EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104864/2024

Claimant: S Peggie

Respondent: 1. Fife Health Board,
2. Dr B Upton

CERTIFICATE OF CORRECTION
Employment Tribunal Procedure Rules 2024

In accordance with the power set out in Rule 67 of the Employment Tribunal Procedure Rules 2024, Employment Judge A Kemp hereby corrects the clerical mistake(s), error(s)or omissions(s) in the judgment sent to the parties on 8 December 2025 by deleting Paragraph 791 and substituting therefor

791**.** Secondly, there are different protected characteristics under the Act but there is nothing stated specifically within the Act itself, or the court's decision, that one protected characteristic takes precedence over any other. In ***Forstater v CDG Europe and others UKEAT/0105/20*** the Employment Appeal Tribunal stated:

> "This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case."

We consider that quotation provides support for the proposition that the Equality Act 2010 does not create a hierarchy of protected characteristics.

A corrected version of the Judgment is attached.

Important note to parties:
Any dates for the filing of appeals or reconsideration are not changed by this certificate of correction or the corrected Judgment or Case Management Order. These time limits still run from the date of the original Judgment or Case

Management Order, or if reasons were provided later, from the date that those were sent to you.

Date: **11 December 2025**

Sent to parties **11 December 2025**

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4104864/2024

Final Hearing held in Dundee on 3,4,5,6,7, 10,11,12,13 and 14 February; 16,17,18, 21,22,23,24, 25, 28 and 29 July; and 1 and 2 September 2025; with deliberation days on 14, 15, 16 and 20 October, and 26 November, 2025

Employment Judge A Kemp
Tribunal Member L Brown
Tribunal Member C Russell

S Peggie	**Claimant** **Represented by:** **Ms N Cunningham and Ms C Elves, Barristers** **Instructed by:** **Ms M Gribbon, Solicitor**
Fife Health Board	**First respondent** **Represented by:** **Ms J Russell KC** **Instructed by:** **Mr A Watson, Solicitor**
Dr B Upton	**Second respondent** **Represented by:** **Ms J Russell KC** **Instructed by:** **Mr A Watson, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

1. **The first respondent harassed the claimant contrary to section 26(1) of the Equality Act 2010 ("the Act") by:**
    - **(a) failing to revoke the grant of permission to the second respondent to use the female staff changing room of the Emergency Department of Victoria Hospital, Kirkcaldy from on and after 16 September 2023 until the claimant returned to work on 14 April 2024 when rota arrangements were made such that the claimant and second respondent were not working together at the same time, as a result of which the second respondent entered the said changing room when the claimant was present on 25 October 2023 and the claimant entered it when the second respondent was present for a period over midnight on 24-25 December 2023;**
    - **(b) taking an unreasonable length of time to investigate the second respondent's allegations against the claimant in the period from its commencement on 5 January 2024, a reasonable period of time to do so being not more than six months;**
    - **(c) making reference to patient care allegations against the claimant on 28 March 2024; and**
    - **(d) giving an instruction to the claimant on 5 July 2024 not to discuss the case, until a further message on 22 July 2024 confirmed that that applied only to the investigation.**
2. **The claim of harassment under section 26(1) so far as made by the claimant beyond those findings does not succeed, and the claims under sections 26(2) and (3) do not succeed and those claims are dismissed.**
3. **The claim of direct discrimination contrary to section 13 of the Act does not succeed and is dismissed.**
4. **The claim of indirect discrimination contrary to section 19 of the Act does not succeed and is dismissed.**
5. **The claim of victimisation contrary to section 27 of the Act does not succeed and is dismissed.**
6. **The claim as directed against the second respondent does not succeed and is dismissed.**

A Final Hearing on remedy will be fixed separately.

REASONS

Introduction

1. This was a Final Hearing held in person, confined to issues of liability in respect of claims under the Equality Act 2010.

2. The claimant and second respondent are both employed by the first respondent, the former with very long service as a nurse and the latter at the earlier stages of a career as what was termed at that time a junior doctor. They have beliefs that in some respects are in conflict. The claimant is a woman who holds what are often called gender critical beliefs. The second respondent is a trans woman, who identifies as female and had been permitted by the first respondent to use the female changing room used by staff at a hospital where they both worked. The issues before the Tribunal concern centrally but far from solely an encounter between them in that changing room around the last minutes of Christmas Eve and into Christmas Day 2023, and how the first respondent dealt with a complaint by the second respondent against the claimant that followed it.

3. The Supreme Court, in the case of ***For Women Scotland Ltd v Scottish Ministers [2025] ICR 899*** ("***FWS***") which was issued between the first set of dates for the Final Hearing in February 2025 and the second in July 2025, and is addressed further below, said the following about its role:

> "It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy."

4. This Tribunal also has a limited role. Its function in essence is to identify the issues arising from the case before it, assess the evidence it heard, consider the submissions made to it by the parties, apply the law as the Tribunal finds it to be to the facts it has found established in order to answer those issues, and give its reasons for doing so, as required by Rule 60 of the Employment Tribunal Procedure Rules 2024 ("the Rules"). The Tribunal does not purport to decide all of the matters that were raised during the evidence in the case, some of which in the Tribunal's opinion strayed beyond the scope of any of the issues before it and into the arguments in the public domain.

5. In a number of respects the issues in the case are novel and complex. That has led to a judgment that is unusually lengthy.

Claims

6. The claims made by the claimant are, following the order of sections in the Act relied upon:

   (i) direct discrimination because of (a) sex or (b) belief, under section 13 of the Equality Act 2010 ("the Act")

   (ii) indirect discrimination in relation to a protected characteristic, being (a) sex or (b) belief, under section 19 of the Act

   (iii) harassment related to (a) sex or (b) belief, under section 26(1) of the Act

   (iv) sexual harassment, under section 26(2) of the Act

   (v) harassment by rejection of harassment, under section 26(3) of the Act, and

   (vi) victimisation, under section 27 of the Act.

Procedural history

7. There has been a comparatively high number of Preliminary Hearings held in the case. The first Preliminary Hearing before EJ d'Inverno held on 26 August 2024 addressed a number of case management matters and made orders, after which dates for the Final Hearing were fixed for between 3 and 14 February 2025, restricted to liability.

8. The second Preliminary Hearing before EJ Tinnion held on 28 and 29 November 2024 addressed an application by the claimant for orders as to documents and information, which was decided by Note with case management orders for those matters dated and issued on 3 January 2025, as well as an application for an order for privacy made by the respondents, to summarise that briefly, which was refused by Note dated 5 January 2025 and issued to parties the following day.

9. The third Preliminary Hearing before EJ Kemp on 21 January 2025 was held firstly on an open basis, and secondly on a closed basis, and Notes in respect of each were issued on 22 January 2025. The Note of the open part of that hearing granted orders in relation to an application for what is generally known as live tweeting, orders in relation to the evidence of witnesses, granted an application for amendment which added to the claims that for direct discrimination in substitution for one as to alleged protected disclosures and to add a new claim under section 26(3) of the Act. It also had comments with regard to the use of terminology at this

hearing, in respect of which no orders were made for the reasons set out in that Note.

10. The Note of the closed part of that hearing dealt with a number of case management issues, including as to written witness statements, and a related Supplementary Bundle of Documents, for two witnesses giving what the parties described as research evidence, which the parties had agreed between themselves they wished to do.

11. During the first days of evidence in February 2025 issues arose with regard to the numbers observing the proceedings remotely, and some disruptions to the hearing, as a result of which a Note was issued in relation to that on 12 February 2025. A number of other matters were addressed during that hearing.

12. The ten days allocated at the first Preliminary Hearing proved to be insufficient, and further days were fixed in order to conclude that hearing, commencing on 16 July 2025 and leading to what was a most unfortunately long delay to the conclusion of the evidence and submissions. In the intervening period a number of issues arose, which were dealt with at further Preliminary Hearings, and the Tribunal issued a series of Notes and related orders.

13. The first of these, and the fourth Preliminary Hearing, was held on 18 March 2025. It refused an application by the respondents to vary the order of 3 January 2025, refused the claimant's application to add Dr Searle as a third respondent and add as an additional detriment an email from Mr Doyle, granted an application by the claimant to amend the pleadings to include as a detriment Dr Searle's email of 29 December 2023, refused the claimant's application for inspection and for an unless order, and deferred a decision on an application as to a search of the second respondent's mobile phone. The second on 14 May 2025 addressed issues as to remote observation and related matters. The third on 15 May 2025 refused the claimant's application for the said search, granted an application for amendment regarding emails of 29 December 2023, and 5 January 2024, and provided for further pleading and documents in relation to that amendment. The fourth and fifth on 3 and 22 June 2025 addressed issues of open justice and in relation to the claimant having arranged for stenographers to prepare a transcript of the evidence to be given in the July hearing dates.

14. A Preliminary Hearing was also arranged to take place on 15 July 2025, being the day before the resumption of the adjourned Final Hearing, to address case management issues in advance of that, as the parties had requested. An oral decision was given on the following day which, in very brief summary: (i) did not uphold the claimant's objection to the respondents leading two witnesses, (ii) received a statement from Mr Peter Donaldson of the first respondent, and as the claimant wished to

cross examine him arranged that he also give evidence for the respondents; although no order for a written witness statement had been made the Tribunal agreed that his statement could be taken as evidence in chief, that being unopposed; (iii) received (intimated during the Preliminary Hearing) a report from Mr Jim Borwick a skilled (expert) witness instructed by the claimant, and allowed the claimant to call him as an additional witness although she had closed her case in February 2025 without objection from the respondents, and (iv) received a supplementary witness statement and documents referred to from Mx Vic Valentine a witness for the respondents, without objection from the claimant.

15. Further issues arose during the July hearing, which included that the claimant had wished to call an additional witness, an application for which was granted initially, but that witness then withdrew her co-operation overnight on 28-29 July 2025. The claimant on the latter date applied to have an order for a document and to hear evidence from her solicitor in relation to a witness statement drafted for that intended witness. That was addressed in private session as a case management matter under Rule 30, at the request of the claimant's counsel and without objection, and after hearing submissions for reasons given orally to the parties the Tribunal refused the application.

16. On 29 July 2025 the claimant was recalled to give evidence on points arising from the evidence of Ms Wishart and Ms Nicoll where she had not had a reasonable opportunity to address that in her evidence in February 2025, and was cross examined on that evidence, and she was permitted to lead an additional witness Ms Moore, as noted below.

17. The evidence for both parties was thereafter on that day confirmed as having been concluded. The Tribunal gave directions as to submissions, as summarised below, and after written submissions were given they were made orally on 1 and 2 September 2025.

18. On 1 September 2025 an issue arose over the details in the written submissions with regard to the second respondent, on which the parties had sent a series of emails, which the respondents argued should not be made publicly available, and which the claimant argued should be. For reasons given orally and then later set out in a Note and Order a Rule 49 order was made in relation to the former name or names used by the second respondent, and that subject to compliance with that order the submissions could be released, as then took place.

19. At shortly before midnight on 1 September 2025 the respondents emailed the Tribunal with a commentary on their ***Higgs*** defence, a matter discussed below, which they argued did not require to be within the pleadings or a list of issues, but which the claimant argued did, and required amendment both of pleadings and the List of Issues. That was addressed by oral submission on 2 September 2025 with further written

submissions from the respondents on 9 September 2025 with regard to that point, and supplementary submissions on the substantive claim from both parties on 16 September 2025. The Tribunal issued a written decision on those matters by Note on 24 September 2025 refusing the application in relation to the pleadings as being unnecessary and granting that in relation to the List of Issues.

20. On 13 October 2025 the claimant made a further supplementary submission by email which referred to what she said had been issued by the first respondent on 30 September 2025, which was attached. It was said to be an Equality and Children's Rights Impact Assessment (Stage 1) pursuant to duties under the Equality Act 2010 and the Equality Act 2010 (Specific Duties) Scotland Regulations 2012. The respondents replied to that on 14 October 2025 not disputing that the assessment had been issued by the first respondent but noting that that was after all evidence and submissions had concluded. The claimant made a further written submission on 16 October 2025. The issue is addressed below.

21. Applications were also made by three organisations under Rule 36 to participate in the proceedings in order to make written submissions. The first two were granted unopposed. Written submissions from the parties concerned, For Women Scotland and Not All Gays, were provided. The third application was from TransLucent, which for reasons addressed on 29 August 2025 the Tribunal allowed although the claimant had objected to that, and the written submission tendered by that organisation was considered.

22. This unanimous Judgment of the Tribunal was produced after its deliberations, held over four days in October 2025 and finally on 26 November 2025. The Tribunal has been requested in submission to deal with all of the matters raised by the case, including ones which would ordinarily not require to be addressed following a particular finding, and in the circumstances of anticipated appellate proceedings as raised during the hearing has decided that it is in accordance with the overriding objective to do so.

Terminology

23. This Judgment seeks to follow the comments as to terminology in the Note from the open part of the hearing on 21 January 2025. The Act uses the term "transsexual" which has been subject to adverse judicial comment for a considerable period, as noted below, but remains the term in the Act.

24. Issues as to the sex of the claimant and second respondent, the protected characteristics each holds, including their respective beliefs, are central to this case, and are in dispute. The Tribunal is required to remain, and be

seen to remain, impartial between the parties in this case. The Equal Treatment Bench Book issued by the Judicial College says the following:

> "Typically, it should be unproblematic for the judge to use the trans person's preferred name and pronouns ("he/she" or "they"), regardless of whether they have obtained a GRC. However, where one side's case hinges on the recognition of the biological sex of the trans person as crucial, and the other side on the recognition of their chosen identification, judges need to be careful not to let the choice of gendered pronouns give an appearance of bias, or that there is a predetermined conclusion. If possible, using the individual's name instead of a pronoun where these pronouns are contested, or alternatively, the gender-neutral pronoun of "they" may help minimise offence towards, or the undermining of, an individual's personal identification, while also not validating and giving it undue weight over the perceptions of others."

25. That is guidance which we have broadly followed both during the hearing and in this Judgment, although we considered that not using pronouns for the second respondent was preferable to using that of "they" given that that is not the pronoun that the second respondent wished to be used as we understood it. There is separately an Equal Treatment Bench Book issued by the Judicial Institute, intended for civil and criminal courts in Scotland, which does not have the same level of guidance directly applicable to the circumstances in this case.

26. The claimant does not dispute that the second respondent is a person to whom the provisions as to gender reassignment apply, such that the second respondent has the protected characteristic of gender reassignment. The Tribunal will use the terms "trans woman" being a person assigned male by sex at birth who has the protected characteristic of gender reassignment in the context of transition to female, and "trans man" being a person assigned as male by sex at birth who has the protected characteristic of gender reassignment in the context of transition to male, or the generic "trans person", although those terms do not appear in the Act. It broadly follows the terminology used by the Supreme Court in ***FWS***.

27. Ms Cunningham referred in cross examination to the second respondent as not being a "literal woman" by which it is understood she meant a person assigned as female at birth whose body was capable (absent medical issues) of producing eggs, and that the second respondent was a "literal man" by which it is understood she meant a person assigned male at birth whose body was capable (absent medical issues) of producing sperm. The claimant in her evidence and in documentation submitted to the Tribunal by her agents referred to the second respondent as a man and used male pronouns. Her counsel used the same pronouns when

questioning the respondents' witnesses, and the second respondent, in cross examination, and in oral and written submissions.

28. The second respondent believed that the second respondent had the gender and sex of a female (the sex of the second respondent under section 11 is addressed below), gave evidence on that basis, and wished to use the term "cis woman" for a person assigned female at birth and "cis man" for a person assigned male at birth. In documentation submitted to the Tribunal for the respondents, and during the second respondent's evidence in chief and that from witnesses for the first respondent, and in cross examination of the claimant, the second respondent was referred to as a female and female pronouns were used.

29. There were therefore a number of differences of terminology used during the Final Hearing, particularly in the examination in chief and cross examination of the second respondent but also in the examination in chief and cross examination of the claimant and her witnesses, and of the first respondent's witnesses. It meant for example that a question in cross examination of the respondents' witnesses relating to the second respondent used male pronouns and the answer was with female pronouns. Ms Russell raised that issue on a number of occasions, arguing that it was misgendering, amounted to harassment of the second respondent under section 26, and had the potential to confuse witnesses. The Tribunal reviewed the position on a regular basis, and did not consider that any witness was confused as to what the use of the male pronoun for the second respondent meant. One witness, Ms Glancey, was asked about that issue directly, and stated that she was not confused. The Tribunal did not consider at any stage that it was appropriate under the overriding objective to make any order or other direction on the use of language.

30. The desire to use neutral terminology in this Judgment to seek to avoid a perception of lack of impartiality has resulted in somewhat stilted language being used on a number of occasions. There are several points where a pronoun would have been the obvious and best word to use, but that has been avoided in relation to the second respondent given the nature of the dispute between the parties over matters of gender and sex, the desire to remain impartial when determining that dispute and the anticipation of appellate proceedings referred to above.

The issues

31. The parties had agreed a List of Issues, later amended by them, and by the Tribunal. The Tribunal has concluded that it is appropriate to conduct its analysis by initially considering the main questions arising from the case, as set out in the Discussion section below, and then by answering the points raised by the List of Issues, as that was amended following the

Note on 24 September 2025. The Tribunal has also identified other aspects of the issues the parties had themselves agreed, amending some and making an addition, as it discusses below.

The evidence

(i) Documents

32. The parties had provided a Bundle of Documents extending initially to 719 pages for use during the Final Hearing when it commenced. On 7 February 2025 the claimant sought additional case management orders to compel searches for documents said not to have been provided in response to the orders of 3 January 2025. The respondents opposed the application made. There was a lengthy debate on that issue taking most of that day. The outcome was that the respondents provided further documents voluntarily, and agreed to undertake searches over the following weekend which resulted in additional documents being provided, and no formal order was made. That resulted in further pages of evidence being admitted of consent. Further documents were added later when it emerged in cross examination that documents falling within the order granted existed but which had not been produced.

33. There were a large number of documents not provided to the claimant that ought to have been under the terms of the order granted on 3 January 2025, which had required compliance by 15 January 2025. Whilst that is a reasonably short time-frame firstly for an organisation such as the first respondent compliance was practicable, and secondly no application for variation of the order was made at the time, nor was it appealed. When an application to vary it was made later that was refused as referred to above.

34. The second respondent stated in evidence that the order had been provided to the second respondent about two weeks prior to the first day of the hearing, in one of the versions of the bundle of documents. That was clarified to be after the date for compliance. That point was not raised as a matter in re-examination. It is not clear which member of the respondents' legal team is responsible for the fact that a party represented, who was one of those who were the subject of the order referred to, did not see it until after the date for compliance had passed, but it is wholly unacceptable that such a situation arose. The terms of the order are clearly addressed to both respondents. The same solicitors from the Central Legal Office of the NHS and the same counsel act for both respondents. Instructions from the second respondent should have been taken on the terms of the order as soon as it was issued.

35. So far as the first respondent is concerned, instructions should have been taken and the order complied with both under the order itself and the terms of the overriding objective in Rule 2 of the 2013 Rules, in force on the date

of the order, and then Rule 3 of the 2024 Rules which came into force on 6 January 2025. The terms of those Rules are in essentials the same.

36. Ms Russell, on instruction, stated initially to the Tribunal that Ms Davidson was not an investigator and had only received one witness statement. Emails produced by the first respondent after Ms Davidson had given evidence appeared directly to contradict that, including those from Ms Davidson herself, and one that on the face of it had been sent to her. It appeared to the Tribunal that the comment by Ms Russell was at the very least incomplete, although doubtless made on instruction. It had been inferred if not directly suggested on behalf of the respondents that full compliance with the order would not provide relevant evidence, but that proved not to be accurate to a substantial extent. Much relevant evidence that clearly fell within the order was not produced until very late indeed.

37. What the Tribunal regards as a wholly improper and large-scale lack of full and appropriate compliance with the order for documents, which the Tribunal addressed in the Note following the hearing on 17 March 2025 but which despite its terms appears not to have been timeously and effectively acted upon by the first respondent thereafter, was a factor that we took into account as set out below. For a public body such as the first respondent not to comply with the orders granted by the Tribunal in such a matter is concerning.

38. Further documents were, because of that history, added to the documentation before the Tribunal in piecemeal fashion as the hearing progressed, and latterly the documents extended to over 1,700 pages (separately to that in the Supplementary Bundle for what the parties described as research evidence as discussed below). That resulted in documents not being in chronological order, and located in a patchwork of different places. That in turn made ascertaining the facts materially more difficult than it normally is, or ought reasonably to be. More significantly it also meant that a substantial volume of documentation was latterly available which had not been raised with the witnesses who had given evidence during the initial days of hearing in February 2025, but who might well have been asked about them had they been available, in particular the second respondent and Ms Davidson.

39. Simply by way of two examples, the email from Dr Currer dated 5 January 2025 was latterly provided by the first respondent which suggested that Ms Davidson, one of those to whom it was sent, should not conduct the investigation as she had had discussions with the claimant before the material events. It had an admittedly inaccurate comment that the claimant had been referred to the NMC. It was not a document produced in accordance with the order either timeously under the order, or during the February hearing dates, but had been received by Ms Davidson and by other prospective witnesses of the respondents. It was not addressed in

Ms Davidson's evidence, and the claimant cannot be criticised for not doing so as the document had not been provided to her. The evidential difficulties of that matter not being put to Ms Davidson as her evidence had been completed, there being no application for her to be recalled, were not minor ones.

40. Secondly the claimant's submission addressed in detail the evidence related to the creation of notes on the second respondent's mobile phone, which it was argued had been interfered with by the second respondent and demonstrated a lack of credibility, to paraphrase a lengthy aspect of that submission. The material used for that included evidence provided by Mr Donaldson of the first respondent, as noted below, by way of a statement and documents referred to within it as well as orally, and the written and oral evidence of Mr Borwick for the claimant in relation to that. It followed events on 16 May 2025. That was after the second respondent had given evidence. The claimant had not made similar applications when seeking orders in November 2024 and only did so after she had closed her own case. The allegations made by the claimant in this regard were not therefore put directly to the second respondent, who has not given us evidence about them. There was no application to recall the second respondent.

41. These are not the only examples of difficulties created where evidence was led before us on matters not raised with witnesses who could have commented on them. They largely, but not entirely, result from a failure by the respondents to comply with the order of 3 January 2025.

42. There was in addition to the main Bundles of Documents what was described as a Supplementary Bundle extending latterly to a little over 1,000 pages comprising documents referred to in two written witness statements from Ms Forstater and Mx Valentine referred to below, with a supplementary statement and related documents from the latter added latterly. That evidence is assessed and commented upon below.

43. Most but not all of the documents placed before the Tribunal were spoken to in evidence. Where a document was not referred to in the oral evidence, or within the statements of Ms Forstater or Mx Valentine, we did not consider it, a matter further commented on below. It was simply a document that had been tendered, and the risks of considering a document only on that basis were illustrated by a dispute over a letter dated 15 May 2024 that the first respondent said had been sent to the claimant which the claimant said had not been received. The exception to that is where there was email correspondence between the parties' solicitors, which they had arranged for inclusion within the Bundle, some of which was spoken to in evidence, and we inferred from these facts that the parties had agreed that the emails between their representatives which had been produced before us had been sent and received.

44. The parties had also agreed what was termed a Statement of Undisputed Facts. In preliminary discussion it was explained that the matters stated therein were agreed and it was taken on that basis as in effect a Statement of Agreed Facts.

45. Various applications for orders were made by the claimant during the course of the hearing, which were dealt with by separate Notes for them as referred to above. The parties also produced additional documentation including for example documentation provided by Mr Donaldson for the respondents, and a report in part on the basis of those documents from Mr Borwick for the claimant.

46. Evidence in chief was given orally, there being no order for use of written witness statements, save for those witnesses permitted to do so as noted below.

(ii) Witnesses for claimant

47. Evidence was given by the claimant herself which commenced on 3 February 2025 and she called as witnesses Ms Maya Forstater, whose evidence in chief was given by written witness statement as had been addressed in the Note following the closed Preliminary Hearing referred to above, her husband Mr Darren Peggie, her daughter Ms Nicole Peggie, and her mother Mrs Sheila Bell. The claimant closed her case on 5 February 2025.

48. Mr Jim Borwick was later called as an additional witness for the claimant, and his evidence interposed during that of the respondents, with consent of the respondents. He had prepared a written report. In addition, on 28 July 2025 the claimant sought leave both to be recalled herself, and to lead two further witnesses Ms Emma Moore of Sex Matters and another witness. The application was granted and Ms Moore was allowed to give her evidence remotely as she is in London.

(iii) Witnesses for the respondents

49. The second respondent gave evidence commencing on 5 February 2025, and for the first respondents the following witnesses were called: Ms Esther Davidson who did so on 13 February 2025, and from 16 July 2025 and thereafter Ms Isla Bumba, Ms Gillian Malone, Dr Elspeth Pitt, Ms Louise Curran, Ms Charlotte Myles, Dr Kate Searle, Ms Lauren Harris, Ms Angela Glancey, Ms Anne Hamilton, Dr Margaret Currer, Mr Peter Donaldson, Ms Fiona Wishart and Ms Lindsey Nicoll. The first respondent tendered a written witness statement for Mr Donaldson, which was received without opposition.

