limited

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**Respondent
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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the complaints of harassment related to sex, direct sex discrimination and indirect sex discrimination do not succeed and are accordingly dismissed.

E.T. Z4 (WR)

REASONS

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Introduction

- 15 1. The claimant made complaints of sex discrimination which were denied by the respondent.
2. In summary her complaints were that the respondent's toilet access policy (permitting access based upon asserted gender rather than sex) amounted to unwanted conduct related to sex which had the prohibited effect (harassment); amounted to less favourable treatment because of sex (direct discrimination); and put women to a particular disadvantage in comparison with men which was not objectively justified (indirect discrimination).
- 20 3. A final hearing was listed to determine liability and remedy. Both parties had professional representation. Parties lodged a joint bundle of documents and had prepared a statement of agreed facts. The claimant gave evidence on her own behalf. Andrew Letton, Vice President, People Share Services gave evidence on behalf of the respondent. Parties made written and oral submissions.
- 25 4. The intended first day of the hearing (30 September) was converted to a closed preliminary hearing to determine issues of case management relating to the list of issues, the joint bundle, statement of agreed facts, a potential site visit, the schedule of loss, witness timetabling, observers attendance, terminology used, privacy issues, skeleton arguments, and submissions.
- 30

Terminology and abbreviations

- 35 5. The terminology used in this judgment reflects that used in the Supreme Court FWS judgment (see below) –

Term	Meaning
Woman	A biological woman

Man	A biological man
Trans / transgender	A person whose gender identity is at variance with their biological sex (historically, a transsexual)
Trans woman	A biological man who identifies as a woman
Trans man	A biological woman who identifies as a man

6. The claimant used the phrase “trans identifying man” both in evidence and in submissions to mean a biological man who identifies as a women (i.e. a trans woman). The importance of this phase to the claimant is noted and fully understood but is not replicated in this judgment in the interests of simplicity, with a view to avoiding confusion with the phrase “trans man”, but without prejudice to the issues to be determined.
7. The pronouns used in this judgment reflect those used by the Supreme Court such that a trans woman is referred to as she/ her again in full cognisance that a trans woman is a biological man and again without prejudice to the issues to be determined.
8. The following initials are used by way of abbreviation in this judgment –

Initials	Name
MK	(B) M Kelly (the claimant)
AL	A Letton, Vice President, People Share Services
L Ltd	Leonardo UK Limited (the respondent)
GN, HR	G Nairne, Vice President of Human Resources for Edinburgh
RR	R Ruxton, Head of Inclusion and Diversity

List of Issues

9. It was agreed with the parties that the issues to be determined were as follows –

Provision, Criterion or Practice

10. The claimant asserts that from September 2019 to date (the ‘relevant period’) the respondent applied to staff including the claimant a provision, criterion or practice of permitting those staff who assert a gender identity at variance with their sex to use purportedly single-sex toilet facilities provided for the opposite sex (‘the PCP’).
11. The respondent accepts that it applied that PCP from 22 June 2023 to date and neither admits nor denies that it applied that PCP prior to that date.

Discrimination at Work (Part 5 Equality Act 2010)

12. Has the respondent discriminated against MK in the way it affords the claimant access to toilet facilities or by subjecting the claimant to a detriment? (Section 39)

13. Has the respondent harassed the claimant? (Section 40)

European Convention of Human Rights ("ECHR")

14. Is Article 8 of the ECHR engaged for all employees affected by the PCP?

Harassment related to sex (Section 26 Equality Act 2010)

15. Is the PCP conduct on the part of the respondent which is unwanted by the claimant?

16. Is the PCP conduct which is related to sex?

17. Does the PCP have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking into account:

a. the claimant's perception;

b. the other circumstances of the case; and

c. whether it is reasonable for the conduct to have had that effect.

Direct Sex Discrimination (Section 13 Equality Act 2010)

18. By applying the PCP, did the respondent treat the claimant less favourably than it did treat or would treat others (by reference to the appropriate comparator, as below)?

19. If so, was this less favourable treatment because of the claimant's sex?

20. Is a male user of women's toilet facilities in the same material circumstances as the claimant as a female user of woman's toilet facilities? (Section 23)

21. Does the presence of a man in the women's facilities violate the claimant's privacy but would not violate the privacy of a male user of those woman's toilet facilities? Does the presence of a person of the opposite sex render the toilet facilities not suitable for her because of her sex?

Indirect Sex Discrimination (Section 19 Equality Act 2010)

22. Did the PCP put the respondent's female staff at R's Edinburgh site, including the claimant, at a particular disadvantage compared to its male staff at the respondent's Edinburgh site -

a. in the period from September 2019 up to around October 2024 when the amendments were made to facilities at the Edinburgh site?

b. after the amendments were made to the facilities at the Edinburgh site in or around October 2024 until the further amendments were made in January 2025?

- c. since the amendments were made to the facilities at the Edinburgh site in or around January 2025?

23. In particular (in relation to issues 12 to 14, above):

- 5 a. Are women in general more fearful of men than men are of women?
b. Are women in general at greater risk of violence at the hands of men than men are of violence at the hands of women?
c. Are men statistically more likely to be guilty of crimes of violence, sexual assault, indecent exposure and voyeurism than women?
10 d. Do women by reason of their anatomy need to undress to a greater extent than men in order to use the toilet?
e. Do women by reason of menstruation, pregnancy and menopause have greater need of privacy than men when using the toilet and washing after using the toilet?

15 24. The claimant accepts that the PCP was applied by the respondent with the aims of:

- a. treating transgender employees lawfully;
b. treating employees with respect and dignity according to the gender by which
20 they have identified;
c. creating an inclusive workplace environment where all employees feel respected, valued and supported; and
d. to encourage inclusion amongst employees who identify as a gender that is not consistent with their biological sex.

25 25. Was the respondent's aim legitimate?

26. If so, was the PCP a means of achieving it?

27. If so, was it a proportionate means?

30 Remedy (Section 124 Equality Act 2010)

28. If the tribunal finds that there has been a contravention of Part 5 (discrimination at work), is the claimant entitled to:

- a. a declaration that she has suffered discrimination?
b. compensation including for injury to feelings and interest?
35 c. a recommendation that the respondent takes the following specified steps for the purpose of obviating or reducing the adverse effect on the claimant –
i) the recommendations set out in the proposed list.

Findings in fact

40 29. The Tribunal makes the following findings in fact:

Background

30. MK, M Kelly ('MK') is a woman. She has been employed by the respondent ('L Ltd') as an Engineer from January 2007 and continues to be employed by them. She is a valued employee who is regarded as a highly competent. She was promoted to the role of People and Capability Lead in September 2024 with responsibility for resourcing, training and supporting around 300 engineers.
31. L Ltd is a global security company that realises multi-domain technological capabilities in aerospace, defence and security. It is one of the largest suppliers of defence and security equipment to the Ministry of Defence in the UK. It employs around 9,500 staff across eight main sites in the UK including Edinburgh.
32. L Ltd has a 'People Function' in which there are four departments ('service pillars'): Talent Development, Inclusion and Change; Talent Acquisition and People Engagement; People Systems and Analytics UK; and People Share Services. Each site has a Vice President of Human Resources ('VP, HR'). Gill Nairne is VP, HR for the Edinburgh Site. She has a reporting line to Wendy Allen, People Director.
33. MK was employed to work at the Edinburgh site which comprises two buildings known as Phase 1 and Phase 2. Phase 1 has five floors: basement, ground, first, second and third. Phase 2 has four floors: basement, ground, first and second. Around 2,800 employees work from the Edinburgh site. Around 20% of the workforce are woman. Around 0.5% of the workforce is trans.
34. L Ltd has access to classified information and stringent security requirements are applied to them as a 'List X' contractor. Staff, contractors and visitors are subject to security vetting and varying levels of security clearance are required to access different areas within the site.
35. MK was required to work at least 1 day a week at the Edinburgh site. In practice MK worked 3 days a week on site.

Collective bargaining and consultation

36. L Ltd has a recognition agreement with the Unite the Union and engages in collective bargaining with them. Around 35% of the workforce are members of the union.
37. L Ltd also has a Joint Information and Consultation Committee ('JICC') and a Local Joint Consultation Committee ('JCC') for each of its sites. L Ltd engages in collective consultation with them. The constitutional objective of the JCC is "To promote effective two-way communication and consultation between the management and employees. To provide a constructive forum for the discussion of matters concerning the business performance, development and day to day operation of the Company".

38. MK is not a member of the trade union. MK has been an elected member of the JCC for the Edinburgh site since 2018. She is the JCC Rep for Regular Remote Workers.
39. In addition L Ltd has seven staff networks run by staff which are aligned around particular characteristics or circumstances including Equalise which is aligned around gender equality.

Equal Opportunities and Diversity

40. Throughout the relevant time L Ltd operated an Equal Opportunities and Diversity Policy which provided that it “is committed to providing a working environment in which the rights and dignity of anyone who works for the Company in any capacity are respected...” and “...which is free from discrimination and in which all employees are treated as equals. This means that the Company is committed to equality and diversity throughout its business and that this is reflected in its values;” “The company is committed to treating job applicants and employees fairly and equally, throughout its operations, irrespective of sex, marital and civil partnership status, sexual orientation, gender identity and reassignment, pregnancy and maternity, age, race, nationality, religion or belief, ethnic or national origin, disability, working pattern, educational or social background, or Trade Union preference or activity. These factors are key to the Company’s approach to promoting equality and diversity”.

Toilet facilities until October 2024

41. MK worked 3 days a week on site from her desk on the first floor of Phase 2. There are 150- 200 desks for each staff member on the first floor. About 10-15% of the workforce in Phase 2 are female.
42. The first floor comprises two desk areas (each containing a toilet block), a central atrium (with a works café) and a stairwell.
43. Until October 2024, the toilet facilities provided on the first floor of Phase 2 were as follows:
- a. Two toilet blocks each comprising the following –
 - i) A room badged as female containing five individual and lockable toilet cubicles and a shared wash basin area (‘the female toilet block’);
 - ii) A room badged as male containing four individual and lockable toilet cubicles, urinals and a shared wash basin area (‘the male toilet block’);
 - iii) A room badged as disabled containing an accessible toilet and wash basin (‘the accessible toilets’);
 - b. In or near the stairwell –
 - i) A room badged as female each containing two individual and lockable toilet cubicles and a shared wash basin area (‘the stairwell toilets’);

- ii) A room badged as male containing an individual and lockable toilet cubicle, urinals and a shared wash basin area.
44. The cubicles have gaps at the top and bottom of the partitions and are lockable.
- 5 45. The doors of the toilet facilities were badged with a simplified silhouette of a person (with or without a skirt) or a wheelchair intended to indicate female, male and accessible toilets respectively.
46. Single occupancy toilets were also provided on the other floors in Phase 2: three in the basement, two on the ground floor, and one on the second floor; and two in each floor badged as “accessible”. (Multiple occupancy male and female toilet blocks were also available on those floors.)
- 10 47. Prior to June 2023 L Ltd did not have a policy or practice regarding access to toilet facilities. On 22 June 2023 L Ltd adopted a policy that access to toilet facilities would be based upon staff gender rather than their biological sex.
- 15 The effect of that policy was that trans staff were permitted to use the toilets which aligned with their gender identity.

Correspondence relating to toilet access from June 2023 to June 2024

48. On 13 June 2023, MK sent an email to Gill Nairne, Vice President of Human Resources for Edinburgh (‘GN, HR’) enquiring:
- 20 *“does Leonardo have a policy on access to toilets? Specifically, can I assume that the female loos within Phase 1 and Phase 2 are accessible by sex rather than gender?”*
49. On 22 June 2023, GN, HR Edinburgh responded to MK , stating that: *“the toilet facilities at the Leonardo are based on gender aligning with the Workplace (Health, Safety and Welfare) Regulations 1992. Regulation 20, Sanitary – full details can be found here:”* (with a link to the 1992 Regulations provided).
- 25 50. On 28 June MK sent a detailed reply asking when was the policy introduced, was there anything in writing, was the policy going to be shared with staff, how is gender identity determined, how is the reference to men and women being interpreted given the 1992 Regulations require separate toilets for men and women, and was there an equality impact assessment on all 9 protected characteristics, and noting that staff expect toilets to be segregated on the basis of sex, that the policy has the effect of making all of our toilets mixed sex, that religious, breastfeeding, menstruating and menopausal women may be particularly affected, that single sex toilets are lawful and that unisex toilets may be unlawful.
- 30 51. GN, HR directed MK’s enquiry to Rachel Ruxton, Head of Inclusion and Diversity (‘RR’).
- 35 52. On 8 September MK chased for a response. On 12 September RR advised that she was getting in touch with the relevant stakeholders and asked for information about the policy.
- 40 53. On 10 October, RR sent an email to MK stating:

"I will come back to you as soon as I can...In the interim, as I invest time researching and learning more about the subject matter, can I adjust my previous guidance (which was shared with Gill), to confirm that toilets are legislated by Workplace (Health, Safety and Welfare) Regulations 1992, which states that they are separated by men and women".

54. On 11 October MK chased for a response. On 16 November RR stated she still needed to meet with Wendy Allen and *"there isn't a new toilet policy – there isn't a policy in the first instance. This is about clarity around bathroom provision in the workplace and I want to make sure I have a clear answer for you."*

55. On 17 November and 23 February 2024 MK chased for a response, sought confirmation of the stakeholders and advice on setting up a staff network for women.

56. On 28 February 2024 RR replied stating:

"Leonardo UK has an obligation to comply with the Equality Act 2010 and to ensure employees are not discriminated against due to a protected characteristic. This includes gender reassignment. On this basis, and taking into account appropriate guidance including the Government Equalities Office guidance for the recruitment and retention of transgender staff 2015 and the ACAS guidance on gender reassignment discrimination 2017, we consider it is appropriate, and an inclusive approach, that anyone who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of reassigning their gender should use the toilets which is aligned to the gender to which they identify. It is an employee-led decision as to which gender toilet they choose to use and when they choose to use the toilet of the gender to which they are transitioning or have transitioned. There is no specific toilet policy within Leonardo, however the above falls under our commitment to inclusion and diversity, as well as aligning to the law".

57. With regard to networks query RR advised that there are already two relevant networks: Equalise and Springboard.

58. On 28 February MK replied stating: "It's a very disappointing response"; whilst there are nine protected characteristics she only mentioned gender reassignment and failed to mention sex, pregnancy and maternity, religion and belief and disability and there is a conflict between them; that private facilities would be appreciated; asking to be advised of the stakeholders who were consulted; noting that Luton now has mixed-sex toilet facilities.

59. On 15 April RR advised:

"We understand this topic is highly emotive for all those involved. However, it should be recognised that Leonardo is aligning with legislation and supplementary guidance and as employers, the law should always be our guiding principle. Our approach to bathroom access, based on the law, has been in place for many years".

MK replied advising that she was "disappointed not to be given an answer about how L Ltd will be ensuring that other groups" are protected.

60. On 15 April, MK emailed GN, HR Edinburgh, stating:

“There are 9 protected characteristics in equality legislation and no one trumps any other. There may be conflicts of rights but they need to be addressed (like the provision of mixed-sex toilets...). For Leonardo not to provide any single sex toilets I strongly believe that it is fostering direct discrimination for those of either sex that want a single-sex toilet, as well as for females that are entitled to safety, privacy, dignity when dealing with issues such as menstrual flooding, expressing milk and those with a religion that must have a single sex environment in which to use the loo, adjust headwear, etc. [with a link to the Equality Act 2010]. I’m not getting an answer on how Leonardo is dealing with any of these issues and I have no doubt that Leonardo is not complying with legislation”.

61. On 27 May RR sent an email to MK stating:

“...I’ve shared your questions and concerns with our external legal advisors, whilst engaging with our employee relations team and People Director. No protected characteristic (PC) under the Equality Act (EqA) trumps any other PC. All PCs therefore have equal weight. It is well-established that transgender employees are entitled to use the toilet facilities of the gender by which they identify. This means that a female transgender employee is entitled to use the female toilet facilities. There can be occasions when separate facilities need to be provided for a religious reason but these situations will be very limited and will be based on strict religious need...”

62. On 3 June MK replied noting that it did not address several of the scenarios she had highlighted, there has been no mention of any Equality Impact Assessment, there has been no consultation with the staff or union.

JCC Meeting in April and June 2024

63. On 15 April 2024 MK attended an Edinburgh JCC meeting in her capacity as a JJC rep. JCC minutes were published on the staff intranet. The minutes note:.

