



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002658/2025

Held in Glasgow on 6 May 2026

Employment Judge Campbell

**Ms F MacDonald**

**Claimant  
Represented by:  
Ms N Cunningham -  
Counsel**

**Public and Commercial Services Union**

**Respondent  
Represented by:  
Mr S Brittenden KC -  
Counsel**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for strike-out of part of the claim is refused.

#### REASONS

##### Introduction

1. This hearing dealt with the respondent's application under rule 38(1) of the Employment Tribunal Procedure Rules 2024 to strike out part of the claimant's case (the 'application'), namely a complaint of indirect discrimination under section 19. The complaint was brought via section 57(2) as one by a member against a trade organisation. The respondent is a trade union.
2. The claim also contained a complaint of direct discrimination which was not within the scope of the strike-out application.
3. Under both complaints the claimant relies on the protected characteristic of belief under section 10(2), specifically what is commonly referred to as gender critical belief ('GCB'), by which sex is considered biologically dictated at birth and immutable. As such, the counterpart to that was gender identity belief ('GIB'), as the term is described in paragraph 9 of *Smith v Chief Constable of Northumbria Police [2025] EWCH 1805*.
4. The application was made on 18 December 2025, which procedurally was approximately two weeks after a response to the claim was lodged and before any case management.

5. Parties were asked to prepare skeleton notes of argument in advance of this hearing and did so. A joint bundle and list of authorities were also prepared. The claimant submitted a short (14 pages) supplementary bundle.
6. The claimant's skeleton contained grounds of an application to amend the claimant's case should it be deemed necessary to do so. Ms Cunningham confirmed at the outset of this hearing that she did not wish that to be considered initially, and that she only wished to rely on it if required in order for the section 19 complaint to proceed. Mr Brittenden's position was that even if the additional wording were added by amendment, it would not cure the defects he said existed in the complaint. This is discussed further below.
7. In the course of submissions, and after Mr Brittenden's submissions on the point, Ms Cunningham said that separately she wished to amend the claimant's case by removing the words 'In the alternative' at the beginning of paragraph 43 of the particulars of claim, in which the majority of the section 19 complaint was set out. This was opposed by Mr Brittenden on the basis that it would fundamentally change the claimant's case. Paragraph 42 to 44 of the particulars of claim, headed up 'The legal claims' read as follows:

42 *By failing to invite the Claimant to receive her National DLM award in person at the NDC or at an STUC event the Union has treated her less favourably than it has treated or would treat others because of her protected belief contrary to s57(2) of the Equality Act 2010.*

43 *In the alternative, at all material times (and continuing to date) the Union has operated a provision, criterion or practice (PCP) by which Gender Identity Belief has been adopted as an institutional belief. The PCP puts Union Members holding protected gender critical beliefs at [a] disadvantage insofar as it:*

- a. *Creates barriers to recognising and rewarding their contributions to the Union (publicly or otherwise);*
- b. *Permits and/or requires non-engagement with them either in their discharge of their functions within the Union, their contributions to the Union or in other correspondence with Members;*
- c. *Discourages them from applying for elected roles and permits harassment of them on the basis of their beliefs when they do apply for them;*
- d. *Causes institutional isolation of them;*
- e. *Prevents or stifles them in the expression of their protected beliefs and the exercise of their Article 10 rights and*

- f. *Prevents public association and recognition of them by the Union.*

44 *That PCP is not a proportionate means of achieving a legitimate aim.'*

8. After I clarified a small number of fundamental points with counsel, each provided oral submissions to supplement their notes (and to comment on each other's). Mr Brittenden spoke first given that it was the respondent's application which had to be decided.
9. At the end of the hearing I indicated that I would reserve my judgment and issue it in writing, which I now do.

### **The terms of rule 38 of the Employment Tribunal Procedure Rules 2024**

The power to strike out all or part of a claim or response is couched in the following terms:

#### ***Striking out***

38.

- (1) *The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—*
- (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*
  - (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
  - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
  - (d) *that it has not been actively pursued;*
  - (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).*

The respondent relies on rule 38(1)(a) in the application, specifically that the complaint of indirect discrimination 'has no reasonable prospect of success'.

There is by now an extensive body of case law in this area. Counsel referred to the key authorities in their skeletons and orally. Where necessary they are referred to in that context below.