50. Mx V Valentine (who identifies as non-binary and for whom the title “Mx” was used on request) had produced in addition to a written witness statement on essentially the same basis as for Ms Forstater, a

Supplementary Statement with additional documents, received without objection. The claimant later confirmed through her counsel that she did not wish to cross examine Mx Valentine, and the evidence of that witness was taken as read and as if given on oath, with the parties' agreement.

(iv) General

51. There were a number of objections to questions during the evidence, either determined at the time or often by allowing the question subject to competency and relevancy. As an example, an objection concerned social media posts made by the claimant's husband, which the respondents wished to put to the claimant. The Tribunal rejected an argument from Ms Cunningham that that line was not permissible, given the width of the latitude allowed in cross examination and that the matter might affect the assessment of credibility or reliability to some extent, and the line of questioning was allowed under reservation of issues of competency and relevancy to be addressed in submission. In general, the parties were allowed considerable latitude in how they presented their respective cases both in evidence in chief and cross examination, but did not address the detail where issues of competency and relevancy had been reserved in their submissions.

52. The Tribunal asked some of the witnesses questions to elicit facts, doing so under Rule 41 where it considered it appropriate to do so having regard to the overriding objective in Rule 3.

53. The combination of these matters in relation to the evidence, and the complicated procedural history outlined above, made conducting the Final Hearing and determining the outcome particularly difficult, against the background of what are in any event at least partly novel and complex issues. The Tribunal allowed the parties very considerable latitude in the manner in which they presented their cases given the nature of the issues in dispute, which it considered appropriate under the overriding objective in Rule 3.

Facts

54. The Tribunal considered all the evidence that was led, including that which it has concluded was irrelevant to the issues before it and has not included within the section on Facts which follows. The Tribunal took into account the facts admitted in the pleadings as well as those in the Statement of Agreed Facts. Certain facts were taken to be within judicial knowledge as set out below, and as later addressed in the Discussion section. The Tribunal found the following facts, which it considered were those material to the issues before it, to have been established:

Parties

55. The claimant is Mrs Sandie Peggie. She is female.

56. The first respondent is Fife Health Board. It is one of fourteen territorial Health Boards that make up NHS Scotland, alongside seven Special Boards. The first respondent is a separate legal entity to the other Boards.

57. The first respondent is the board responsible for Victoria Hospital, Kirkcaldy ("the hospital"). Within the hospital is an Accident and Emergency Department, also called an Emergency Department ("the department").

58. The claimant had thirty years of experience as a nurse and she was 50 years of age at the material times for the purposes of this claim. She worked in the department at all material times, and continues to do so.

59. The second respondent is Dr Elisabeth Upton. The second respondent is known as Beth. The second respondent is a Junior Clinical Fellow, then known as a junior doctor, at the early stages of a career as a doctor. The second respondent was 28 years of age at the material times for the purposes of this claim. The second respondent was provided with a birth certificate stating sex as male shortly after birth.

60. The second respondent has identified as female since around January 2022, being fully open about that in public since around August 2022. The second respondent since 2022 has used the female names of Elizabeth and Beth, and female pronouns; has sought to have an appearance as a female; has worn clothing that is consistent with what is generally regarded as feminine in style; and has worn makeup in what is generally regarded as feminine in style. The second respondent presents in what is generally regarded as a feminine manner including as to having a long hairstyle worn in what is generally regarded as feminine in style, and a pitch and tone of voice consistent with that for a female. The second respondent has been presenting as a female in such a manner since prior to working at the hospital, and throughout the period since commencing at the department.

61. The second respondent is not a person who is obviously male from external appearance. Some people meeting the second respondent in a work or social setting unaware of the sex assigned at birth for the second respondent are likely to consider the second respondent to be of the female sex. Other people meeting the second respondent in such circumstances, or after more detailed interactions with the second respondent, are likely to consider the second respondent as someone assigned male by sex at birth.

62. The second respondent is about six feet tall. The claimant is about five feet four inches tall.

The hospital

63. The hospital serves the town of Kirkcaldy and the area surrounding it. Staff working at the hospital normally travel to and from the hospital in non-working clothes. Doctors and nurses working there each require to wear a uniform. The uniform is different for each, but essentially for each of those roles involves a top and trousers. For doctors the uniform is maroon in colour, and for nurses it is blue in colour. Other members of staff in different roles also wear their own uniforms. The uniforms are the same for men and women in each job role.

64. Staff working at the department were not required to change clothing, into or out of uniforms, at any one particular place. Most staff used one of the changing rooms described in the following paragraph. There are other rooms for staff working in the department to use for changing clothing. In the main building of the hospital, in the basement, there is one changing room for females and another for males, which is situated further away from the department than the said changing room in the department. In the department there is a well-being room, which can be used by any member of staff if vacant, which has a lockable door; a small room used as a store area which also has a lockable door; and a separate set of toilets for males and females. Use of those rooms allows the member of staff to change clothing not in the presence of others.

The female changing room in the department

65. There are two rooms used by most staff working at the department to change into and out of work clothing at the start and end of each shift, one for males and one for females. Each has a sign on the door. The sign for the female changing room states “female staff only”. It is located in an area of the department to which access is gained by swipe card given only to staff.

66. The female changing room in the department (“the changing room”) is a room which is entered from only one door. The changing room measures about 6 x 4 metres and can comfortably accommodate up to about six members of staff. On entering the changing room through the door there are benches with coat hooks above along a wall on the left hand side. Immediately to the right hand side of the door is a bin, beside which is a shoe rack. Along a wall on the right hand side from where the door is located, and opposite the said benches, are a series of lockers. Beyond the lockers on that wall are two sinks in a unit. At the wall on the opposite side of the changing room from the door are two toilet cubicles, each with a lockable door, situated perpendicularly to each other.

67. The changing room is used by several but not all of the female junior doctors, nurses, and many of the auxiliaries, also known as Healthcare Care Workers, working in the department. It has been used by the claimant to do so for about twelve years, which was from the time that part of the hospital was built.

68. The changing room had been designed as a locker room to store casual clothing, footwear and other belongings. It also has two toilets. It was not designed specifically as a changing room. The changing room formally provided for female staff in the hospital as it had been designed is that in the basement, and includes showers, but was not generally used by those working in the department because of its location.

69. All bar one of the consultants working in the department did not use the changing room to change clothes, but did so in rooms designated for consultants situated in the department.

70. The claimant regularly but not invariably changed her clothes within one of the two toilet cubicles in the changing room.

71. The second respondent normally changed clothing in the changing room facing towards a wall.

72. Nurses and doctors work normally on different shift patterns, but on occasion will end a shift at around the same time and use the same changing room to change into or out of casual clothes both at the start and end of shifts. They may also use the changing room during a shift to access belongings stored there or to use the toilet within it.

Employment

73. The first respondent employed the claimant as a staff nurse in the department. The claimant has been employed by the first respondent since December 1994. She has worked on two night shifts per week since May 2000. The nights when she worked varied week by week. Night shifts start at 7.30pm and end at 8am.

74. The claimant had an unblemished disciplinary record with the first respondent throughout the period of her employment, with no complaints against her by other staff until after the incident on 24 December 2023 referred to below. No complaints have been made by any patient treated by the claimant. The claimant has treated a number of patients who identify as trans men or women.

75. The claimant travelled to work taking her work uniform with her to change into on arrival. She washed her own uniform at home. For the claimant changing into her uniform normally meant changing out of her top and trousers and into her uniform top and trousers.

76. The second respondent was employed as a Junior Clinical Fellow (also known as a junior doctor) in the department in August 2023. Prior to doing so the second respondent had worked in the Psychiatry department of the hospital, and had visited the department when in that role from time to time. Prior to employment by the first respondent the second respondent had been employed by Lothian Health Board. When in that employment

and after being fully open about reassigning gender to female the second respondent had used the female changing room and toilet facilities without issue or complaint.

77. The second respondent when applying for the role of Junior Clinical Fellow had been interviewed by consultants for that. Several of the consultants in the department were aware that the second respondent was a trans woman from attending that interview. The second respondent separately spoke to Dr Maggie Currer, a consultant in the department, shortly prior to joining the department and stated that the second respondent was a trans woman.

78. Each of the claimant and second respondent operated under a different line management structure. The claimant's line managers were within the nursing structure, and were directly Ms Louise Curran and Ms Lauren Harris, who reported to Ms Esther Davidson. They came under the overall management of the Director of Nursing. The second respondent's line manager was Dr Melvin Carew, but on a day to day basis clinical supervision of the second respondent was carried out by the consultant or consultants working in the department at the time.

79. From the second respondent's visits to the department prior to starting as a Junior Clinical Fellow most of the staff working in the department were aware of the second respondent being someone with the protected characteristic of gender reassignment. No member of staff had raised any concern formally or informally with any manager of the first respondent about the second respondent whether with nursing line management or medical line management prior to the claimant doing so informally in late August 2023, as set out further below.

Claimant's beliefs

80. The claimant believes that biological sex is real, important, and immutable, and is not to be conflated with gender identity. She holds a belief both referred to as "sex realist" and also as "gender-critical". That includes a belief that those who are biologically male, including trans women, are not entitled to use female only spaces such as the changing room.

81. When the claimant first met the second respondent in August 2023 the claimant believed that the second respondent was a male from hair worn in a ponytail which appeared to the claimant to be receding, that the second respondent was she thought taller than the average woman, the second respondent being materially taller than the claimant, that the second respondent had she thought a prominent Adam's apple, and had she thought large hands and feet.

Second respondent's beliefs

82. The second respondent believes that the second respondent has the sex and gender of a woman. The second respondent believed and understood at the time of joining the department that the second respondent as a trans woman had a right to use the female changing room in the department.

Policies

(a) NHS Scotland

83. NHS Scotland has a Workforce Conduct Policy. It has a provision as to Suspension as follows:

> "In all cases, suspension should be a last resort. The use of suspension is not in itself a conduct action but does form part of this policy. The manager should assess if there is a significant risk to the organisation in areas such as clinical care, the safety of other persons and/or any investigation.
>
> Where these risks can be managed alternatives to suspension should be used. These will include temporarily moving the employee to another work area or considering other duties. Where this is not possible suspension may be appropriate. For more information, read the Guide to Suspension……"

84. It also had a provision for "Formal approach" as follows

> "Where early resolution has not been successful, or in more serious cases, a formal approach will be required.
>
> Prior to any formal conduct process starting, a full and thorough investigation must be carried out in line with the NHSScotland Workforce Policies Investigation Process. This should be undertaken in a timely manner to establish the facts of the case……"

85. The Guide to Suspension included a list of situations where suspension might be used, one of which was "Where allegations are made of bullying or harassment and it is considered necessary for whatever reason that the person under investigation cannot attend work." It referred to providing a Designated Contact Person for the suspended employee "to obtain advice on the process and progress with their case."

86. Under the heading "Terms of Suspension" it was stated that "the employee must not contact or discuss with others the matter under investigation without prior agreement by management."

87. Under the heading "Guidelines for Suspension" it was stated that

> "the employee's line manager, or the responsible manager onsite, will normally carry out the investigation…..

> Suspension will always be for as short a period as is possible. In some circumstances as set out above where the purpose of the suspension is to take the heat out of the immediate situation, it may not be necessary for the individual to remain on suspension until the whole investigation is complete. Where ongoing suspension is appropriate, the investigation should be completed, and if relevant the conduct hearing held, within an agreed timescale. Ongoing suspension must be reviewed on a regular basis in accordance with the Suspension Record. Only in exceptional circumstances should an employee be suspended for more than four calendar weeks, and this must be discussed with the HR representative."

88. NHS Scotland has a Workplace Policies Investigation Process. Under the Pre-Investigation stage it is stated that "the manager should assess the risk to determine whether alteration of duties or suspension is required" The responsibilities of the manager of the employee under investigation include "Advise employee at the earliest opportunity when they are subject to investigation and why this is the case."

89. It states that "an investigation team will be identified comprising an investigating manager and an HR representative……In identifying the team to undertake the investigation, the manager should consider the complexity, nature and scale of the case. This will determine the level of training and skill required of the investigating manager and the time commitment to undertake the investigation in a timely manner. Taking into account these factors it may be appropriate for the manager to undertake the investigating manager role unless a conflict of interest has been identified."

90. There is a section on investigation team planning, which includes letters being sent to the complainant and employee subject to a bullying and harassment complaint where that arises to confirm that "they have been appointed to undertake the investigation and offers to meet the individual to hear their initial response to the allegations, making clear full allegations and information will not be available at this stage." It refers to a further meeting being necessary. It states that following the meeting with the person complained about "the investigating manager will provide a provisional timescale for the completion of the investigation".

91. The section headed "Investigation" states that "the investigation team will collate and consider relevant documentation, including policies, procedures and protocols. Witness investigation meetings are addressed, with provision for notice and return of the written record of the meeting. An investigation meeting with the employee is set out, of which at least 14 days' notice is required. There is provision for a reconvened investigation meeting. The factual findings of the investigation are to be provided in a report, which has three potential findings (i) allegation not upheld

(ii) learning outcomes or (iii) referral to a formal panel under the relevant NHS Scotland Workforce Policy.

92. NHS Scotland has a Bullying and Harassment Policy. Under the heading of "Examples of harassing behaviours" and sub-heading "harassment can be related to" it is stated that harassment can be related to gender reassignment and sex/gender, amongst others. An Appendix includes examples of harassing behaviours, within which was

> "**Types of harassing behaviour**:
>
> "The most common forms of harassment are listed below and are specifically directed towards the protected/personal characteristic(s). This can be one significant incident or an ongoing pattern of behaviour. This is not an exhaustive list.
>
> - Offensive jokes, banter and comments…….
> - Use of derogatory terms
> - Inappropriate personal questions/comments…….
> - Deliberate and consistent behaviours which demonstrate a non-acceptance of aspects relating to a protected or personal characteristic(s) e.g. failure to use requested gender pronouns for a transitioning individual."

93. The Policy states that "If Early Resolution is unsuccessful or the bullying or harassing behaviour is significant or persistent in nature, the employee or manager may initiate the Formal Procedure" and then provides:

> "In such cases, the manager will assess any risk. They will determine what supports can be put in place to allow the employees to continue working together during this period, such as alternate shift patterns.
>
> Where this is inappropriate, the employee alleged to have demonstrated the bullying or harassing behaviours or both will be moved to an alternate placement unless:
> • the complainant requests a move
> • there is a legitimate service need which dictates that the other employee cannot be moved
>
> To initiate the Formal Procedure, the employee should write to their manager. Where this is not possible, or appropriate, they should write to the next level of management.
>
> The communication should detail the employee or employees alleged to be demonstrating the behaviours and their nature. For more information, read the guide for employee complainants.

The employee may access a-confidential contact or HR for advice, or a trade union representative for support and assistance.

If the employee has chosen to go straight to the formal stage of the procedure, a manager will:
• discuss with the employee why they think Early Resolution is not appropriate
• offer every support to allow Early Resolution to take place

The manager who receives the complaint must acknowledge the complaint in writing within 7 calendar days. The Standard acknowledgement letter template is used. The letter outlines the process for either revisiting the possibility of Early Resolution or the process of investigation to be undertaken in line with the NHSScotland Workforce Policies Investigation Process."

94. There is an NHS Scotland Workforce Conduct Policy Guide to Suspension which includes that "Before deciding to suspend an employee, the manager should assess the degree of risk involved……Where practicable, employees should be given reasonable notice to organise representation." It had links to documents for two checklists but not to a written risk assessment document.

95. There is an NHS Scotland Workforce Grievance Policy [which was not before the Tribunal]. The said NHS Scotland policies have been adopted by the first respondent.

(b) First respondent

96. The first respondent has an Equality, Diversity & Human Rights Policy ("the EDHR policy"). Its provisions include the following:

"**5. AIM OF POLICY/ PRINCIPLES AND VALUES**

This policy sets out the aims of NHS Fife to:

• Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010 and less favourable treatment (directly or indirectly) of other categories of worker as set out within other relevant legislation;

• Advance equality of opportunity between people who share a protected characteristic (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation) and those who do not;

• Foster good relations between people who share a protected characteristic and those who do not; and

• Ensure that the organisation has due regard for the European Convention of Human Rights (ECHR) in the discharge of its function.

6. PRINCIPLES AND VALUES

The following principles and values are key to the achievement of these aims:

• Equality, diversity and human rights must be at the heart of NHS Fife and everything it does;

• Disadvantages experienced by people due to their protected characteristics will be removed or minimized in order to create an environment in which individual differences and the contributions of all staff are recognised and valued;

• Steps will be taken to meet the needs of people from protected groups where these are different from the needs of those not in protected groups.

• Steps will be taken to reduce underrepresentation of people with particular protected characteristics and increase the diversity of our workforce, both at an organisational level and within different job roles;

• A zero tolerance approach will be taken to intimidation, bullying or harassment, recognising that all staff are entitled to a working environment that promotes dignity and respect for all;

• NHS Fife will act as an agent for change within local communities by positioning equality, diversity and human rights at the heart of local delivery plans;

• Whilst this will be achieved in part by being championed at a senior level, it can only be fully achieved through all those working within NHS Fife recognizing and adhering to their own personal responsibilities in this regard, and NHS Fife will therefore take steps to ensure that everyone in the organisation understands their rights and responsibilities under this policy;

• NHS Fife will ensure that arrangements are in place to support staff who have equality, diversity and human rights issues;

• Equality and diversity monitoring will be undertaken on a regular basis, with resulting improvement actions being identified and achieved; and

• This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles

and values are being met. The policy will be subject to regular review, in partnership, to ensure that it remains fit for purpose…….”

“If a member of staff is undergoing gender reassignment, NHS Fife will consult with them sensitively about their needs in the workplace and whether there are any reasonable and practical steps that can be taken to help them as they undergo their gender reassignment process;……..

8. REMEDIES

NHS Fife will not tolerate behaviours that may constitute discrimination, harassment or victimisation of its staff in the course of their employment, nor will it tolerate such behaviour by its staff whether directed against colleagues or other people with whom they come into contact during the course of their employment.

Staff should be encouraged to report any such incidents via DATIX, and have access to the NHS Scotland Bullying and Harassment policy and processes available to progress concerns. Managers can also instigate an investigation into concerns raised.

All staff must adhere to this policy, and failure to do so may lead to disciplinary action.

8.1 Grievances

Any member of staff who believes that they have been treated less favourably because of their age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, part-time status, fixed-term contract status or membership (or non-membership) of a trade union/ professional organisation is encouraged to raise the matter through NHS Scotland Workforce grievance policy [hyperlink added].

8.2 Harassment

If the complaint is about harassment or victimisation, then the staff member should raise the matter using NHS Scotland Workforce Bullying and Harassment Policy. Bullying and Harassment Policy [hyperlink added]

8.3 Dealing with Grievances / Harassment

It is the policy of NHS Fife to ensure that:

• Where a complaint is received, staff are not discriminated against in the way that the organisation responds to it;

> • Such matters will be taken seriously and investigated promptly and not dismissed as "over-sensitivity" or "workplace culture" on the part of the member of staff;
>
> • The matter will be thoroughly investigated using NHS Scotland Workforce Policies Investigation Process, and where an investigation recommends that a conduct process is appropriate, the individual against whom allegations have been made will be given a fair hearing; and
>
> • Members of staff who have raised allegations in good faith, regardless of whether or not they are upheld, and members of staff who have participated in the process, (eg as a witness), must not be subject to any detriment because of having done so……"

97. The first respondent has an Employees Guide to Responding to Hate Incidents. It defines a hate incident as "an incident which is perceived by the victim or any other person as being motivated by prejudice, hatred or ill-will towards any identifiable person or social group." It states that "a hate incident can take on many forms and there is no definitive list, rather the matter is subject to interpretation based on the victim's perception." It includes "harassment, bullying or victimisation (harassment is behaviour that is intimidating, upsetting, embarrassing humiliating or offensive." It further states that "NHS Fife staff must record all Hate Incidents and where appropriate report the incident to the Police……" Hate crime is defined as including "harassment, bullying or victimisation (Harassment is behaviour that is intimidating, upsetting, embarrassing, humiliating or offensive)".

(c) NMC

98. The Nursing & Midwifery Council ("NMC") is the regulator for nurses, and has issued a Code titled "Professional standards of practice and behaviour for nurses, midwives and nursing associates". Under the heading "Prioritise people" the following is stated after an introductory paragraph:

> **"1. Treat people as individuals and uphold their dignity**
>
> To achieve this, you must:
>
> 1.1 treat people with kindness, respect and compassion…….
>
> 1.3 avoid making assumptions and recognise diversity and individual choice…..
>
> 1.5 respect and uphold people's human rights"

99. Under the heading "Promote professionalism and trust" after an introductory paragraph is stated:

> "**20. Uphold the reputation of your profession at all times**

> To achieve this, you must……
>
> 20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment
>
> 20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people…….
>
> 20.7 make sure you do not express your personal beliefs (including political, religious or moral beliefs) to people in an inappropriate way……"

(d) No written policy regarding trans people or staff

100. The first respondent did not have a written policy with regard to trans staff, being those with the protected characteristic of gender reassignment under the Equality Act 2010, as at August 2023 and as at July 2025 continues not to have such a written policy.

101. Ms Isla Bumba, the Equality & Human Rights Lead Officer (Patient Experience Team) of the first respondent was asked to prepare a policy for trans patients [on a date not given in evidence, but likely to have been around the spring of 2024]. She considered the terms of paragraph 13.57 of the Equality and Human Rights Commission (EHRC) Code of Practice: Services, Public Functions and Associations ("CoP: Services") to do so. She also considered the policies of other NHS Scotland Boards, including that of NHS Lanarkshire, and spoke to her equivalents in some of those Boards. She reviewed policies from some NHS Trusts in England. She was aware that NHS Scotland was considering developing a "Once for Scotland" policy with regard to trans staff which the first respondent would, once it had been prepared, adopt.

102. NHS Scotland has not formally issued any such policy as at July 2025.

August 2023

103. Shortly before the second respondent started to work in the department, in or around late July 2023, Dr Currer, a consultant in the department, sought advice from Ms Bumba about the use of a changing room by a trans person, without identifying the second respondent as being that person. Ms Bumba gave general advice that a trans person should use the changing room for the gender that they identified as having, or words to that effect.

104. The second respondent commenced work in the role of Junior Clinical Fellow in the department on 2 August 2023. On arrival an induction was provided which included showing the second respondent where the male and female changing rooms were, but without specific direction in relation to which of those the second respondent should use. The second respondent said during that induction that the second respondent believed

that the second respondent had the right to use the female changing room as a trans woman.

105. The second respondent used the female changing room in the department from the time of commencement to work in it.

106. The second respondent met Dr Kate Searle, Consultant in Emergency Medicine, on or around 16 August 2023 as part of the induction process. Dr Searle was the second respondent's clinical and educational supervisor. Her role as such included providing support for the well-being of the second respondent. There was a discussion between them about use of facilities including changing rooms. Dr Searle had undertaken research into the matter. She had considered paragraph 13.57 of the CoP: Services, and took that to mean that the second respondent had the right to use the changing room of the gender the second respondent presented in, being female. She was not aware of any other policy of the second respondent or NHS Scotland on trans staff. She did not consider that excluding the second respondent from that room would be a proportionate means of achieving a legitimate aim. She was unaware of any concerns or complaints from any staff over the second respondent using the female changing room from visits the second respondent had made to the department before joining it. She considered that the second respondent should use the female changing room if the second respondent so wished.

107. Dr Searle asked the second respondent if the second respondent was happy to use the female changing room. The second respondent said yes. The second respondent considered that permission had been given to do so from that exchange.

108. The giving of that permission was not communicated to other members of staff at the department. Many members of staff were aware of the second respondent using the female changing room. Save by the claimant as referred to below, no member of staff raised any concern or complaint with any manager of the first respondent as to the use of the female changing room from August 2023 onwards.

109. A group of about five members of staff including the clamant had private discussions with regard to the second respondent's use of the female changing room between themselves in around August and September 2023. That group included one male member of staff and three female members of staff, as well as the claimant.

First incident

110. On or about 26 August 2023 the claimant entered the female changing room at about 8am, which was at the end of her shift, to change out of her work clothes. When she entered the changing room the second respondent was already there, sitting down and putting on shoes. The

claimant felt embarrassed by the presence of the second respondent who she perceived to be male, in the room where she was intending to change out of her uniform into her non-work clothes which required partial undressing, and the claimant left the changing room. She waited outside it until the second respondent left it. She then entered the changing room, changed her clothes and left the hospital.