“MK brought up the next topic of toilets. She started by asking in spring 2023 if there is a policy based on toilet usage for sex or gender and if anyone can use the toilet of the gender they identify with. It feels as though there is an unwritten rule and staff don’t know what the policy is. MK states there needs to be single sex toilets for women and the main issue is that there is nothing written down so nobody knows what the policy is”.

The union rep said he would find out what the union had to say

64. On 3 June 2024, MK attended an Edinburgh JCC meeting in her capacity as a JCC rep. JCC minutes were published on the staff intranet. The minutes note:

“MK then moves onto toilet usage and that it has now been confirmed by RR, D & I Lead that it will be based on gender not sex with no single sex facilities on site. However, female staff may not want to share the toilets with males, however they identify, and vice versa. It has taken over a year to get an answer and MK feels as though this is an unsatisfactory answer and it doesn’t seem like it will be made a formal policy of any kind and only she has been informed of this unwritten policy. MK is raising at the JCC so it can be minute and staff can be aware of the policy”.

Claimant's grievance – June to October 2024

65. On 24 June 2024, MK submitted a formal grievance in which she stated:

a. Equalise staff network was unsuitable because of their use of "cis" which put the views of those subscribing to gender identity theory above those who do not. When she questioned their approach she was removed from their mailing list.

b. She had asked a series of questions but received no responses:

i) *Which stakeholders were consulted when establishing the policy?*

ii) *When was the policy introduced and were employees aware of the policy?*

iii) *How the company was interpreting "men" and "women" in the Workplace (Health, Safety and Welfare) Regulations 1992?*

iv) *[Was] an Equality Impact Assessment was carried out prior to establishing the policy?*

v) *What consideration had been given to protected characteristics of sex, pregnancy & maternity, religion?*

vi) *She stated: "I have explained why many women need to have use of a single sex space for dignity, privacy, comfort and possibly safety to deal with the consequences of menstruation and menopause; breastfeeding, and religious practices, which may include the use of the washbasins and not just the cubicles"*

vii) *She stated: "The Luton office had 2 sets of mixed-sex toilets (shared washing facilities) while Edinburgh does not have any".*

viii) *The female toilets at Edinburgh are regularly used by trans-identifying women.*

c. By reason of their approach to access to toilet facilities she is subjected to indirect sex discrimination; "harassment related to sex and, or, my protected philosophical belief that sex is binary, immutable and that men cannot be women"; "direct discrimination because of protected philosophical belief that sex is immutable" and "females are treated as being inferior to those who subscribe to gender identity theory".

d. She noted that it had taken 14 months to establish the company position, a prior diversity and inclusion glossary was removed having pointed out it focused on gender and ignored several protected characteristics, no equal opportunity training is mandated for existing staff.

66. Andrew Letton, VP of People Share Services ('AL') was appointed to hear MK's Grievance.

67. On 26 June 2024, AL held a meeting with MK to discuss her grievance. MK was supported by a male colleague. Minutes were taken by a note taker and revised and agreed by MK. At the meeting MK made the following points in summary: the use of toilets based upon gender impacts all females and a large proportion of individuals (males and females) in terms of sex, religion, disability, pregnancy and maternity; she provided examples of the impact; the policy is not compliant with the Equality Act; it is unknown who the company has consulted with but no-one had spoken to her apart from an informal chat with GN, HR in April 2024; the toilet access policy has not been

communicated to staff; the Equality Act requires a safe same sex toilets; she had taken legal advice and may need to pursue matters externally; she put forward the suggestion of having unisex toilets with fully enclosed cubicles that contain a wash hand basin (unlike in Luton); there should be mandatory equal opportunities training.

68. On 23 July, AL held a further meeting with MK to discuss the Grievance, a draft outcome letter he had prepared and proposed amendments to the Respondent's toilet facilities. MK was supported by a male colleague. A note taker was in attendance. MK noted she had only 1 hour to review the letter, expressed concern that the reason for not upholding her grievance was insufficiently explained, and the newly introduced definition of sex (not limited to biological sex) was of concern, and the delays in progressing her grievance required explanation.

69. On 8 August 2024 AL issued the grievance outcome letter to MK in which:

- a. He thanked MK for raising these matters and noted her entitlement to do so
- b. He did not uphold her grievance but sought to provide a solution to the issues she raised
- c. He noted L Ltd's adherence and compliance with current legal guidance
- d. He acknowledged her criticism of L Ltd's initial silence and that she had pursued these issues for close to 14 months but noted that this has been a difficult area to navigate and that "your efforts will have helped influence bringing about change for toilet facilities across the UK estate"
- e. He stated: *"Our clarification of the legislation is any individual, living in the gender with which they identify, even if they have not undergone or do not intend to undergo medical or surgical procedures, is entitled to access the facilities of the gender by which they identify. This includes toilets and changing rooms. Advice from our external legal counsel makes it very clear that any attempt by the company to refuse individuals access to use the toilets of their affirmed gender would be unlawful"*.
- f. He noted in support the provisions of the EHRC code.
- g. He understood that the Court of Session had determined that sex was not limited to biological or birth sex.
- h. Taking into account her requirements, he had agreed with GN, HR and the facilities team that the stairwell toilets would be made single occupancy and universal/ mixed use "and will provide employees with privacy in a self-contained space, which is one of the requests that you have made. Toilet facilities at the Edinburgh site will now provide for; • Female • Male • Accessible use • Single Occupancy – mixed/universal".
- i. He advised L Ltd ultimately aimed for mixed use, self-contained single occupancy toilet facilities across their estate
- j. He provided a response to each of the questions she had listed in her grievance.

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- 70.
- i) In response to the question ‘Which stakeholders were consulted?’ he advised “RR, consulted with her colleagues in HR, Employee Relations and sought legal advice from our external legal counsel.”
 - ii) In response to the question “When was the policy introduced [?]” he advised “The company does not have a documented ‘toilet policy’ and relies on current legislation to be compliant on this matter”; “I will ensure that a communication is issued which will inform employees what toilet facilities are available and where they are located”
 - iii) In response to the question “How the company was interpreting ‘men’ and ‘women’ in the 1992 Regulations” he advised “We have sought legal advice around this point and the position we have taken is “sex” is not limited to biological or birth sex”.
 - iv) In response to the question “Did the company undertake an Equality Impact Assessment [?]” he advised “No .., as we have adopted the approach as per the guidance we received from our external legal advisors and, as stated, it is our understanding that this is in compliance with the 2010 Equality Act”.
 - v) In response to the question “What consideration had been given to multiple protected characteristics?” he replied “To be clear, the company does not have a policy;” “Those who are living as women use the women’s room, and those that are living as men use the men’s toilet... I am, therefore, not in agreement with your phraseology that male employees are using the female toilets”.
 - vi) In response to her statement “I have explained why many women need to have use of a single sex space ...to deal with the consequences of menstruation and menopause; breastfeeding, and religious practices” he noted as follows: “I have arranged for three existing toilets in Phase 2 to be amended to single occupancy, mixed use, which will provide further private facilities for those employees who wish to use them”; “You clearly hold very strong beliefs around this point, (which you are entitled to do so) and in the meantime until we have budget to amend the facilities in Edinburgh, you are able to use the newly created single occupancy toilets in Phase 2 (existing facilities in Phase 1) if you so wish”.
 - vii) The Luton office had 2 sets of mixed-sex toilets (shared washing facilities) while Edinburgh does not have any.
 - viii) In response to her statement “The female toilets at Edinburgh are regularly used by trans-identifying women” he noted that employees are entitled to have access to the facilities of the gender with which they identify.
- On 13 August 2024, AL met with MK to discuss the outcome of her grievance. MK was accompanied and there was a note taker. It was confirmed that three existing toilet facilities in the stairwell would be converted to single occupancy facilities, likely by the end of September; there was a wider refurbishment plan

for the Respondent to look at updating its facilities across its UK sites; he hope to issue communication to staff regarding toilet facilities by the end of August; as regards delay he confirmed he had spoken at length with legal advisors, Wendy Allen, Director of People, GN and RR, and the facilities director and had met with MK on multiple occasions. MK noted that RR had said Gender Pay Gap reporting would be based on sex at birth whereas he had said it would be based upon gender.

71. On 23 August 2024 MK appealed the grievance outcome on the following grounds:

- 10 a. the toilet access policy “puts the views of those subscribing to gender self-identification theory above those (including me) who hold protected gender critical beliefs and so do not subscribe to the theory. I explained how I was adversely affected by this. It is also harassment related to my protected belief”;
- 15 b. Whilst she welcomed the provision of single-occupancy toilets, the provision was not proportionate to the number of women on site and it is preferable that there should be female only toilets;
- 20 c. “the choice of language used within staff networks, and the toilet policy of allowing access on the basis of self-identified gender, only prioritises the goal of self-identified gender identity”
- 25 d. “You have had no regard to the importance of biological aspects of being a woman which are blatantly clear (e.g. those affecting me and others because of menopause and or as a result of the characteristics pregnancy, maternity, some religions). I, and other women, have reasons of privacy, dignity and boundaries. We feel vulnerable because of our female biology and bodily functions”; the creation of 3 single occupancy toilets “appears to be an acknowledgement of the problems associated with a toilet policy based on self-identification of gender allowing access to the female toilets by males without actually upholding my complaint, which is contradictory”;
- 30 e. The EHRC Code provides that “it is lawful to exclude a person from a separate sex service who has the characteristic of “gender reassignment” where it is a proportionate means of achieving a legitimate aim” and that her and other women’s privacy provides a reason to exclude men from the female toilets;
- 35 f. “Under Health and Safety law, separate toilets must be provided for men and women except in limited circumstances where there is a separate room with a lockable door. What is provided now is not suitable or sufficient in terms of toilet provisions for women, and in terms of washing facilities”;
- 40 g. Under the Equality Act 2010, ‘sex’ is understood as binary, being a man or a woman. For the purposes of the Act, a person’s legal sex is their biological sex as recorded on their birth certificate. A trans person can only change their legal sex by obtaining a Gender Recognition Certificate (and she noted at the

appeal hearing she would be unable to tell whether a facilities user had a certificate).

72. Mark Stead, Senior Vice President and Site Director ('MS') was appointed to hear the Appeal. On 19 September MS held an appeal meeting with MK. MK was accompanied by a colleague and a note taker was present. The minutes, which were sent to MK for approval, noted in detail the basis upon which she asserted that it was lawful to exclude males from single sex provisions including toilets. MS referenced having appointed legal counsel. MS said he would like to consult with a female leader to keep any unconscious bias at bay.

73. On 2 October 2024 MS issued the appeal outcome letter. In it he noted:

- a. Whilst an appeal is ordinarily limited to new evidence or major procedural failings her grievance concerned sensitive, wide-reaching and complex matters;
- b. beliefs held for multiple reasons come into direct conflict with the notion of inclusion and tolerance towards all;
- c. L Ltd has followed its own policy and process in hearing the grievance;
- d. L Ltd has acted lawfully in its position of defining toilet use by self-identified gender (and at any stage of transition whether or not intending to undergo surgery) as opposed to biological sex.
- e. This is evidenced by two separate pieces of external legal advice sought and received from independent counsel. It is recognised that in law there are some specific cases and environments where special dispensation is given to the need for biologically female-only spaces to exist, but general office toilet facilities are not currently considered to be defined in this way, not least as there are adequate single-use spaces also available nearby.
- f. "the female group is not placed at a material disadvantage, as adequate toilets and safe spaces are already available throughout UK sites and specifically Edinburgh site for anyone to be able to easily locate and utilise a lockable single-use space for sanitary or other matters, but in any case more are being created to even-better serve this need. And further... it may be potentially considered indirectly discriminatory if it altered its position to be on the basis of biological sex (as would then highly likely be found to be discriminating against transgender people using the toilet of the gender with which they self-identify)"
- g. The numbers of toilets available on Edinburgh site of all types, are more than adequate with considerably more for women than men. Converting all toilets to single-use facilities is both unnecessary but also unrealistic and impractical
- h. L Ltd recognises due to the complexity and sensitivity of the issue, it took longer than the Company would ordinarily expect to respond with a clear position in reply to concerns raised prior to the formal grievance being raised
- i. She had raised her concerns constructively and with due courage in order to ensure adequate consideration and that there should be no personal

detriment. He also made clear that any actions on any employee's part (or as instructed by them) that are considered as directly or indirectly discriminatory towards trans-gender colleagues may result in disciplinary action.

- j. The appeal was not upheld and there was no further right of appeal.

5 *Employment Tribunal proceedings*

74. On 10 July 2024 (after her grievance meeting and before the outcome) MK commenced ACAS Early Conciliation which concluded on 21 August 2024.

75. On 20 September 2024 (after the grievance appeal hearing and before the outcome) MK raised employment tribunal proceedings in respect of her complaints arising out of the toilet facilities policy.

Toilet facilities from October 2024

76. On 19 September 2024 IP wrote to MK in her capacity as Edinburgh chair of the JCC to let her know that they planned to undertake a session with the JICC, the union and other employee groups regarding proposed changes to the toilet facilities. Attached to it was a draft of the presentation.

77. On 1 October the presentation of the proposed changes was shared at a meeting with trade union and JCC representatives. It noted that the aim was to standardise toilet facilities for all sites; that there would be men's, women's, accessible and unisex cubicles on each site; that the unisex toilet cubicles would be fitted with a toilet and sink inside floor to ceiling panelling; the accessible toilet badge would also state "not every disability is visible" in addition to the wheelchair symbol. A summary of the changes was provided to staff via the intranet on 4 October.

78. By the end of October 2024 some changes had been made to the ground and second floor of Phase 2 which increased the number of single occupancy toilets. The changes that were due to be made to the first floor of Phase 2 were not made until January 2025.

79. In January 2025 the toilet facilities on the first floor of Phase 2 were changed as follows: the badge on the outer door of the stairwell ('secret') toilet was changed from a person in a skirt (intended to indicate female) to a 'WC' sign (intended to indicate unisex i.e. universal) and a poster was put up noting that it was single occupancy and the outer door should be locked. This change reduced the number of toilet facilities badged as female and increased the number of single occupancy toilets.

80. This change prevented the cleaner from being able to access a cleaner's cupboard (situated between the outer and inner door). In September 2025 the poster and lock were moved from the outer door to the inner door. The male stairwell toilet (which contained urinals) was not rebadged as unisex i.e. universal.

MK's use of the toilet facilities

- 5 81. Throughout the relevant time (September 2019 to September 2025) MK worked on the first floor. She changed desk in September 2024 contemporaneous with her promotion. Both her first and second desk was proximate to one of the two toilet blocks.
- 10 82. Throughout the relevant time MK used both the female toilet in the toilet block and the stairwell toilet. She used the toilet block for “a quick pee” but otherwise used the stairwell toilet and particularly if she was experiencing issues relating to the perimenopause or menopause. She rarely if ever used the accessible toilets. She used the toilet as a refuge (including as a place to cry).
- 15 83. MK has been going through the perimenopause or menopause throughout the relevant time. Her perimenopausal symptoms included heavier more irregular periods which sometimes result in blood leaking through her underwear on to her clothes. MK used to the toilet facilities to attend to the consequences of mensuration including changing sanitary protection.
- 20 84. It took MK about 20 seconds to get to the female toilet block and 1 minute longer to get to the stairwell toilet which she did not regard as a long trek (it involved a walk route through the atrium). She never needed to queue for any of the toilets and she rarely met anyone within the toilets.
85. Since September 2022 MK has been aware of 2 trans women who use the female toilets regularly (which increased to 3 during the summer).

Observations on the evidence

- 25 86. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Toilet Access Policy

- 30 87. Prior to June 2023, there was no evidence that management of L Ltd had expressly permitted trans staff to use toilet facilities aligned with their gender or knew of trans staff using the toilet facilities aligned with their gender and had thereby given implicit permission.
- 35 88. MK stated in evidence that colleagues advised her that they had seen a trans woman using the female toilets in Edinburgh in 2019 but “he” was just visiting from the Luton site. MK stated that she first encountered a trans woman in the female toilets in March 2023 but she did not advise management of this. In June 2024 MK stated in her grievance that the female toilets in Edinburgh are regularly used by trans women. At the grievance meeting in June 2024 MK
- 40 stated that “there were three males in the office in which I work that identify

as women (there are now currently two, which will return to three later in the year) and use the female toilets I use on a regular basis, two of which are in my own project team. They use the female toilets at the same time as I do.”