### The terms of the respondent's application

10. I do not reproduce in detail the substance of the respondent's application for strike-out as that is adequately contained in the respondent's skeleton. However, I summarise as relevant Mr Brittenden's additional oral submissions made as follows:
  - a. The submissions contained two principal grounds of argument. In relation to **Ground 1**, he confirmed that he was no longer insisting on an assertion that the respondent, either because it was a legal person other than an individual, or because of its specific identity and constitution, could not be capable of holding a belief. This restricted Ground 1 to the argument that there was a sufficient body of contemporaneous evidence showing that the respondent could not realistically have held GIB as an institutional belief, as the claimant argued.
  - b. To develop this point, he argued that the respondent generally recognised, respected and advocated for both GIB and GCB, even if support or advocacy for one on a particular occasion did not align with the principles of the other. He said that documentary evidence, which had indeed been provided by the claimant and was being relied on by her, demonstrated this. By way of example he cited a bulletin issued to members following the judgment of the Employment Appeal Tribunal in **Forstater v CGD Europe and others UKEAT/0105/20**, in which he said the protected status of GCB was highlighted and it was made clear that those holding such beliefs should be able to express them in a reasonable and non-discriminatory fashion, alongside balanced guidance provided on respecting both views.
  - c. Mr Brittenden referred to other material which he said made essentially the same point, such as documents showing that over 72,000 members at the 2025 National Conference voted in favour of rejecting a motion tabled by a branch office which contained pro-GIB messaging (some 49,000 voting against), guidance issued regarding compliance with the principles of the Supreme Court judgment in **For Women Scotland Limited v The Scottish Ministers UKSC/2024/0042** which prompted vociferous opposition from a sub-group of members named PCS Independent Left favouring GIB, and steps taken following legal advice to distance itself from its Leith branch after it suggested disobeying those principles. PCS Proud, another sub-group of

members, had strongly criticised the respondent for marking 25 motions intended for National Conference as out of order on legal grounds, the majority of which were believed to be in favour of protecting trans individuals.

- d. To recap, it could hardly be objectionable to recognise the rights and protections of those on both sides of the debate, and given the evidence already provided at this stage, and being relied on by the claimant, it was superficial to argue that the respondent was guilty of institutional bias against those on the GCB side of the debate.
- e. Moving to **Ground 2** of his skeleton, which dealt with whether the claimant's pleadings had properly outlined a valid case which could meet the requirements of section 19, Mr Brittenden reiterated his argument that the claimant had not properly described a legitimate provision, criterion or practice ('PCP') allegedly applied by the respondent. Referring to Ms Cunningham's skeleton, he said that even if the respondent were said to have 'adopted' as well as having 'held' an institutional belief in favour of GIB or against GCB, that made little or no difference conceptually and did not cross the threshold of having 'applied' that belief to the claimant as section 19 required.
- f. He next explained why he considered merely holding a belief without implementing, manifesting or otherwise acting upon it could not be enough to qualify as a PCP. I note here that it had been made clear in Ms Cunningham's skeleton that the claimant was not saying that merely holding an institutional belief could be a PCP, or was the nature of the PCP relied on by the claimant. In her oral submissions (discussed below) she confirmed this and did not take issue substantively with the law, largely based on judicial decisions, as Mr Brittenden described it.
- g. Suffice to say therefore that it was not contentious that the respondent would run the risk of contravening Articles 9, 10 and 11 of the European Convention on Human Rights if members, individually or collectively could not hold beliefs that other members would find objectionable. This was consistent with *Higgs v Farmor's School and the Archbishops' Council of the Church of England [2025] ICR 1172*, especially in the way discussed by Underhill LJ at paragraph 33 of the judgment. Freedom of expression was said to be the sine qua non of a trade union's existence by the ECHR in *Palomo Sanchz v Spain [2011] IRLR 934*. And in relation to debating issues in the public interest, arguably even less restriction on that freedom is permissible – *Szima v Hungary [2013] IRLR 59*. That followed through into domestic law for example in the wording of section 19 itself which uses

the work 'applies' or a variant of it. The EAT in *Ishola v Transport for London [2020] ICR 1204*, dealing with the concept of a PCP in relation to an employer's obligation to make reasonable adjustments, refers to how a worker is managed or treated.