111. The second respondent considered that the claimant's behaviour in entering and then leaving in such a manner had been unusual. The second respondent felt sad that the incident had happened, but considered that that was the way that the claimant was dealing with the second respondent and did not discuss it with anyone at that time.

112. Later the same day the claimant sent a message to a colleague stating "The trans doctor was in the middle of getting changed when I went in this morning. I thought Chris was winding me up." The reference to Chris was to a colleague who had told the claimant that the second respondent was using the female changing room. Her colleague replied that "you have made my night" with laughing emojis. The claimant replied to that stating "OMG IT WAS NOT FUNNY. I just looked at him and come back out lol. Don't think it's right though. Don't mind him her but I would have been raging if he had walked in on me half naked." By "lol" the claimant meant laugh out loud.

Claimant's first discussion with Ms Davidson

113. On or about 27 August 2023 the claimant spoke with Ms Davidson who was the Acting Clinical Nurse Manager, having very recently been appointed to that role from being a Senior Charge Nurse. The claimant told her that she was unhappy that a person she regarded as a man was being given access to the female changing room, and told her about the incident on 26 August 2023. She explained that the incident had left her feeling awkward, embarrassed, and uncomfortable. Ms Davidson told the claimant something to the effect that she would look into it, and that the claimant could change in the toilets in the changing room so as not to get undressed in front of a colleague.

114. Ms Davidson sought advice from Ms Bumba by telephone or by a Teams call that same day, or on the following day. Ms Davidson explained that there was a trans female member of staff who had started at the department, that another member of staff was uncomfortable with that, without giving details of name or role of either of them, and sought advice including whether there was any policy. Ms Bumba said that there was no written policy and advised her to the effect that, because the person was a trans woman and identified as a woman, that the person had the right to use the female changing room.

115. Ms Bumba gave that advice as it was her understanding from a review of policies from several other Boards in Scotland, and NHS Trusts in England, and how they addressed the use of facilities by trans staff, including changing rooms and toilets, as well as her understanding of paragraph 13.57 of the CoP: Services. She considered that that applied to members of staff using staff only facilities.

116. One of the policies from another Board she considered was that of NHS Lanarkshire. The policy was titled "Supporting Trans Staff in the Workplace", which included the following provision:

> "**4.7 Use of Toilets, Showers and Changing Facilities**
>
> The use of changing/showering facilities and toilets will be part of the discussion process with the member of staff transitioning to their affirmed gender with a view to agreeing the point at which the use of facilities should change from one gender to another.
>
> Should there be any objections to this by other staff, the objections will be dealt with by the manager in a sensitive and understanding way while not denying the Trans staff member access to facilities appropriate to their lived gender. It would not be acceptable to expect an individual undergoing transition to use facilities for use by the gender they were assigned at birth. It is not good practice to allocate specific facilities for the individual who is transitioning."

117. The wording of the other policies she considered was different in detail but very broadly similar in nature to that in the preceding paragraph. She believed from her review of those policies and the discussion with those in similar positions to her in other Boards and Trusts that the position adopted across the NHS in Great Britain was to the effect that a member of staff with the protected characteristic of gender reassignment had the right to use a changing room that aligned with the gender they identified as having.

118. The first respondent did not conduct an equality impact assessment in relation to the use by the second respondent of the changing room either around then or at any other stage.

119. Ms Davidson carried out her own research separately into the matter of use of a changing room by a trans member of staff. She made a search on the first respondent's online system called "Blink" which has all the first respondent's policies accessible for staff to view. It includes those of NHS Scotland which the first respondent has adopted for use. There was no specific policy with regard to trans persons she found. She read the first respondent's Equality, Diversity and Human Rights Policy, and other policies, being the Workforce Policy, the first respondents' Principles and Values Policy and the Nurses Midwifery Council Code of Conduct. She

spoke with a Consultant in the department Dr Maggie Currer who told her that she had received the same advice from Ms Bumba that a trans female member of staff had the right to use the female changing room.

120. Mr Jamie Doyle, then a Clinical Nurse Manager of the first respondent, was consulted by Ms Davidson about the position, and he spoke to Ms Bumba about it. He then emailed Ms Angie Shepherd, Service Manager; Ms Gillian Malone, Head of Nursing; Ms Davidson and Ms Curran, who was a Charge Nurse and one of two line managers for the claimant, on 29 August 2023 and stated that he had contacted Ms Bumba. He recorded that she had given advice to Ms Currer. The email recorded the advice as:

- "Check in with staff member and see if there is any supports we need to consider as appropriate
- There is no NHS policy for staff on this as yet, there is a patient policy being produced just now which will support the staff policy
- NHS Fife only has gender neutral facilities within the NTC currently
- We could consider transgender awareness training for our team which could support the allegation of concerns and answer questions that the team may have
- As the staff member identifies as a woman, access to female only facilities would be seen as her right."

121. Dr Currer and Ms Davidson had a meeting [on a date not given in evidence but likely to have been in late August or early September 2023] when they confirmed that each had been given similar advice by Ms Bumba.

122. Ms Davidson and the claimant worked on opposite shift patterns, and Ms Davidson was on holiday for much of September 2023. Ms Davidson did not relay the advice she had received from Ms Bumba until late October 2023 as referred to below.

October 2023

123. In about early October 2023 the claimant spoke to Ms Curran stating that she had spoken to Ms Davidson earlier but wished to make her aware also that she was not happy with the second respondent using the changing room, and did not feel that it was right. Ms Curran was aware of the earlier conversation and advice from Ms Bumba having been told that by Ms Davidson, and informed the claimant of that. Ms Curran advised the claimant that there were alternative changing facilities in the basement of the main Phase 2 building, and a well-being room in the department with

a locked door available to all staff. She said she would raise the claimant's concerns with Ms Davidson.

124. Ms Curran spoke to Ms Davidson shortly thereafter and asked if there was any update. Ms Davidson said that there was not and that Ms Bumba's advice still stood. Ms Curran was not on shift again with the claimant in the period up to the Christmas Eve incident referred to below.

125. On or around 23 October 2023 the second respondent met Dr Searle to discuss how matters had been going at work. The second respondent mentioned the first incident, which they discussed. Dr Searle said that it was unpleasant for the second respondent or words to that effect and asked the second respondent if the second respondent wished the claimant to be spoken to. The second respondent stated that the second respondent did not wish to do so or go down any formal process. The second respondent had informed Dr Searle of the matter in order that she was aware of it in the event that there was any later escalation.

The second incident

126. On 25 October 2023 the claimant was in the changing room changing her clothes. The second respondent entered the room. At the time the claimant was dressed in her bra and trousers. The claimant was embarrassed by the presence of a person she regarded as a man in the room where she was undressing. She replaced her top and left the changing room. She waited outside until the second respondent left. She then re-entered it and completed changing.

127. The second respondent was aware of the claimant's actions in leaving the changing room and waiting outside it, and prepared a note of the circumstances of the incident as the second respondent considered it to be on a mobile phone on 26 October 2023. When doing so the second respondent also made a record of the incident on or around 26 August 2023. The second respondent thought that the second incident was part of a pattern, but decided not to do anything about it if matters stayed at the same level. It was not reported to anyone at that time by the second respondent.

Claimant's second discussion with Ms Davidson

128. At or around the end of October 2023 the claimant spoke to Ms Davidson again, and asked her what she had done after the discussion they had held after the first incident. Ms Davidson told her that she had telephoned Equality & Diversity, by which she meant Ms Bumba, and been told that she had found nothing to support excluding the second respondent from the changing room. The claimant said that she was very unhappy that a person she regarded as a man was being given access to a female changing room. The claimant was obviously upset and angered by the

reply from Ms Davidson. Ms Davidson proposed that the claimant could use alternative changing areas including the toilet cubicle of the changing room or the said store room. The claimant said that she would not change in the toilet cubicle. Ms Davidson also said that there were other places the claimant could use to change, being a well-being room and the changing room in the main building.

129. The claimant understood from that conversation that the second respondent had received permission from the first respondent to use the changing room.

130. At some point around the end of October 2023 a meeting was held between consultants and senior nurses, as was done on around a monthly basis. The circumstances of the second respondent and use of the changing room were raised, it was explained that a complaint had been raised by a nurse about it. It was stated that the advice received from Equality and Diversity (a reference to Ms Bumba) was that the second respondent had the right to use the changing room.

Resus room

131. In or around November 2023 the claimant and second respondent were working in the resuscitation area (known as the "resus" room) of the department. The second respondent was with a patient. The claimant came in to where the patient was, and the second respondent expected her to undertake normal observations. The claimant asked the second respondent to do so. The claimant then left that area. The second respondent did not make any record of what had happened on the said mobile phone nor report it to anyone.

December 2023

132. On 8 December 2023 the second respondent orally raised concerns with Dr Searle over the claimant's interactions with the second respondent during the said three incidents. Dr Searle emailed Ms Bumba that day to refer to the department having its first transgender doctor, and asking if there was "any information/policies for transgender staff (particularly regarding changing areas/toilets)?" Ms Bumba replied on 11 December 2023 to state that there were no policies or guidance for trans staff at the first respondent but said that it was expected that there would be an NHS Scotland policy on that soon.

Child patient incident

133. On 18 December 2023 the second respondent and claimant were both working in the department. A child patient had originally presented and had been triaged by the claimant, and asked to wait in the waiting room. The second respondent later called that patient's name, but discovered that the patient had left. The second respondent wished to find out the

circumstances of the patient and noted from the records that the claimant had carried out the triage. The second respondent sought to find the claimant without success, and a Healthcare Worker Ms Rehanna Ashraf offered to look for her. Ms Ashraf and the claimant then came to where the second respondent was in the department. Ms Ashraf asked the claimant in the second respondent's presence if there had been any concerns about the child patient. The claimant said that she had no concerns. The second respondent said thanks and added that the second respondent had needed to know for a letter to be sent recording what had happened. The claimant left the area.

134. The second respondent recorded the matter in the said mobile phone later that day stating: "Working nights, won't make eye contact, won't acknowledge my present [sic]. Not had a direct conversation yet but I can feel the dismissal/hostility."

The Christmas Eve incident

135. On 24 December 2023, Christmas Eve, the second respondent worked a shift which commenced at 2pm and lasted until midnight. The claimant was working a night shift starting at 7.30pm that day and due to last until 8am on 25 December 2023, Christmas Day.

136. Towards the end of the shift the second respondent went round the department to wish colleagues a merry Christmas, and wrote a message to others. Shortly before midnight the second respondent went into the changing room to change in order to go home. The second respondent was wearing work uniform known as "scrubs". Two other female members of staff also entered the changing room at about the same time; one a GP in training the second respondent knew only as Shwayts, and the other an emergency nurse practitioner Ms Fiona Wishart. They were wearing their uniforms. All three entered the changing room in order to change out of uniforms at the end of their shifts. All three of them changed into casual clothes.

137. At very approximately the same time the claimant who was working at a computer, noticed that she had had heavy menstrual bleeding, was concerned that it might be visible to others and wished to change her clothing. The claimant walked to the female changing room to change. She kept spare clothing in her locker there. She intended to change her clothes in the toilet cubicle within the changing room.

138. As the claimant entered the changing room the said three persons were still present being the second respondent, the person named Shwayts and Ms Wishart, each of whom had completed changing into casual clothes. The claimant's locker was at the end of the lockers which were in a line, furthest from the door and next to two sinks. The claimant stood beside her locker and spoke to Ms Wishart for a short time. She did not speak to

the second respondent when doing so. The second respondent's locker was in the same line of lockers and situated closer to the door.

139. At about that time or shortly afterwards Shwayts left the changing room to go home. The second respondent then went into the toilet cubicle situated nearer to the sinks, wearing casual clothes. The toilets are on the opposite side of the changing room to the door. Whilst the second respondent was in the toilet Ms Wishart left the changing room to go home. The claimant at that time was alone in the changing room, with the second respondent still in the toilet cubicle. The second toilet cubicle situated nearer to the bench in the changing room was vacant.

140. The second respondent came out of the toilet cubicle and went to one of the sinks. The second respondent started washing hands. The claimant at that point was standing near her said locker, and was nearer to the door than where the second respondent was standing. The claimant initiated a conversation between them.

141. The claimant told the second respondent that she did not think that it was appropriate for the second respondent to use the changing room. She explained that she felt intimidated because of the presence of the second respondent, who she said was a man, in the women's changing room, that the second respondent could not be in it, it was wrong, and lots of others felt that way. The second respondent said that the second respondent was very sorry she felt intimidated but had been told that the second respondent could change there. The claimant said that she had no problem with the second respondent, that she understood that the second respondent was going through some process but the second respondent was not a woman and could not be in there.

142. At some point during the conversation [precisely when was not identified in the evidence] the second respondent moved from the area by the sink to collect the second respondent's bag. The second respondent walked around the claimant to do so, after which the second respondent was closer to the door than the claimant was.

143. The claimant asked the second respondent "what are your chromosomes?" The second respondent did not answer that question. The second respondent repeated being sorry that the claimant was intimidated but that the second respondent was a woman and allowed to use the space, and said that if the claimant had concerns could she raise them formally as the second respondent did not think that this was the most appropriate time, place or process for the conversation. The claimant repeated that she was intimidated, that lots of people were talking about it and are all intimidated by the second respondent. The claimant repeated that the second respondent was not a woman. The second respondent stated that no one else had raised a concern but that if they did have a

concern the second respondent hoped that they would raise them through the proper channels or come to the second respondent to raise them.

144. The claimant said that maybe she was the only one who felt able to, that she would not change in front of men because she had a bad history with men. The second respondent started to say that the second respondent understood and sympathised. The claimant interrupted the second respondent and said that the second respondent did not understand or sympathise enough or would not be changing in the changing room. The second respondent repeated that the second respondent was sorry the claimant was intimidated but did not wish to have the conversation there, did not think that that was appropriate, and that if she or others had concerns to raise them formally. The second respondent said that there were protocols to follow if the claimant was unhappy. The second respondent said that the second respondent was not sure what could be done to resolve the matter, repeating the comment about being sorry the claimant felt intimidated.

145. The claimant said that the second respondent could not change in the changing room and that it would help if the second respondent did not do so. She said that women have a right to feel safe and that it was just like that person in the prisons. That was a reference to the case of Isla Bryson/Adam Graham.

146. The second respondent repeated that this was an inappropriate time, that the second respondent did not wish to talk to her about it now, and did not think that a discussion between two people at the end of a long shift was productive or the best way to resolve matters. The claimant repeated her concerns and the second respondent repeated the comments about appropriate channels and having a formal conversation. The claimant said that she would raise the matter and the second respondent then left the changing room. The claimant remained in the changing room.

147. The claimant and second respondent were facing each other throughout almost all of the exchanges between them. During the latter part of their discussion [at a time not specified in evidence] the second respondent put on a jacket.

148. At no point did the second respondent touch the claimant or the claimant touch the second respondent. Neither the claimant nor second respondent raised their voices. The exchange between them took approximately five minutes, and concluded just after midnight on 24 – 25 December 2023.

149. The claimant felt extremely nervous throughout the exchange but did not articulate that to the second respondent save by reference to feeling intimidated. She felt intimidated by the presence in the changing room of a person she perceived to be male. She felt embarrassed that the bleeding that had taken place may have been visible to others.

150. The second respondent felt attacked and distressed by the exchange with the claimant including the language used, the comment that the second respondent was a man not a woman and could not use the changing room, the question as to chromosomes, and what was taken by the second respondent to be a comparison with a rapist, but did not articulate that to the claimant.

Second respondent's meeting with Dr Pitt

151. Immediately after the second respondent left the changing room, the second respondent went to find a consultant colleague Dr Elspeth Pitt. Dr Pitt was the consultant who had been working at the department, and whose shift ended at midnight after which she was to be on call.

152. It took about five minutes for the second respondent to locate her. The second respondent looked shaken, was visibly distressed and upset, and presented as startled to Dr Pitt. They went into the well-being room in the department. The second respondent reported the events in the changing room to her. When doing so the second respondent was very distressed, it appeared to Dr Pitt that the second respondent was fearful, and the second respondent was sobbing. The second respondent stated that the second respondent had had a very unpleasant and painful conversation with the claimant at the end of the second respondent's shift; that the claimant had said that the second respondent should not be in the changing room; that the claimant had likened the situation to that involving a convicted rapist; that the second respondent had felt cornered; that it had escalated and the second respondent could not get away and that the second respondent felt very upset at what had been said by the claimant.

153. Dr Pitt listened to the second respondent and provided comfort. She gave advice to the second respondent including peer support from the British Medical Association, and to write a factual account of what had happened.

154. Their discussion lasted about thirty minutes. As the second respondent was fearful Dr Pitt suggested that the second respondent go home, and walked out to the second respondent's car with the second respondent in case there was an encounter with the claimant. There was no such encounter, and after preparing an initial note of the discussion on the second respondent's mobile telephone using an application called Google Notes, doing so for several minutes around 00.45am, the second respondent drove home.

155. Dr Pitt sent an email to Dr Searle and Ms Davidson at 00.48am on 25 December 2023 with reference to the incident and stating that the second respondent had "had a very upsetting interaction with another member of staff." She did so as she was in her car about to go home, and shorty after her discussion with the second respondent had concluded.

156. The second respondent arrived home at around 1.50am. The second respondent made a change to the note made on 18 December 2023 by adding:

> "Needed to ask Sandie a question about a child patient who left before being seen as she had triaged them. Couldn't find her. HCA (Rihanna) offered to look for her. Both came back, Rihanna asked Sandie if any concerns while both were in front of me. Sandie didn't look or otherwise engage with me. Responded she had no concerns. I said thanks and that I needed to know for the letter. She did not acknowledge me either through words or eye contact and left the area."

157. The second respondent made further entries in relation to the exchange with the claimant on Christmas Eve and into Christmas Day 2023. [The detail of which part of the notes was prepared when is accurately set out in the written report from Mr Borwick.]

158. The claimant continued to work for the remainder of her shift. She met Ms Curran in the period after the incident with the second respondent and before the claimant completed her shift. The claimant made no mention of the incident to Ms Curran. The claimant appeared to Ms Curran to have a demeanour that was unchanged from that exhibited by her prior to the incident during the earlier part of that shift.

Email to Dr Searle

159. The second respondent sent an email to Dr Searle at 03.17am on 25 December 2023 setting out what was described as a summary of the events to the best of recollection. It stated the following:

> "<u>Summary</u>
>
> Myself another junior doctor and one of the ENPs were in the changing room. We were all chatting, and Sandie came in. I thought this was unusual as Sandie often leaves when I am in the changing room. I went to the bathroom, and the others left, apart from Sandie. I left the cubicle and she was still in the changing room. I started washing my hands and she started talking to me, saying she doesn't think it's appropriate that I use the changing room. She said she feels intimidated by me. Stated it's the women's changing room, I can't be in here, it's wrong and that lots of others feel this way. I explained I'm very sorry she feels intimidated but I've been told I can change here. She kept telling me she finds me intimidating. She stated she has no problem with me and understands I'm going through 'some process' but I'm not a woman and I can't be in here. She asked me 'What are your chromosomes?'. I explained I'm sorry she is intimidated but I am a

> woman and I am allowed to use this space. If she has concerns could she please raise them formally as I do not think this is the most appropriate time, place or process for this conversation.
>
> She continued to tell me she is intimidated and that lots of people are talking about it and are all intimidated by me. She told me I'm not a woman. I said that no one else has raised a concern with me but I would hope if they had concerns they would raise them formally through the proper channels or come to me with those concerns. She stated maybe she's the only one who feels able to. She told me she wouldn't change in front of men because she has a bad history with men. I said I understand and sympathise. She cut me off and says I don't understand and don't sympathise enough or I wouldn't be changing in this changing room. I again stated I'm sorry she is intimidated but I do not want to have this conversation here, I don't think it's appropriate, if she or others have concerns they should raise it formally. I told her I'm not sure what I can do to resolve this, I'm sorry she feels intimidated. She told me I could not change here and that would help. She told me women have a right to feel safe, she said 'its just like that person in the prisons'.
>
> I again told her this is an inappropriate time, I do not wish to talk to her about it now, I don't think a discussion between two people at the end of a long shift is productive or the best way to resolve this. She wouldn't let it go, we went back and forth a few times for about a minute, each time I repeated my previous statement about appropriate channels and formal conversation. Eventually she told me 'she will raise this' and I then left the changing room….."

160. It included that:

> "I'm not really sure what the next steps are to improve/resolve the situation. To be honest the whole thing has left me very upset and shaken. I'm concerned that I won't feel safe working with Sandie going forward and I'm certain that I don't feel safe using the changing room when she is there. I'm next due in to work on the 28th of December which I appreciate is not a lot of time and certainly not enough time to fully resolve this issue. My thought is to change elsewhere for the time being, mostly for my own safety and to minimise my contact with her other than what is required for clinical work. Please let me know if there's anything else I should be doing and what options there are for taking this further should it come to that….."

161. The claimant returned home after her shift ended, and went to bed. She spoke to her family about the incident later that day, being Christmas Day, and explained how upset she had been by the incident with the second

respondent. She explained to them that she had gone to change after experiencing bleeding, that there had been a man in the changing room [by which she meant the second respondent] and that she had felt intimidated and embarrassed.

162. On 26 December 2023 Ms Davidson was on shift and read the email from Dr Pitt of the previous day. She sent a reply shortly after having done so stating “This is totally unacceptable” and responded regarding a meeting.

163. On the same day the second respondent sent an email to the British Medical Association (“BMA”), the second respondent’s union, to seek advice on what had happened. It set out a detailed explanation of the events on 26 August 2023, 25 October 2023, 18 December 2023 and on Christmas Eve 2023. It included comments as follows:

> “[after a description of the 25 October 2023 incident] My interactions with colleague X since these two incidents have been minimal. She does not talk to me, frequently won’t look at me, and often seems to ignore me if I’m present. I broadly accept this reasoning we don’t have to be friends, just colleagues. On the one occasion we have had to take care of a resus patient together I was taking a history, she came in to do the observations, asked me to take the observations, and then left. I have never had a nursing colleague ask me to take observations on a patient anywhere in the department, especially not an unwell patient in resus. We often work simultaneously on such cases doing obs/getting access/taking bloods/taking histories.
>
> 18/12/23
>
> On a nightshift with colleague X who was as usual not acknowledging my presence. At one point I needed to find her to ask about a patient she had triaged. I couldn’t find her so an HCA went to look for her. She came back with the HCA who asked her about the patient and said that I had asked if colleague X had any concerns about the patient at triage. In front of me she responded only to the HCA, not acknowledging me at all. I said thanks for the information and explained why I had asked. I got no acknowledgment from person X for this statement and she subsequently left the area.
>
> I again recorded this in my phone as an instance of rudeness but not a patient safety issue.”

164. The second respondent had an initial conversation with Mr Antoni Wilson of the BMA after which the second respondent was sent an email asking fo any documentation and explaining the support the BMA provided.

165. On 27 December 2023 the second respondent emailed Mr Wilson thanking him for advice, and passing to him the email sent previously to the BMA, the Bullying and Harassment Policy of NHS Scotland and the first respondent's Equality Diversity and Human Rights Policy.

166. On that day the second respondent sent a WhatsApp message to a colleague Dr Niamh Higgins stating that "….I've been having trouble with somebody at work regarding changing rooms and me being trans…..[asking to] meet you before work tomorrow so we could get changed at the same time to avoid me potentially being alone with this person in the changing room."

167. On 28 December 2023 the second respondent returned to work to undertake the next shift after that ending at midnight of 24 December 2023. Dr Higgins' train was delayed. The second respondent decided to go to the changing room alone. As the second respondent did so the second respondent noticed that the claimant was coming out of the toilet in the changing room, and hurriedly left it. The second respondent changed in the plaster room of the hospital. The claimant had not noticed the second respondent.

Datix report

168. Dr Searle returned to work after being on leave on 29 December 2023, and read the emails that had been sent to her by Dr Pitt and the second respondent. She replied to the second respondent's email sent on 25 December 2023 after she read it that day. Dr Searle commented that the claimant's actions were "completely unacceptable."

169. Dr Searle met the second respondent at around 5pm that day. They discussed the incident on 24/25 December 2023 ("the Christmas Eve incident"). The second respondent said that the second respondent had come across the claimant earlier that day. The second respondent was shaken and distressed at doing so following the exchange during the Christmas Eve incident. The second respondent said that there had been two earlier incidents when the claimant had firstly left a cubicle when carrying out observations on a patient when the second respondent entered, and when asked about those observations said that the second respondent could do them, and later had only spoken about a patient who had attended the department but left before being called by the second respondent to be attended to, speaking not directly to the second respondent but through another member of staff. The second respondent further referred to occasions when the claimant had left the changing room when the second respondent was present.

170. They reviewed policies on Bullying and Harassment, the Employee Guide on Responding to Hate Incidents, and policies on Equality, Diversity and Human Rights. They considered that the circumstances were a hate

incident, and may be a hate crime. They decided that an appropriate first step was by way of a Datix report, so as to record the matter. Dr Searle also raised the possibility of the second respondent reporting the matter to the police. The second respondent wished to consider whether to do so. The second respondent did not report the matter to the police.