5 89. AL stated in evidence in chief that prior to October 2024 they didn’t have a written policy and if there had been a policy he would have consulted with the unions; the issue had never been raised before MK raised it [in March 2023], he assumed staff had a choice and it was employee led; when MK raised her grievance [in June 2024] he spoke to RR who had consulted with HR; he sought legal advice; he wanted to find out if this was common industry practice. AL stated in cross examination he had never been aware of a policy or correspondence about it until MK asked; it was the practice for as long as he can recall (he moved into HR in 1990); he was relying upon legislation, he is unaware when practice started, he assumed it might be 1992. In judicial examination he stated that he was not aware of a trans woman ever having asked to use the female toilets and he was not aware of any trans women using the female toilet facilities until MK’s grievance.

10 90. The claimant submitted that AL was candid and reliable in his evidence and that his evidence should be relied upon that the practice started in 1992. However the claimant also recognised that this was implausible because the relevant EHRC code only came into force in 2011. AL’s evidence regarding whether there was a toilet access policy was confusing. However it is apparent from the totality of his evidence that AL did not tend to distinguish between staff practice (trans access without knowledge or approval of management) and company policy or practice (trans access with express or implied approval of management).

15 91. In March 2023 MK asked her line manager whether L Ltd has a policy on access to toilets. Her stated assumption was that the female toilets were accessible by sex rather than gender. Her line manager said he did not know and got no response from whomever he asked. His line manager also said he didn’t know and again got no response from whoever he asked.

20 92. On 13 June, MK sent an email to Gill Nairne, Vice President of Human Resources for Edinburgh (‘GN, HR’) enquiring: “*does Leonardo have a policy on access to toilets? Specifically, can I assume that the female loos within Phase 1 and Phase 2 are accessible by sex rather than gender?*” MK stated that she wanted to know what the policy is or if there is one.

25 93. On 22 June GN, HR Edinburgh responded to MK stating that “*the toilet facilities at the Leonardo are based on gender aligning with the Workplace (Health, Safety and Welfare) Regulations 1992. Regulation 20, Sanitary – full details can be found here:*” (with a link to the 1992 Regulations provided).

30 94. MK sent a detailed reply asking when “the new toilet policy” was introduced, was there anything in writing, and was the policy going to be shared with staff. GN, HR directed MK’s enquiry to RR. RR is Head of Inclusion and Diversity and was an external appointment to that role in 2022.

95. On 8 September MK sent an email to GN stating “I haven’t had a response to my questions about the new toilet policy yet”, noting her understanding it was being covered at Luton JCC and asking that it be covered at the Edinburgh JCC “as I think staff need to understand about the change of policy”. On 11 September she forwarded her questions to RR.
96. On 12 September RR advised that she was getting in touch with the relevant stakeholders and asked for more information about the policy and JCC presentation because she was not aware of either.
97. On 23 September MK replied advising that “I’m not aware of a ‘policy’ that exists that can be read...All I have is the response from GN in her email from 22 June telling me that toilet usage is on the basis of gender. There has been no other mention anywhere else so I don’t think this is a widely known policy change.” MK advised that the policy was mentioned at the Luton JJC in August but that it was not going to be minuted.
98. On 10 October, RR sent an email to MK stating “*I will come back to you as soon as I can...In the interim, as I invest time researching and learning more about the subject matter, can I adjust my previous guidance (which was shared with Gill), to confirm that toilets are legislated by Workplace (Health, Safety and Welfare) Regulations 1992, which states that they are separated by men and women*”.
99. When MK chased for a response RR stated she still needed to meet with Wendy Allen and “*there isn’t a new toilet policy – there isn’t a policy in the first instance. This is about clarity around bathroom provision in the workplace and I want to make sure I have a clear answer for you.*”
- a. On 28 February 2024 RR replied stating: in compliance with the Equality Act 2010 and taking into account related guidance;
“*anyone who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of reassigning their gender should use the toilets which is aligned to the gender to which they identify. It is an employee-led decision as to which gender toilet they choose to use and when they choose to use the toilet of the gender to which they are transitioning or have transitioned. There is no specific toilet policy within Leonardo, however the above falls under our commitment to inclusion and diversity, as well as aligning to the law.*”
100. On 28 February MK replied stating “it sounds like you are not going to inform staff that toilets have no[w] become mixed-sex.”
101. On 15 April RR advised:
“*We understand this topic is highly emotive for all those involved. However, it should be recognised that Leonardo is aligning with legislation and supplementary guidance and as employers, the law should always be our guiding principle. Our approach to bathroom access, based on the law, has been in place for many years*”.
102. On 9 May, RR sent an email to MK, copying GN, stating that she knew MK was waiting to hear back regarding her questions about toilet provisions and

stating that she was awaiting guidance from external legal advisers and would be back in touch as soon as she had heard from them.

103. On 27 May RR sent a further email stating:

5 *"...Our external legal team has also reviewed your question regarding bathrooms being designated by sex or gender. They recognise that the terms are often used interchangeably, however, it is recognised that toilet use should now be based on gender and not sex. The link to the GEO document was live when this was originally shared with you. However, this has now been taken offline (on 8 April 2024) and has not yet been replaced by a new guidance document. The ACAS document remains live. Leonardo has spent a considerable amount of time in looking into this matter. The company has taken legal advice at each stage and its position has been guided by that advice".*

104. On 3 June MK replied noting:

15 *"It's not clear if this is a policy or guidance and staff won't be aware of this news because it isn't written down anywhere and I'm pretty certain will surprise many".*

105. On 3 June MK raised the toilet access policy at a JCC meeting for the express reason of making staff aware of the policy.

20 106. On 24 June MK noted in her grievance that it had taken 14 months to establish the company position.

107. On 24 June, MK submitted a formal grievance in which she noted regarding RR's email of 27 May "While no clarification was given on whether this email was stating a company policy or guidance, I have to assume this is the company policy despite employees remaining unaware of this position".

25 108. In the grievance meeting on 26 June AL commented that it might be that the company may not wish to create an official policy on toilets; MK noted that "sharing a female toilet with male colleagues had now been confirmed as company policy."

30 109. On 8 August 2024 AL issued the grievance outcome letter in which he noted: *"Our clarification of the legislation is any individual, living in the gender with which they identify, ...is entitled to access the facilities of the gender by which they identify... Advice from our external legal counsel makes it very clear that any attempt by the company to refuse individuals access to use the toilets of their affirmed gender would be unlawful".*

35 110. In response to the question 'Which stakeholders were consulted?' he advised "RR, consulted with her colleagues in HR, Employee Relations and sought legal advice from our external legal counsel."

40 111. In response to the question "When was the policy introduced [?]" he advised "The company does not have a documented 'toilet policy' and relies on current legislation to be compliant on this matter". He later noted "we have adopted the approach as per the guidance we received from our external legal advisors."

45 112. In the grievance appeal outcome letter in October 2024 MS noted: L Ltd has acted lawfully in its position of defining toilet use by self-identified gender as opposed to biological sex; this is evidenced by two separate pieces of external

legal advice sought and received from independent counsel; L LTD recognises due to the complexity and sensitivity of the issue, it took longer than the Company would ordinarily expect to respond with a clear position in reply to concerns raised.

- 5 113. There was no evidence that prior to June 2023 the respondent gave explicit or implicit permission to trans staff to use the toilet facilities which aligned with their gender rather than their biological sex. Having regard to all the evidence it was apparent that notwithstanding RR's comment "Our approach to bathroom access, based on the law, has been in place for many years" it is
10 considered likely that the respondent did not have either a practice or policy regarding access to toilet facilities until MK made enquiries in June 2023. Those enquiries prompted the respondent to take independent legal advice which resulted in the respondent adopting a policy that access would be based upon gender rather than biological sex ("the access to toilet facilities policy"). This is wholly reflected by MK's reaction that this was a new policy that would surprise many.
114. The toilet access policy was set out in communication with MK and HR and was disseminated to staff through the JCC minutes in June 2024 but it did not appear to have been formally disseminated by management to staff or the
20 unions during the relevant time (June 2023 to September 2025).

MK's belief

115. MK believes that biological sex is immutable (i.e. unable to be changed). MK also believes that people do not have a gender or gender identity and as such a man cannot identify as a woman and a woman cannot identify as a man.
- 25 116. MK referred in evidence to a trans woman as a "trans identifying man" (and a trans man as a "trans identifying woman").
117. MK stated in evidence that she and women generally can identify with high accuracy that a trans woman is a biological man because of their physical shape and movement. When referring to a trans person MK did not use their preferred pronoun and instead used the pronoun applicable to their biological sex (e.g. in evidence she referred to a trans woman colleague as "him" / "her" and the trans man summer student as "she" / "her").
- 30 118. MK stated in evidence that the respondent were supporters of gender identity theory evidenced by their use in 2020 of a glossary which at times referred to gender and rather than (biological) sex (e.g. in relation to the 9 protected characteristics).
- 35 119. In her grievance she expressed concern about their use of unsuitable language which put the views of those subscribing to gender identify theory above those who do not. In correspondence related to her grievance she
40 noted on 8 July 2024: "There are two staff networks that use the language of gender identity theory in Leonardo... Each of these are directly discriminatory because of my protected gender critical belief...the issue of gender identity

theory, publicly demonstrated by the two staff networks, makes me and other staff very nervous in a way I've rarely experienced in a workplace. I, and other staff, have an understandable fear that we will be accused of intolerance and transphobia for discussing issues relating to sex and gender in the workplace."

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120. In her grievance she sought to set up a women's only network to support biological females and in grievance appeal she noted she was instead directed to Equalise which "is further evidence of it putting those who subscribe to self-identified gender identity theory above gender critical belief holding employees." In her grievance appeal hearing MK stated that the issue came to a head in April 2023 when 'Equalise' staff network started to use the labelling of 'CIS' to describe a person having a gender that matches their sex assigned at birth. The grievance appeal outcome letter noted that the purpose of the Equalise network is to promote recognition, discussion and debate on matters of inclusion within the Company and is by its nature and design open to all; a woman's network exclusive to biological females would be at odds with L Ltd's principles of fostering an inclusive environment for all; she was encouraged her to re-engage with Equalise and actively debate with them.

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121. MK considered that L Ltd's approach to use of the toilet facilities represented an ideological stance. In her grievance appeal she stated that L Ltd's subscription to gender self-identification theory adversely affected those who hold gender critical beliefs; and the toilet access policy "only prioritises the goal of self-identified gender identity (which is not an express 'protected characteristic' in law)" which refers to a process of reassignment of sex.

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122. MK believes that trans women should not be permitted to use the female toilets which she described in evidence as "ridiculous". She considered that it was prioritising the needs of a few men over the needs of hundreds of women. She considered it as tantamount to permitting any man to access the female toilets because in her view a trans woman and a biological man are materially the same. She equated this with making the toilets mixed sex (i.e. unisex) which she considered to be an awful, terrible idea because she has the right to use the toilet without a male being there.

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123. In her grievance she stated that when she advised the JCC about the new toilet access policy the VP Operations had commented that she was committing a "hate crime"; whilst she recognised that she will have provoked strong feelings amongst a small number of staff she would expect that her beliefs are protected. In her grievance meeting she said she was not sure if he was joking. In the grievance outcome AL noted that the comment was made by an ex-employee and AL was sorry for the upset it caused. In the grievance appeal outcome letter it was noted the term 'hate crime' had come up earlier in the JCC meeting in relation to a new law that had recently come into being in Scotland and there was no harassment.

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124. MK stated in evidence that once the Supreme Court judgment was issued in April 2025 she thought the position was clear and she would get female only toilets but instead L Ltd unnecessarily sought views on its interpretation. AL stated in evidence that they consulted with the union and with staff.

5 *MK's use of the toilet facilities*

125. MK's evidence regarding her use of the toilet facilities was inconsistent.

126. Initially she stated in evidence that she used the female toilet block until March 2023 when she saw a trans woman using them and she then started using the stairwell ('secret') toilet. The respondent submitted that this was not credible because she described that alleged encounter for the first time in oral testimony but at no time throughout the grievance process despite being asked if there were any specific incidents she wished to raise and despite having access to the anonymous hotline. During the grievance process MK stated that she raised the issue of the toilet access policy with her line manager in March 2023 when it became clear to her that there may be a practice of men using the female toilets and that she changed toilet to minimise the chances that a man will enter.

127. MK stated in evidence that in 2019 three colleagues had advised her that a trans woman had used the female toilets and they were upset. As the respondent submitted, although she "joined the dots" and presumed this was with management approval, she did not raise it with management because he was just visiting from the Luton site. MK also stated in evidence that by September 2022 she was aware that trans women were regularly using the female toilet block but she did not assert that this prompted a change to which toilets she used.

128. Subsequently MK stated in evidence that she had been using the stairwell ('secret') toilets since she started with the company (in 2007) and particularly when she became perimenopausal (significantly before 2019) to give her privacy from other women. She was embarrassed because there may be blood on her clothes and hands and this was exacerbated by having to go to the stairwell toilet which is further away. MK regarded the stairwell toilet as her "secret toilet" because she rarely encountered another woman in there. If she needed a quick pee (i.e. to urinate) she'd go to the female toilet block but otherwise to the stairwell toilet.

129. Latterly in evidence she stated that she never stopped using the female toilet block – it depended upon the circumstances. She said the changes made to the stairwell toilet in January 2025 made no difference to her.

130. It was considered likely that MK's use of the toilet facilities changed as a consequence of the (peri)menopause (significantly before 2019) and did not materially change as a consequence of her becoming aware in September 2022 that trans women were regularly using the female toilet block, or with

the introduction of the toilet access policy in 2023, or with the changes made to the stairwell toilet in January 2025.

The effect of the toilet access policy

5 131. MK stated in evidence that permitting a trans woman to access the female toilets put her and women generally to a disadvantage in comparison with men for the following reasons -

i. Fear of men

10 132. MK gave evidence that she had friends and colleagues who had been raped or abused and that most women know someone and that this caused her and other women to be on high alert that the presence of a man presented an additional risk. She gave evidence of highly traumatic childhood experiences (she was aware that a close family member had been sexually and physically abused) and she was understandably very tearful and upset when giving this evidence. She also gave evidence that as a young adult she briefly
15 encountered a man in the toilets at university who she thought may have been lost.

20 133. No qualitative or quantitative data was provided beyond MK's personal experience. Nevertheless it can reasonably be inferred that as a generality women are more likely to be fearful of men than men are of women given the crime statistics noted below.

25 134. MK did not however state in evidence that the toilet access policy made her more fearful and her continued use of the female toilet block (rather than one of the single occupancy toilets) suggested she was not more fearful. Furthermore, during the grievance process MK did not assert that the toilet access policy made her more fearful for her safety (what she expressed a fear of being accused of intolerance and transphobia).

ii. Risk of assault

30 135. MK stated in evidence that men are statistically much more likely to be guilty of crimes of violence than women (85% of convictions) and that men are statistically more likely to be guilty of sexual crimes than women (90% of convictions). No evidence was provided as to whether men or women were more likely to be victims of these crimes. It is within judicial knowledge, having regard to census data, that men are more likely to be victims of violent crime and women are more likely to be victims of sexual crime. However no
35 qualitative or quantitative evidence was provided as to the likelihood of being victim of violent or sexual crime in toilets where accessed based on sex or gender.

136. Even if the crime statistics can reliably be applied to female toilets being accessed by trans women (whether public toilets or at work), it is much more

likely that any assault (including sexual assault) will be committed by a biological woman than a trans woman (96% of any assaults in the female toilets will be committed by biological women and 4% by trans women given that 99.5% of the facility users will be women and women commit 10% of assaults and 0.5% of the users will be trans women and biological men commit 90% of assaults).

137. During the grievance process MK did not assert that the toilet access policy put her and women to a disadvantage because of an increased risk of assault. AL stated in cross examination that there is no evidence that their staff were either fearful of or at risk of violence in their facilities; it's a controlled environment and there were no reports of any incidents. It was considered likely that a member of staff was a very low risk of being assaulted or sexually assaulted at this place of work given the stringent vetting requirements applied to staff and any visitors.

iii. Need for privacy

138. MK stated in evidence that women by reason of their anatomy need to undress to a greater extent than men to use the toilet. That is not accepted given that men need to undress to the same extent when defecating. It is however accepted that women need to use the toilet more frequently because of additional needs arising from menstruation, pregnancy (or lactation) and menopause.