- h. The point was made that the current indirect discrimination complaint (in paragraph 43 of the particulars of claim) was made expressly as an alternative to the direct claim in the paragraph before it. The act or omission complained about was therefore the non-invitation of the claimant to an annual conference or other suitable event to receive her lifetime membership award. The suggested PCP did not engage with this, for example by referencing any practices or policies for setting agendas for annual conference business or for presenting awards in recognition of service. Further, the evidence on this point would go against the claimant's desired argument and not for it were it to be examined.
- i. It was also argued that the different examples of group disadvantage narrated by the claimant were lacking in detail and read as other types of complaint such as direct discrimination or harassment. The complaints were made through the gateway of section 57(2) which protected members of a trade organisation in that capacity and not more widely at large from actions of the organisation with which they might disagree.
- j. In relation to the claimant's provisional original amendment application, to add that the PCP had been operated by way of GIB being '**adopted including by being regularly manifested and acted upon as an institutional belief**' (new wording in bold), no issue was taken with the words themselves but they did not cure the key defect of the claimant's argument failing to provide fair notice of a relevant claim.
- k. In relation to the second application to amend, proposing to remove the words 'In the alternative' as an introduction to the indirect discrimination complaint, Mr Brittenden opposed this as he said it had the effect of considerably widening the claim, from effectively complaining about a single act or omission which was already the subject of the section 13 complaint to something more which was unidentifiable.

### **The claimant's opposition to the application**

- 11. Ms Cunningham began her submissions by saying that the respondent was inviting the tribunal to adopt an unduly narrow and hostile interpretation of the

claimant's case. She went on to say, again in summary and in addition to her skeleton:

- a. Strike out is well known to be a draconian measure. It is rarely appropriate when key facts are in dispute, and arguably less so in discrimination cases – per **Cox v Adecco and others UKEAT/0339/19/AT**. As reiterated in that decision, a claimant's case should be taken at its reasonable highest at this early stage.
- b. The question of whether the claimant's case was that the PCP relied upon involved the respondent merely holding a belief or doing something more in relation to it was addressed in her skeleton.
- c. To clarify one aspect, the claimant only relied on the belief of the respondent and not its members as individuals.
- d. The original wording of the pleadings was clear enough to amount to a PCP. If necessary, the (first) application should be granted to make the position even clearer.
- e. In relation to this point, in some cases a PCP is less easy to confine to an explicit rule or a particular situation, such as where a qualification is said to be required for a job. A PCP can be more pervasive and become akin to a constant state of affairs, which would be in line with **Ishola**. Support for this could be found in **Glover v Lacoste UK Limited [2023] EAT 4**, particularly:
  - i. in paragraph 22 where the earlier decision in **Cast v Croydon College [1998] I.C.R. 500** is discussed and the point is made that a detriment arises when a requirement is applied to an individual which they cannot meet and not at a later stage, such as when they complain about it or suffer from a consequent decision taken by their employer; and
  - ii. similarly in paragraph 23 where **Meade-Hill and Another v British Council [1995] I.C.R. 847** is cited in support of the proposition that a contractual term such as a mobility clause should be viewed as being 'applied' to an employee at the point it is introduced into the contract and not when, at some later date, it is invoked by the employer in some way which causes the individual tangible hardship.
- f. Reference by the respondent to **Ishola** was selective – as well as covering how an employee is managed or treated it also refers – in paragraph 36 of the judgment - to an aspect of 'its [i.e. the employer's] operation' as being capable of amounting to a PCP.

- g. If the respondent was unclear as to aspects of the claimant's case, further particulars could have been requested. This would have been more proportionate. The application was made early in the course of the claim and before any opportunity to discuss its terms at a case management hearing, for example.
  - h. The respondent now refers to documents produced by the claimant in a way not originally intended – they were provided to illustrate how GIB as an institutional mindset could be evidenced. The documents provided more recently in the supplementary bundle were further and clearer evidence in support of this position. Ms Cunningham understood there was or would likely be further evidence still, which would be provided as necessary in advance of any full hearing.
  - i. Of all the group disadvantages articulated in paragraph 43, perhaps the clearest to affect the claimant personally was (e) – prevention or stifling of expression of protected beliefs and exercise of Article 10 rights.
12. Ms Cunningham took time to comment, with reference to documents including those in the supplementary bundle, how they could go towards persuading a tribunal that the respondent had adopted GIB as an institutional belief. It could not therefore be said at this early stage in the claim that the argument was blatantly contradicted by evidence in a manner envisaged by Underhill LJ in ***Ahir v British Airways PLC [2017] EWCA Civ 1392***, relied upon by the respondent in favour of strike-out. Inferences should not necessarily be drawn in the way the respondent suggested. For example, cancelling a motion at annual conference or issuing guidance off the back of a judicial decision could simply reflect prudent risk management and not have a bearing any core ideology.