171. Datix reports are used to record issues of concern both clinical and otherwise. A Datix report was typed by Dr Searle on the basis of the second respondent's comments to her and as discussed between them. The details given as to location were "staff changing area". It did not name the second respondent as the complainant or the claimant as alleged perpetrator, using Nurse A and Doctor B respectively. It had as a description:

> "Incident involving protected characteristic (Transgender identity)
>
> Nurse A unexpectedly stopped Doctor B in staff changing area and stated that a Doctor B should not be using that changing area on account of Nurse A's perception of Doctor B's trans status. Nurse A then proceeded to use offensive language in questioning Dr B's "chromosomes", and suggested that other staff members did not feel safe in the changing room with Doctor B present. Nurse A alluded to Dr B's presence in the changing room being akin to the situation of a convicted rapist being housed in a women's prison after transitioning.
>
> Doctor B repeatedly tried to stop the discussion and stated that other mediators should be involved, and that this was not the right place or time to have the discussion, but Nurse A repeatedly stated her views in an aggressive and confrontational manner.
>
> This is representative of an escalation of prior behaviours in which Nurse A refuses to engage or acknowledge Doctor B in work situations."

172. In relation to action taken it stated that "Doctor B informed Consultant A on shift, and informed clinical supervisor Consultant B. Line manager of Nurse A informed." On the staff listed it stated that "Nurse A - Can be given if required, and Doctor B prefers to remain anonymous at this point – is willing to provide if required."

173. It was categorised as a verbal assault, and the motivating factors listed as "gender reassignment".

174. The Datix report was automatically sent to Dr Currer, Dr Searle, Mr William Coyne (Violence and Aggression Adviser of the first respondent), Ms Bumba, Mr Stuart Bennett (Physical Interventions Trainer of the first respondent) and Dr Carew.

175. On 29 December 2023 Dr Searle wrote to the department's consultants by email summarising what the second respondent had told her about the incident on 25 December 2023, which she referred to as a "hate incident". There were at that time nineteen consultants working within the department, who worked different shifts and shift patterns. She referred to the circumstances as she understood them to be from the second respondent, and believing that she had no reason to disbelieve the second respondent. She stated "I have had a long chat with Beth today and ensure she knows we all support her, and that we condemn the actions of Sandie."

176. Consultants have both a medical education role with junior doctors and a pastoral role. Other consultants required to be made aware of the incident in light of the impact on the second respondent, that that may affect how the second respondent presented when working at the department or carrying out work there, and in the event that it led to any changes in the working shift for the second respondent under the rota. Dr Searle intended that the second respondent leave work after meeting her at 5pm that day, and not continue to the end of that shift.

177. Rotas for the doctors are prepared separately to those of the nurses. Rotas for doctors are prepared about six months in advance, from August to February and February to August. The rota commencing in February 2024 had been concluded before Christmas 2023. The rotas are complex in order to cover the department with a limited number of doctors. Shifts for doctors are (i) 8am to 6pm (ii) 10am to 8pm (iii) noon to 10pm (iv) 2pm to midnight and (v) 10pm to 8.15am.

178. On 29 December 2023 Ms Stephanie Donnachie of the BMA emailed the second respondent to state that the query had been assigned to her whilst her colleague Robert Ronald was on leave.

Special leave

179. On 30 December 2023 Ms Curran passed to Mr Doyle, by then promoted to Head of Nursing, Acute Services Division, the Datix report of the Christmas Eve incident. He replied the same day. He stated that "due to the gravity of the allegations/complaints I would recommend that the nurse is granted special leave and I would recommend Esther picks this up early next week, noting the nurse is due back on duty on Tuesday 2 January 2024". He referred to the claims being untested and that special leave should be supportive to both members of staff. He said that "such incidents relating to potential hate crime/bullying and harassment – as you know is not acceptable nor should be tolerated in any circumstances." His message was copied to Ms Davidson, and the other charge nurse Ms Lauren Harris.

180. On that day Ms Curran met Mr Doyle and she informed him further of the incident on Christmas Eve, and the earlier complaint by the claimant as to the second respondent using the changing room. He said that matters needed to be investigated and that HR advice was required although at that point no member of the HR staff was at work. They discussed the policy as to equality and diversity, the policy as to bullying and harassment, and the Code of Conduct of the NMC.

181. From their discussion Ms Curran understood that Mr Doyle had decided that the claimant should be placed on special leave. Ms Curran then informed the claimant by telephone from Mr Doyle's office that she was being placed on special leave following receipt of a serious complaint that she had bullied another member of staff on 24 December 2023. The claimant told Ms Curran that she had confronted the second respondent and advised that the second respondent should not be changing in the changing room as the second respondent was not a female. The claimant had said that it was not acceptable and that it made the claimant feel very uncomfortable, and that several other staff felt the same. The claimant said that she was extremely unhappy about the situation but if the first respondent did not want the claimant to come to work and pay her for sitting at home that was fine with her.

182. Although the claimant did not indicate to Ms Curran that she was distressed by the call, immediately after it she visited her family and was distressed when explaining matters to her family.

183. Ms Curran told Ms Davidson that day that the claimant had been placed on special leave.

184. Dr Searle sent an email to Ms Davidson, Ms Curran and Ms Harris on the same day [30 December 2023] thanking Ms Davidson for her support and referring to the discussion with the second respondent and "ensured that she knows she has our support and that we will condemn Sandie's actions." It referred to the second respondent writing a letter of complaint and discussed the arrangements proposed for managing matters, and noted that rosters had been arranged to avoid contact between the claimant and second respondent until the end of January 2024.

185. Dr Searle also emailed the second respondent that day to state that Ms Curran was sad not to be able to speak to the second respondent and that she also condemned the claimant's actions, and fully supported the second respondent. It added that Ms Curran, Ms Harris and Ms Davidson would be meeting the claimant "to inform her that her actions were unacceptable and to make a plan for going forward."

186. Dr Searle emailed Dr Currer that day asking to whom a complaint should be sent. Dr Currer replied with advice and comments. Dr Searle had also

earlier that day emailed Ms Bumba although Ms Bumba had received the Datix.

187. The claimant exchanged messages that day with a colleague, Sharlene, who she had told about the special leave. The claimant stated "I'll lose the argument though. Everyone sticks up for the minority. Wouldn't be so bad but I've been feckin pleasant with her and didn't even bully. I was shaking like a leaf. I'm mad now though. My mum said she would make her into a woman!!!"

188. On 31 December 2023 Ms Davidson returned to work. She had been in the role of Clinical Nurse Manager on an interim basis for about three weeks. She did not have experience of or training in investigations. Dr Searle informed Ms Davidson of the Christmas incident involving the claimant and second respondent, that the claimant had walked out of the resus room, and had not done observations on a patient when the second respondent had walked in. Ms Davidson was informed that the claimant had been placed on special leave. As there were still no HR staff available for advice Ms Davidson decided that the special leave should continue until that could be obtained on 3 January 2024, after the new year holiday.

189. The second respondent drafted a document as a formal complaint on 31 December 2023, but did not send it at that stage.

190. Also on that day Mr Doyle emailed Dr Searle, Ms Davidson, Ms Curran, Ms Shepherd and Ms Malone with the said document on Responding to Hate Incidents.

January 2024

191. On or around 1 January 2024 Ms Davidson called the claimant and advised her that the special leave would continue to 3 January 2024 that being when HR staff returned to work after being on holiday.

192. On 2 January 2024 Ms Malone returned to work after being on holiday. She emailed and sent by internal message an extract of the Datix report to colleagues Ms Belinda Morgan, Ms Angie Shepherd, Ms Bumba, Ms Davidson, HR officers and others that day and sought an urgent call the following day for HR advice on next steps.

193. On 3 January 2024 Ms Davidson decided to place the claimant on suspension. She took that decision after having had advice from Ms Jackie Herkes of HR of the first respondent [as referred to below], after discussion with Dr Searle who told Ms Davidson about alleged incidents when the claimant had not communicated with the second respondent with regard to a patient on two occasions, and separately from Ms Gillian Malone, the first respondent's Head of Nursing. In her call with Ms Malone they discussed the risk assessment that Ms Davidson had undertaken (which was not before the Tribunal) and any mitigations that could be put in place,

and the option of alternative work in another department was considered. Ms Davidson explained that she had a patient safety concern as it was suggested that on two occasions the claimant had left a cubicle as she did not want to work with the second respondent.

194. Ms Malone's advice was that the claimant should be suspended, that there would need to be an investigation and that Ms Davidson would be the lead investigator given her role as Clinical Nurse Manager. Ms Davidson decided to act on that advice, and to suspend the claimant.

195. Ms Herkes wrote to HR colleagues, copied to Ms Davidson, on 3 January 2024 setting out the advice she had given. It stated that suspension was a last resort, not to be used if there were other options, commenting that Ms Davidson felt that it was almost impossible to keep the claimant and second respondent apart in the department, and that she had spoken to Ms Malone. It included that Ms Davidson "believes that there is a patient safety issue due to the seriousness of the allegation and therefore wishes to suspend".

196. Ms Malone also emailed her manager Ms Norma Beveridge, Director of Nursing, and Mr Iain MacLeod, the Deputy Medical Director (Acute) of the first respondent, with the Datix report that day. Ms Beveridge responded on the same day that "This is a very serious allegation and the potential for significant reputational damage. Urgent HR advice is required. Please let me know what the HR response is and if necessary I will escalate to Sandra Raynor." Ms Raynor is Head of Workforce Planning and Resourcing at the first respondent. Ms Malone sent the Datix to Mr MacLeod as the incident involved the second respondent as a junior doctor. He replied that he would update the Director of Medical Education and the Medical Director for their information.

Suspension

197. Ms Davidson decided to suspend the claimant after discussion with Ms Malone on 3 January 2024, who had advised that course of action. Ms Davidson did so to allow investigation of the allegations made, and in order she thought to protect both the second respondent and the claimant. She had regard to concerns she had over whether patient safety had been affected by how the claimant had, as she understood it, interacted with the second respondent, and a concern that the claimant had breached the NMC Code of Conduct. She wished to avoid any further incidents between the claimant and second respondent which if they occurred could impact on the claimant's regulatory position, and thought that it would take time to arrange rosters to allow the investigation.

198. Ms Davidson completed a suspension record document. Under the reason for suspension she wrote "In accordance with the workforce conduct policy and the serious allegation of bullying and harassment it was deemed

necessary to suspend Sandie with immediate effect until the matter is able to be investigated, HR guidance sought." No written risk assessment document was prepared by Ms Davidson. She completed a checklist document for the suspension.

199. Ms Davidson telephoned the claimant that day [3 January 2024] and made reference to having a meeting to discuss the incident. The claimant said that she was near the hospital and would come in. She came to the office Ms Davidson used. The claimant attended the meeting without being aware of the possibility of suspension, and was not informed in advance of the possibility of having representation from her union at it. It was with Ms Davidson and with Ms Angie Shepherd, Ms Davidson's Manager, at which Ms Shepherd advised the claimant of her immediate suspension.

200. Dr Searle emailed the second respondent on 3 January 2024 stating that Mr Doyle was now involved in investigating the incident and wanted to pass on his support to the second respondent. She said that he and the senior nursing team were taking the incident very seriously, and wanted to reassure the second respondent that the second respondent would not have to work with the claimant again.

201. Also on 3 January 2024 the second respondent emailed Ms Donnachie of the BMA attaching a draft of a formal complaint. She responded on 8 January 2024 to state that Mr Ronald was back from leave and would be in contact with the second respondent.

202. The claimant sent a message to a group of colleagues with whom she had been on holiday to inform them of her suspension. One replied on 3 January 2024 to the effect that it was ridiculous, and another that it was "horrendous. Where are your rights, the world's gone mad. Should have a separate changing room for non male/female….."

203. The suspension was confirmed by letter to the claimant from Ms Davidson of 4 January 2024, which said that the meeting had proceeded because of a delay in representation becoming available. It also advised her that Ms Davidson would be arranging an investigation under the NHS Scotland Workforce Policies Investigation Process. It informed her that there were concerns in relation to "alleged unwanted behaviours towards another member of NHS Fife staff". The letter informed her that Ms Michelle Gilmour, Service Manager, was her Designated Contact Person, and noted that the role of that person was outlined in a guide to suspension which was enclosed. It stated that during suspension she should not access her work email or visit her office base, but did not instruct her specifically to maintain confidentiality.

204. On 4 January 2025 the second respondent met Dr Currer and Ms Davidson. The second respondent was informed that there was to be an investigation, that the claimant had been suspended pending that

investigation. The purpose of the meeting Dr Currer considered was to reassure the second respondent that the second respondent would not be working on shift with the claimant.

205. In the period 3 – 5 January 2024 Ms Davidson spoke to Ms Bumba, who had been on holiday until 3 January 2024 and seen the Datix report on her return. Ms Bumba advised that from the terms of that Datix report it appeared that the incident had been unpleasant, that it could be discriminatory and advised that she contact Human Resources.

206. In that same period Ms Herkes, Ms Sinclair-Forrow and Ms Jorgensen all of HR at the first respondent exchanged emails with regard to the matter. Ms Jorgensen asked on 4 January 2024 “I am assuming the patient safety concern relates to the potential for patients undergoing a similar process being treated in a similar manner but do we have any evidence to support this concern, as it’s possible that this nurse’s issue relates only to this doctor? Let’s see what is documented in the risk assessment.” Ms Herkes replied that “we have no evidence….I heard loud and clear that the issue was sharing the changing room.”

207. Their opinions as expressed in the emails were to the effect that the risk could be managed. The HR advice to Ms Davidson had not been to suspend the claimant. An email from Ms Herkes summarising comments in a discussion with Ms Davidson included that there was a belief of “a patient safety issue due to the seriousness of the allegation and therefore wishes to suspend.” A later email noted that advice had been taken from the Head of Nursing, Ms Malone, which was to suspend. Reference was made to a staffing crisis and “how it was ludicrous to have a nurse at home, 2 nightshifts a week, but the response was what if there is a similar situation in another area.”

208. The claimant and second respondent were not rostered to be on the same shift in January 2024.

Investigation planning

209. On 5 January 2024 Mr Doyle emailed Ms Davidson with links and attachments "to help start planning investigation.” He referred to having a meeting with her later that morning. The attachments included a partly completed planning document much of which he had populated. It did not have a completed start or end date, but stated in relation to when/where notes to be taken by: “As soon as possible for both parties would be supportive.” Ms Davidson prepared an Investigation planning document, consisting of one page with the "issues that need to be explored/clarified” stated to be “incident in Changing Room. Alleged exclusion from interacting with person.” It stated that the investigation meetings were to be completed by Ms Davidson and Ms Mechelle Sinclair-Forrow [the date on which that form was completed was not given in evidence].

210. Also on that date Dr Currer emailed Dr Melvin Carew the consultant who was the clinical lead for the department, Dr Searle, Ms Davidson, Ms Curran and Ms Harris. It had the subject line "Protected characteristic incident". It referred to a discussion and a "need to know" group, with commentary that included the following:

> "…..The lead for the investigation has yet to be determined but will likely be Jamie Doyle or Angie Shepherd. Esther cannot do it as she has been involved in the discussions with Sandie previously.
>
> Sandie has also been referred to the NMC. This information must not be shared with anyone outside this group……Esther and I updated Beth yesterday and reiterated that the behaviour was unacceptable…..Please let the group here know of any updates/further conversations to avoid the risk of foot-in-mouth syndrome!"

211. The claimant had not been referred to the NMC. None of the recipients replied to that email.

212. On 7 January 2024 Dr Carew emailed Dr Searle, and all the department's consultants, in response to her message of 29 December 2024 adding "I just wanted to say that the incident is being investigated and Beth is being supported."

213. On 9 January 2024 Ms Davidson made a referral to the first respondent's occupational health team to address whether the claimant was fit to attend an investigation meeting.

214. On 10 January 2024 the claimant posted a message to a group of friends responding to a message from one of the group referring to the second respondent: "that sounds like it. You forgot the shadow and pathetic voice. The trans have all the rights even when it comes to not telling the other staff. Only way I can get around this is by saying we weren't made aware of those protocols prior to it starting (I think)."

215. Another member of the group replied "Yes they should have a protocol for this as this not only affects both you and them, and obviously society has changed. I feel if they have full gender change then this would be appropriate, however if the [sic] still got their "bits" I feel they should use a disabled toilet as its unisex, especially a man.".

216. The second respondent was scheduled to go on secondment to ICU/Anaesthetics from the second week in January 2024 for a period of four weeks, such that the second respondent was not to be in the department during that period.

217. On 12 January 2024 Dr Searle emailed the second respondent and Ms Davidson with a copy to Dr Currer, Dr Carew, Ms Curran and

Ms Harris. It had as its heading “Re: protected characteristic incident.” Normally “Re” is added automatically when an email replies to an earlier email. It can be removed or altered by the sender, as can the content of the message including by deleting all or part of the original message. If a message is replied to by using “reply to all” the message automatically populates the individuals to whom it is sent in the same way as in the original message.

218. The message from Dr Searle stated that “Esther [Davidson] has taken the lead on investigating the incident….” and made reference to a summary of the details of the incident.

219. The second respondent responded on 14 January 2024 asking if it was “just the details of the incident at Christmas that Esther would like a summary of? I had planned to include some of the background in my formal statement as well. …” Ms Davidson replied the following day to state that “to commence the investigation it would be good to have the initial incident at Christmas” and that the background could be addressed at interview “which would enable me to investigate fully.”

220. On 15 January 2024 Mr Robert Ronald of the BMA who had been advising the second respondent sent the second respondent a draft statement prepared by the second respondent with his own comments, and asked for emails and attachments submitted or received in relation to the matter, a copy of any relevant policy/process if provided and anything else considered relevant.

221. On 16 January 2024 the second respondent replied to Ms Davidson to state that the second respondent was waiting on advice from the BMA. On 18 January 2024 Ms Davidson emailed the second respondent to seek the statement by 24 January 2024. The second respondent replied to the effect that that would be done.

222. Ms Davidson and Ms Sinclair-Forrow arranged an investigation planning meeting on 18 January 2024.

Second respondent’s further written report of incident

223. On 23 January 2024 the second respondent sent by email to Ms Davidson a document headed “Hate Incident 24 December 2023”. The document was copied principally from the draft of a formal complaint document that had been prepared and amended to include only the reference to the incident on 24/25 December 2023. The second respondent did so as that is what the second respondent understood was being requested at that stage from Ms Davidson’s email of 15 January 2024. The second respondent understood that background or earlier issues would be addressed at an investigation meeting from what Ms Davidson had stated in that email.

224. On 25 January 2024 Ms Davidson wrote to the second respondent to acknowledge that and stated “As a department this is not the behaviour we would expect or tolerate. There will be a full investigation carried out….”

February 2024

225. On 2 February 2024, Ms Angie Shepherd, Service Manager and Ms Davidson’s line manager, reviewed and decided to continue the claimant’s suspension. A letter was sent to the claimant that day by her to confirm that, which referred to “the investigation is still ongoing”. It was continued to 1 March 2024.

226. By that date the claimant had not been assessed by occupational health (OH) as being fit to attend the interview, and on 4 February 2024 Ms Davison emailed Ms Malone that delay had been caused by the claimant not having had the OH assessment and said that she felt that without HR support she would be unable to progress the investigation. Ms Malone replied on 5 February 2024 with advice including the need for a suspension review within four weeks. She separately sought to expedite the OH assessment. She was aware that there had been delays at OH due to pressure of work.

227. An appointment was sent to the claimant for an interview on 9 February 2024 but she did not attend. A later date was arranged.

228. On 13 February 2024 Ms Anne Hamilton, HR Adviser, emailed Ms Davidson asking about whether she had obtained statements from the second respondent and Senior Charge Nurse, by which she meant Ms Curran, and whether she had heard from OH about the claimant’s fitness to participate in the investigation. Ms Davidson replied and after a further exchange on 14 February 2024 sent an email attaching statements from the second respondent and Ms Curran, and seeking support for the investigation. Ms Hamilton replied on the same day to advise that Ms Davidson arrange meetings with the second respondent and Ms Curran, referring her to a meeting template, and noting that this was Ms Davidson’s first investigation.

229. Ms Curran sent Ms Davidson her statement that day.

230. On 15 February 2024 the claimant’s solicitor wrote to the first respondent stating that they had been instructed to raise proceedings against the first respondent alleging direct discrimination, harassment on the grounds of sex and gender critical belief and victimisation under the Equality Act 2010, and whistleblowing detriment under section 47B of the Employment Rights Act 1996. It included the following narrative:

> “It is understood that from on or about late 2023, management at the Victoria Hospital has allowed a trans identifying male junior

doctor (who uses the name “Beth Upton” and who hereinafter is referred to as “B”) unfettered access to the A & E female changing room. It is alleged that the decision to permit male people access to a workplace “female only” changing room contravenes Regulation 24 of the Workplace (Health, Safety and Welfare) Regulations 1992 and amounts to sex discrimination for failing to provide suitable female only changing facilities (i.e. where women are not forced to share with members of the opposite sex). Further, this policy was not properly communicated to staff in advance and was implemented without any type of risk assessment, equality impact assessment or consultation with unions or female staff.

On or about mid November 2023 B entered the female changing room when our client was in a state of undress (she was wearing only her trousers and bra) (“the first incident”). Our client’s dignity was violated, and she was extremely uncomfortable and intimidated by the presence of a man and so left the changing room and waited outside in the corridor re-entering only once B had left.

Shortly after the first incident, our client raised concerns with her Line Manager, Esther Davidson (Acting Clinical Nurse Manager) (“ED”) stating that she found it upsetting and uncomfortable that a man was being allowed access to the female changing room. ED appeared sympathetic and told our client that she would get the matter sorted.

On or about early December 2023, there was an almost identical repeat of the first incident (“the second incident”). A week or so after the second incident our client again raised her concerns with ED who told her that she had raised the matter with HR but “never got anywhere”. Our client once again told ED how she was being negatively impacted by having to share changing room facilities with a man.

Our client was on shift on Christmas Eve 2023 when at around midnight she found herself alone in the female changing room with B. Our client is going through the menopause and had an unexpected heavy period. She entered the changing room in order to fetch a clean pair of pants from her locker to change into. Our client did not want to start changing in the presence of a man. B then started to undress in front of our client; specifically, B started to remove his trousers. Our client immediately turned her face away from B so as to avoid having to witness him undress in front of her. Our client then told B that she found him undressing in front of her unacceptable and was embarrassed and intimidated by his presence in the female changing room. She told B that she had no issue with how he identified but asked if he could try to understand

> that his presence in a female changing room distressed and frightened some women. It is alleged that B was indifferent to our client's upset telling her that he had as much right to be in the female changing room as she did (which our client denied). B then informed our client that there were protocols she could follow if she were unhappy. Our client contends that she felt forced to raise her concerns directly with B because of management's failures to act on her two complaints made to ED and referred to above."

231. The email addressed matters on 30 December 2023 and a meeting she said was on 4 January 2024 when she was suspended, and also protested the claimant's suspension, argued that it was unlawful. It referred to the impact on the claimant's health, and stated that the claimant contended that other female colleagues are upset by the second respondent's presence in the female changing room but the workplace culture actively discourages the raising of concerns. It sought confirmation that the suspension be lifted immediately and that the female only changing room will be returned to female only. It suggested the provision of a separate space for staff who do not wish to use either male or female changing room facilities be provided.

232. Ms Malone acknowledged receipt of that message on 19 February 2024 and confirmed that it had been passed to NHS solicitors.

233. On 21 February 2024 Ms Michelle Gilmour, the first respondent's Service Manager who had been appointed as the claimant's designated contact person as a result of the suspension, to provide support to her, emailed the claimant a copy of the Datix report that had been made by the second respondent.

234. On 23 February 2024 the claimant sent a message to her friend Sandra asking if she had any more details about the second respondent and added "it would help to know if he's a serial complainer."

Early Conciliation

235. The claimant commenced Early Conciliation in relation to both respondents on 26 February 2024.

Review of suspension

236. On 26 February 2024 Ms Malone emailed Ms Jorgensen about appointing a manager to review the suspension. She did so in response to Ms Jorgensen who had asked "anything further on the suspension being lifted?" Ms Shepherd who had been involved was by then absent through illness.

237. Ms Charlotte (Lottie) Myles was appointed by Ms Malone to review the suspension. Ms Malone and Ms Myles had a brief discussion about the

position on 27 February 2024. Ms Malone emailed Ms Jorgensen and others with an update and referred to the claimant wishing to be accompanied by an MSP. Ms Jorgensen replied by referring to the Once for Scotland policy approach to representation which was by trade union representative or colleague.

238. Ms Myles was provided with little documentation in relation to the decision to suspend, but had an outline summary of the position left on her desk [which was not before the Tribunal]. She did not have sight of any written risk assessment carried out when the decision to suspend was first made.