139. MK stated in evidence that women by reason of menstruation, pregnancy (or lactation) and menopause have greater need of privacy than men when using the toilet and washing their hands. In correspondence related to her grievance she stated: "Every female colleague I have discussed this issue with shares and has repeated the same need as I have for place to carry out our ablutions with privacy and dignity and I do not believe sharing a female toilet with male colleagues - now confirmed as company policy - meets that standard". In her grievance appeal MK stated "You have had no regard to the importance of biological aspects of being a woman which are blatantly clear (e.g. those affecting me and others because of menopause and or as a result of the characteristics pregnancy, maternity, some religions). I, and other women, have reasons of privacy, dignity and boundaries. We feel vulnerable because of our female biology and bodily functions." There was no evidence beyond MK's own testimony that women experiencing menstruation, lactation and menopause sought greater privacy in the toilets than women who were urinating or than men who were defecating.

140. MK stated in evidence that when menstruating she was embarrassed using a shared basin when washing blood off her hands. Whilst it is accepted that menstruating woman may require to clean up blood, it is not accepted that this would be readily apparent to other toilet users given access to toilet paper

within the cubicle. MK stated in evidence that she didn't want to be heard unwrapping sanitary items.

141. MK stated in evidence that women in general feel taboos about physical modesty more powerfully than men when going to the toilet. Whilst it is accepted that men by reason of their anatomy are able to urinate with less impact on their modesty than women, there was no evidence beyond MK's own testimony that use of a toilet cubicle was inadequate to address the impact on their modesty.
142. AL noted in his grievance outcome "I'm sure that transgender employees also want privacy in workplace toilets". Whilst it is reasonable to infer that trans staff are likely to experience issues of physical modesty where there is a disconnect between their physiological and psychological attributes, use of a toilet cubicle would also be adequate to address that impact. AL noted in evidence requiring a trans person to use toilets that do not align with their reassigned gender would risk outing them as trans, which it is inferred may impact upon their dignity.

iv. Reluctance to speak up

143. MK stated in evidence that she and other women were reluctant to speak up about the issue of trans access to toilet facilities because they were worried about being called transphobic. At her grievance meeting she said several female colleagues have raised this issued directly to her privately in her capacity of JCC rep over the last few years.
144. MK stated in evidence that she felt that she could raise these issues after Maya Forstater won her appeal (in 2021). At her grievance appeal she stated the decision gave her confidence to raise matters. MK gave evidence that she raised the issue with management in March 2023 when she first saw a trans women in the female toilets and she raised a grievance when she was dissatisfied with their response. MK stated in correspondence related to her grievance that she raised the issue when it became clear to her there appeared to be a practice of males using the female toilets but MK had been aware of trans women using the toilets regularly since September 2022. The respondent submits that this calls into question the genuineness of her reason for not raising the issue for 2 years.
145. MK is an elected member of the JCC. MK was a member of the JCC and raised the issue with the JCC in April and June 2024.
146. In May 2023 the JCC arranged a survey of the Luton staff regarding their unisex toilets used by men and women. No evidence was given regarding the methodology but AL stated in evidence that the survey sample was very small (significantly more people responded to their milk carton survey). The stated conclusions of the survey were that women were strongly negative but the issue of cleanliness attracted far more negative responses than the issue of sharing with men (as MK put it, because of the pee on the floor).

147. L Ltd has and applies a grievance policy and procedure. It also operates an anonymous whistleblowing hotline. They also conduct staff surveys. They have consultation with staff through a recognised union and collective consultation with a staff through the JCC. The issue of trans access to toilet facilities has not been raised by any other member of staff by grievance, whistleblowing or otherwise. In the circumstances it was not considered likely that female staff had not raised any concerns because they were reluctant to do so but rather because they didn't have any material concerns.

iv. Failure to warn or consult

148. MK stated in correspondence related to her grievance that she and women "assume access on the basis of sex" and that there was a failure to consult or to warn staff about the new toilet access policy.

149. Staff were not consulted about the toilet access policy (which permitted access based upon asserted gender rather than sex) prior to its introduction in June 2023. There was no consultation with the trade union or the JCC or the staff networks. No equality impact was undertaken with a view to considering its effect on all protected groups. Furthermore staff were not made aware of that change until it was disseminated by MK through the JCC in June 2024 .

Equal Opportunities and Diversity

150. Staff received training on the Equal Opportunities and Diversity Policy upon recruitment but this training was not refreshed during their employment. This issue was raised in MK's grievance and is now being addressed.

151. AL stated in evidence that they invest a lot of time and money on inclusion and diversity activities; that they worked hard to foster an inclusive environment; that they are committed to inclusion and diversity and in 2017 created a post dedicated to it. He considered it would be contrary to their understanding of the law and contrary to their policy of inclusion to prevent trans staff from accessing the toilets based upon their gender.

Injury to feelings

152. MK stated in evidence that the toilet access policy made her very annoyed because it happened in an underhand way. The respondent submitted that it was of note that she did not give any evidence in chief that she was upset or distressed by application of the policy.

153. During the grievance process MK was annoyed and embarrassed that it was necessary to explain why she did not want a trans woman in the female toilet facilities with reference her (peri)menopausal symptoms and menstruation. She was upset and frustrated that it took a year for her questions to be answered.

154. In the grievance appeal outcome she was advised that notwithstanding the legitimacy of a grievance or other constructive due process, she must safeguard against misgendering or disclosing their details which may be considered discrimination towards trans-gender colleagues and may result in disciplinary action. In September 2024 her lawyer advised L Ltd legal counsel that she may require to crowdfund and this will unavoidably create a risk that their identities become part of the story although she will not name them. In response L Ltd's legal counsel advised her lawyer that the leaking of employee names may result in disciplinary action. MK said in evidence that her lowest point was being threatened with disciplinary just for referring to men as men. She found the legal counsel's letter shocking and she was tearful and upset when giving evidence about this.

Discussion and decision

Summary of the complaints

155. The claimant has made complaints that operation of the respondent's toilet access policy (permitting access based upon gender rather than sex) amounted to sex discrimination. These complaints are denied by the respondent.
156. In summary the claimant submitted that: the requirement under the Workplace (HSW) Regulations 1992 to provide suitable and sufficient toilet facilities must be interpreted to protect her human right to bodily privacy and the requirement to provide separate facilities for men and women must be given a biological rather than a gender certified interpretation following the Supreme Court FWS judgment; permitting trans women (biological men) to access the female toilets in breach of the 1992 Regs amounted to unwanted conduct related to sex which had the prohibited effect (harassment); amounted to less favourable treatment because of sex (direct discrimination); and put women to a particular disadvantage in comparison with men which cannot be objectively justified (indirect discrimination).

Article 8 of the Human Rights Act 1998

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
157. The claimant submitted that permitting trans women (biological men) into the female toilet facilities is in violation of her Article 8 human right to respect for her private life which includes bodily privacy. The respondent submitted that

this right is limited including as is necessary in a democratic society for the protection of health and morals or the rights and freedoms of others.

- 5 158. By virtue of Sections 3, HRA 1998 Courts and tribunals must interpret legislation in a way that is compatible with the European Convention rights so far as it is possible to do so.
- 10 159. The claimant submits that women have a particular interest in asserting bodily privacy against the opposite sex. She relies upon *R (On the application of James Dowsett) v Secretary of State for Justice* [2013] EWHC 687 (Admin), in which it was held that it was not discriminatory to deny male prisoners same-sex body searches, when female prisoners were so entitled, because a much higher proportion of the female prisoners had experienced sexual abuse.
- 15 160. Both women and trans women (and men and trans men) have an Article 8 human right to a private life and the Gender Recognition Act 2004 was ultimately enacted as a consequence of that right. A wide margin of appreciation is afforded when endeavouring to strike a balance between competing rights (*ECHR, Eweida v UK* (2013) 57 EHRR 8).
- 20 161. The European Court of Human Rights (ECHR) in *Goodwin* (Application No 28957/95) (2002) held that it was a breach of Article 8 for there to be no legal recognition of acquired gender where a biological male had undergone gender reassignment. In *Bellinger* [2003] 2 AC 467 (10 April 2003) the House of Lords (in its function as the Supreme Court) made a declaration of incompatibility in the light of *Goodwin* but was not prepared to lay down what pre-conditions should be satisfied before recognition was given to a trans person's acquired gender.
- 25

Employment Appeal Tribunal, Croft v Royal Mail 2002

- 30 162. It is against that background that the Employment Appeal Tribunal (and subsequently, the Court of Appeal) considered complaints of gender reassignment discrimination in the context of the 1992 Regs (*Croft v Royal Mail Group [formerly Consignia] plc* (2002 EAT/1160/00; (CA) [2003] ICR 1425). The complaint was made by a trans woman. "Under our current domestic law she is male; she was male at birth and remains so biologically and genitally. She is, though, an instance of gender dysphoria and has embarked on the "real life experience" of dressing and generally "presenting" as a woman" (EAT, para 1). She was not permitted access to the female toilets pending sufficient progress in gender reassignment and instead was temporarily required to use the disabled toilets. The Employment Tribunal held that this did not constitute gender reassignment discrimination.
- 35

163. The EAT Lindsay J (President) noted at para. 55: "The terms "men" and "women" were not defined in either the Directive or the [1992] Regulations but, as it seems to us, in 1989 [EU Directive] and 1992 the references would be to those at law or believed by the employer to be male and female respectively."
164. The EAT held that it was not less favourable treatment to deny her use of the female toilets, but a treatment akin to that of all others, because "she was being treated, consistently with the workplace provisions [1992], in accordance with what was, in the employer's belief, to be taken to be her sex at law, just as were all other employees, both those believed male and those believed female" (para 60).
165. In relation to *Goodwin*, it is noted at para 72.: "we see the case as likely to sweep away the domestic position, now rare in Europe, that a person's legal sex remains as was the biological sex at birth despite gender re-assignment surgery, and hence that [*Goodwin*] will probably ease the resolution of toilet issues where there has been such surgery."

Court of Appeal, Croft v Royal Mail 2003

166. Upholding the ET and the EAT decisions that this did not amount to discrimination in the circumstances, the Court of Appeal held that a trans woman's right to use the female toilet depended upon the stage they had reached in the process of reassignment (noting that it was not necessary to reach the final stage of surgical intervention). It was apparent that use of the female toilets by a trans woman who had completed the third stage of reassignment ('the real-life experience') was not considered to be a breach of the 1992 Regulations.
167. The leading judgment was given by Pill LJ who cited *Bellinger [2003] 2 AC 467* with approval at para 17:
- "Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex ...It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress"...*
- "And noting that there are typically four stages of treatment "psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience') [expected to last 2 years], and finally, in suitable cases, gender reassignment surgery."*
168. As noted in the SC FWS judgment, living in an acquired gender may entail changing physiology through hormone treatment or surgery, and/or changing other attributes of sex including their name and pronouns, dress, voice

(through therapy) and mannerisms, to enable how they present to accord with how they perceive themselves.

169. Para. 39: *“Accepting that it is for Parliament to lay down the test of sexuality as provided in Bellinger v Bellinger [2003] 2 AC 467, the court has to consider a current and practical problem about the use of lavatories. Pending any action by Parliament, the court must attempt to resolve the question ... To hold that the applicant must still use the male toilets is no less unacceptable than allowing a person, who has been known to the female workforce as a man for many years and has male genitals, an immediate right to use the female toilets. While the good faith of the applicant in this case in wishing to be a woman is not in doubt, the gender test is open to abuse and, quite apart from that, .. self-definition presents a serious practical problem in this context”.*

170. And at para. 46:
“I do not accept that the employers can escape liability on the basis that the applicant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men. Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against...”.

171. It was recognised that some female staff were unhappy or had specific objections sharing facilities with a man who is anatomically male. The magnitude of the decision to engage in gender reassignment was acknowledged as neither arbitrary or capricious and that society may reasonably be expected to tolerate a certain inconvenience to enable them to live with dignity and worth.

172. The claimant submitted that both the EAT and the CofA in *Croft* recognised “the obligation and the need for separate facilities for men and women” under the 1992 Regs (para 48). Notwithstanding that legal obligation the CofA recognised that a trans woman would ultimately be entitled to access the female toilets. Pill LJ states at para 47:

“I do not accept that a formerly male employee can, by presenting as female, necessarily and immediately assert the right to use female toilets. The status of transsexual does not automatically entitle the employee to be treated as a woman, with respect to toilet facilities. The right does not arise automatically but it is acquired by making progress in the procedure ... The tribunal has to make a judgment as to when the employee becomes a woman and entitled to the same facilities as other women”

173. The phrase “becomes a woman” was being used in a context where the House of Lords (in its function as the Supreme Court) had declared that the UK was a breach of Article 8 for not providing legal recognition of acquired gender. (Likewise the phrase “she is a female” used below.) The phrase “becomes a woman” is being used as a proxy for entitlement to be treated as such (see para 21 citing *Bellinger* “Recognition of gender reassignment...will

- mean that in law a person who...had all the biological characterises of one sex at birth may subsequently be treated as a member of the opposite sex”).
174. The Court of Appeal in *Croft* was determining a complaint of discrimination in respect of the protected characteristic of gender reassignment and not the protected characteristic of sex. The supporting judgment makes clear that the relevant comparators were not women but “employees of either sex who were not transsexual” and that a requirement to use the disabled facilities “provided an admirably practical solution to what the employers rightly recognised, and rightly treated, as a delicate issue requiring a low-key and sensitive approach.”
175. As Pil LJ states:
- “Statute recognises the existence of a category of persons undergoing gender reassignment which includes the applicant, but that very recognition militates against her being entitled automatically to claim that, as well as being transsexual, she is a female entitled to all the choices which females have. It is, in my judgment, inherent in a situation in which two sets of facilities, male and female, are required and in which a category of persons changing from one sex to the other is recognised, that there must be a period during which the employer is entitled to make separate arrangements for those undergoing the change”.*
176. In summary, the Court of Appeal in *Croft* held that whilst a trans woman (a biological man) who had completed the third stage of reassignment (2 years of living as a woman under professional supervision) had a right to use the female toilet, a trans woman who not completed that stage did not have that right and could be expected to use the disabled toilet instead.

Gender Recognition Act 2004

177. The stage in the process approach adopted in *Croft* was then put on a statutory footing with the introduction of Gender Recognition Certificates (‘GRC’) under the Gender Recognition Act 2004 (‘GRA’). Under that Act a GRC is granted by a panel where specific criteria are met including a medical diagnosis of gender dysphoria (a marked incongruence between a persons experienced/expressed gender and their sex) and evidence of living in the acquired gender for 2 years.
178. According to the census data cited in SC FWS judgment, around 0.5% of the UK population are trans (have a gender identity different from their sex registered at birth) and less than 10% of the trans population have a GRC.
179. The GRA provides that where a person has a GRC “the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman)” (Section 9 (1). This is subject to specific exceptions including marriage and parenthood and is also subject to a general exception - “subject to provision made” in any enactment (Section 9(3)).

Supreme Court Judgment 2025

180. The Supreme Court in *For Women Scotland Ltd v The Scottish Ministers [2025] UKSC 16* considered the meaning of sex for the purposes of the Equality Act 2010 ('EA 2010') ('SC FWS judgment'). The issue arose in the context of positive action measures for public appointments in Scotland. The central issue was whether references to "woman" and "female" in the EA 2010 were to be interpreted under the GRA 2004 to include persons who have an acquired gender through the possession of a GRC ('certified gender').
181. The SC FWS judgment held that sex means biological sex recorded at birth and the words man and woman should be interpreted accordingly. The claimant in effect submitted that this disarms the social and cognitive heist, perpetuated by the educated elite, that trans women are women.
182. The SC judgment determines sex in respect of EA 2010 and not in respect of the 1992 Regulations which it did not consider.

i. Implied exemption from the GRA

183. The GRA provides that where a trans person has a GRC their sex their acquired gender for all purposes (a trans woman with a GRC is a woman)" (Section 9 (1). This is subject to a general exception - "subject to provision made" in any enactment (Section 9(3)). SC held that the general exception ("subject to provision made" Section 9(3)) applies not only where there is express provision made but also where there is implied provision: "where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1).
184. As stated by the SC:
- "The question that must therefore be answered is whether there are provisions in the EA 2010 that indicate that the biological meaning of sex is plainly intended and/or that a "certificated sex" meaning renders these provisions incoherent or as giving rise to absurdity. An interpretation that produces unworkable, impractical, anomalous or illogical results is unlikely to have been intended by the legislature"(para 160).*

ii. Was a biological interpretation of sex plainly intended?