## Discussion and decision

### *Respondent's Ground 1*

13. As indicated above, Ground 1 became essentially that there was a sufficiently large and clear body of evidence, including material relied upon by the claimant herself, to demonstrate even at this early stage in the claim that an argument based on GIB being an institutional belief had no reasonable prospect of success.
14. The counter to this was that the material referred to by the respondent could be interpreted in other ways, that further documents provided suggested a different picture, and that there was even more evidence to come which would also have a bearing on the question of whether the respondent had an institutional belief.

15. In paragraphs 6 to 10 of his skeleton Mr Brittenden recognised with reference to case law authorities the relatively high bar which must be cleared in a strike-out application based on an argument of no reasonable prospect of success, whilst pointing out where exercise of that power may be appropriate.
16. More specifically he cited ***Mechkarov v Citibank NA [2016] ICR 1121*** in which some key principles for deciding a strike-out application were considered and enunciated as follows (numbers added to original wording):
  - (1) *that only in the clearest case should a discrimination claim be struck out as having no reasonable prospect of success, taking the claimant's case at its highest;*
  - (2) *that, if a claimant's case was conclusively disproved by, or was totally and inexplicably inconsistent with, undisputed contemporaneous documents, it might be struck out;*
  - (3) *that, where there were core issues of fact that turned to any extent on oral evidence, they should not be decided without an oral hearing, but the tribunal should not conduct an impromptu mini-trial of such facts.'*
17. Picking up on the second of those points, he referred to ***Ahir*** and in particular paragraph 16 of the judgment in which Underhill LJ said that employment tribunals:

*'should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no prospect of the facts necessary to liability being established and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.'*
18. The respondent's argument is clear. It is that the claimant relies on a PCP of institutional belief, which is a demanding thing to prove. There is evidence, provided by the claimant herself, which suggests otherwise. The clarity and extent of that evidence should be enough to put the complaint into the territory envisaged by point (3) in ***Mechkarov***, and ***Ahir***. As such, this is one of the exceptional situations where strike-out is permissible.
19. The claimant's position is also clear. Strike-out is an exceptional and potentially draconian step to take. To deny a claimant the opportunity to have their claim tested on its merits by conducting a brief preliminary assessment of its prospects based on only partial documentary evidence and no oral evidence would be unfair.
20. Considering the parties' submissions, the material before me and the relevant case law authorities I accept the claimant's argument on this point. Whilst the

holding of an institutional belief by a trade organisation may not be an easy thing to prove, nor it is it easy to demonstrate at a preliminary stage by documents that there is no reasonable prospect of it being established. There is clearly already documentary evidence provisionally pointing both towards and away from that finding, which may be viewed differently when supplemented by oral evidence. There would likely be further documents and aspects of the issue raised and debated at a full hearing. Ultimately, the position is not clear enough at this point to be able to say that the claimant has no reasonable prospect of establishing her assertion.

21. In short, this claim appears more to fall outside of the situation envisaged by Underhill LJ in the above quoted passage from *Ahir*. The claimant's case is not 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, per the second point in *Mechkarov* and to find for the respondent on this point would risk embarking on an 'impromptu mini-trial' of evidence without an oral hearing, as is counselled against in the third point.

#### *Respondent's Ground 2*

22. The respondent's second ground focussed on the adequacy of the pleadings in the indirect discrimination complaint. This centred on (i) whether the PCP the claimant relied on could properly be labelled as such, (ii) whether or how the PCP was said to had been applied to the claimant (iii) whether valid group and individual disadvantages had been identified and (iv) whether the complaint as a whole was clear enough that it could be meaningfully responded to.
23. The claimant's position was that the adoption of an institutional belief could amount to a PCP as it would, subject to being established on the evidence, represent 'a state of affairs ... indicating how similar cases are generally treated' or 'some form of continuum in the sense that it is the way in which things generally are or will be done' in the wording of *Ishola*. The proposed amendment, if required, amplified this by making reference to the belief being 'manifested and acted upon'.
24. I accept the claimant's position on this point. Again this appears to be a stateable case at this stage in the proceedings. It may, as noted above, be a demanding task to prove but that will depend on the evidence, both documentary and oral and should properly be dealt with at a full hearing. The proposal is not so tenuous that it can fairly be said at this stage that it has no reasonable prospect of succeeding. I note the respondent's argument that 'adoption' of an institutional belief could be said to be tantamount to holding a belief, and therefore both unlawful in other ways and insufficient to amount to a PCP. The claimant however clearly argues that 'adoption' should be construed in a wider sense to mean 'use' or 'implementation', which would be

sufficiently aligned with 'applies' within section 19. For the sake of clarity I allow the claimant's amendment application, which was unopposed by the respondent, with the effect that paragraph 43 of the particulars of claim will now read as follows:

*'43. In the alternative, at all material times (and continuing to date) the Union has operated a provision, criterion or practice (PCP) by which Gender Identity Belief has been adopted **including being regularly manifested and acted upon as an institutional belief.**' (new wording in bold).*

25. I have sympathy with the respondent's other arguments, however. The way in which the claimant's two statutory complaints are pleaded suggest that they are about the same act or omission, namely how it was proposed to present the claimant with her award and whether it should have been done differently. The use of the words 'In the alternative' as opening context to the indirect discrimination complaint is one clear indicator of this.
26. Ms Cunningham suggested that this was not the case and that the indirect discrimination complaint was not confined in this way. However, she did not go on to say what it was about and where within the preceding 41 paragraphs of factual narrative the necessary details could be found. If that was the claimant's view of her complaint then specifying six specific group disadvantages (a) to (f) within paragraph 43 of the particulars of complaint might make sense, but these were broad assertions and they did not link sufficiently to factual pleadings in a way which gave fair notice of the fundamentals of a section 19 complaint in terms of how the PCP was applied - what was done or not done, when, by whom, and whether it was a continuing or free-standing act, how the application of the PCP caused a group disadvantage and how it similarly put the claimant at a specific disadvantage. I am mindful of the analysis of the claimant's pleadings and the more general guidance provided by HHJ Tucker in **C v D UKEAT/0132/19/RN** in this respect.
27. The respondent held the understanding that the indirect discrimination complaint was based on the same clear and narrowly defined event as the direct discrimination claim. This explains its argument that the wrong PCP was identified and that group disadvantages were listed which were unrelated to that event.
28. The point arrived at following the discussion which took place at the hearing appears to be as follows. First, there is a direct discrimination complaint which was not the subject of the application and remains unaffected by it. Second, it can be said that an indirect discrimination complaint has been advanced as an alternative but based on the same facts. It lacks specification and appears to have been drafted too widely in relation to the group disadvantage issue.

Third, the claimant maintains that her indirect discrimination complaint goes beyond this, but whether it does and to what extent it is not clear. She will at the very least require to provide further particulars and may need to seek to amend the claim, depending on the specifics.

*Disposal*

29. Based on the above my decision is as follows.
30. Firstly, I refuse the respondent's application for strike out of the section 19 complaint for the reasons above.
31. Secondly, I order the claimant to provide further particulars of her section 19 complaint. In doing so she must:
  - a. clearly list the key specifics of that complaint as it relates to the events already relied on in the section 13 complaint; and
  - b. if it is her position, also clearly list the key specifics of any other instances of indirect discrimination based on her pleadings.

She should do so no later than 28 days after the date this judgment is issued to the parties, by sending the information to the tribunal and the respondent.

32. Thereafter, the respondent is given the opportunity to reply to the claimant's further particulars. It may deem that those provide the necessary specification of the claim to allow it to say it has fair notice of the claim. If so it may ask to amend the grounds of resistance in order to reply to the claim more specifically. It may consider that further specification is still required, but may be able to state more clearly what that is. Further information may be shared on a voluntary basis. The respondent may consider that aspects of the further particulars represent new complaints to the extent that amendment is required. If so it should make that clear and also indicate whether amendment would be consented to or opposed. The respondent should start its position within 28 days of receiving the claimant's further particulars.
33. Given the uncertainty over the full extent of the section 19 complaint, I refuse the claimant's application to remove the wording 'In the alternative' from paragraph 43 of the particulars of claim at this time. To allow the amendment at this point would seem to make the claimant's case less clear rather than more focussed. The claimant may wish to revisit this in the course of considering what further particulars to provide, but that will be for her and her advisors.
34. Further to completion of these steps and dependent on the parties' positions at that point, further procedure can be decided upon.

Date sent to parties

1st June 2026