239. On 27 February 2024 Ms Myles called the claimant to inform her of her role in reviewing the suspension. The claimant said that she wished to be represented by her MSP (as recorded in documents although it may have been her MP) at any meeting. Ms Myles sought HR advice on that issue. Ms Jorgensen replied that day recommending that the claimant be informed of the policy of representation by a trade union representative or work colleague.

240. Ms Malone met Ms Myles that day, after which she emailed colleagues about the issue of representation. Also on that date Ms Malone had a discussion with Ms Anne Hamilton of HR. They discussed that the claimant had raised a concern over the second respondent using the female changing room with Ms Davidson prior to the incident on Christmas Eve, and concluded that Ms Davidson should not be the investigator as she was a potential witness.

241. Also on that date Ms Jorgensen emailed Ms Raynor with a copy to Ms Hamilton and referred to the claimant's wish to be accompanied by her MSP, referred to the policy about being accompanied, and raised whether Ms Davidson was the right person to investigate the incident as the claimant stated that she had raised her concerns with her manager, which Ms Jorgensen assumed was Ms Davidson.

242. On 28 February 2024 Ms Hamilton emailed Ms Raynor and stated that she would ask Ms Malone to suggest an alternative investigating officer. She also emailed Ms Raynor and Ms Jorgensen in reply to the latter's email, and stated that Ms Malone would give consideration to changing the investigating officer. It also noted that an OH report on the claimant was awaited.

243. On the same day OH issued a report to the first respondent which had followed a telephone discussion with the claimant that day. The claimant had agreed to participate during the call. The report confirmed that the claimant was passed fit to undertake an investigation meeting. It referred to the adverse impact of matters on the claimant, treatment given by her GP and that to delay the investigation meeting would impact negatively on her mental health.

244. On 29 February 2024 Ms Malone had a discussion with Ms Angela Glancey, Clinical Service Manager, and another Service Manager, and asked if one of them had capacity to undertake the investigation. Ms Glancey said that she did, and Ms Malone confirmed that she would be the investigator accordingly.

Investigation

245. On 29 February 2024 Ms Glancey commenced a disciplinary investigation in relation to the complaint by the second respondent. It was carried out under the NHS Scotland Workforce Policies Investigation Process ("the Investigation Process"). She went on holiday immediately after that date.

March 2024

246. On 7 March 2024 the claimant and her trade union representative Mr Stuart Fraser attended a suspension review meeting with Ms Myles and Ms Davidson. The claimant gave her account of the occasions when she had left the changing room when the second respondent was present, and the incident on Christmas Eve. The claimant stated that she would return to work under protest. Ms Myles asked the claimant about her position in relation to dealing with a trans patient, and was assured that she would treat a trans patient the same as any patient. Ms Myles accepted that assurance.

247. During the meeting, Ms Davidson and Ms Myles asked the claimant if she would be receptive to a return to work at a different workplace temporarily whilst the investigation was ongoing. That possibility is a part of the Conduct Policy and Investigation Policy. The claimant did not wish to do so. Ms Myles did not consider that there was a risk to patient safety from alleged prior acts of the claimant in leaving a work position when the second respondent was there, in light of the absence of any written record of such an issue being raised at the time in accordance with procedure to do so. There was no written record of any complaint against the claimant by a patient or member of staff. Ms Myles considered that there was no sufficient reason for the claimant to remain on suspension.

248. Ms Myles told the claimant that she would return to work and arrangements for that were discussed. Ms Davidson and Ms Myles told the claimant that they would try to ensure that she and the second respondent were not rostered for the same shifts and suggested that the claimant return on day shifts initially. The claimant requested that the first respondent not permit those she regarded as men to use the female changing room. Ms Myles stated that this would be difficult given the advice from Equality and Diversity, by which she meant the advice from Ms Bumba.

249. Ms Myles reported to Ms Malone and Ms Davidson by email after the meeting. Her report indicated that the claimant deliberately misgendered the second respondent during it by calling the second respondent “he” during it. There was also reference to a possible return to work on 18 March 2024 on different shifts to the second respondent.

250. A risk assessment form was completed in relation to the review of the suspension. In it Ms Myles did not consider that there was a risk to patient safety in the claimant returning, having been assured on that by the claimant. She was also informed by Ms Davidson that the claimant had not had any complaints against her from patients in her 30 years of service. The form recorded the terms of the conversation with the claimant which included exploring the possibility of the claimant working in another department which the claimant did not wish to do, or working on alternative shifts to the second respondent which the claimant was content with to limit exposure to the second respondent, which Ms Myles and Ms Davidson considered “possibly a good idea.”

251. The claimant’s solicitor and the first respondent’s solicitor exchanged emails that day [7 March 2024]. At that time the first respondent’s solicitor had not been instructed by the second respondent.

252. On 8 March 2024 Ms Malone reported the position to Ms Jorgensen copied to others by email, stating that a further risk assessment was supportive of returning the claimant to work on a different shift pattern to that of the second respondent, and that the claimant would return to day shift work so as to be supported by a manager at band 6 or 7 level. Such manager support could not be provided on night shift. The return to work was anticipated to be on 27 March 2024.

253. Ms Myles spoke after making her decision to Dr Searle and Dr Currer separately, both of whom did not agree with that decision. They raised the issue of patient safety. Ms Myles asked if there had been any documentation of any concern at the time of any incident as required by procedure, and it was confirmed that there had not been. She stated that that lack of documentation had been part of the reason for her decision. Ms Myles also spoke after the meeting to Ms Davidson and Ms Curran, both of whom did not agree with the decision. Ms Malone appeared to Ms Myles to be surprised by the decision and asked her for her reasons for it. When Ms Myles explained those reasons Ms Malone agreed with them.

254. On 12 March 2024 Ms Myles emailed the claimant to tell her that she was still trying to catch up with Ms Davidson to work out a suitable shift pattern, but proposed potential days for returning to work initially on 27 and 28 March 2024. On 13 March 2024 Ms Hamilton forwarded an email from Ms Davidson dated 14 February 2024 to her and attached statements from the second respondent and Ms Curran. Those were the only statements obtained by Ms Davidson from her investigation.

255. At around the same time Ms Davidson provided a folder of documents for the investigation which contained the statements from the second respondent and Ms Curran, the checklist she had completed in relation to the claimant's suspension, the Bullying and Harassment Policy and the Workforce Investigation Policy. Ms Glancey met Ms Hamilton at about that time to discuss how the investigation would be undertaken. The names identified at that stage for interview were the second respondent and claimant, Ms Davidson, Ms Curran and Dr Searle.

256. On 15 March 2024 Dr Searle emailed the second respondent to state that an independent investigating officer had been appointed, not from the department, and that Ms Hamilton wanted to reassure the second respondent that the investigation is definitely progressing.

257. On 23 March 2024, the claimant called Ms Harris about her returning to work, who told her that she would be working two half day shifts on a graduated return to work. On 24 March 2024 she called again and spoke to Ms Davidson, who explained that she had been advised to return the claimant to work on short day shifts to enable her to have support from senior staff. The claimant explained that she was unable to work day shifts and agreed to take that week and the following as annual leave.

258. On 24 March 2024 Ms Davidson emailed Ms Myles stating that the claimant had contacted Ms Curran the day before stating that she "was not willing to work on days" [as opposed to the night shift]. She stated that she had received advice from HR of the first respondent that it was reasonable for the claimant to return on days when senior staff would be available. She said that that was the view of senior charge nurses and was her own view.

259. On 25 March 2024 the claimant's solicitor wrote to the first respondent's solicitor to ask the latter to remind the first respondent that the claimant's continuing absence from the workplace was an ongoing detriment and evidence of on-going discrimination. The first respondent's solicitor replied confirming that the message had been shared with the first respondent, and that he was now instructed to act for the second respondent.

260. On 28 March 2024 Ms Myles spoke to the claimant who was adamant that she did not wish to return to work on day shift. Ms Myles emailed Ms Davidson and Ms Curran to ask for details of the claimant's shifts. Ms Curran replied that day with those details.

261. That day Ms Myles emailed the claimant about her suspension, the possibility of a short term return to work on days which she [Ms Myles] and the claimant's RCN representative felt supportive, with a different shift pattern to the second respondent. It referred to the claimant not agreeing to do so and the reinstatement of suspension on 1 April 2024, and

proposed a meeting to discuss it while they sought "to resolve and further explore matters."

262. Ms Myles gave reasons for the return to day shift, being firstly to support her return for about a month before resuming night shift, secondly she referred to a need for proper oversight of the claimant's return to work, including oversight of her interactions with staff and patients, and said that "part of the allegations/concerns to be investigated relate to the care of patients", and thirdly to ensure that there was no possible interference with the investigation. That letter was the first occasion on which the claimant had been informed by the first respondent of any issue over her care of patients being investigated. Ms Myles considered that having a senior member of staff present when the claimant returned would assist the claimant should any issue arise when she was at work partly in an effort to assist the claimant.

263. That day Ms Curran sent Ms Myles details of allocated shifts for the claimant on a graduated return to work.

April 2024

264. On 1 April 2024 the claimant emailed Ms Myles with a letter setting out why for her working on day shift was a difficulty, related to the care of her dog. She said that her family was able to care for the dog at weekends and that she could return to work for a four week period working on Saturday or Sundays from 1.30pm for a six or twelve hour shift.

265. Ms Myles replied to the claimant by email that day stating that she believed that that could be accommodated for a 4 week trial period and that she would have the shifts allocated as soon as possible. Ms Myles emailed Ms Davidson about that, and arrangements for managerial support were made. Ms Myles received from Dr Searle also that day details of the second respondent's shifts and replied to state that the claimant's return to work could be accommodated so that there would be no opportunity for the claimant to have contact with the second respondent.

266. On 2 April 2024 the claimant told Ms Myles that she would return to work, under protest, on weekend day shifts for an initial four week period. On the following day the claimant's solicitor wrote to the first respondent's solicitor to state that she wished to place on record that she only agreed to the conditions for return to work "under duress" as the first respondent had made it clear that had she not agreed to return under those conditions her suspension would have remained in place.

267. Also that day Dr Searle sent Ms Myles details of the second respondent's shifts by a spreadsheet.

268. On 3 April 2024 the claimant's solicitor wrote to the respondents' solicitor that the claimant was returning to work under protest. The letter set out a

request for information and documents. That included the risk assessment referred to in the letter to the claimant of 28 March 2024 and full details of the patient care allegations including a) the date made b) the identity of the person making them c) to whom made d) in what form made and e) the nature of the allegations(s). The letter alleged that the allegation as to patient care was false.

269. Also that day Ms Malone emailed Ms Davidson about the level of seniority of the manager required for the claimant's return to work suggesting that it could be at band 6 or above. Ms Davidson replied that "it was just to maintain safety as this has not been discussed with any of the band 6 nurses."

270. On 4 April 2024 the claimant and Ms Myles exchanged messages about the shifts to return to work.

271. On 6 April 2024 after the second respondent learned of the claim being pursued against the second respondent as an individual, and after the second respondent was told at a meeting with Ms Myles that the claimant would be returning to work on a phased basis on different shifts to those of the second respondent, the second respondent commenced a period of eight weeks of sick leave, followed by a period on a phased return to work.

272. An Early Conciliation Certificate was issued to the claimant on 8 April 2024.

273. On 9 April 2024 Ms Myles started the completion of a risk assessment form in relation to the review of suspension of the claimant, the template for which had been sent to her that day by Mr Doyle.

274. On 10 April 2024 Ms Glancey sent background papers to Ms Myles, after which Ms Myles completed the form. On the same day Ms Myles emailed Ms Glancey asking for the notes she had, and whether dates had been scheduled for the investigatory meetings. Ms Glancey replied that day sending what she described as the "paperwork" she had, and stating that letters for meetings had not been sent and she would speak to Ms Hamilton to have that done.

Investigation allegations

275. Ms Glancey returned from a period of annual leave of about two weeks on or around 12 April 2024. She spoke to Ms Mechelle Sinclair-Forrow who was the HR member of staff allocated to assist her in the investigation. Ms Glancey was informed that Dr Pitt was a person who should be interviewed. Ms Glancey made arrangements to send formal letters of invitation to witnesses, which had not been done during her leave. By then Ms Glancey had had sight of the Datix report and the Guidance in relation

to Hate Incident and the written complaint by the second respondent dated 23 January 2024.

276. On 12 April 2024 the claimant was invited by letter from Ms Glancey to an initial meeting under the Investigation process. It gave the following by way of explanation for the delay in matters to that point:

> "I appreciate the time that has passed since [the complaint] was first submitted and would like to take this opportunity to apologise on behalf of NHS Fife for the delay in taking this forward. I have been advised that several factors have impacted on this being progressed, some of which relate to unplanned staff absences, other leave, requests for statements and identifying a suitable manager to investigate the complaint."

277. It provided the clamant with details in relation to the allegation as follows:

> "Incident – End of shift midnight 24/12/23 into 25/12/23
>
> Whilst Dr Beth Upton, who is a transgender woman, was in the changing room, you came in. She went to the bathroom, and on leaving the cubicle noted you were still in the changing room. You stated to BU that you don't think it's appropriate that she use the changing room. You advised that you felt intimidated by her and stated it's the women's changing room, you can't be in there, its wrong and that lots of others feel this way.
>
> BU explained that she was very sorry that you feel intimidated, but she has been told she can change there. You kept telling her you find her intimidating. You stated you has [sic] no problem with her and understands you're going through 'some process' but she is not a woman and can't be in here. You asked her 'What are your chromosomes?'. BU explained she was sorry you are intimidated but BU is a woman and is allowed to use the space. BU advised that if you have concerns could you please raise them formally as she did not think this was the most appropriate time, place or process for this conversation.
>
> You continued to tell BU you are intimidated by her, and you told her she is not a woman. You told her you wouldn't change in front of men because you have had a bad history with men. BU advised that she understood and sympathised. You stated that she doen't understand and doesn't sympathise enough, or she wouldn't be changing in that changing room.
>
> BU again advised she was sorry you were intimidated but re-iterated she did not want to have this conversation there, she didn't think it was appropriate, BU said she was not sure what she could do to resolve this, you responded to say you could not change there

> and that would help. You stated that women have a right to feel safe, you said ‘’it’s just like that person in the prisons’.
>
> BU advised that she re-iterated on more than one occasion that she felt it was an inappropriate time, however, you would not let it go and continued to repeat what had already been said.”

278. It referred to maintaining the confidentiality of the investigation process, and attached the NHSScotland Workforce Policies Investigation Process, Flowchart and Guide for Employees. It was copied to the claimant’s union representative Mr Stuart Fraser, and to Ms Sinclair-Forrow.

Return to work

279. The claimant returned to work on 14 April 2024, working from 1.30pm to 8pm, and did so on again 20, 27 and 28 April and 4 and 11 May 2024.

280. On 15 April 2024 the respondents’ solicitor wrote to the claimant’s solicitor with commentary on matters, and stated in relation to the investigation “I do hope that matters can now progress speedily as I acknowledge there has been a significant delay.” The claimant’s solicitor replied the following day asking that instructions be taken on the patient care allegations seeking fair notice of them.

281. On 16 April 2024 Ms Sinclair-Forrow emailed the administration team, Ms Glancey and others with the subject line of “Meetings SP” being a reference to the claimant, stating that the “CLO are chasing for this to progress as a matter of urgency”.

282. On the same date Ms Sinclair-Forrow emailed Ms Glancey about asking Ms Davidson for a statement.

283. On 17 April 2024 Ms Glancey emailed the second respondent stating that she had “the statement provided at the time but if you would like to add any further statements please can you send them to me beforehand.” The second respondent emailed Ms Glancey in reply about the investigation and gave Dr Searle as the person to be the work colleague at it. The second respondent asked if Ms Glancey had the statement just detailing the incident or the summary including the incidents leading up to it.

284. Ms Glancey emailed the second respondent on 18 April 2024 and stated that Dr Searle was to be spoken to as a witness and it would be preferrable if someone else could be asked to support the second respondent but “that if the second respondent would prefer to retain Dr Searle in that role that’s OK.” It suggested a meeting on 8 May 2024.

285. On 18 April 2024 Ms Sinclair-Forrow emailed Ms Glancey stating that Ms Davidson had advised that there were issues around the claimant leaving cubicles and work areas where the second respondent was in attendance.

That was the first time that allegation had been brought to Ms Glancey's attention.

286. Also on 18 April 2024 Ms Glancey wrote to each of Ms Davidson, Ms Curran, Dr Searle and Dr Pitt inviting them to an investigation meeting. The letter included a standard provision as follows:

> "If you have not already done so, it would be helpful if you are able to provide me with a statement outlining your awareness of these issues before we meet. Alternatively, we can explore this with you further at the meeting.
>
> In the meantime, you should avoid discussing the case with anyone other than your representative to ensure your confidentiality and that of the other parties involved."

287. The policy provided that the person could be accompanied by a trade union representative or work colleague.

288. Further on 18 April 2024 the respondents' solicitor emailed the claimant's solicitor regarding the patient care allegations and said that he didn't have anything to add. He agreed that if there are specific allegations the claimant will need clarity on them and a chance to respond.

289. On 19 April 2024 Ms Malone confirmed in an email to Ms Belinda Morgan of the first respondent that the return to work of the claimant was going well, and stated that as the suspension was revoked there was no need for a Designated Contact Person.

290. On 23 April 2024 the second respondent emailed Ms Glancey and said that "I will aim to bring someone else with me" other than Dr Searle.

291. On 24 April 2024 Dr Pitt provided Ms Glancey with a statement.

292. On 25 April 2025 Dr Searle emailed Ms Glancey stating that she felt strongly that she should be allowed to accompany the second respondent to the interview to support the second respondent. Ms Glancey replied that day confirming that the second respondent had a prior appointment and could not attend a meeting on the following day.

293. Ms Glancey met Ms Davidson, Ms Curran, and Dr Searle as part of the investigation on 26 April 2024. The notes of their meetings in each case is a reasonably accurate record of it. The meeting with Dr Searle took place before that with the second respondent so that Dr Searle was able to accompany the second respondent to it. That had been described as not ideal as Dr Searle was a witness, in an email from Ms Glancey on 18 April 2024.

294. After each meeting a written note was provided, and sent to the person interviewed who had the opportunity to propose changes. Ms Davidson and Dr Searle made some changes to the notes sent to each of them.

295. On 30 April 2024 the second respondent was invited by letter to a meeting on 9 May 2024 by Ms Glancey

296. On a date not given in evidence Dr Searle spoke with Ms Ashraf who the second respondent had said may be able to give evidence. Ms Ashraf told Dr Searle that she did not wish to get involved with the matter.

Claim Form

297. The Claim Form in these proceedings was presented to the Tribunal by the claimant on 2 May 2024.

Interview of second respondent

298. On 6 May 2024 after further exchanges of email with Ms Glancey the second respondent stated that "as long as it does not negatively impact the investigation I would like to bring Dr Searle with me as my supportive person."

299. On 9 May 2024 the second respondent attended a meeting with Ms Glancey in order to provide a statement in relation to the investigation. A note of that meeting was taken, and sent to the second respondent afterwards. When that note was prepared the recording of the audio of that conversation was destroyed by the first respondent, as was their general practice. Also that day Ms Glancey met Dr Pitt. A note of the meeting was taken.

300. The claimant attended a brief initial meeting with Ms Glancey, attended also by Mr Fraser and Ms Sinclair-Forrow, at which Ms Glancey explained that there would be interviews held and that she would be in touch again within two weeks. [No note of that meeting was provided to the Tribunal]

301. On 13 May 2024 Ms Glancey emailed the second respondent asking who the nurses were on the shifts relating to what she described as the resus incident and the incident of the patient leaving without being seen. The second respondent replied on 14 May 2024 stating that

> "Unfortunately I can't remember with certainty who the other nurses were on the shift when the resus incident occurred. I could make an educated guess but I couldn't be certain as it was a while ago. I could probably work out the day it occurred by cross-referencing rotas with the reg who was on but I'm not sure, sorry. I appreciate this means it may not be able to be included in the report."

302. In relation to the other incident the first [misspelt] name of the person was provided, not a second name which was not known. Ms Glancey identified

that person. Ms Glancey did not review shifts of the claimant and second respondent in relation to the resus incident.

303. The second respondent wished to review the note of the meeting and after exchanging emails with Ms Glancey on 14 May 2024 and on the following day, when Ms Glancey informed the second respondent that the recording of their meeting had been deleted once the notes were prepared, met with Ms Glancey to discuss its terms. No note of that meeting was taken, and no third party was present.

304. On 14 May 2024 Ms Sinclair-Forrow emailed Ms Glancey amending a draft letter stating "I have added a third allegation in related [sic] to leaving changing rooms as it is not about her personal choice, it is to demonstrate on any other occasion she has left the changing room but she chose to remain in the changing room with Beth on her own which was not her normal behaviour and again this allows us to tease out why she was there in the first place given we know she was not there to change."

305. On 15 May 2024 Ms Glancey intended that a letter was sent to the claimant which included an allegation that "On any other occasion when you have entered the changing room and Dr Upton has been present you have removed yourself from that situation and waited outside until Dr Upton had left the changing room however on the 24 December 2023 you made a point of remaining in the changing room on your own with Dr Upton." Letters are sent out by an administration team at the first respondent not Ms Glancey herself. The claimant did not receive that letter.

306. At the end of the four week period on weekend day shifts in around mid-May 2024, the claimant returned to undertaking two night shifts per week.

307. On 21 May 2024 the claimant's solicitor sent the respondents' solicitor an email informing the latter of a sexual assault on the claimant when she was 17 and outlining the circumstances. It was acknowledged the same day.

308. A revised note of the meeting held on 9 May 2024 was prepared by Ms Glancey after she met the second respondent to discuss the original note, which revised note was sent to the second respondent by email on 22 May 2024, who approved it by email reply on 23 May 2024.

309. On 24 May 2024 Ms Glancey emailed Ms Ashraf asking her for a statement. Ms Ashraf replied on 30 May 2024 to state that "due to limited information surrounding the incident I will not be providing a statement however I am happy to have a formal discussion regarding the matter."

June and July 2024

310. On 11 June 2024 the second respondent emailed a formal complaint document to Mr Adam Watson, the solicitor advising the first respondent, who in turn passed it to Ms Sinclair-Forrow stating "I assume this has been provided to the investigation team? It's undated but purports to be the complaint that started the investigation process?"

311. The document provided as a formal complaint included reference to the incident on 31 October 2023, amongst other matters. It concluded "I hope that by submitting this complaint it will be acknowledged that this behaviour is unacceptable and that steps will be taken to prevent it from happening again such as myself and SP not sharing shift times."

312. The formal complaint document was forwarded to Ms Glancey by Ms Hamilton on 12 June 2024.

313. On 13 June 2024 Ms Glancey invited Ms Ashraf to a meeting.

314. On 15 June 2024 Ms Glancey emailed the second respondent asking for a further meeting.

315. On 18 June 2024 Ms Ashraf emailed an administration assistant at the first respondent who had informed her of the location of the meeting asking about representation at it and the date of the incident. Ms Glancey replied that details could be discussed at the meeting.

316. On 26 June 2024 Ms Glancey emailed the second respondent to state that a meeting was not required at that time but would be arranged after other staff had been spoken to.

317. On or around 2 July 2024 Ms Bumba raised with colleagues press interest in relation to the claimant's circumstances. A meeting took place between Ms Nicola Robertson, Ms Belinda Morgan and others on 2 or 3 July 2024 on Teams during which Ms Bumba was contacted and asked for her advice. Ms Bumba reminded those present that the claimant was entitled to hold gender critical beliefs and that it was a protected characteristic under the Equality Act 2010. She also stated that the first respondent expected staff to show care and compassion.

318. Ms Sandra Raynor, Head of Workforce Resources & Relations of the first respondent, discussed the press articles with Ms Malone, five of which had been emailed to her and Ms Beveridge, amongst others, [the articles were not before the Tribunal] and emailed colleagues on 2 July 2024 about a suggestion that the claimant had "allegedly discussed the case in detail with work colleagues (in their own time) that has been reported to Esther and a statement from the staff member is awaited". It referred to the possibility of a new allegation, and suggested that the claimant be reminded of the expectation of confidentiality under the Conduct Policy by

her line manager. Ms Beveridge replied by email that day to state that there was "no real trigger to reconsider suspension because there is no robust evidence to support the rumours circulating."

319. Ms Malone contacted the NMC for advice in relation to the press interest. She decided that the claimant should be reminded as to confidentiality. Ms Malone emailed the claimants line managers Ms Curran and Ms Harris on 3 July 2024 asking them to remind the claimant of the requirement for confidentiality.

320. On 5 July 2024 shortly after the claimant had started her night shift the claimant was asked by Ms Harris to speak with her. She instructed the claimant to avoid discussing the case with anyone other than her representative to ensure her confidentiality and that of the other parties involved.