185. EA 2010 consolidated and reformed the Sex Discrimination Act 1975 and was enacted in a context where man and women meant biological sex.
186. The SC stated that "the definition of sex in the EA 2010 makes clear that the concept of sex is binary, a person is either a woman or a man"; "the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman" (para

171). Further, “we have concluded that a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)” (para 248).

5 *iii. Is a gender certified interpretation of sex incoherent, unworkable, impracticable, anomalous or illogical?*

187. The SC noted that a gender certified interpretation of sex would create heterogenous groupings such that “woman” would contain biological women, some biological males with a GRC (trans women who are legally female) and
10 exclude some biological females with a GRC (trans men who are legally male). Protected characteristics depend upon homogenous groupings and accordingly the protected characteristic of sex would be rendered incoherent.
188. Under Part 3 of the EA 2010 it is unlawful to discriminate in the provision of goods and services. Under Part 5 it is unlawful to discriminate at work.
15 Schedules contain exemptions which permit conduct (e.g. provision of single sex or separate services) which would otherwise amount to unlawful discrimination.
189. Schedule 23 contains general exemptions which apply to all parts including services under Part 3 and work under Part 5. A person does not engage in
20 sex or gender reassignment discrimination in relation to communal accommodation which include “residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation” (Sch 23, para 3).
190. Schedule 3 contains exemptions which apply to Part 3 (services) but not Part
25 5 (work). A person does not engage in unlawful discrimination by providing: services to pregnant woman where there is a risk to their health or safety; separate services based upon sex “if the limited provision is a proportionate means of achieving a legitimate aim;” and single-sex services where additional conditions are met: e.g. “there is likely to be physical contact
30 between a person (A) to whom the service is provided and another person (B), and B might reasonably object if A were not of the same sex as B”.
191. The SC noted that a gender certified interpretation “would undermine the very considerations of privacy and decency between the sexes” which these exemptions allow. If trans women (i.e. biological men who identify as female)
35 are admitted there could be no justification for excluding other non-trans men as a proportionate means of achieving a legitimate aim (as required under the exemption).
192. The SC also noted the SDA 1975 made an exception for occupational requirements including “Where the job needed to be held by a man to
40 preserve decency or privacy because it was likely to involve physical contact or where men would be in a state of undress or using sanitary facilities”; or

“the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men”. These provisions pertaining to decency and privacy were not carried forward into the EA 2010.

193. The SC rejected having a variable definition of sex in the EA 2010 because “The definition of sex is foundational to the EA 2010” and “It is important that the EA 2010 is interpreted in a clear and consistent way so that groups which share a protected characteristic can be identified by those on whom the Act imposes obligations so that they can perform those obligations in a practical way” (p265).

194. The SC found that a gender certified approach was unworkable, impracticable and illogical:

“Moreover, it makes no sense for conduct under the EA 2010 in relation to sex-based rights and protections to be regulated on a practical day-to-day basis by reference to categories that can only be ascertained by knowledge of who possesses a (confidential) certificate” (para 173).

“We can see no good reason why the legislature should have intended that people with the protected characteristic of gender reassignment should be regarded and treated differently under the EA 2010 depending on whether or not they possess a (confidential) certificate, even though in many (if not most) cases there will be no material distinction in their personal characteristics, either as regards gender identity, or appearance, or as to how they are perceived or treated by others or society at large” (para 203):

“While many women in a female-only changing room or on a women-only hospital ward or in a rape counselling group might reasonably object to the presence of biological males, it is difficult to see how the reasonableness of such an objection could be founded on possession or lack of a certificate. This is so especially when the distinction does not track physical appearance or presentation, and the woman is unlikely to have any information about the GRC at the point at which her objection might be raised. A trans woman with a GRC who presents fully as a woman may feel she is more likely to prompt objections from other users if she enters the men’s changing room or other facilities than if she uses the women’s changing room or facilities. But in facing that dilemma she is in the same position as a trans woman without a GRC. Although such trans women may in practice choose to use female-only facilities in a way which does not in fact compromise the privacy and dignity of the other women users the Scottish Ministers do not suggest that a trans woman without a GRC is legally entitled to do so” (Para 217)

Workplace (Health, Safety and Welfare) Regulations 1992

195. Parties were in agreement that the respondent was under a duty to provide suitable and sufficient toilets under Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 which were made under the Health and

Safety at Work, etc Act 1974. The claimant submitted that a biological (rather than a gender certified) interpretation should be applied to Regulation 20 having regard to the SC FWS judgment. The respondent submitted that regardless of whether a biological or certified interpretation is applied, they have acted in compliance with the regulations.

196. Regulation 20 ('Reg 20') provides:

"20.—(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless—

(a) the rooms containing them are adequately ventilated and lit;

(b) they and the rooms containing them are kept in a clean and orderly condition; and

(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside".

How are "men and women" to be interpreted under Reg 20 of the 1992 Regulations?

197. The GRA provides that where a trans person has a GRC their sex is their acquired gender for all purposes and accordingly a trans woman with a GRC is a woman (a gender certified interpretation of sex). This is subject to any enactment which has an express or implied provision to the contrary; "where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule" (SC FWS judgment).

198. Around 0.5% of the workforce is transgender (1 out of 200 workers) and around 10% of transgender workers have a GRC. It is within judicial knowledge, supported by the findings of fact in this case, that transgender persons living in their gender endeavour to use the toilet facilities which accord with their gender identity.

199. The interpretation of legislation entails a determination of meaning in light of context and purpose interpreted not historically but in its modern context. The Supreme Court (*News Corp UK & Ireland Ltd (Appellant) v Commissioners for His Majesty's Revenue and Customs [2023] UKSC 7: (para.s 27 and 28)*):

"the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: ... it is also a well-established principle of statutory interpretation that, in general, a provision is always speaking...as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law".

i. What is the legislative purpose of Reg.20?

200. The 1992 Regulations ('1992 Regs') were enacted under the Health and Safety at Work Act 1974 ('1974 Act'). The general purpose of the 1974 Act is to secure the health, safety and welfare of persons at work. Section 2 provides that "it is the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees" (the "general duty"). Breach of the 1992 Regs is a criminal offence which can be committed by an individual or company (including a manager or officer) and may result in prosecution. An HSE inspector may issue improvement or prohibition notices demanding compliance (for which appeal is made to the Employment Tribunal). There is no civil liability other than indirectly.
201. Approved Codes of Practice ('ACOP') are approved by the Health and Safety Executive under the 1974 Act. In light of Section 17 the HSE states in the introduction to the ACOP that "if you follow the advice [of an ACOP] you will be doing enough to comply with the law."
202. The 1974 Act provides that regulations may be enacted to secure the general purpose and/or a specific purpose including "the provision of specified welfare facilities for persons at work, including in particular such things as an adequate water supply, sanitary conveniences, washing and bathing facilities, ambulance and first-aid arrangements, cloakroom accommodation, sitting facilities and refreshment facilities" (Schedule 3).
203. The 1992 Regs were enacted in pursuance of this provision and their primary purpose is to ensure, so far as is reasonably practicable, the health, safety and welfare of workers through the provision of a safe place of work.
204. Reg.s 20, 21 and 24 mandate the provision of "suitable and sufficient" toilet, washing and changing facilities for all workers (the welfare facilities duty) which includes a specific requirement to provide separate facilities for men and women. However, the changing facilities only require to be separate "where necessary for reasons of propriety". The washing facilities do not require to be separate where only hands and face are washed. The toilets do not require to be in a separate room where each toilet is separate and lockable. The secondary purpose of the welfare facilities duty is therefore to provide facilities which are separate "where necessary for reasons of propriety" (what is morally proper). It is understood that this aligns with what the SC in FWS judgment described as "decency between the sexes". Moral propriety is a social construct and standards of decency change over time, and accordingly it must be interpreted in a modern context.
205. The claimant submitted that the duty to protect bodily privacy arises under Reg 20(2). Moral propriety and bodily privacy are not the same. The first depends upon what is socially acceptable. The second is an inalienable human right. Reg 20(2) does not require separate toilet cubicles to be available for each user within a toilet block which would be a basic

requirement of bodily privacy. Instead Reg 20(1) which requires the provision of “suitable and sufficient” toilet facilities which must be interpreted to include the human right to bodily privacy (and therefore separate cubicles available for each user).

5 206. The claimant submitted that permitting trans women into the female toilet facilities is in violation of her Article 8 right to respect for her private life which includes bodily privacy. By virtue of Sections 3 of the Human Rights Act 1998 Courts and tribunals must interpret legislation in a way that is compatible with the European Convention rights so far as it is possible to do so. Both women
10 and men (including trans women and trans men) have an Article 8 human right to a private life including bodily privacy.

ii. What is meaning of the words used in Reg 20 in the light of their context?

207. Regulation 20 provides -
15 *“(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.
(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless—
(a) the rooms containing them are adequately ventilated and lit;
20 (b) they and the rooms containing them are kept in a clean and orderly condition;
and (c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside”.*

25 208. It is apparent from the words used that Reg 20(1) mandates the broader duty to provide “suitable and sufficient sanitary conveniences” and it is supported by the specific requirement under Reg 20(2) to provide separate toilet facilities for men and women.

209. It is apparent that Reg 20(2) is directed at the physical estate (“the rooms containing the conveniences”). This interpretation is supported not only by the words used but their context. The focus of the 1992 Regulations is on providing and maintaining the physical estate: “Every employer shall ensure that every workplace, modification, extension or conversion ...complies with any requirement of these Regulations” (Reg 4). Reg 20(1) refers to provision
30 “at readily accessible places” which is also indicative of a physical facility.

210. It is within judicial knowledge that workplaces are constructed or adapted in pursuance of Reg 20(2) and commonly have a toilet facility with cubicles and a urinal badged as male, a toilet facility with cubicles and sanitary bins badged as female and an accessible toilet facility badged as disabled.

40 211. Unlike the general duty under Section 2 of the 1974 Act, Reg 20(2) is not limited by provision “so far as reasonably practicable.” Furthermore, unlike for changing facilities, the requirement is not restricted only to “where necessary”. Notwithstanding use of the words “suitable and sufficient” in Reg 20 (1), the statement that follows in Reg 20 (2) is categoric: “shall not be suitable unless”.

Accordingly, failure to comply with Reg 20(2) gives rise to a strict liability criminal offence which requires neither intent nor harm and which admits no assessment of whether compliance is reasonable or effective.

- 5 212. In these circumstances it is apparent that Regulation 20(2) mandates the requirement to physically provide “the rooms containing the conveniences” and Reg 20(1) mandates the broader duty to provide “suitable and sufficient sanitary conveniences” and any requirement to control access to those facilities must arise under that broader duty.
- 10 213. Under the 1974 Act there is a general duty to ensure, so far as reasonably practicable, safe systems of work (Section 2). There are also specific duties directed to the control of premises. That approach is not replicated under the 1992 Regs. Furthermore, the relevant ACOP does not articulate any requirement to control access to the toilet facilities. Accordingly, any requirement to control access (presumably through effective and enforced policy) must therefore be limited to what is reasonably practicable for the purpose of ensuring health, safety and welfare (including their bodily privacy) and moral propriety.
- 15

iii. What is the meaning of men and women in the 1992 Regs?

- 20 214. Under the 1992 Regulations what is necessary for moral propriety is addressed through the provision of separate facilities for “men and women”. The issue of whether that requires a biological or gender certified interpretation is considered having regard to the reasoning of the Supreme Court FWS judgment on the application of the GRA to the EA 2010.
- 25 215. Men and women are not defined under the 1992 Regs. Reg 20 replicates equivalent provisions in the prior Factories Acts dating back to 1937. These provisions were enacted before gender reassignment was recognised and protected in law. Considered in that historical context it is inferred the words men and women were intended to refer to biological sex. The issue is whether in its modern context a biological or a gender certified interpretation is required.
- 30

a. Reg 20(2) – physical estate

- 35 216. The specific requirement under Reg 20(2) to provide separate toilet facilities for men and women is for the purposes of moral propriety. What is necessary for moral propriety does not necessarily depend upon a biological interpretation. Moral propriety is a social construct and standards of decency change over time. The GRA provides that a trans woman with a GRC is a woman for some purposes but not all. Some believe a trans woman is a woman; some do not.
- 40 217. Assuming that the parliamentary intention was to have a consistent meaning across the statutory provisions enacted under the 1974 Act, and recognising

that some of these provisions are directed at protecting women from health and safety risks related to their female biology, it is inferred that the phrase “men and women” in Reg 20(2) is intended to have a biological meaning notwithstanding that the requirement for separate facilities is directed at moral propriety and not health and safety.

218. Further it is apparent that the relevant ACOP (2013) applies a biological interpretation to the provision of the physical estate: “In toilets used by women, suitable means for the disposal of sanitary dressings should also be provided” (para 192); “where it is necessary to provide urinals for use by men...” (para 198). These requirements arise from the physiology of biological women and men respectively.

b. Reg 20(1) – broader duty

219. The issue is whether any duty to control access arising under the Reg 20(1) broader duty must also be based upon biological sex or whether a gender certified interpretation is required.

220. Unlike the EA 2010, the definition of sex is not foundational to the 1992 Regs whose primary purpose is health and safety. Applying a biological or gender certified interpretation to toilet access may have significant implications for the health, safety and welfare of trans persons and non-trans persons respectively.

221. The definition of sex is relevant to its secondary purpose of moral propriety. Applying a gender certified interpretation to toilet access may cause significant distress and embarrassment to some non-trans users required to share toilet facilities with trans users of the opposite sex. Likewise applying a biological interpretation to toilet access may cause significant distress and embarrassment to trans women required to use the male toilet facilities (and likewise with trans men using the female toilets).

222. A gender certified interpretation would not undermine the statutory exemptions under the EA 2010 which apply to the provision of separate public services and not to workplaces. Further, the statutory exemptions under the EA 2010 require an assessment of whether a separate service is objectively justified (a proportionate means of achieving a legitimate aim) whereas the 1992 Regs neither require nor allow any such assessment.

223. The SC FWS judgment noted that previous sex discrimination legislation “*recognised and accommodated the reasonable expectations of people that in situations where there was physical contact between people, or where people would be undressing together or living in the same premises, or using sanitary facilities together, considerations of privacy and decency required that separate facilities be permitted for men and women*” (para 52). (The sanitary facilities being those which serve live-in accommodation.)

224. What is necessary for bodily privacy and for moral propriety of course differs according to the circumstances of the facility or service provided. E.g. A

woman using a toilet within a cubicle which is adjacent to that being used by a trans woman (a biological man) is in a materially different position to a woman undergoing an intimate physical examination being performed by a trans woman (a biological man). Furthermore, the ability to control access to that facility or service is materially different for an everyday facility accessed by everyone, than it is for a specialised service accessed by specific users.

225. Applying a biological interpretation to any duty to control toilet access is unworkable - the biological sex of another toilet user is likely to be unknown and may be unknowable (because birth certificates may be updated with a GRC). This results in an incoherence between any requirement (toilet access based upon biological sex not gender identity) and the practice (toilet access based upon perceived gender not biological sex). Workers are unlikely to know the biological sex of another worker but they may infer their gender identity from how they present. This is recognised by the EAT in *Croft* (para 56):

"In the massively preponderant number of cases the employer will have no reason to distinguish between sex and gender. If such papers as a person discloses identify him as male and he "presents" as male in the sense of dressing and appearing as a male, the employer can properly treat him as at law male as he will have no reason to think otherwise of him. So also in the corresponding case of someone presenting as a woman."

226. The claimant stated in evidence that women can tell someone's sex with 99% accuracy just by looking at them. However in cross examination and submissions it was recognised that some trans woman may successfully pass as a woman and use the toilets "in stealth".

227. The EAT in *Croft* recognised that access is based upon "putative sex" rather than biological sex: "an employer is to be expected to require those who are, or who are believed by him to be, at law males to use only the mens' facilities and those who are at law or who are believed by him to be females to use only the womens'" (para 56). The putative sex approach permits access to those trans staff who "pass" (perceived to be female or male) and prohibits access to those who don't "pass." This is a distinction without purpose given that it still permits access to some trans staff of the opposite sex which may impact on moral propriety between the sexes. The claimant submitted that permitting access to any number of trans women (i.e. biological men) however small renders the toilets mixed-sex and therefore unsuitable.

228. A gender certified interpretation of toilet access is also unworkable— a trans person with a GRC is indistinguishable from a trans person who has a medical diagnosis of gender dysphoria and has lived in their acquired gender for 2 years. The only material difference is the panel certification but disclosure of the certificate cannot be required by an employer. This is recognised by the SC in *FWS* (para. 202):

"there is no obvious outward means of distinguishing between a person with the protected characteristic of gender reassignment who has a GRC and a

person with that characteristic who does not. The only difference between these two groups is possession of a paper certificate and that fact (possessing a GRC) is confidential to the person who has it and subject to stringent restrictions on disclosure”

5 229. The SC in FWS found that a gender certified interpretation creates heterogenous groupings (women would mean biological women (without a GRC) and also biological men (with a GRC)) rendering the protected characteristic of sex incoherent. In the context of the 1992 Regs, a biological interpretation also creates heterogenous groupings in practice such that
10 women would mean putative women (biological women and biological men perceived to be female) rendering the distinction unworkable.

230. The indistinguishability problem also affects disabled access. The requirement to provide facilities for the disabled under the 1992 Regs applies to those who qualify as disabled under the Section 6 of EA 2010. In summary
15 this requires “a physical or mental impairment” which has a “substantial and long-term” impact on daily activities usually for at least 12 months. That definition may include a person with a psychiatric or psychological condition e.g. a trans person suffering from gender dysphoria may be entitled to use the disabled facilities whilst undergoing gender reassignment treatment (per CofA
20 in *Croft*). Use of a disabled toilet by an unqualified user may result in use by a qualified user being delayed or denied but it may well be unknown whether a user qualifies as disabled under Section 6. In practice access to disabled facilities is permitted for those who are perceived to qualify (again, a putative approach).

25 231. This putative approach to indistinguishability could be applied to a gender certified interpretation. Access could be permitted to those who have a medical diagnosis and have lived in their acquired gender for 2 years i.e. those whom it is perceived may have a GRC. Whilst this accords with the stage of reassignment approach adopted by the Court of Appeal in *Croft*, the claimant submitted that this approach is defunct following the GRA.
30

232. The indistinguishability problem only arises if Regulation 20(1) mandates that access must be controlled on the basis of biological sex or certified gender. However all that Regulation 20(1) requires is the provision of “suitable and sufficient sanitary conveniences.” Any requirement to control access to those
35 facilities (presumably through effective and enforced policy) is limited to what is reasonably practicable for the purpose of ensuring health, safety and welfare (including their bodily privacy) and moral propriety between the sexes. This does not necessarily mandate either a biological or certified gender approach, which may be counter to the primary purpose and in any event not
40 reasonably practicable. This interpretation is supported by the Court of Appeal in *Croft* who did not envisage that granting access based upon established gender identity (i.e. not biological sex) would put the employer in breach of the 1992 Regs. However as the EAT noted in *Croft*: “In the massively

preponderant number of cases the employer will have no reason to distinguish between sex and gender.”

Has R complied with Regulation 20 of the 1992 Regs?

- 5 233. The respondent operated a toilet access policy which permitted access to toilet facilities based upon asserted gender identity rather than biological sex or established gender identity or certified gender.
- 10 234. The respondent submitted that it has complied with Reg 20 even if a biological reading is applied to the interpretation of men and women; that the claimant has been provided with a sufficient selection of suitable toilet facilities, at readily accessible places, all within a reasonable distance from her former and current desks (both factually and in terms of the 1992 Regulations and ACOP).
- 15 235. Under Reg 20(2) the toilets must be in separate rooms for men and women ('separate toilets') "except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside" ('shared toilets'). The claimant submitted that the washing facilities also required to be provided separately under the 1992 Regs. The requirement for separate facilities applies only to the toilets themselves and not to associated hand basins (which may be in a shared room under Regulation 21).
- 20 236. The claimant submitted that cubicles with gaps did not constitute a separate room under the 1992 Regs. The respondent did not submit that their cubicles with gaps constituted rooms or provided adequate privacy.
- 25 237. If a separate toilet block is provided for men and women, Reg 20(2) does not require separate toilet cubicles for each user. If a separate toilet block is not provided, Reg 20(2) requires each convenience to be in a separate lockable room. The relevant ACOP states: "196. Facilities should be arranged to ensure adequate privacy for the user. In particular: each toilet should be in a separate room or cubicle, with a door that can be secured from the inside". Accordingly, cubicles with gaps (which may allow for more hygienic cleaning),
- 30 may, depending upon the circumstances, provide adequate bodily privacy for each user and moral propriety between the sexes if no urinals are provided.
- 35 238. The claimant submitted that all toilets provided must comply with the 1992 Regs and the respondent submitted that they must merely provide a sufficient number which comply. Many of the provisions 1992 Regulations apply to "every room", "every floor", "every window" but the toilet provisions do not expressly apply to every sanitary convenience and instead the regulation states that "suitable and sufficient sanitary conveniences shall be provided" and specifies what is meant by "suitable" and "sufficient." Whilst ACOP refers to "each toilet" it may be relied upon for conclusive proof of compliance rather
- 40 than conclusive proof of breach.
239. The respondent submitted that it provided a sufficient number of suitable toilets in compliance with the 1992 Regs. Part II provides that there should be

at least 1 suitable toilet for every 25 females and likewise for males. Reg 20 provides that they must be provided "at readily accessible places". ACOP states at 190: "Facilities should be located so they are convenient. They do not have to be within the workplace, but they should, if possible, be within the building". The respondent submitted that taking into consideration the toilets on each floor there were sufficient suitable toilets at all material times and the claimant did not dispute this. Insufficient data was provided to do a precise calculation but it appears there were under 25 females working on the first floor (average of 12.5% females working from 175 desks). Throughout the relevant time there were at least 2 fully enclosed single occupancy toilets (badged as accessible) on the first floor and on the immediately adjacent floors there were at least 3 single occupancy toilets (not badged as accessible) as well as 4 single occupancy toilets (badged as accessible).

240. In the circumstances, the respondent acted in compliance with the Reg 20 of the 1992 Regs throughout the relevant period.

241. A failure to comply with Reg 20 is a criminal offence; there is no civil liability. Whether or not an employer has complied with Reg 20 is relevant to, but not determinative of, complaints of discrimination which arise in the context of access to toilet facilities at work.

Summary of Regulation 20

242. In summary, the specific duty under Reg 20(2) requires the provision of separate toilets for men and women by way of the physical estate designed to meet their different physiological and biological needs such that workplaces are commonly constructed or adapted to have a toilet facility with cubicles and a urinal badged as male, a toilet facility with cubicles and sanitary bins badged as female and an accessible toilet facilities badged as disabled.

243. Under Reg 20(2) separate toilet blocks must be provided for men and women except where each toilet is in a separate lockable room which may be formed by partitions. There is no requirement under the 1992 Regs for that room to contain the hand basin provided it is readily accessible. Each toilet must be compliant with the general duty of health, safety and welfare under the 1974 Act, but it is not necessary for all toilets to comply with Reg 20 provided a sufficient number do comply.

244. The broader duty under Reg 20(1) to provide suitable and sufficient facilities requires access to those facilities to be controlled only to the extent reasonably practicable to ensure the primary purpose of health, safety and welfare (including bodily privacy) for all users and the secondary purpose of moral propriety between the sexes. This does not necessarily require either a biological or certified gender approach which may be counter to the primary purpose and in any event not reasonably practicable. In most cases the respondent will have no reason to distinguish between sex and gender.

245. The respondent acted in compliance with Reg 20 throughout the relevant period because it provided a sufficient number of toilets which complied. However operation of the toilet access policy may still amount to sex discrimination under EA 2010 if it amounted to unwanted conduct related to sex which had the prohibited effect (harassment); amounted to less favourable treatment because of sex (direct discrimination); or put women to a particular disadvantage in comparison with men which cannot be objectively justified (indirect discrimination).

Discrimination at work (Part 5 EA 2010)

246. Part 5 of the Equality Act 2010 regulates discrimination at work (other parts regulate discrimination in other contexts e.g. Part 3 regulates discrimination in the provision of public services).

247. Under section 39 of the EA 2010 an employer must not discriminate against an employee (or applicant) as to their terms, etc, by dismissal or by subjecting them to any other detriment. Specifically an employer must not discriminate against a person in the way it affords access to a facility (Section 39(2)(b)).

248. A detriment is construed widely and arises where a reasonable worker might take the view that they had been disadvantaged. Separately an employer must not subject an employee to harassment (detriment does not include conduct which amounts to harassment under Section 212).

249. A tribunal must take into account a provision in an EHRC Code of Practice where it appears to be relevant (Section 15 Equality Act 2006). Neither the Code of Practice on Employment (the 2011 Code) nor the Code on Services, Public Functions and Associations have been updated following the SC judgment. In April 2025 the ECHR issued an Interim Update which was withdrawn. Pending approval of revised Codes parties were in agreement that no account should be taken of the parts that require updating.

Protected characteristics

250. The EA 2010 recognises nine protected characteristics including sex, disability, gender reassignment and religion or belief. No characteristic is inherently more important than the other.

251. The protected characteristic of “sex” is not defined under the EA. The Supreme Court has determined that “sex” under the EA means biological sex i.e. “the sex of a person at birth.” And that a trans woman (or man) with a GRC is not a woman (or man) for the purposes of the EA.

252. The protected characteristic of gender reassignment is defined under Section 7 and arises where a “person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex” i.e. a trans person. (There is no requirement for a GRC to qualify for protection.)

253. To be a protected belief it must be genuinely held and “must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others” (*Nicholson v Grainger Plc* [2009] UKEAT 0219/09/0311).

5 *Prohibited conduct*

254. In summary, the EA 2010 prohibits direct discrimination, indirect discrimination, harassment and victimisation (with additional prohibitions extending to the protected characteristic of disability).

10 *Statutory Exceptions*

255. Schedules to the EA 2010 provide a number of exceptions to the duty not to discriminate.

15 256. Schedule 3, Part 7 provides that the provision of separate or single sex services to the public does not constitute sex discrimination or gender reassignment discrimination if it is a proportionate means of achieving a legitimate aim e.g. provision of separate changing rooms “that might be essential for religious reasons or desirable for the protection of a woman’s safety, or the autonomy or privacy and dignity of the two sexes” (SC judgment, para 211). This exception only applies to Part 3 (discrimination in the provision of public services) and not to Part 5 (discrimination of employees at work) (unless the toilets are also accessible by the public).

20 257. The claimant submits that where an employer provides single sex toilets in compliance with Reg 20 of the 1992 Regs that provision will not be susceptible to a complaint of sex discrimination from a trans woman (biological man) thereby excluded from the woman’s facilities because it falls within the Schedule 22 statutory exception.

25 258. Schedule 22 provides that complying with a legal requirement concerning the protection of women does not constitute sex discrimination at work (under Part 5) -

30 “(1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with—

(a) a pre-1975 Act enactment concerning the protection of women;
(b) a relevant statutory provision (within the meaning of Part 1 of the Health and Safety at Work etc. Act 1974) if it is done for the purpose of the protection of W (or a description of women which includes W);
35 (c) a requirement of a provision specified in Schedule 1 to the Employment Act 1989 (provisions concerned with protection of women at work).

(2) The references to the protection of women are references to protecting women in relation to—

40 (a) pregnancy or maternity, or
(b) any other circumstances giving rise to risks specifically affecting women.

(3) It does not matter whether the protection is restricted to women.

(4) These are the specified provisions—

(a) Part 5 (work);...

(5) A pre-1975 Act enactment is an enactment contained in—

5 *(a) an Act passed before the Sex Discrimination Act 1975;*

(b) an instrument approved or made by or under such an Act (including one approved or made after the passing of the 1975 Act)...

(8) This paragraph applies only to the following protected characteristics—

(a) pregnancy and maternity;

10 *(b) sex”.*

259. Contrary to the claimant's submissions, the Schedule 22 exception does not apply to Regulation 20 of the 1992 Regs because it is not concerned with “protecting women in relation to—(a) pregnancy or maternity, or (b) any other circumstances giving rise to risks specifically affecting women.” Reg. 20 is
15 concerned with protecting both men and women and not women specifically. Furthermore, the Sch. 22 exception applies “only by doing in relation to a woman” and not by doing in relation to a man.

260. In any event, reliance upon the Sch 22 exemption appears to be both unhelpful and unnecessary – any complaint by trans women excluded from
20 the female toilets may be framed as indirect gender reassignment discrimination which is not exempt but, as with the public services, their exclusion could be objectively justified.

Burden of Proof

25 261. Section 136(2) EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions”.

30 262. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37*, SC).

35 263. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong [2005] ICR 935*)

40 264. Under the first stage it is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic (‘Stage 1’ *prima facie* case).

265. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).

266. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the explanation for the less favourable treatment is fully adequate and cogent (*Laing v Manchester City Council* [2006] ICR 1519, EAT).

Harassment

267. The claimant's complaint is that "In operating a policy of permitting those staff who assert a gender identity at variance with their sex to use purportedly single-sex facilities provided for the opposite sex [the toilet access policy], the respondent has at all material times (and continuing to date) engaged in" harassment of her related to sex.

268. The respondent admits that it applied to staff including the claimant a provision, criterion or practice to this effect from 22 June 2023. It is therefore reasonably inferred that the respondent accepts that it operated such a policy.

269. Section 26(1) EA 2010 provides that "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".

270. The tribunal must determine whether the person engaged in the conduct; whether the conducted related to the protected characteristic; whether the conduct was unwanted; and whether that conduct had the purpose, or the effect, of violating the claimant's dignity, or creating the offensive, etc environment.

Did the operation of the toilet access policy amount to unwanted conduct?

271. The claimant submitted that the operation of the toilet access policy amount to unwanted conduct.

272. The respondent submitted that the operation of the toilet policy does not amount to unwanted conduct because it was without practical effect on the claimant (she continued to use the shared toilets, she did not assert a single negative encounter after introduction of the toilet access policy and her objection is ideological).

273. The existence of an act does not depend upon its practical effect and this reflected in the wording of the statute which separates conduct, purpose and effect. The toilet access policy was not a formal written policy. It is a label applied to the following acts:

- a. Since 2022 trans women have been working on the same floor as the claimant, and using the female toilet block.

- b. In March 2023 the claimant asked her line manager and then his line manager whether there was a policy on access to toilets and she was told there was no policy.
- c. On 13 June 2023, MK sent an email to GN, VP HR for Edinburgh enquiring:
5 *“does Leonardo have a policy on access to toilets? Specifically, can I assume that the female loos within Phase 1 and Phase 2 are accessible by sex rather than gender?”*
- d. On 22 June 2023 GN, VP HR Edinburgh replied to the claimant by email stating:
10 *“the toilet facilities at the Leonardo are based on gender aligning with the Workplace (Health, Safety and Welfare) Regulations 1992. Regulation 20, Sanitary” [link to the 1992 Regulations was provided].*
- e. The claimant sought more information on what she described as the new toilet policy.
- f. On 28 February 2024 RR, HID replied advising:
15 *“anyone who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of reassigning their gender should use the toilets which is aligned to the gender to which they identify. It is an employee-led decision as to which gender toilet they choose to use and when they choose to use the toilet of the gender to which they are transitioning or have transitioned. There is no specific toilet policy within Leonardo”.*
- g. In April 2024 the claimant disseminated the following to staff through the JCC minutes:
20 *“MK: She started by asking in spring 2023 if there is a policy based on toilet usage for sex or gender and if anyone can use the toilet of the gender they identify with. It feels as though there is an unwritten rule and staff don’t know what the policy is. MK states there needs to be single sex toilets for women and the main issue is that there is nothing written down so nobody knows what the policy is”.*
- h. In June 2024 the claimant disseminated the following to staff through the JCC minutes: *“toilet usage...will be based on gender not sex.”* No information regarding toilet usage or access was disseminated to staff by management.
- i. On 8 August 2024, the Grievance outcome letter sent by AL to the claimant stated: *“any individual, living in the gender with which they identify,...is*
35 *entitled to access the facilities of the gender by which they identify...”*
274. Notwithstanding the claimant’s pleaded case which broadly narrated this chronology as the facts relied upon, it was understood from the claimant’s submissions that she does not seek to rely upon the manner in which the policy was communicated. Accordingly the act relied upon is that of advising
40 that trans staff would be permitted to access the toilets based upon their asserted gender rather than their biological sex. This amounted to conduct which was unwanted because she believed that toilet access should be based upon sex and not asserted gender.