321. No other person involved in the investigation received a similar reminder.

322. On 11 July 2024 the claimant's solicitor emailed the respondents' solicitor about the instruction from Ms Harris, and asked "exactly what it is R1 is telling her to refrain from discussing and why."

323. Ms Glancey met Ms Ashraf on 18 July 2024 and the note of their meeting is a reasonably accurate record of it. Ms Ashraf stated that she remembers a conversation between the second respondent and claimant in relation to an incident when a patient had left without being seen, but also that she could not recall any of the conversation.

Invitation to investigatory meeting

324. On 19 July 2024 the claimant was invited to an investigatory meeting to address four allegations listed in the letter. It included enclosures of documents from the investigation. The allegations in that letter were as follows:

- "Between October 2023 and 18th of December 2023, you were carrying out observations on a patient within the Resus area of Emergency Department when Dr Upton came into the cubicle. Rather than complete what you were doing, you stopped, walked out of cubicle and told Dr Upton to complete observations herself. This is not normal practice as when patients come into ED, everyone has their own roles and responsibilities. Allegation is of failure to provide patient care.

- 18th of December 2023 you were working in the triage area when a child left without being seen by medical staff. Dr Upton asked for your advice and assessment, from triage and you refused to answer her, choosing to speak through a colleague

(HCSW) who was beside both of you. Allegation is of failure to communicate regarding patient care.

- On any other occasions when you have entered the changing room and Dr Upton has been present you have removed yourself from that situation and have waited outside until Dr Upton had left the changing room however, on the 24th December 2023 you made a point of remaining in the changing room on your own with Dr Upton.

- A complaint that was received in January 2024 which the complainer categorises as a hate incident. The incident was alleged to have happened during a night shift 24 – 25th of December 2023."

325. On 22 July 2024 the respondents' solicitor emailed the claimant's solicitor regarding Ms Curran's instruction and stating "The issue was ensuring confidentiality in terms of the investigation." It attached the email from Ms Malone of 3 July 2024. The claimant's solicitor replied on 24 July 2024 to state that the policy referred to had not been brought to the claimant's attention, asking for it, and stating that the claimant "cannot be prevented from discussing matters which are of a concern to her (and other colleagues) in the workplace, namely R1's alleged unlawful policy of permitting a man to use a female only workplace changing room."

August to October 2024

326. The claimant sent on 26 August 2024 a written statement to Ms Glancey in response to the letter dated 19 July 2024. She set out a detailed response to each of the allegations. In it she made allegations against the second respondent in relation to positions held before joining the department. Ms Glancey did not investigate those allegations considering them outside the scope of the investigation she was undertaking.

327. An investigatory meeting was held on 30 August 2024 between Ms Glancey, Ms Mechelle Sinclair-Forrow of HR, a note-taker, the claimant and her representative Mr Fraser. A note of that meeting is a reasonably accurate record of it. The meeting date had been postponed at the request of the claimant.

328. On 1 September 2024 Ms Davidson emailed Ms Glancey stating that she gave a pack with the risk assessment to Ms Glancey.

329. On 3 September 2024 Dr Searle emailed the second respondent with a copy to Ms Catriona Fullerton of the first respondent about a failure to cross check the second respondent's rota with the rota for the claimant, which led to a potential for them to be working that evening, and noting another similar issue for 26 September 2024. The second respondent did not work on either shift.

330. On 4 September 2024 Ms Glancey emailed the second respondent and Dr Searle apologising for the length of time the investigation was taking.

331. On 9 September 2024 Ms Sinclair-Forrow emailed Ms Glancey about a statement Ms Davidson made that she had given the risk assessment prepared for the claimant's suspension to Ms Glancey stating "but I am assuming she is referring to the suspension checklist that you have just sent me?"

332. On 10 September 2024 Ms Sinclair-Forrow emailed Ms Davidson stating that she was "muddling up the suspension checklist with the actual risk assessment." Ms Davidson did not further respond.

333. The second respondent and Ms Glancey exchanged emails on 22 and 25 September 2024. On 25 September 2024 the second respondent emailed Ms Glancey in response to a question she had asked about the incident on 24 – 25 December 2024, whether the second respondent had changed after leaving the toilet. The second respondent stated that the second respondent had completely changed before using the toilet. The second respondent stated that the conversation started at the sink, after which the second respondent walked around where the claimant was standing, next to the lockers, to get to a bag.

334. On 27 September 2024 Ms Glancey wrote to the claimant to arrange a meeting for further matters to be addressed to be held on 14 October 2024. The further matters related to the email from the second respondent on 25 September 2024.

335. On 27 September 2024 the claimant's solicitor emailed the respondents' solicitor noting that the minute of the investigation meeting with the claimant stated that Ms Glancey said that she did not want to look at the written statement the claimant had provided. The email stated that the documents had been sent specifically to be read by the investigating officer and that it was expected that they be considered in full. The respondents' solicitor responded on 27 September 2024 by stating that the email had been forwarded, and on 30 September 2024 referring to Ms Glancey had spoken further to the second respondent and that the documentation referred to in the earlier email "would be referenced in the eventual investigation report."

336. On 1 October 2024 the claimant's solicitor asked the respondents' solicitor for a note of the further meeting with the second respondent.

337. On 10 October 2024 Ms Glancey and Ms Sinclair-Forrow met to discuss the investigation.

338. The claimant sent a document to Ms Glancey on 10 October 2024 with her further response to the emails of 22 and 25 September 2024.

339. On 11 October 2024 the claimant emailed Ms Glancey, having attempted to confirm with another member of staff, and stated that she was not available to meet on 14 October 2024 as she was on holiday. The respondent's solicitor emailed the claimant's solicitor that day to state that a further meeting was not required. Following that message the meeting between the claimant and Ms Glancey proposed for 14 October 2024 did not take place, and was not re-arranged.

November and December 2024

340. On 31 October 2024 Ms Glancey prepared a first draft of her investigation report. She discussed it with Ms Hamilton.

341. A second draft report was prepared on 4 November 2024.

342. Ms Glancey conducted a further meeting with Ms Davidson on 2 December 2024. The note of their meeting is a reasonably accurate record of it.

343. On 9 December 2024 Ms Glancey emailed the claimant apologising for the delay with the report.

344. A final version of the Report was prepared by Ms Glancey and submitted to the first respondent on 13 December 2024. It recommended that the claimant be called to a disciplinary hearing. It included for the first time an allegation of the claimant "misgendering" the second respondent. She referred to examples of that and added "If part of the allegations under consideration it will need to be determined at the recommended hearing if these are SP acceptably expressing her Gender Critical views or if they are an act of misconduct."

345. That report was sent to the claimant by email on the same day.

346. By letter [the date for which is not visible in the copy provided to the Tribunal] Ms Belinda Morgan of the first respondent wrote to the claimant referring to an email from Ms Shepherd dated 23 December 2024 [which was not before the Tribunal but is likely to have been a reference to the email of 13 December 2024] confirming her agreement with the report recommendation and stating that the evidence justifies a formal conduct hearing in accordance with the NHS Scotland Conduct Policy.

347. In December 2024 the claimant referred to the second respondent in a text message to one of those in the said group of friends as "the weirdo".

January to May 2025

348. On 4 January 2025 the claimant emailed a letter to Ms Glancey commenting on section 6 and page 21 of the report stating that it was inaccurate and a misrepresentation of her evidence. It denied a comment that if the incident recurred the claimant would "have it out" with the second

respondent, but that she "would have to say something" to the second respondent.

349. On 10 January 2025 Ms Glancey wrote to the claimant to correct her report when referring to a discussion with Esther Davidson which had noted the claimant stating that she would "have it out" with the second respondent if matters happened again. Ms Glancey stated that that was her interpretation and should have read that the claimant would "say something" or "confront" the second respondent in such circumstances.

350. On the same date Ms Jillian Torrens, Head of Critical Care and Complex Services of the first respondent, wrote to the claimant with an invitation to attend a conduct hearing on 24 January 2025.

351. On 14 January 2025 the claimant emailed Ms Glancey to state that neither she nor Mr Fraser recalled the claimant using the word "confront". On the same date Ms Torrens emailed the claimant to cancel the meeting for 24 January 2025. On 16 January 2025 Ms Glancey wrote to the claimant agreeing that the words "say something" were accepted in place of "confront".

352. On 7 February 2025 the respondents' solicitor wrote to the Tribunal to state the position of the first respondent in respect of the investigation process and the roles of Ms Davidson and Ms Glancey.

Outcome of disciplinary allegations

353. Ms Torrens wrote to the claimant on 15 July 2025 with the result of the disciplinary allegations against her. It followed a conduct hearing held on 25 June 2025 in the claimant's absence under the NHS Scotland Conduct Policy. The allegations were (i) a failure to provide patient care on a date between October 2023 and 18 December 2023, (ii) a failure to communicate regarding patient care on the latter date (iii) "on 24 -25th December 2023 it is alleged you told BU [the second respondent] that she did not have the correct chromosomes to be within a female changing room and you made reference to a recent news story that involved a transgender woman in a female prison. It is alleged that you were persistent in challenging BU, despite BU's attempts to de-escalate matters. The allegation is your actions on 24 – 25th December 2023 amounted to misconduct" and (iv) referred to the second respondent as "he/him" in discussions with colleagues, and misgendered the second respondent.

354. For reasons set out in that letter it decided that the evidence against the claimant was inconclusive or insufficient and to take no action on them. It stated that the interaction "caused the second respondent visible distress and impacted on her well-being" in respect of which it was stated that the claimant as a registered nurse was expected to have the skills and

knowledge to de-escalate and remove herself from the situation. It stated that a facilitated reflective practice discussion had been arranged to consider her decision making in relation to the Christmas Eve incident with the second respondent, which will be supported by a professional nurse advisor and should be recorded for her submission as part of the next NMC revalidation.

Other matters

355. Female reproductive organs in most adult females normally are capable of producing eggs, which are large gametes. Menstruation normally occurs in females between puberty and menopause. Male reproductive organs normally are capable of producing sperm, which are small gametes.

356. A person's sex is determined by chromosomes, arranged in 23 pairs. Almost always males have XY chromosomes and almost always females have XX chromosomes. Chromosomes determine the body's development including of reproductive organs, the normal height and weight ranges for each sex, how the person's body responds to drugs, and the normal ranges for blood tests for each sex.

357. Not all persons have only XY or XX chromosomes. Some have XO chromosomes. Some have XXY or XYY chromosomes. There are some with a condition known as intersex, with to some extent parts of both male and female reproductive organs. The incidence of those with such presentations is generally less than about 0.3%.

358. Some individuals separately have differences of sexual development, by which their reproductive organs do not fully develop as expected for a person assigned their sex at birth.

359. Surgery, hormone therapy and other medical interventions for those undergoing transition of their gender from that assigned at birth do not change the nature of that person's chromosomes. Such treatments can change the physiological attributes of sex. Dependent on outcome such treatments can make a person assigned male at birth appear to have the physiological attributes of a female and a person assigned female at birth appear to have the physiological attributes of a male.

360. When the claimant was about seventeen a male General Practitioner prescribed medication for heavy periods, stated that there may be side-effects, and examined her breasts by touching them. The doctor also showed her how to examine her breasts using his hands to do so. She considered that to have been a bad experience, and that the doctor had acted inappropriately towards her. She mentioned that to friends for the first time about twenty years later, who told her that they thought that that had been inappropriate.

361. In August 2022 the claimant forwarded a message on a private Messenger Group to about six colleagues, which contained a series of comments which were highly offensive and derogatory towards people whose racial origins was in Pakistan, in the context of there having been a substantial loss of life.

362. The claimant did not look at the terms of the Bullying and Harassment Policy of NHS Scotland or the Equality Diversity and Human Rights Policy of the first respondent in the period August to December 2023 inclusive. Both were available on the first respondent's intranet to be viewed by members of staff.

363. The second respondent had at the material time a mobile telephone which had an application used to records notes called Google Notes. The application records the time a note is created, or edited. The application recorded that a note in relation to the incident on 28 August 2023 was created on 26 October 2023 at about 3.10am, and edited at 5.15am on 18 December 2023 by providing the claimant's full name.

364. The note created by the second respondent on 26 October 2023 also included a note as to an event on 25 October 2023 stating "She did it again. Sandie was in the changing room when I walked in. Christina (consultant) came in too. Christina and I chatting. Presumably Sandie left as I then found her waiting outside to go back in once I'd left. Didn't even say hi. Weird."

365. On 18 December 2023 the note was amended further with the addition of that date and an entry stating "Working nights, won't make any eye contact, won't acknowledge my present [sic]. Not had a direct conversation yet but I can feel the dismissal/hostility." The note was further amended from 00.33am to 00.58am on 25 December 2023, and on further occasions as set out in a report by Mr J Borwick dated 14 July 2025.

366. NHS Scotland prepared a draft policy in relation to trans staff which it issued as what it termed a soft launch in February 2025, by which it was sent to a restricted number of staff for commentary. The draft was not proceeded with. No formal written policy in that regard has been produced by NHS Scotland to date.

367. Ms Bumba the first respondent's Equality and Human Rights Lead Officer has below her email signature a logo stating "LGBT Ally" and reference to the Equality Lead Network.

368. Ms Mechelle Sinclair-Forrow had several periods of absence and other leave during 2024, and some days of phased returns to work, which materially impacted on her ability to contribute to the investigation into the claimant.

369. On 15 January 2025 the respondents' solicitors wrote to the claimant's solicitors providing answers to questions that the latter had asked. It included that as at 31 March 2024 the first respondent had 9,992 employees. Of those 8448 or very approximately 85% were female, and 1544 or very approximately 15% were male. When providing monitoring information 32.3% of the employees gave detail as to their gender re-assignment status. Two stated that they were trans women, and one that the person was a trans man. The monitoring is undertaken at commencement of employment, and does not capture changes to gender re-assignment status during employment. It is likely that there are more trans members of the first respondent's staff. An accurate number is not known, but it is less than 100, and probably materially less than that number.

370. At the material time the department had very approximately 200 employees, of which very approximately 170 were biologically female and 30 biologically male.

371. Adam Graham was convicted of two offences of rape. After the offences had been committed he commenced transitioning to female, and used the name Isla Bryson. When imprisoned initially that was in a female prison. After a brief period it was changed so as to be in a male prison.

372. A substantially higher proportion of those convicted of crimes of violence and particularly of sexual violence are those assigned male at birth than those assigned female at birth, in each case where the person does not claim to have the protected characteristic of gender reassignment [there was insufficient evidence before the Tribunal to make any finding in relation to those who did have that protected characteristic]

373. The second respondent initially agreed to attend a meeting to have the said mobile phone examined by Mr J Borwick a skilled witness instructed by the claimant, in or about about March 2025, but that meeting was cancelled by the claimant's legal team as Mr Borwick had sought details of the phone which had not been provided. It was not re-arranged successfully as details of how it was to be conducted were not agreed between the parties.

374. On 16 May 2025 the second respondent attended an online meeting with Mr Watson of the Central Legal Office of the NHS, who was representing both respondents, and Mr Peter Donaldson of the first respondent. Mr Donaldson talked the second respondent through how to obtain data relating to the dates and times of creation of the notes taken by the second respondent on the mobile phone. Screenshots were taken by the second respondent. Documents were prepared by the second respondent following those instructions. Not always throughout that meeting did Mr Donaldson have sight of what the second respondent was doing, as on two occasions the second respondent's screen froze. The data and

screenshots, together with a statement from Mr Donaldson, were then sent to the claimant's legal team.

Facts derived from judicial knowledge

375. Physiological attributes of sex are (i) external on the body and can be observable by the naked eye if the person is clothed, (ii) external on the body but not observable by the naked eye if the person is clothed and (iii) internal within the body such as not to be observable by the naked eye when the person is not clothed. Such attributes are generally found in either males or females, but are not found in every member of each sex. External attributes of sex partly visible where the person is not clothed include reproductive organs.

376. On average males are taller, have greater muscle mass, and different skeletal structures than females, causing differences in the shape and proportions of the body of the average male and female, observable when the person is clothed.

377. There are on average differences in distribution of body hair, with most adult males having the capacity for facial hair and a greater propensity to hair loss in later life and more body hair than most adult females.

378. Adult males on average have a lower pitch of voice than adult females, which is audible when speaking.

379. Internal attributes of sex include some parts of the reproductive organs, differences in hormones such as most adult males predominantly producing androgens and most adult females predominantly producing oestrogens, and differences in chromosomes.

380. An individual may not have all the normal physiological attributes of sex. For example, a particular male may be less tall, have a lesser muscle mass and have a higher pitch of voice, than a particular female. As a result of bodily condition, illness or accident a particular person may not have all the normal physiological attributes of sex. Not all men are capable of producing sperm and not all women are capable of producing eggs.

381. Attributes of sex that are not physiological include the names given at birth, or adopted by an individual by choice during their lives. Most names are normally associated with being either a male or a female but some names are associated with both sexes. Such attributes also include the clothing and shoes traditionally worn by each sex for example a dress by a woman and trousers by a man; that on average men choose to have shorter hair length than women; that on average women choose to wear make-up more frequently than men; and that on average women wear

jewellery such as rings on their fingers and a necklace more frequently than men.

382. A person of the male sex may wear clothing traditionally considered female, or a person of the female sex may wear clothing traditionally considered male; a male may choose to have longer hair than a female or a female may choose to have shorter hair than a male; a male may wear make-up or jewellery or a female not do so. In each case that may be done without that being any part of a gender reassignment process.

Submissions

383. The evidence concluded on 29 July 2025 with the claimant's further evidence. The parties had provided skeleton submissions initially as ordered at the first Preliminary Hearing. The Tribunal informed parties that it wished written submissions either full, partial or in skeleton form as they preferred, with a list of authorities agreed between them, by noon on 30 July 2025, and permitted supplementary written submissions by 10am on 25 August 2025. The claimant provided a written submission initially on 30 July 2025, then provided (having been granted an extension) a far more extensive further written submission in two tranches on 26 August 2025. The respondents similarly provided a written submission on 30 July 2025 which was an extensive one, and then a more brief supplementary submission on 25 August 2025. The parties wished to make oral submissions and they were made on 1 and 2 September 2025. As the submissions were set out fully in writing, and the oral submissions have been both recorded and transcribed by stenographers instructed by the claimant, only the very briefest summary of each submission is provided at this point in the Judgment. Further aspects of the submissions are addressed in addressing particular points in the discussion section below.

384. The parties' representatives provided detailed and substantial submissions in writing which were supplemented orally, which was clearly the result of substantial industry from all concerned. We do however have some concerns over certain aspects of them, for example seeking to introduce issues of fact which had not been addressed in the evidence. Both sides in our view sought to do so, and neither should have done so. There were a small number of errors in the chronology provided by the claimant as to dates.

385. On 2 September 2025 at the oral submissions, and by email shortly thereafter as had been discussed, the Tribunal raised some points for clarification for both sides. Some of the answers provided by the respondents did not directly engage with the questions asked, or did so in a particularly vague manner. The claimant sought to make a further supplementary submission on 13 October 2025 as noted above, which we address below.

For the claimant

386. As there are full written submissions the following is a very brief outline of the parties' respective main argument. Ms Cunningham argued that the second respondent was male by sex in light of the Supreme Court decision in ***FWS,*** and that permission to allow the second respondent to use the female changing room had been unlawfully given by the first respondent. She argued that the claimant had been harassed by the first and second respondents from the grant of permission, and the circumstances that occurred on Christmas Eve 2023. She argued that that incident was a permissible manifestation of the claimant's beliefs. She invited the Tribunal to prefer the evidence of the claimant to that of the respondents. She argued that the first respondent had been involved in a conspiracy to punish the claimant for expressing her beliefs which were contrary to the position of the first respondent on matters related to trans members of staff, and that that had been effected by an unjustified disciplinary process starting with the suspension and continuing to the end of that process. She argued that there had been direct discrimination, indirect discrimination, sexual harassment, harassment by rejection of harassment and victimisation.

387. She argued that in a number of respects the second respondent had been lying to the Tribunal, that the first respondents had not provided all documents required by the order, had not called witnesses who could give relevant evidence, and that inferences against them should be drawn both for that. She argued that the first respondent had a delusional belief system that could only be enforced by bullying, and explained why the claimant was subjected to a heresy hunt for her refusal to undress with a male. She asked the Tribunal to find for the claimant in all respects.

For the respondents

388. Ms Russell argued that the evidence for the respondents should be accepted over that of the claimant. She argued that the claimant had not been discriminated against, harassed or victimised as had been alleged. She founded on the Code of Practice:Services, and argued that as the second respondent was a trans woman it was lawful to permit use of the female changing room by the second respondent. She argued that the claimant had impermissibly manifested her beliefs, and had not been reasonable in her perception of harassment. She further argued that the reason for the treatment of the claimant was how she had conducted the Christmas Eve discussion. She argued that the case was not one of direct discrimination, there had not been harassment of any kind by the respondents, and that there had not been victimisation. She invited the Tribunal to dismiss the Claim.

The law

(i) Statute

389. The Equality Act 2010 ("the Act") consolidated and in part reformed discrimination law. It implemented the Equal Treatment Directive, relevant parts of which are set out below.

390. The Act provides, in section 4 which is within Part 2 Equality: Key Concepts, that each of gender reassignment, religion or belief, and sex are protected characteristics.

391. Gender reassignment is defined in section 7 as follows

> "**7 Gender reassignment**
> (1) A person has the protected characteristic of gender reassignment if the 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.
> (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
> (3) In relation to the protected characteristic of gender reassignment –
> (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
> (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."

392. Religion or belief is defined in section 10 as follows:

> "**10 Religion or belief**
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
> (3) In relation to the protected characteristic of religion or belief—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

393. Sex is defined in section 11 as follows

> "**11 Sex**
> In relation to the protected characteristic of sex –

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

394. Section 13 provides as follows:

"**13 Direct discrimination**
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
……
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy, childbirth or maternity."

395. Section 19 provides as follows:

"19 Indirect discrimination
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.
(3) The relevant protected characteristics are—
- …..gender re-assignment…..
- religion or belief;
- sex…."

396. Section 23 provides as follows:

"**Comparison by reference to circumstances**
(1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

397. Section 26 provides as follows:

> **“26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (2) A also harasses B if—
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are
> …. gender reassignment….
> religion or belief….
> sex”

398. Section 27 provides as follows:

> “**27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
>
> ……

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

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

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

399. Section 29, within Part 3 Services and Public Functions, provides as follows:

29 Provision of services, etc.

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(3) A service-provider must not, in relation to the provision of the service, harass—

(a) a person requiring the service, or

(b) a person to whom the service-provider provides the service.

(4) A service-provider must not victimise a person requiring the service by not providing the person with the service.

(5) A service-provider (A) must not, in providing the service, victimise a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

(8) In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation……."

400. Section 31 provides as follows:

> "**31 Interpretation and exceptions**
> (1) This section applies for the purposes of this Part.
> (2) A reference to the provision of a service includes a reference to the provision of goods or facilities.
> (3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
> (4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.
> (5) Where an employer arranges for another person to provide a service only to the employer's employees—
> (a) the employer is not to be regarded as the service-provider, but
> (b) the employees are to be regarded as a section of the public.
> (6) A reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service.
> (7) A reference to a service-provider not providing a person with a service includes a reference to—
> (a) the service-provider not providing the person with a service of the quality that the service-provider usually provides to the public (or the section of it which includes the person), or
> (b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).
> (8) In relation to the provision of a service by either House of Parliament, the service-provider is the Corporate Officer of the House concerned; and if the service involves access to, or use of, a place in the Palace of Westminster which members of the public are allowed to enter, both Corporate Officers are jointly the service-provider.
> (9) Schedule 2 (reasonable adjustments) has effect.
> (10) Schedule 3 (exceptions) has effect."

401. Section 32 provides as follows:

> "**32 Application of this Part**
> (1) This Part does not apply to the following protected characteristics—
> (a) age;
> (b) marriage and civil partnership.
> (2) This Part does not apply to discrimination, harassment or victimisation—
> (a) that is prohibited by Part 5 (work) or Part 6 (education), or
> (b) that would be so prohibited but for an express exception.

(3) This Part does not apply to the provision of accommodation if the provision—

(a) is generally for the purpose of short stays by individuals who live elsewhere, or

(b) is for the purpose only of exercising a public function or providing a service to the public or a section of the public.

(4) The reference to the exercise of a public function, and the reference to the provision of a service, are to be construed in accordance with Part 3.

(5) This Part does not apply to—

(a) a breach of an equality clause or rule;

(b) anything that would be a breach of an equality clause or rule but for section 69 or Part 2 of Schedule 7;

(c) a breach of a non-discrimination rule."

402. Section 39, within Part 5 Work, provides as follows:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……."

403. Section 40 provides as follows:

"**40 Employees and applicants: harassment**

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) Who is an employee of A's ……."

404. Section 109, within Part 9 (Enforcement) provides as follows:

"**109 Liability of employers and principals**

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it

is a defence for B to show that B took all reasonable steps to prevent A-

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).”