Was operation of the toilet access policy related to sex?

275. The claimant submitted that operation of the toilet access policy related to sex. The respondent submitted that the purpose of the toilet access policy related to gender reassignment and not sex. Conduct is related to a protected characteristic if it is connected with it without necessarily being because of it. Under the policy toilet access was based upon asserted gender and sex was rejected as a basis for access. It is therefore readily apparent that the operation of the toilet access policy related to sex.

Does the operation of the toilet access policy have the prohibited purpose or effect?

276. The unwanted conduct must have “the purpose or effect of - (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.

277. The claimant asserted that it had a prohibited effect rather than a prohibited purpose.

278. In deciding whether the conduct has the prohibited effect the tribunal must take into account “the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect” (Section 26(4) EA 2010). This entails both a subjective question (what did B perceive?) and an objective question (was it reasonable, etc?) (*Pemberton v Inwood [2018] EWCA Civ 564*, CA) Where the conduct has the prohibited effect the person does not have to have intended it. However it is relevant to consider whether it was reasonably apparent that the conduct was not intended to have that effect (*Richmond Pharmacology v Dhaliwal 2009 ICR 724*, EAT).

What was the claimant’s perception?

279. Did the claimant perceive that the operation of the toilet access policy (permitting access based upon asserted gender rather than sex) had the effect of violating her dignity or creating a degrading, etc environment for her?

280. The claimant submitted that the operation of the toilet access policy converted single-sex facilities into mixed-sex and that permitting men to use the women’s facilities had the effect of violating her dignity and creating an intimidating, hostile, degrading, humiliating environment for her.

281. The respondent submitted that the claimant’s perception arises not as a result of being female but as a result of her ideological belief that trans women should not use the female toilets because they are men. Whilst there requires to be is a relationship between the unwanted conduct and her sex (“related to”), and a relationship between the conduct and the effect (“has the purpose or effect”), it is not accepted that there requires to be a relationship between her sex and the effect. That may however be relevant to consideration of whether it was reasonable for the unwanted conduct to have that effect.

282. It is accepted that the claimant believes that biological sex is real, important and immutable and that trans women are a subcategory of biological men.

283. The claimant submitted that men and trans women are legally indistinguishable. The claimant believes that people do not have a gender or gender identity and as such a man cannot identify as a woman. However she is aware that some people believe that they do have a gender identity at variance to their sex, that they may undergo a process which they believe reassigns their gender, and that this is recognised in law as a protected characteristic. It is not therefore accepted that the claimant believes that there is nothing to distinguish them in law.

284. The claimant submitted that men and trans women are indistinguishable in practice and that they are readily discernible as men. She submitted that there is no practical difference between a trans woman and a male colleague who grow long hair, puts on some lipstick, dresses up in a skirt and tights (a transvestite i.e. cross-dresser).

285. The claimant is aware that trans women believe their gender identity is at variance to their sex and whereas non-trans men (including transvestites) do not. The claimant is aware that beliefs, like motives and feelings, are “real and important” and indeed she relies upon these psychological traits in asserting a philosophical belief and also in making legal complaints of discrimination.

286. The claimant is aware that trans women often undergo a process for the purpose of reassigning their gender identity (or their belief in it) which may entail medical advice, hormonal treatment, and/or endeavouring to live permanently as a female including modifying their appearance and presentation. The claimant is aware that a transvestite i.e. cross dresser does not undergo such a process and is merely engaged in a temporary modification of their appearance.

287. It is not therefore accepted that the claimant believes that trans women are indistinguishable from men in practice.

288. The claimant submitted that the toilet access policy was unworkable because it was not possible to identify trans women with a genuine belief and further it was possible for a man to simply declare that they were trans without recourse to any process. There was no evidence that any of the trans women who were using the toilets were not “living in the gender with which they identify” and were not genuinely trans. In any event this was not a relevant distinction because it would not matter to the claimant whether a trans woman had lived in that gender for years – in her view they were men who should not be permitted regardless. It is not therefore accepted that the claimant believed that it was the unworkability of the policy which violated her dignity or created a degrading environment.

289. The claimant made submissions on matters upon which no evidence was heard namely toilet access by transvestites, cross dressers, fetishists, voyeurists, exhibitionists, predators and bullies. There was no evidence

whatsoever that the trans women (biological men) who accessed the women's toilet were not genuinely trans and accessed for some ulterior and nefarious motive.

5 290. The claimant did not perceive that operation of the toilet access policy violated her dignity or created degrading, etc environment for her. Prior to application of the policy, trans women had been regularly using the female toilets from 2022 to her knowledge, and without objection or material change of use on her part. After introduction of the toilet policy she continued to use the multiple occupancy female toilet block and the application of the policy caused no 10 material change of use on her part or theirs. The claimant was not upset by operation of the policy which had no practical effect. She was annoyed that the respondent had permitted access based upon gender which she considered was "ridiculous." As she stated during the grievance process, the toilet access policy "puts the views of those subscribing to gender self- 15 identification theory above those (including me) who hold protected gender critical beliefs."

Was it reasonable for the conduct to have that effect?

20 291. The respondent notes that toilet access policy applied to all equally staff whether male or female and that its obvious aim was to recognize and act lawfully in respect of the gender identity of trans employees (and not to harass her). It is accepted that this would have been reasonably apparent to the claimant.

25 292. The respondent submits that the claimant was not required to use the multiple occupancy female toilet block (which was affected by the toilet access policy) and it was open to her to use the single occupancy toilets available on the ground, first, second floors (which were not affected by the toilet access policy).

30 293. The claimant's perception is that the toilet access policy converted female toilets into "mixed sex" toilets. That perception depended upon her belief that a person cannot have a gender identity separate to their sex i.e. that there is no distinction between female toilets that admit trans women and female toilet that admit all men regardless. That belief is not shared by all women generally.

35 294. Whilst a toilet access policy based upon asserted gender identity could have had the effect of violating the dignity of a member of staff or create a degrading environment for them, in the circumstances of this case it was not reasonable for the application of the toilet access policy to have the effect of violating the claimant's dignity or create a degrading environment for her because it had no practical effect upon her dignity or environment.

What other circumstances are relevant?

295. Prior to introduction of the toilet access policy the claimant had shared the toilet facilities with trans women both to her knowledge and without complaint. As such the toilets were already “mixed sex” as she described it. The claimant could have raised this issue in her capacity as a JCC rep or as an employee through the grievance process or confidentially through the anonymous whistleblowing hotline but she did not do so. The respondent articulated its approach to toilet access in direct response to the claimant repeatedly asking whether it had a toilet access policy. Once advised of their approach it was the claimant who sought for it to be disseminated to staff as a policy. As the respondent submitted, after introduction of the toilet access policy the claimant continued to use the same toilets she had used for years despite having access to other toilets and furthermore she did not assert a single negative encounter after its introduction - the only issue was that the practice was now permitted by the respondent.
296. In the circumstances of this case the operation of the toilet access policy did not have the effect of violating her dignity or creating a degrading, etc environment for her.

Summary of harassment complaint

297. By operation of the toilet access policy the respondent engaged in unwanted conduct related to sex but in the circumstances of this case the conduct did not have the effect of violating the claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Direct Discrimination

298. The claimant’s complaint is that “Permitting male staff who assert a female gender identity to use the women’s facilities most convenient for the Claimant is less favourable treatment of the Claimant than it would be of a male user of those facilities, because the presence of a man in those facilities violates the Claimant’s privacy but would not violate the privacy of a male user; and it is to her detriment, because it denies her the use of suitable toilet facilities”.
299. Section 13(1) EA 2010 provides: “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.”
300. Direct discrimination requires consideration of whether the claimant was treated less favourably than a man and whether the reason for that treatment was because of sex.
301. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or

hypothetical, the less favourable issue may be resolved by first considering the reason why issue (*Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)

5 *Was the claimant treated less favourably than the respondent did or would treat a man by application of the toilet access policy?*

302. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

10 303. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the claimant and their comparator. The comparison must be like with like (*Shamoon*).

304. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances.

15 *Was a male user of the women's toilets in the same material circumstances as the claimant?*

20 305. The claimant's pleaded case was that the relevant comparator was a male user of the women's toilets i.e. a trans woman. The respondent submitted that the relevant comparator was a male user of the men's toilets which are also used by trans men (i.e. women who identify as men). *Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting* [2002] ICR 646 (CA), per Ward LJ, at para. 54:

25 *"If the applicant can point to an actual person whose circumstances are the same or not materially different from his own, then so much the better. Frequently, however, there may be no actual comparator whom it can be shown has been treated more favourably than the applicant. In those circumstances it is necessary to construct a hypothetical comparator to show how a person of the [opposite sex] would have been treated".*

30 306. A male user of the female toilets is not in the same material circumstances as a female user of the female toilets because this discounts the asserted gender of the toilet users as a material circumstance. In circumstances where the complaint is the female toilets most convenient for the claimant are being accessed by a trans woman, it is readily apparent that the correct comparator is a man whose most convenient male toilets are accessed by a trans man.

35 307. The claimant ultimately accepted in oral submissions that the correct comparator was not a male user of the women's toilets (as plead) but a male user of the male toilets.

40 308. The respondent submitted that: by application of the toilet access policy the claimant was not treated less favourably than a man because the policy applied equally to men and women and all employees including the claimant

had access to individual occupancy toilets; the reference in her pleaded case “the women’s facilities most convenient to her” was misleading when at all times she had access to suitable and sufficient toilet facilities.

309. The claimant submitted that the same treatment can constitute less favourable treatment where the facilities provided are unsuitable for a woman but suitable for a man. The EAT held in *Earl Shilton Town Council v Miller* [2023] EAT 5 para 28:

“the claimant was not provided with toilet facilities that were adequate to her needs, because of the risk of coming across a man using the urinal and the lack of a sanitary bin. That treatment was less favourable than that accorded to men”

310. The claimant submitted that the presence of a trans woman (a biological man) when she was using the toilet violated her privacy, rendered the toilets unsuitable, not compliant with the 1992 Regs, and thus amounted to direct discrimination.

311. The respondent submitted that the EAT decision in *Earl Shirlton* can be distinguished on the basis that there were no urinals in the female toilets and there was no complaint regarding a lack of sanitary bins.

312. The 1992 Regs do not distinguish between a man and a woman’s human right to bodily privacy. The requirement for separate facilities is for moral propriety between the sexes i.e. of both sexes relative to each other. Both women and men have privacy needs when using the toilet. The 1992 Regs do not give any primacy to a woman’s bodily privacy over a man’s. A woman in the female toilets would be using a toilet within a cubicle but a man in the male toilets might be using a urinal rather than a cubicle and the presence of a trans man may have greater impact on their privacy.

313. It cannot reasonably be said the presence of a trans woman in the female toilets would cause a greater violation of a woman’s bodily privacy than the presence of a trans man in the male toilets would cause to a man’s bodily privacy. There was no basis for concluding that the toilets were less suitable for a woman than a man.

Was her sex the reason for the less favourable treatment?

314. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In “reason why” cases the matter is dispositive upon determination of the alleged discriminator’s state of mind.

315. The claimant submitted the presence of a biological man rendered the toilets unsuitable for her because she was female. The respondent submitted that it was because of her ideological beliefs.

316. The respondent submitted that the claimant had not satisfied Stage 1 of the burden of proof (see above) because she has not proven facts from which the

tribunal *could* conclude that the respondent has treated the claimant less favourably because of her sex.

317. There is no need to consider the alleged discriminator's state of mind when the treatment is inherently less favourable because of sex or when the less favourable treatment is because of an exact proxy for sex (*Earl Shilton* para 32).

Summary of direct discrimination complaint

318. By operation of the toilet access policy the claimant was not treated less favourably than the respondent did or would treat a man in the same circumstances because she was a woman. The policy applied equally to men and women. It cannot be said that it violated the privacy of a woman but did violate the privacy of a man (the complaint as plead). There was no basis upon which it could reasonably be inferred that the policy was inherently less favourable to a woman in the circumstances of this case. The operation of toilet access policy did not amount to direct discrimination of the claimant.

Indirect sex discrimination

319. The claimant's complaint is that the application of the toilet access policy (permitting access based upon asserted gender rather than sex) put female staff, including the claimant, at a particular disadvantage in comparison with men. Her pleadings did not explicitly state the particular disadvantage but it is inferred that the disadvantage asserted was the policy made women more fearful, at greater risk of violence and sexual assault, and had a greater impact on their privacy, than men.

320. Indirect discrimination arises under Section 19 EA 2010 where: an employer applies a provision, criterion or practice ('PCP') to a worker; the employer applies or would apply that PCP to persons who do not share the worker's protected characteristic and persons who do; the application of the PCP did or would put persons who share the Claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it ('group disadvantage'); the application of the PCP did or would put the Claimant at that disadvantage ('individual disadvantage'); and the employer cannot show it to be a proportionate means of achieving a legitimate aim ('objective justification').

321. The burden of proof is on the Claimant to prove the PCP, the group disadvantage and the individual disadvantage. If established, the burden of proof is on the Respondent to prove objective justification.

322. Direct discrimination is aimed at inequality of treatment; indirect discrimination is aimed at equality of treatment which has an inequality of results (*Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27).

Did the toilet access policy amount to application of a provision, criterion, practice?

323. The PCP must have been applied or would have been applied to the worker and others.

5 324. It is for the Claimant to identify the PCP relied upon in making the complaint. The words “provision, criterion or practice” are cumulative and do not require an absolute bar (*British Airways plc v Starmar* [2005] IRLR 862, EAT) but do not include every act that results in inequality (*Ishola v Transport for London* [2020] EWCA Civ 112). They connote a state of affairs indicating how the employer generally acts in that situation. A one-off decision may amount to a practice if there is a reasonable basis to infer that the same decision would be taken if a similar situation arose again. The phrase should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions (para 4.5 ECHR Code).

10 325. The claimant asserted that from September 2019 to date i.e. March 2025 (the ‘relevant period’) the respondent applied to staff including MK a provision, criterion or practice of permitting those staff who assert a gender identity at variance with their sex to use purportedly single-sex toilet facilities provided for the opposite sex (‘the PCP’). The respondent accepts that it applied that PCP from 22 June 2023 to date and neither admits nor denies that it applied that PCP prior to that date.

20 326. Whilst some trans staff used toilets aligned to their asserted gender prior to June 2023, there was no practice of the respondent permitting them to do so prior to June 2023, and as such the PCP was not applied until June 2023.

Did application of the PCP put female staff to a particular disadvantage?

30 327. Group disadvantage arises where the application of the PCP did or would put persons who share the Claimant’s sex to a particular disadvantage in comparison with persons who do not share it.

i. Pool for comparison

328. The pool for comparison is with all the workers to whom the PCP is applied and whose relevant circumstances are the same, or not materially different (Section 23(1) EA 2010). Where the PCP has not been applied to others it may be necessary to consider the pool of hypothetical comparators to whom it would apply (*Starmar*).

329. In general the pool for comparison should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively (4.18 EHRC Code) (*Essop*). Once the PCP has been identified “there is likely to be only

one pool which serves to test its effect” as a matter of logic (*Allonby v Accrington and Rossendale College and others* [2001] ICR 1189).

330. The toilet access policy was or would be applied to all staff and accordingly the relevant pool for considering group disadvantage is all staff.

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ii. comparative disadvantage

331. Looking at the pool, a comparison must be made between the impact of the PCP on those with the relevant protected characteristic and its impact on those without (4.19 EHRC Code). It is not sufficient to show disadvantage; there must be a comparative disadvantage albeit which does not require to be serious, obvious or significant.

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332. Direct discrimination requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage. However, there is no requirement to show why it does by identifying the context factor (*Essop*).