405. Section 110 provides as follows:

“110 Liability of employees and agents

(1) A person (A) contravenes this section if-

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if-

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so……”

406. Section 111 provides as follows

“111 Instructing, causing or inducing contraventions

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.
(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.
(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—
(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;
(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C."

407. Section 112 provides as follows:

"**112 Aiding contraventions**
(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).
(2) It is not a contravention of subsection (1) if—
(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and
(b) it is reasonable for A to do so.
(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.
(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.
(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools)."

408. Section 113 provides as follows:

"**113 Proceedings**
(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part [9]……..

409. Section 114 provides that in Scotland the Sheriff Court has jurisdiction to determine a claim relating to Parts 3,4, 6 and 7 and a contravention of sections 108, 111 or 112 that relates to those Parts.

410. Section 120 of the Act provides:

> **"120 Jurisdiction**
>
> (1) An employment tribunal has, subject to section 121 [applicable to armed forces], jurisdiction to determine a complaint relating to—
> (a) a contravention of Part 5 (work);
> (b) a contravention of section 108, 111 or 112 that relates to Part 5……"

411. Section 123 of the Act provides as follows:

> "**123 Time limits**
> (1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable…….
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

412. Section 136 provides as follows:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

413. Provisions as to the effect of Early Conciliation are set out in section 140B.

414. Section 149, within Part 11 Advancement of Equality, provides as follows:

> "**149 Public Sector Equality Duty**
> (1) A public authority must, in the exercise of its functions, have due regard to the need to –
> (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
> (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

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

415. Section 191, within Part 14 General Exceptions, provides as follows:

"**191 Statutory provisions**
Schedule 22 (statutory provisions) has effect."

416. Section 196 provides as follows:

"**196 General**
Schedule 23 (general exceptions) has effect."

417. Section 212, within Part 16 General and Miscellaneous provides as follows:

"**212 General Interpretation**
(1) In this Act - …. 'man' means a male of any age; …'woman' means a female of any age"……
"detriment does not, subject to subsection (5) include conduct which amounts to harassment" ……
"substantial" means more than minor or trivial….
(4) A reference (however expressed) to providing or affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service.
(5) "Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic""

418. Schedule 3 provides as follows:

"**Schedule 3 Services and public functions: exceptions**
…….
PART 7 SEPARATE, SINGLE AND CONCESSIONARY SERVICES, ETC
……
Separate services for the sexes
26(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—
(a) a joint service for persons of both sexes would be less effective, and
(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective,

(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and

(c) the limited provision is a proportionate means of achieving a legitimate aim.

(3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

Single-sex services

27. (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if— (a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and (b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that —

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the Page 66 service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of —

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that —

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that —

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and
(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service."

Gender reassignment

28(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
(2) The matters are—
(a) the provision of separate services for persons of each sex;
(b) the provision of separate services differently for persons of each sex;
(c) the provision of a service only to persons of one sex."

419. Schedules 6 to 9 provide for exceptions to Part [none of which are relevant, or were founded on by the parties, for the purposes of this case].

420. Schedule 19 has a list of organisations which are public authorities for the Act which includes "A Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978."

421. Schedule 22 provides as follows:

"**SCHEDULE 22 Statutory provisions**

Statutory authority

1(1) A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.

Specified provision	**Protected characteristic**	**Requirement**
Parts 3 to 7	Age	A requirement of an enactment
Parts 3 to 7 and 12	Disability	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment
Parts 3 to 7	Religion or belief	A requirement of an enactment

Section 29(6) and Parts 6 and 7 Parts 3, 4, 6 and 7	Sex Sexual orientation	A relevant requirement or condition imposed by virtue of an enactment A requirement of an enactment A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment

……..

Protection of women

2(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);

(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—

(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);

(b) Part 6 (education), so far as relating to vocational training.

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

(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).

(6) If an Act repeals and re-enacts (with or without modification) a pre-1975 enactment then the provision re-enacted must be treated as being in a pre-1975 enactment.

(7) For the purposes of sub-paragraph (1)(c), a reference to a provision in Schedule 1 to the Employment Act 1989 includes a reference to a provision for the time being having effect in place of it.

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

(a) pregnancy and maternity;

(b) sex."

422. Schedule 23 provides as follows:

"**SCHEDULE 23 General exceptions**

Acts authorised by statute or the executive

1(1)This paragraph applies to anything done—

(a) in pursuance of an enactment;

(b) in pursuance of an instrument made by a member of the executive under an enactment;

(c) to comply with a requirement imposed (whether before or after the passing of this Act) by a member of the executive by virtue of an enactment;

(d) in pursuance of arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown;

(e) to comply with a condition imposed (whether before or after the passing of this Act) by a Minister of the Crown.

(2) A person does not contravene Part 3, 4, 5 or 6 by doing anything to which this paragraph applies which discriminates against another because of the other's nationality.

(3) A person (A) does not contravene Part 3, 4, 5 or 6 if, by doing anything to which this paragraph applies, A discriminates against another (B) by applying to B a provision, criterion or practice which relates to—

(a) B's place of ordinary residence;

(b) the length of time B has been present or resident in or outside the United Kingdom or an area within it…….

Communal accommodation

3(1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—

(a) the admission of persons to communal accommodation;

(b) the provision of a benefit, facility or service linked to the accommodation.

(2) Sub-paragraph (1)(a) does not apply unless the accommodation is managed in a way which is as fair as possible to both men and women.

(3) In applying sub-paragraph (1)(a), account must be taken of—
(a) whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and
(b) the frequency of the demand or need for use of the accommodation by persons of one sex as compared with those of the other.
(4) In applying sub-paragraph (1)(a) in relation to gender reassignment, account must also be taken of whether and how far the conduct in question is a proportionate means of achieving a legitimate aim.
(5) Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex.
(6) Communal accommodation may include—
(a) shared sleeping accommodation for men and for women;
(b) ordinary sleeping accommodation;
(c) 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.
(7) A benefit, facility or service is linked to communal accommodation if—
(a) it cannot properly and effectively be provided except for those using the accommodation, and
(b) a person could be refused use of the accommodation in reliance on sub-paragraph (1)(a).
(8) This paragraph does not apply for the purposes of Part 5 (work) unless such arrangements as are reasonably practicable are made to compensate for—
(a) in a case where sub-paragraph (1)(a) applies, the refusal of use of the accommodation;
(b) in a case where sub-paragraph (1)(b) applies, the refusal of provision of the benefit, facility or service."

(ii) Case law

Direct discrimination

423. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***.

424. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. It was a case brought under section 29 (the goods and services provisions) of the Sex Discrimination Act 1975. The claimant was charged on entry to a public swimming pool whilst his wife was allowed in free. The Council's policy was to provide free entrance to the pool for those who had reached pensionable age – at the time 65 for men and 60 for women. Had the claimant been a woman he would have been given free entry. Their Lordships considered the test was a causative one: the question was would he have received the same treatment as a woman but for his sex? The answer was inevitably, yes, and the claim of direct discrimination was upheld.

425. For there to be inherent discrimination there must be an exact correspondence between the protected characteristic and the criterion in question: ***Preddy v Bull [2013] UKSC 73.***

426. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.*** The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less favourable treatment

427. Part of the consideration must be of the treatment of the claimant by the first respondent, not its treatment of others or the claimant's reasons for acting as she did. In ***London Borough of Islington v Ladele [2009] ICR 387*****;** upheld by the Court of Appeal: ***[2010] ICR 532*****,** later considered at the European Court of Human Rights as noted below, a Christian registrar of births, deaths and marriages objected, because of her religious beliefs, to officiating at same sex civil partnership ceremonies. Her claim of direct discrimination succeeded before the Tribunal but failed at the appellate stages. The EAT decision was that the tribunal had confused the council's reasons for treating the claimant as it did with her reasons for acting as she did; that there was no evidence to support any inference other than that the reason for the alleged discriminatory acts was the council's refusal to allow the claimant not to conduct civil partnerships, and not her religious convictions, even though that was her reason for refusing to do those duties

428. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He or she must show less favourable treatment, one of whose effective causes was the protected characteristic relied on. Although something more than unreasonable behaviour and the protected characteristic is required that need not be a great deal: ***Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279***.

429. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority it was held that an unjustified sense of grievance could not amount to a detriment. In ***R (ex part Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. The test is an objective one – ***HM Land Registry v Grant [2011] ICR 1390***.

430. What is superficially the same treatment of men and women may amount to less favourable treatment. In ***Smith v Safeway [1996] IRLR 456*** the Court of Appeal held that

> "a code which made identical provisions for men and women but which resulted in one or other having an unconventional appearance, would have an unfavourable impact on that sex being compelled to appear in an unconventional mode. Can there be any doubt that a code which required all employees to have 18-inch hair, earrings and lipstick, would treat men unfavourably by requiring them to adopt an appearance at odds with conventional standards?"

431. It was held in ***Earl Shilton Town Council v Miller [2023] EAT 5***, a case which concerned toilet provision at work for an employee and was pursued as a claim under section 13 on the protected characteristic of sex, that:

> "In this case it might be said that the same toilet facilities were provided to men and women and so the treatment was the same. However, if the treatment is assessed as being the provision of toilet facilities that are appropriate to a person's requirements the analysis may differ……
>
> "Taken from her perspective the claimant was treated less favourably than men in that she, a woman, was at risk of seeing a man using the urinals. While a man might see another man use the urinals, the treatment of the claimant, as a woman, was less favourable. A woman being at risk of seeing a man using the urinals is obviously not the same as the risk of a man seeing another man using the urinals. Put another way, if one starts by considering the nature of the treatment, the man 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."

432. The Employment Tribunal had held that it was a case of inherent discrimination, and had stated: "It is clear in our judgment that this is a case of inherent discrimination, referred to in Nagarajan and Amnesty and exemplified in James." The EAT held that it was entitled to come to that view, stating in that regard:

> "The employment tribunal correctly concluded that this was a case in which it did not have to consider the mental process of a discriminator because the treatment was inherently because of sex. This was not an "exact correspondence" type case, but one in which the discrimination was inherent in the treatment. Women were provided with inadequate toilet facilities in comparison with men. As in the **Birmingham** and **Coll** cases separate facilities, of a poorer quality, were provided for females than males. That less favourable treatment was inherently because of sex, just as the provision of fewer grammar school places for girls in comparison with boys was inherently because of sex. The facilities were inadequate for the claimant because she is a woman."

433. Guidance on what is less favourable treatment is provided in paragraphs 3.4 – 3.6 of the Equality and Human Rights Commission Code of Practice: Employment ("the Code").

Comparator

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

435. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***.

436. The law was summarised by the EAT in ***Martin v Board of Governors of St Francis Xavier 6th Form College [2024] IRLR 472***.

> *"*In order for a comparator to be an actual or statutory comparator, is not necessary that the circumstances are the same in every particular…… Whether a point of difference has any significance or not depends on the nature of the less favourable treatment about

> which complaint is made. So, for example, if the complaint is about the claimant not being selected for a job, whilst the comparator was selected, the fact that the claimant and comparator have similar academic qualifications may well be relevant if the job required developed intellectual skills, but it is not relevant if the job requires solely manual labour or (to use one of Langstaff P's examples) is to model clothing."

437. The Code states at paragraph 3.23 that the circumstances of the claimant and comparator need not be identical but are sufficient if the same or nearly the same, and it provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial reason

438. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

439. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

440. The general issue of treatment because of a protected characteristic is addressed at paragraphs 3.11 – 3.17 of the Code.

Indirect discrimination

441. Lady Hale in the Supreme Court gave the following general guidance in ***R (On the application of E) v Governing Body of Jewish Free School [2010] IRLR 136***:

> "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

442. The same principle applies for other protected characteristics.

Provision, criterion or practice

443. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science [1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558***.

444. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler, as she then was, considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

445. The Code states at paragraph 4. 5 as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

446. There must be evidence that shows the PCP creates or would create a disproportionate impact upon the relevant group, with the group often also referred to as a pool, and the disproportionate impact often being referred to as group disadvantage. The first step is to identify the appropriate pool of employees (***Barry v Midland Bank plc [1999] ICR 319***). In ***Allonby v Accrington and Rossendale College [2001] EWCA Civ 52*** it was held that identifying the pool was not a matter of discretion or of fact-finding but of logic.

447. Although it is for the claimant to identify the PCP which she seeks to impugn it is for the Tribunal to determine the appropriate pool, and there may be - depending on the PCP in issue - a range of logical options open to it. The EAT so held in ***Ministry of Defence v DeBique [2010] IRLR 471:***

> "In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

448. The Court of Appeal held in ***Grundy v British Airways plc [2008] IRLR 74*** that "Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen."

449. In ***Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] ICR 640*** Lady Hale explained one of the salient features of the legislation as follows:

> "Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect

> discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

450. The requirement for group disadvantage was thus that "many "within that group cannot meet a requirement from a PCP. She expanded on that as follows:

> "There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory…."

451. As to proving disadvantage it was held that: "it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence." The extent of disadvantage was addressed as follows "At the level of the group the disadvantage may be no more than likely but that does not make it a different disadvantage from the actual disadvantage suffered by those who are affected. The difference is between potential and actual disadvantage but the disadvantage is the same."

452. On the nature of the pool for group disadvantage it was held that:

> ". … all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – ie the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

453. How many would be disadvantaged within a group had earlier been addressed by the Court of Appeal in ***Eweida v British Airways plc [2010] ICR 890***. It held a narrow view would be other uniformed BA staff who wished to wear a cross in a visible place; a wide view would operate where evidence showed that there were others in society who shared the material religion or belief and so would suffer a disadvantage were they to

be BA employees; an intermediate view would operate by assuming that the workforce included such others and asking if they would be adversely affected by the relevant requirements. The court held that all three approaches have difficulties.

454. In ***Games v University of Kent UKEAT/0524/13*** it was held that statistical information was not necessary: if it existed it would be "important material" but that "the evidence of the claimant and others in his group might suffice and could provide compelling evidence of disadvantage even if there are no statistics at all."

455. There may however a need for evidence where the issue is in dispute, dependent on what that dispute is. That was addressed by the EAT in ***Page v NHS Trust Development Authority UKEAT/0183/18,*** which was appealed to the Court of Appeal but not on this point.

456. The Court of Appeal held that a sole holder of a belief may not be sufficient to establish group disadvantage in ***Mba v Mayor and Burgesses of the London Borough of Merton [2014] IRLR 145***. That was followed by the EAT in ***Trayhorn v Secretary of State for Justice [2018] IRLR 502*** which held that "the threshold of s 19(2)(b) is not a high one. However, as Lord Justice Elias held in *Mba*, it is there and cannot be ignored. Whether it has been surmounted is a question of fact in each case."

457. In ***Essop*** the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …"

458. In ***Cumming v British Airways plc UKEAT/0337/19*** that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

459. In ***Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699*** the EAT stated the following:

> ". ... particular disadvantage can be established in one of several ways, including the following: a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect

> discrimination (and of group disadvantage in particular) being rejected in limine; b. Group disadvantage 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; c. The disadvantage may be inherent in the PCP in question; and/or d. The disadvantage may be established having regard to matters, such as the childcare disparity, 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."

460. The limitations to taking judicial notice were explained as follows:

> "A matter in respect of which judicial notice may be taken, by its very nature, ought to be one that is uncontroversial. The fact that it is not might cast doubt on whether it really is so notorious and well-established that it can be accepted without further inquiry."

461. In assessing the impact of the PCP upon the affected group, it is necessary for the Tribunal to ascertain both the quantitative and the qualitative effect: ***University of Manchester v Jones [1993] ICR 474***). In so doing, the individual situation of the claimant may provide relevant evidence, although (as for the determination of particular disadvantage):

> "... proper attention [must be] paid to the question of how typical they are of any other men and women adversely affected by the requirement."

462. These are matters also referred to in the Code at paragraphs 4.15 – 4.22. Paragraph 4.19 provides that once the pool has been identified the question for the Tribunal is whether there is a particular disadvantage to people sharing the relevant protected characteristic; that means that a comparison must be made between the impact of the PCP on the people within the pool with, and without, the protected characteristic. The particular disadvantage can be shown by direct evidence, inference from primary fact, statistical materials, or by judicial knowledge (the term normally used in Scotland which is the equivalent of what is known as judicial notice in England and Wales and is addressed further below). At paragraph 4.21 it is said that "Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage."

Objective justification

463. The statutory test for justification requires to be read in accordance with case law from the Court of Justice of the European Union. In ***Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] IRLR 601*** decided in the Supreme Court Lady Hale said: "Although the [UK legislation] refers only to a 'proportionate means of achieving a legitimate aim', this has to be read in the light of the Directive which it implements". She added in summary that "to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so."

464. It is for the employer to establish the defence on the balance of probabilities. Evidence is not always required. The EAT in ***Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2009] ICR 223*** (considered on other grounds by the Supreme Court ***[2012] IRLR 601***) stated:

> "… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions".

465. Where the PCP is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered rather than the impact on the individual. In ***Seldon v Clarkson Wright and Jakes*** the EAT said: 'Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' This was approved by the Court of Appeal and by the Supreme Court ***[2012] IRLR 590*),** where Lady Hale commented on the passage just quoted:

> "Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it."

466. The issue of objective justification need not have been considered by the employer at the time of the dispute arising. In ***Cadman v Health and Safety Executive [2004] IRLR 971*** the Court of Appeal held that there is

no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer. But it may be more difficult for an employer to discharge the burden of establishing justification where there is no evidence to show that it ever applied its mind to the question of whether there was another way of achieving the legitimate aim that would avoid or diminish the disparate adverse impact on the protected group: ***Hockenjos v Secretary of State for Social Security [2005] IRLR 471***.

467. In ***MacCulloch v ICI [2008] IRLR 846*** the EAT set out four principles, later approved by the Court of Appeal in ***Lockwood v DWP [2013] IRLR 941***, as follows:

(i) The means to achieve the aim must correspond to a real need for the organisation

(ii) They must be appropriate with a view to achieving the objective

(iii) They must be reasonably necessary to achieve that end

(iv) The Tribunal is to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and make its own assessment of whether the former outweigh the latter.

468. The Supreme Court held in ***Essop*** that there can be no finding of indirect discrimination until all four elements of the definition are met. Lady Hale held:

> "some reluctance to reach this point can be detected in the cases, yet there should not be.…The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind."

469. In applying the test of reasonable necessity there may be more than one option which would constitute a proportionate means of achieving the legitimate aim in question - ***Health and Safety Executive v Cadman [2005] ICR 1546.*** An employer is not required to prove there was no other way of achieving its objectives - ***Hardys & Hansons place v Lax [2005] IRLR 726*** - but in considering the needs of the respondent the Tribunal must make its own judgement upon "a fair and detailed analysis of the working practices and business considerations involved".

470. Care must be taken by tribunals not to reject a justification case on the basis that a respondent should have pursued a different aim which would

have had a less discriminatory impact: ***Harrod v Chief Constable of West Midlands Police [2017] ICR 869***

471. In ***Ladele*** the EAT and Court of Appeal addressed the issue of proportionality having identified the legitimate aim in the case. The Court of Appeal endorsed the EAT decision, quoting from it and then commenting as follows:

> "Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate—and in truth it was bound to be—then … it must follow that [Islington] was entitled to require all registrars to perform the full range of services."

472. As the EAT had stated, permitting the claimant to refuse to perform civil partnerships "would necessarily undermine the council's clear commitment to" what the appeal tribunal described as their "non-discriminatory objectives which [they] thought it important to espouse both to their staff and the wider community".

473. Ultimately this along with other claims was considered by the European Court of Human Rights, reported as ***Eweida, Ladele, McFarlane and Chaplin v The United Kingdom [2013] IRLR 231*** in which it was held that:

> "Both Ms Ladele who objected to officiating at same-sex civil partnership ceremonies, and Mr McFarlane who objected to providing psycho-sexual counselling to same-sex couples, based their objections on their Christian beliefs. Those manifestations were to be protected unless interference was necessary in a democratic society for the protection of the rights and freedoms of others. The equal opportunities policies of the employers in these cases were designed to ensure the provision of services without discrimination—including on the ground of sexual orientation. The state had not been found to have failed to protect the art 9 rights of either of these applicants in seeking to strike a balance between the rights of the two employees to manifest their religious belief and the employer's interest in securing the rights of others.'

474. Proportionality is considered at paragraphs 4.30 – 4.32 of the Code.

Relationship with direct discrimination

475. In ***R(Coll) v Secretary of State for Justice [2017] UKSC 40*** it was held that direct discrimination and indirect discrimination are mutually exclusive concepts.

Harassment

General

476. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, [in relation to the predecessor provision] pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason) [the wording is now "related to" however]; (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

477. The Supreme Court in ***FWS*** commented on harassment in the following terms:

> "To establish harassment, it is simply necessary to establish a sufficient link between the unwanted conduct and a relevant protected characteristic, and that the conduct violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It follows that, as with section 13(1) EA 2010, under section 26(1)(a) the complainant, B, does not have to possess the relevant protected characteristic to bring an unlawful harassment claim. Conduct will fall within this section where it is related to B's own protected characteristic, or where it is related to a relevant protected characteristic of another person or persons.
>
> Applied, for example, to the case of a trans woman with a GRC, who presents as a woman at work and is perceived as a woman, and whose trans status and GRC are confidential: if a colleague harasses her (by making sexualised references to what she is wearing, or degrading comments about how she looks) she can bring a claim for harassment related to sex. She can also bring a harassment claim related to the protected characteristic of gender reassignment but may not wish to do so."

Environment

478. The extent of the protection conferred by the section was examined by the Court of Appeal in ***Land Registry v Grant 2011 IRLR 748*** which focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

479. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218.***

480. In ***Weeks v Newham College of Further Education UKEAT/0630/11*** the EAT stated the following:

> "A decision of fact in a context such as this must be sensitive to all the circumstances. Context is all-important. ……..We would urge caution for a tribunal in placing too much weight upon timing. Where conduct is directed toward the sex of the victim, it may be very difficult for the victim personally, socially and, in particular, in some circumstances, culturally, to make any immediate complaint about it. The fact of there being no immediate complaint cannot prevent a complaint being justified, but equally we cannot say that it is a factor that a tribunal is not entitled to consider as part and parcel of the overall circumstances that it has to gauge….. However, it must be remembered that the word is "environment". An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration."

Related to

481. The test for "related to" is different to that for whether conduct is "because of" a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.*** The fact that a claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. The Tribunal should consider the matter objectively.

482. The position has been considered in a number of cases including ***Warby v Wunda Group Plc EAT 0434/11*** in which the EAT upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct "related to" her sex within the meaning of the sex discrimination provisions then in force. It was held that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was a complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a miscarriage.

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

484. In ***UNITE the Union v Nailard [2018] IRLR 730*** the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to sex *"*because of the background of harassment related to sex*"*. The Court of Appeal considered that went too far. There was a reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related to the protected characteristic).

485. There should be an intense focus on the context in which the words or behaviour took place ***Bakkali v Greater Manchester [2018] IRLR 906***, in which the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was not as it related to a previous conversation. The EAT again emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

486. In ***Raj v Capita UKEAT 0074/2019*** the EAT upheld a Tribunal which had found that the massage at his desk by a manager was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

487. In ***British Bung Manufacturing Company Ltd v Finn [2024] ICR 1375*** a colleague called the male claimant a 'bald' followed by an offensive word. The EAT upheld the employment tribunal's finding that this was 'related to sex' even though some women are also bald. There was no authority, said the EAT, for the proposition that in order for unwanted conduct to relate to sex it must relate to a matter which is both inherent in the gender in question and in no-one of the opposite gender, and such a proposition ran contrary to the purpose of section 26.

488. Further guidance was given in ***Carozzi v University of Herfordshire [2024] EAT 169*** in which it is stated that

> "the term 'related to' is designed to have a relatively broad meaning. The harassment provisions are designed to be pragmatic, balancing the interests of employees against those of their employer and colleagues who may be accused of harassment. That balance is not achieved by applying a limited meaning to the words "conduct related to a protected characteristic".

489. In ***Windsor Clive v Forsbrook [2024] EAT 183*** it was said that:

> "the concept cannot be so broad as to be meaningless. I am of the view that, as Ms Roddick argues, the conduct must relate to the protected characteristic, here disability, in some clear way. It is for the ET to spell out that relationship between the conduct and the disability. It will be necessary, therefore, for an ET to identify with some clarity the precise conduct which creates the prohibited environment."

490. Para 7.9 of the Code states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

491. At paragraph 7.10 of the Code the breadth of the words "related to" is noted and some examples are provided. It gives one such example of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex. At paragraph 7.11 the Code states that in the examples there was "a connection with the protected characteristic".