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333. Comparative group disadvantage may be established by quantitative and/or qualitative means e.g. by statistical evidence, personal testimony, expert evidence or judicial knowledge (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15). Further, “sometimes, a PCP is intrinsically liable to disadvantage a group with a particular protected characteristic” (4.10 EHRC Code). The EAT in *Dobson v North Cumbria* UKEAT/0220/19/LA (para 56): “*particular disadvantage can be established in one of several ways, including the following:*

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a. There may be statistical or other tangible evidence of disadvantage...

b. ...may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

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c. The disadvantage may be inherent in the PCP in question; and/or

d. The disadvantage may be established having regard to matters...of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken”

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334. For a fact to be within judicial knowledge (notice) it must be so notorious as to be indisputable or must be capable of immediately ascertained from sources of indisputable accuracy (Walker and Walker: *The Law of Evidence in Scotland*) (see also *Dobson*)

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335. The claimant submitted that sex is real, important and sometimes matters. The claimant submitted that it can reasonably be inferred that the toilet access policy put women to a particular disadvantage in comparison with men having regard to the following (which she submitted are within judicial knowledge and on which the claimant gave evidence):

- a. *“Women are in general more fearful of men than men are of women;*
- b. *Women are in general at greater risk of violence at the hands of men than men are of violence at the hands of women;*
- c. *Men are statistically a great deal more likely to be guilty of crimes of violence, sexual assault, indecent exposure, and voyeurism than women; and*
- d. *Women by reason of their anatomy need to undress to a greater extent than men to use the toilet.*
- e. *Women by reason of menstruation, pregnancy and menopause have greater need of privacy than men when using the toilet and washing after using the toilet.*
- f. *Women in general feel taboos about physical modesty more powerfully than men.”*

336. It is therefore inferred that the claimant’s complaint is that the application of the toilet access policy (which permitted trans persons to use toilets based upon asserted gender rather than sex) put female staff, including the claimant, at a particular disadvantage in comparison with men of being in general more fearful, at greater risk of violence and sexual assault, and having in general a greater impact on their privacy needs.

337. The respondent submitted that these generalities do not apply in the context of their Edinburgh site; the Claimant’s oral evidence was a series of high level personal views which were not specific to her work environment at the Edinburgh site and there was no direct or indirect evidence from which it can be inferred that application of the toilet access policy put women to a particular disadvantage compared with men; despite access to the grievance procedure and the anonymous helpline, there were no complaints from any of the 9500 staff apart from the claimant. The respondent submitted that the claimant has not therefore satisfied the burden of proof.

338. The toilet access policy permitted trans persons to use the toilets based on asserted gender and accordingly permitted biological men who identify as women (trans women) to use the female’s toilets and biological women who identify as men (trans men) to use the male toilets.

339. There was no quantitative or qualitative evidence that application of the toilet access policy caused the women who worked there to be more fearful than the men. Further there was no evidence that the claimant was more fearful as a consequence and accordingly no inference can be drawn from her individual circumstances. Furthermore it cannot be said that the application of the toilet access policy was intrinsically liable to have that effect given that female staff were likely to be aware that only a very small number of staff were trans and

that there was strict vetting of staff.

- 5 340. There was no quantitative or qualitative evidence that application of the toilet access policy meant women who worked there were at a greater risk of violence or sexual assault in the toilets in comparison with men. Further there was no evidence that the claimant had experienced any such incident at work and accordingly no inference can be drawn from her individual circumstances. Furthermore it cannot be said that the policy was intrinsically likely to have that effect given the very small number of trans staff and the strict vetting requirements.
- 10 341. There was no quantitative or qualitative evidence that application of the toilet access policy would have a greater impact on women's privacy in general than men's. The claimant submitted that women have a greater interest in asserting the right to bodily privacy than men; that women are more prone to modesty norms. The claimant submitted that protecting bodily privacy against the opposite sex is inherent in the requirement to provide separate facilities under 1992 Regs. The 1992 Regs protect the human right to bodily privacy and also moral propriety between the sexes but they do not give any primacy to a woman's bodily privacy over a man's.
- 15 342. The broad effects of menstruation, pregnancy and the menopause are within judicial knowledge. Whilst it is accepted that women in general are likely to use the toilet more frequently than men it is not accepted that they have a greater need of privacy than men when using the toilet cubicles (it is not accepted that a woman who is menstruating has a greater need of bodily privacy than a man who is defecating). It is also not accepted that women in general have a greater need of privacy than men when using the basins to wash their hands and this is recognized by the 1992 Regs which permits shared hand washing facilities.
- 20 343. The claimant sought privacy from other toilet users (female or male) when attending to the consequences of menstruation (changing sanitary protection and washing blood off her hands). There was no evidence the presence of a trans woman (a biological man) in the female toilets had a material impact on the claimant's privacy. She used the stairwell ('secret') toilet before the toilet access policy was introduced (when attending to the consequences of menstruation, etc) and she continued to use the shared toilet block after the policy was introduced. Accordingly no inference can be drawn from her individual circumstances.
- 25 344. Further it cannot be said that the toilet access policy was intrinsically liable to put women to a particular disadvantage in comparison with men given that the male toilet block had urinals (with implications for their bodily privacy) which the female toilet block did not, given that all toilets were contained within individual lockable cubicles, and given that all staff had access to single occupancy toilets if preferred.
- 30 35 40

345. Finally, there were no complaints from any other member of staff (either by way of a grievance or to the anonymous whistleblower hotline) which suggests that female staff did not consider that the application of the toilet policy put them to a particular disadvantage.

5 346. The claimant submitted that even if suitable single occupancy toilets were still available, the application of the toilet policy put women to the disadvantage of rendering the female toilet blocks (which each contained 5 cubicles) unsuitable. However the reduction in the number of suitable toilets was not part of the claimant's pleaded case and there was no evidence that the claimant ever
10 had to queue.

347. In the circumstances of this case, and mindful that the disadvantage does not require to be serious, obvious or significant, there was no reasonable basis upon which it could be concluded that the application of the toilet access policy (permitting access based upon asserted gender rather than sex) put
15 female staff to the particular disadvantage in comparison with male staff of being more fearful, at greater risk of violence and sexual assault, or having a greater impact on their privacy needs.

Individual disadvantage

20 348. Individual disadvantage arises where the application of the PCP puts the Claimant to the same particular disadvantage suffered by the group.

349. There was no evidence that as a consequence of application of the toilet policy the claimant was more fearful. Trans women were already using the female toilets and she did not state in her grievance or in evidence that their presence caused her fear for her safety, what she described was a fear of
25 being accused of transphobia.

350. There was no evidence that as a consequence of application of the toilet policy the claimant was at greater risk of violence or sexual assault. Trans women were already using the female toilets and the claimant did not state in her grievance or in evidence that there had been any incidents and further
30 there were no complaints from any other member of staff following application of the policy.

351. There was no evidence that the presence of a trans woman (a biological man) in the female toilets had a material impact on the claimant's privacy because it did not cause a material change to the pattern of her toilet use despite the
35 availability of alternative single occupancy toilets.

352. The claimant was not upset by operation of the toilet policy which had no practical effect. She was annoyed that the respondent had permitted access based upon gender which she considered was "ridiculous." She does not believe a person can have a gender identity different to their biological sex.
40 As she stated during the grievance process, the toilet access policy "puts the views of those subscribing to gender self-identification theory above those (including me) who hold protected gender critical beliefs."

353. Notwithstanding that the disadvantage does not require to be serious, obvious or significant, the application of the toilet access policy (permitting access based upon asserted gender rather than sex) did not put the claimant to the particular disadvantage of being more fearful, at greater risk of violence and sexual assault, or having a greater impact on her privacy needs.

Objective justification

354. Where there is a particular disadvantage it may be objectively justified if it is a proportionate means of achieving a legitimate aim.

355. The onus is upon the Respondent to establish justification. The test is objective and is therefore not limited to what the Respondent considered at the time of its application. Although judged at the time of application the justification does not have to have been consciously and contemporaneously considered by the Respondent. Justification may be established by reasoned and rational judgement (*Chief Constable of West Yorkshire Police and anor v Homer* 2009 ICR 223, EAT).

356. The claimant submitted that given the importance of the issues and the possibility of appeal, the question of objective justification should be considered even if otiose.

Legitimate aim

357. A legitimate aim must be legal, should not be discriminatory in itself, and it must represent a real, objective consideration (4.28 EHRC Code). The health, welfare and safety of individuals may constitute a legitimate aim. Reasonable business needs and economic efficiency may be legitimate aims but solely aiming to reduce costs does not (4.29 EHRC Code).

358. In its response, the Respondent contends if the PCP (the toilet access policy) put women at a particular disadvantage in comparison with men (which is denied), the PCP (the toilet access policy) was a proportionate means of achieving a legitimate aim because it seeks to:

- i) *“treat transgender employees lawfully*
- ii) *treat employees with respect and dignity according to the gender by which they have identified*
- iii) *create an inclusive workplace environment where all employees feel respected, valued and supported and*
- iv) *encourage inclusion amongst employees who identify as a gender that is not consistent with their biological sex”.*

359. The claimant accepted in oral submissions that aims i. to iii. were legitimate.

360. The claimant submitted that the respondent’s sole witness was wholly unable to explain this aim iv. The respondent accepted in oral submissions that this aim was subsumed by the previous aims and was not therefore insisted upon.

Proportionate means

361. Where there is a particular disadvantage it may be objectively justified if it is a proportionate means of achieving a legitimate aim.

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i. Did the aims correspond to a real need?

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362. The aims must correspond to a real objective need on the part of the undertaking. There must be a nexus between the function of the employer and the aim (*Greater Manchester Police Authority v Lea* 1990 IRLR 372, *EAT*).

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363. The respondent has a large workforce which includes trans gender staff. The respondent aimed to create an inclusive workplace environment where all employees felt respected, valued and supported. The respondent aimed to treat trans gender staff lawfully and according to the gender by which they identified. These aims were reflected in their Policy on Diversity and Inclusion and in their support for staff networks, and notwithstanding the lack of refresher training on the Policy, there was a nexus between their function and the aims which corresponded to a real objective need on the part of the undertaking.

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ii. Were the means appropriate to achieve the aims?

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364. The means must be appropriate to achieve the aim (*Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority* [2012] UKSC 15).

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365. The claimant submitted that the toilet access policy was not an appropriate means to treat trans gender employees lawfully because there was no legal requirement to permit access to the female toilets and it was unlawful to do so under the 1992 Regs. The respondent submitted that they had received legal advice that they had a legal obligation to do so and they acted in reliance on that advice. It may amount to indirect gender reassignment discrimination unless objectively justified.

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366. A range of factors approach is applied when considering whether to enforce a contract which is being performed illegally including: the seriousness of the illegality and public policy concerns; the knowledge and intention of the parties; would it further the purpose of the rule, act as a deterrent, avoid inconsistency and maintain the integrity of the legal system (*Patel v Mirza* [2016] UKSC 42). By analogy a failure to comply with the 1992 Regs would not automatically render the toilet access policy an inappropriate means to achieve the aims. In any event, as noted above, the respondent did not fail to comply with the 1992 Regs.

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367. Transgender persons endeavour to live in their acquired gender to enable how they present to others accord with how they perceive themselves. To this end they endeavour to use the toilet facilities which accord with their gender identity. A toilet access policy of permitting access based upon asserted gender rather than sex was an appropriate means to achieve the aim of an inclusive workplace environment.

iii. *Were the means reasonably necessary to achieve the aims?*

368. The means must be reasonably necessary to achieve the aim (*Rainey v Greater Glasgow Health Board* (HL) [1987] IRLR 26). It does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (4.31 EHRC Code).

369. The claimant did not propose in her pleadings to an alternative means to achieve the aims. However in submissions the claimant asserted that the solution was to permit trans staff to use the accessible toilets because there would be an over provision of disabled facilities. This alternative means was not put to the respondent and no evidence was heard on the issue.

370. Whilst a trans person suffering from gender dysphoria may be entitled to use the disabled facilities whilst are undergoing gender reassignment treatment (per CofA in *Croft*), they may no longer qualify once that reassignment is complete (because there is no longer a marked incongruence between how they perceive themselves and how they present to others). Likewise a person suffering from psychological or psychiatric distress as a consequence of the toilet access policy may be entitled to use the disabled facilities. However any requirement to do so, particularly if a trans person no longer qualifies as disabled, is affected by considerations of illegality and would not fulfil the legitimate aims of treating trans employees inclusively, with respect and dignity according to the gender by which they have identified.

371. The claimant submitted that the toilet access policy was absurd and unworkable because “female colleagues cannot be expected to make windows into men’s souls in order to discern whether their assertion (whatever their style of dress) that they believe themselves to be female is in some sense genuine or not”. A person’s religious or philosophical belief which is protected in law is affected by the same considerations. Further, there was no evidence that any person endeavouring to access toilets based upon their gender was not genuinely trans and in any event this was not a disadvantage relied upon by the claimant.

372. Whilst it may have been open to the respondent to permit access based upon established rather than asserted gender identity (per CofA in *Croft*) this would not have avoided the disadvantages asserted by the claimant because

established trans women (i.e. biological men who have lived as a woman for 2 years) would still have been permitted access.

- iv. Was it a proportionate means of achieving the aims?

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373. An objective balance must be struck between the discriminatory effect and reasonable need (*Hampson v Department of Education and Science* 1989 ICR 179, CofA). In deciding whether the means adopted to achieve the legitimate aim are proportionate, the tribunal must apply an objective test based upon a fair and detailed analysis of the working practices, business considerations and needs of the employer and the discriminatory effect of the means adopted (*Hardy and Hansons plc v Lax* 2005 ICR 1565, CofA). The tribunal must conduct a balancing exercise between the discriminatory effects of PCP against the employer's legitimate aim taking into account all relevant facts (4.30 EHRC Code).

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374. The toilet access policy was introduced by the respondent without proper consultation with staff through the recognised trade unions or the JICC or the staff networks. There was a refusal by management to recognise it as a formal policy and the claimant was forced to take steps to highlight it as such. Whilst best practice rather than compulsory for a private sector employer, no equality impact assessment was undertaken with a view to considering its effect on all protected groups. There was accordingly no quantitative or qualitative evidence on impact beyond the claimant's own testimony (*University of Manchester v Jones* 1993 ICR 474, CA). Whilst it is accepted that the legitimate aims featured consciously and contemporaneously in the decision making process, it appears little regard would have been given to the possible impact on those with other protected characteristics (including religion or belief, sex, pregnancy) had the claimant not raised her grievance. The respondent's failure to take those steps was both surprising and disappointing given its significant size and resources.

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375. Nevertheless, as respondent submitted, the issue is not whether the policy was within the range of reasonable responses; the exercise is to be performed by the tribunal itself (*Hensman v Ministry of Defence* UKEAT0067/14).

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376. It impossible to conduct a balancing exercise without a finding of disadvantage because there is nothing to weigh in the balance otherwise. The claimant's case at its highest was that the policy made women in general more fearful, at greater risk of violence and sexual assault, and/ or had a greater impact on their privacy than men's.

377. The respondent submitted that if there was any disadvantage (which was denied) it was minor because access to the site was subject to restriction and vetting, there were single occupancy facilities available for exclusive private

use if preferred, and only 1 out of 9,500 employees raised a concern about the impact of the policy despite multiple means to do so.

378. The claimant submitted that it was disproportionate to sacrifice the dignity and privacy of all female staff (20% of the workforce) to protect the interests of a tiny minority of trans staff (0.5 % of the workforce). However only 0.05% of the female workforce had complained or raised a concern about the policy (i.e. the claimant) and it cannot therefore be said that all women considered that their dignity and privacy had been sacrificed.

379. A disadvantage does not require to be serious, obvious or significant, and in the circumstances of this case if there was any disadvantage (which was not found) it was in the alternative minor and insignificant. Any fear or privacy impact could be addressed by affected female staff making recourse to the single occupancy facilities. Any effect on risk of assault arising from 0.5% of men using the women's toilets instead of the men's toilets would not have changed the overall risk profile across toilet facilities generally.

380. In the circumstances of this case the toilet access policy was in the alternative a proportionate means of achieving a legitimate aim.

Summary of indirect discrimination complaint

381. The respondent applied to the staff including the claimant a toilet access policy (permitting access based upon asserted gender rather than sex) which amounted to a provision, criterion or practice ('PCP'); the toilet access policy did not in the circumstances of this case put female staff (including the claimant) at a particular disadvantage in comparison with men (it did not make women in general more fearful or at greater risk of violence and sexual assault or have a greater impact on their privacy, than men); in the alternative, any disadvantage was minor and insignificant and the toilet access was objectively justified a proportionate means of achieving a legitimate aim; and accordingly the complaint of sex discrimination does not succeed and is dismissed.

Conclusion

382. The complaints of harassment related to sex, direct sex discrimination and indirect sex discrimination do not succeed and are accordingly dismissed.