Reasonable perception

492. In ***Pemberton v Inwood [2018] IRLR 542*** the claimant alleged direct discrimination arising from the revocation of his permission to officiate ('PTO') as a Church of England priest and refusal to grant him an Extra Parochial Ministry Licence ('EPML') because he had entered into a same-sex marriage, contrary to the doctrines of the Church. The Tribunal held that the claimant's view was not reasonable as he had entered into his

marriage knowing it was considered contrary to Church doctrine and would have the consequence that his PTO would be revoked and an EPML refused. It also held that the enforcement of those decisions involved no aggravating features. The Court of Appeal (approving the decision of the EAT) upheld the tribunal's decision. It held that the claimant's understanding of the position formed part of the relevant context and the employment tribunal had been entitled to take it into account when determining whether his response was reasonable. More specifically, given that the conduct in question was covered by the defence permitted by the Equality Act 2010, Schedule 9, paragraph 2, if there were no aggravating factors, it could not be unreasonable for that conduct to have the effect proscribed in s 26(1)(b): 'to conclude otherwise would make a nonsense of providing the defence to Schedule 9 in the first place'.

493. In ***Driskel v Peninsula Business Services Ltd [2000] IRLR 151*** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered and that throughout the tribunal should remain conscious of the burden and standard of proof.

494. The Tribunal is required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case - ***Fidessa plc v Lancaster UKEAT/0093/16*** in which an appeal was allowed on the basis that the employment tribunal, whilst finding that it would have been reasonable for the particular conduct to have had the necessary effect, had failed to make a finding as to what the effect on the claimant had been.

495. In ***Ali v Heathrow Express Operating Co Ltd [2022] IRLR 558*** as part of a security exercise at Heathrow a suspicious package was placed in a public part of the airport to see if it would be discovered by staff. It had wires sticking out of it and written on it the phrase 'Allahu Akbar' in Arabic. The claimant, a Muslim, learned about it in an email giving the results of the security exercise. The Tribunal held that in the circumstances it had not been reasonable to take the offence that he had. Those circumstances included in particular that the employer had been carrying out the security exercise in the light of recent terrorist incidents in which the phrase had been used and the claimant should have appreciated this. The EAT held that the ET had been within its discretion in reaching this decision.

496. The issue of what might be harassment was addressed in ***Forstater*** which included that

> “Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one or more protected characteristics ; whether or not it does will depend, as in any claim of harassment, on a careful

assessment of all relevant factors, including whether the conduct was unwanted, the perception of the trans person concerned and whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the trans person. A simple example of a situation where referring to a trans person by their pre-GRC gender would probably not amount to harassment is where the trans person in question is happy to discuss their trans status or is sympathetic to or shares the Claimant's gender-critical belief.

A trans person could potentially bring a claim for harassment related to gender reassignment (where the definition under s.7(2) is satisfied), sex (see e.g. *P v S and Cornwall County Council [1996] ICR 795* at paras 17 to 22), disability based on the conditions of Gender Dysphoria or Gender Identity Disorder (see EHRC Code at para 2.28), or even a philosophical belief that gender identity is paramount and that a trans woman is woman."

Sexual harassment

497. The Code addresses the issue of sexual harassment at paragraphs 7.12 and 7.13, as including "unwelcome sexual advances, touching, some forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature."

Rejection of harassment

498. The Code comments on the issue of rejection of harassment at paragraphs 7.14 and 7.15. It comments at paragraph 7.19 on the position of a public authority and on whether the alleged perpetrator was exercising any Convention rights.

Victimisation

499. There are two key questions – (i) has the claimant done a protected act and (ii) if so did she suffer a detriment because she had done so, which is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.*** The House of Lords explained the principle on the basis of predecessor legislation in ***Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065*** as follows "The primary object of the victimisation provisions … is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so"..

500. It is not necessary to state specifically that there has been a breach of the Act for there to be a protected act - ***Waters v Metropolitan Police Commissioner [1997] ICR 1073*** in which the Court of Appeal stated: *"*All

that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b)." It is also not necessary to state specifically that the allegation is of discrimination in relation to one of the protected characteristics.: ***Durrani v London Borough of Ealing UKEAT/0454/2012.*** In ***Page v Lord Chancellor UKEAT/0304/18/LA*** it was confirmed that to be a protected act the claimant must have made an allegation that is sufficient to amount to one of discrimination.

501. In ***Kokomane v Boots Management Services Ltd [2025] EAT 38*** the EAT considered the terms of a complaint to the employer, and the overall circumstances, and stated that:

> "It appears to me the law could be summed up in this way: what is necessary is that the ET should take account of all of the factors that are provided in the information given by the employee to the employer. In addition the ET needs to consider that information on the basis of how it would be understood by the employer in context. It would be understood by the employer, in part, because of the general facts about the employee and the place of work, which the employer would know of in any event. In terms, that the employee's complaint should be considered by the ET by examining the way that it would be understood by the employer. When the employee makes the complaint explicit that will be an easy task. When the complaint is oblique the context becomes important……
>
> The ET should have been taking account of all these factors and asking the question what would the respondent have understood from the complaint or would have understood the complaint to mean from the information provided by the claimant as part of her complaint. That understanding would include the factors which were known to the respondent."

502. If it is shown that a protected act has taken place and that the claimant has been subjected to a detriment, it is essentially a question of the "reason why" that occurred. The protected act must be an effective and substantial (in the sense of more than minor or trivial) cause of the treatment, it does not need to be the sole or principal cause. The Tribunal is concerned with establishing what were the reasons (whether from consciously or subconsciously) for the detriment.

503. In determining whether a detriment was because of a protected act, it is important that the protected act is identified with precision and that the relationship between the detriment and that act specifically is examined: ***JJ Food Service Ltd v Mohamud EAT 0310/15***. The Tribunal has to consider not just whether or not the protected acts themselves were the reason but whether or not there are any other factors relating to the

protected acts which were in the respondents' mind when taking decisions.

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

505. There is no requirement in victimisation claims to show that the alleged discriminator was wholly motivated to act by the claimant's behaviour in carrying out a protected act. Where there is more than one motive involved, all that is needed is that the discriminatory reason should be of sufficient weight - ***O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615***.

506. The Code addresses victimisation in Chapter 9. It stresses at paragraph 9.10 that making a protected act need not be the only reason for the detriment, but is one of them.

(iii) Other matters

Detriment

507. The word "detriment" is defined in section 212) only as "detriment does not subject to subsection (5) include conduct which amounts to harassment". Subsection (5) is where a prohibition on harassment is disapplied. Detriment is otherwise not defined.

508. In ***Ministry of Defence v Jeremiah [1980] ICR 13,*** the Court of Appeal held that a detriment exists "if a reasonable worker would take the view that the treatment was to his detriment", and essentially the same test was applied by Lord Hope in ***Shamoon,*** who held that an unjustified sense of grievance cannot amount to a detriment. There is a need to show that any alleged detriment is objectively regarded as such as discussed by the House of Lords in ***St Helens Metropolitan Borough Council v Derbyshire [2007] ICR 841***.

509. The application of the ***Shamoon*** principles to detriment for the purposes of victimisation was confirmed in ***Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925*** in which the EAT summarised the principles as being that detriment is to be interpreted widely and it is not necessary to establish any physical or economic consequence. It is enough that a reasonable worker might take such a view, such that the bar is not particularly high.

510. The EAT held in ***Greasley-Adams v Royal Mail Group Ltd [2023] ICR 1021*** that in the absence of knowledge of a fact it cannot amount to a detriment.

Burden of proof

511. Section 136 implemented the Burden of Proof Directive 1997/80/EC which remains of effect as assimilated law, a matter addressed below. There is a two-stage process in applying the burden of proof provisions in discrimination and victimisation claims, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

512. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

513. In ***Igen*** the Court of Appeal had said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

514. The same principle applies where other protected characteristics are relied on. ***Efobi*** at the Supreme Court also addressed the issue of the failure to call a witness, and in summary stated that whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are, the court said, inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

515. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***.

516. Unreasonable behaviour of itself is not sufficient to found discrimination, but it may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.*** It may also be inferred if there was what in England and Wales is referred to as disclosure, as addressed in ***EB v BA 2006 IRLR 471***. There is not the same process of disclosure in Scotland, but a material failure to comply with an order for documents is a broad equivalent of that.

517. In ***Chapman v Simon [1994[IRLR 124*** the Court of Appeal gave guidance about drawing an inference of discrimination, which must be from primary facts that have been found, Lord Justice Longmore stating:

> "In order to justify an inference, a Tribunal must first make findings of primary fact from which it is legitimate to draw the inference. If there are no such findings, then there can be no inference: what is done can at best be speculation." Lord Justice Peter Gibson stating:
>
> "It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion."

518. The Supreme Court considered the drawing of inferences in the Tribunal in ***Royal Mail Group Ltd v Efobi [2021] UKSC 33***, in which Lord Leggatt stated that drawing inferences was a matter of ordinary rationality and that

Employment Tribunals should be free to draw, or decline to draw, inferences using their common sense.

519. In the context of the claim of indirect discrimination under section 19 findings must be made as to the 'provision, criteria or practice' being applied and as to the question of 'disadvantage'. When considering a claim of failure to make reasonable adjustments under the predecessor provisions to the Act, which has similar concepts in part, the EAT held in ***Project Management Institute v Latif [2007] IRLR 591***:

> "we very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting on the Claimant."

520. In ***Bethnal Green & Shoreditch Educational Trust v Dippenaar UKEAT/0064/15*** that principle was applied to a claim under section 19. It is therefore for a claimant to prove primary facts in relation to both the PCP and the group and personal particular disadvantage before the reversal of proof provision is engaged for such a claim. It is then for the respondent to prove the defence of a proportionate means of achieving a legitimate aim.

Jurisdiction

521. The Employment Tribunal has been described as a "creature of statute", by which is meant that it only has the jurisdiction conferred on it by Parliament. There is a partial conferring of jurisdiction on the Tribunal within the Act as set out above, and discussed further below.

522. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96***).

523. Where a claim is submitted out of time, there is no formal burden of proof for a claimant to show that it is just and equitable to allow it to be received is on the claimant, but there is a burden on a claimant to persuade the Tribunal to exercise its discretion (***Polystar Plastic Ltd v Liepa [2023] EAT 100***.

524. The Inner House reviewed the just and equitable provision in the case of ***Malcolm v Dundee City Council 2012 SLT 457*** and held that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of the discretion that the section confers. It is not, however determinative of its own.

525. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal emphasised the width of the discretion given to the Tribunal. That was emphasised further in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which discouraged use of what has become known as the ***Keeble*** factors as form of template for the exercise of discretion.

526. The EAT recently reviewed the issue in ***Jones v Secretary of State for Health and Social Care [2025] EAT 76***.

Statutory construction

527. Part of the consideration of the issues in the case involves construing the terms of the 2010 Act. The principles of statutory interpretation were summarised by the Supreme Court in ***FWS*** at paragraphs 8 – 14, which stressed the need to do so giving words their ordinary meaning.

(i) European law as assimilated law

528. There was, prior to the UK's withdrawal from the European Union, a need to interpret the Act purposively, meaning in accordance with the purposes of the Equal Treatment Directive it implemented, and the relevant case law in relation to that Directive from the ECJ and CJEU. In that regard the observations in ***Litster v Forth Dry Dock & Engineering Co Ltd*** *[1989] ICR 341* are often cited, in which in the House of Lords it was said in relation to the principle of purposive construction although in relation to a different Directive

> "The Courts of the United Kingdom are under a duty to follow the practice of the European Court of Justice by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives. Such purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has enacted to use."

529. In ***Uber BV v Aslam [2021] ICR 657*** the general principle was expressed in the Supreme Court as follows:

> "The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose".

530. The position has been changed by the United Kingdom's withdrawal from the European Union. There are now provisions for assimilated law under the European Union (Withdrawal) Act 2018, as amended by the Retained EU Law (Revocation and Reform) Act 2023. These provisions preserve, subject to qualifications, the case law of the Court of Justice where the decision was issued before 31 December 2020, under section 6(7). The analysis required in this regard is impacted by section 5A of the 2018 Act as amended by the 2023 Act. The relevant terms of that section are as follows:

> "**5 Exceptions to savings and incorporation**
> (A1) The principle of the supremacy of EU law is not part of domestic law.
> This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made).
> (A2) Any provision of assimilated direct legislation—
> (a) must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and
> (b) is subject to all domestic enactments, so far as it is incompatible with them…….
> (A4) No general principle of EU law is part of domestic law after the end of 2023…..
> (8) In this section "domestic enactment" means an enactment other than one consisting of assimilated direct legislation."

531. Section 20(1) of the 2018 Act as amended defines "assimilated direct legislation" as that it "means any direct EU legislation which forms part of domestic law by virtue of section 3 (as modified by or under this Act or by other domestic law from time to time, and including any instruments made under it on or after IP completion day." By s 3(2), the expression "direct EU legislation" means any "EU decision" is defined in s 20(1) to include EU case law.

532. As a broad summary of the law from these provisions we consider that (at this level, of the Employment Tribunal) CJEU case law remains binding on unless it applies a general principle of EU law, such as proportionality, equivalence or effectiveness where the decision was issued on or before 31 December 2020. For decisions after that date an Employment Tribunals is not bound by it, but it may be taken into account if considered to be persuasive.

(i) The Equal Treatment Directive

533. The Equal Treatment Directive 2000/78/EU includes the following:

> "Article 1
>
> Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;……."

534. The CJEU has applied the principle from the ECtHR case of ***Eweida*** discussed below in ***Achbita v G4S Secure Solutions NV: C-157/15, ECLI:EU:C:2017:203, [2017] IRLR 466*** and ***Bougnaoui v Micropole SA: C-188/15, ECLI:EU:C:2017:204, [2017] IRLR 447*** in which female employees had been dismissed for refusing to comply with a prohibition by their employers on wearing Islamic headscarves at work. In our view these cases remain binding as assimilated law.

535. In both cases the court held that the prohibition could potentially be objectively justified as something done for the legitimate aim of 'the pursuit by the employer, in its relations with its customers, of a policy of political philosophical or religious neutrality' (***Achbita)*** or presenting a 'neutrality vis a vis its customers' (***Bougnaoui)***. On the issue of proportionality the court in ***Achbita*** held that regard was to be had to whether the policy was pursued in a consistent and systematic manner, and whether it was imposed only on those with customer contact given that that was part of the aim.

536. There is later case law of the CJEU in this aspect being ***IX v WABE eV*: *C-804/18***, and ***MH Müller Handels GmbH v MJ*: *C-341/19***, heard together and reported at ***[2021] IRLR 832*,** and ***OP v Commune d'Ans* C-148/22, *[2024] IRLR 206***, but they were decided after the UK left the European Union, are decided in part on the EU Charter, and in our view are not sufficiently persuasive that we should take them into account.

(ii) Human Rights

537. A similar but different purposive construction is appropriate where an issue of human rights is engaged under section 3 of the 1998 Act, as addressed in the House of Lords in ***Ghaidan v Godin-Mendoza [2004] 2 AC 557***. The principle has been applied both to issues of European law, and human rights. The statutory provision may be interpreted flexibly to accord with the purpose of the Directive or so as not to breach the Convention, provided that doing so does not go against the grain of the legislation. Further authorities on human rights are set out below.

538. The approach an Employment Tribunal should take to such an issue was considered, in the different context of a claim of unfair dismissal, in ***X v Y [2004] IRLR 625.*** Lord Justice Mummery gave guidance in such a case, which involved a private not public sector employer. It referred to a structured approach to considering whether Convention rights were engaged, and in the context of fairness of a dismissal to ask "is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?"

539. For the avoidance of doubt we add that this case is not one raised directly on the basis of human rights, which the Tribunal does not have jurisdiction over. The issue of human rights is only an aid to construction, not a claim pursued before us.

540. The terms of the European Convention on Human Rights ("ECHR") are to be considered when construing legislation, under the terms of the Human Rights Act 1998 ("the 1998 Act"), section 3 of which requires that:

> "**3. Interpretation of legislation.**
> (1) so far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the convention rights.
> (2) This section applies -
> to primary legislation and subordinate legislation whenever enacted"

541. Section 6 provides:

> "**6. Acts of public authorities.**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
(2) Subsection (1) does not apply to an act if—
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
(3) In this section "public authority" includes—
(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature,
but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

542. Section 7 provides

"7. Proceedings
(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may —
(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
(b) rely on the Convention right or rights concerned in any legal proceedings,
but only if he is (or would be) a victim of the unlawful act."

543. The following Articles of the ECHR are included within convention rights and are set out in Schedule 1 to the 1998 Act:

"Article 8

Right to respect for private and family life:
(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, for the protection of the rights and freedoms of others.

Article 9:

Freedom of thought, conscience and religion:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression:
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

544. Whilst not a Convention right, the terms of Article 1 of the Convention state as follows:

"**Article 1**

Obligation to respect Human Rights
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

545. The ECtHR held that a person's body is the most intimate aspect of the right to a private life in ***YF v Turkey, Case. No. 24209/94***, decided on 22 July 2003.

546. Where Convention rights give rise to competing interests, the House of Lords in ***Re S (a child) [2004] 4 All ER 683*** said:

"… neither article has as such precedence over the other … where the values under the two articles are in conflict, an intense focus on

> the comparative importance of the specific rights being claimed in the individual case is necessary … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each …"

547. In ***Evans v United Kingdom Application no. 6339/05*** the ECtHR considered the competing Article 8 rights of a male and female in relation to embryos from IVF treatment. After their relationship ended the male withdrew consent for use of the embryos. The female, who was otherwise unable to have her own children, argued unsuccessfully that there had been a breach of her Article 8 rights. The court held that there required to be a fair balance between the rights of the male and female, and that the UK law governing the matter was within the margin of appreciation. The rights of each of the male and female were treated as if equal, and the court stated that:

> "The Court is not persuaded by the applicant's argument that the situation of the male and female parties to IVF treatment cannot be equated and that a fair balance could in general be preserved only by holding the male donor to his consent. While there is clearly a difference of degree between the involvement of the two parties in the process of IVF treatment, the Court does not accept that the Article 8 rights of the male donor would necessarily be less worthy of protection than those of the female; nor does it regard it as self-evident that the balance of interests would always tip decisively in favour of the female party."

548. In ***Mba v Mayor and Burgesses of the London Borough of Merton [2014] IRLR 145*** the claimant objected to working on Sundays due to her Christian beliefs and pursued an indirect religious discrimination claim under regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003. The majority of the Court of Appeal held that

> "domestic law must be read so as to be consistent with Convention rights where possible, in accordance with s.3 of the Human Rights Act. In my judgment, it is simply not possible to read down the concept of indirect discrimination to ignore the need to establish group disadvantage. But I see no reason why the concept of justification should not be read compatibly with Article 9 where that provision is in play. In that context it does not matter whether the claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion. It is for this reason that in my view the employment tribunal was wrong to make reference to this factor as one assisting the employer.

> This is not to say that the number of employees sharing a particular belief will necessarily be irrelevant to a justification challenge where Article 9 is engaged. Assuming that the employer's criterion is designed to achieve a legitimate end, the greater the number of employees affected, the more difficult it is likely to be for an employer to accommodate those beliefs in a way which is compatible with his business objectives. So paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against."

549. In ***P v Poland [2025] IRLR 393*** the ECtHR did not find that an Article 10(2) defence had been made out as the basis for dismissing an employee for social media posts that were made, summarising matters as follows:

> "the Court concludes that the domestic authorities did not provide 'relevant and sufficient reasons' for dismissing the applicant from his position. Even allowing for a certain margin of appreciation, it cannot be held that the applicant's personal blogging activity threatened the protection of morals of minors in a manner justifying the sanction imposed on him. Therefore, the interference with his right to freedom of expression neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim purportedly pursued. It thus was not "necessary in a democratic society".

The development of the law relating to gender reassignment

550. For the vast majority of people the concepts of sex and gender are congruent. What those two terms mean was addressed by the Supreme Court in ***Elan-Cane v Secretary of State for the Home Department [2021] UKSC 56***. The claimant was assigned female at birth and after surgery decided on a non-gendered status. The issue was whether it was lawful for the respondent to require passport holders to identify as M (male) or F (female), when it was possible to use the identifier X under International Civil Aviation Organisation provisions for passports, which included those identifying as non-gendered. Lord Reed said the following in his speech:

> "The term "gender" is used in this context to describe an individual's feelings or choice of sexual identity, in distinction to the concept of "sex", associated with the idea of biological differences which are generally binary and immutable."

551. The House of Lords held that there was no recognised non-gendered sex, such that under UK law a person's sex was either male or female.

552. There has been a lengthy development of the law in relation to what a person's sex is where there is an incongruence between sex assigned at birth and their perception of their gender or sex. The developments have not always followed a linear path, and there is to an extent an interplay between the European Convention on Human Rights, and case law in relation to the rights under it, as well as decisions of the Court of Justice and domestic decisions in Great Britain. European law and human rights law provisions are nevertheless distinct.

553. The first detailed examination of whether a person was male or female by sex of which we are aware is the Outer House decision of Lord Hunter in ***Forbes-Sempill, Petitioners (unreported) (29 December 1967),*** which involved consideration of evidence given as to the circumstances of a person who argued that he was a hermaphrodite with predominantly male characteristics such that he was a male, but had XX chromosomes and elements of both male and female genitalia. The court concluded that the person was a man. The issue of chromosomes was not considered determinative, and a view from all the evidence led was taken. It was however essentially a biological assessment of sex for someone who had been assigned female at birth, but where the evidence presented was that the person was of the male sex, and a certificate of correction of the birth certificate had separately and earlier been made essentially it would appear on the basis that the assigning of female sex at birth had been an error. The decision was reached after hearing evidence of male sexual function, and took account of all the circumstances including psychological elements.

554. It may be of assistance to quote some of the decision in that case, as it is not reported, and we have added that, together with more lengthy quotations from certain of the cases which follow, in an Appendix.

555. The next consideration as to the sex of a person is found in ***Corbett v Corbett [1971] P 83****,* a case from the High Court**,** which included a detailed examination of biological details ascertained with the benefit of substantial expert evidence. It set out a biological test of sex, being chromosomal, gonadal and genital tests, and if all were congruent that established sex. It held that it was fixed at birth. The Outer House decision just referred to appears not to have been cited to it.

556. In ***Rees v. United Kingdom (application no. 9532/81)*** on which judgment was given on 17 October 1986, the European Court of Human Rights ("ECtHR") held that Articles 8 and 12 had not been breached in respect of a trans man who had sought to amend the birth certificate issued as female to male. The Court also held that a "need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments."

557. In ***P v S and Cornwall County Council (Case C-13/94) [1996] ICR 79*** the European Court of Justice ("ECJ") held that the Equal Treatment Directive (Council Directive 76/207/EEC) required Member States to prohibit discrimination arising from gender reassignment. The claimant in the case informed the employer of an intention to undergo gender reassignment. There was an initial period during with the claimant dressed and behaved as a woman. After initial surgical procedures the claimant was given notice of dismissal on the ground of redundancy, and after the notice but before that expired underwent more extensive surgical procedures. The claimant claimed sex discrimination and argued that there had not been a genuine redundancy. The respondent argued that gender reassignment could not be sex discrimination.

558. The Tribunal referred the matter to the ECJ which referred to ***Rees*** and stated***:***

> "the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus for a fairly well-defined and identifiable group" (judgment of 17 October 1986 in Rees v United Kingdo, paragraph 38, series A, No 106)"

559. It held that that was the expression of the fundamental principle of equality under Community Law and that:

> "Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned."

560. That case was part of the background to the enactment of the Sex Discrimination (Gender Reassignment) Regulations 1999, which amended the Sex Discrimination Act 1975 to prohibit direct discrimination on the grounds of gender reassignment in employment.

561. ***Goodwin v United Kingdom [2002] IRLR 664*** held that the state's failure to recognise the legal status of a post operative transsexual person was a breach of Article 8 rights. In so holding the ECtHR Rights held:

> "In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic

> recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v Bellinger* (see paragraphs 50, 52–53)".

562. It also made the following more general comment when it considered the possible consequences of a change to the status of trans persons:

> "The Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."

563. The following was said in relation to Article 8 rights:

> "Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human being. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved."

564. In ***Van Kuck v Germany (ECtHR) (Application No. 35968/97)*** decided on 12 September 2003, the following was said by the ECtHR:

> "As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition…….the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security (see *I v the United Kingdom para 70* and *Christine Goodwin* para 90, both cited above).,,,,,
>
> Furthermore, considering recent developments (see *I. v. the United Kingdom and Christine Goodwin*, both cited above, § 62 and § 82, respectively), gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate….."

565. In ***Bellinger v Bellinger (Lord Chancellor intervening) [2003] 2 WLR 1174,*** the House of Lords considered the position of a trans woman who had lived as a woman, had undergone gender reassignment surgery, and had after the surgery married a man. It held that the marriage was void as the plaintiff remained a man in law, but also made a declaration of

incompatibility with the Convention. The court considered the position of a trans person and the relationship to sex as male or female, as set out more fully in the Appendix.

566. The Court of Appeal in ***Croft v Royal Mail [2003] ICR 1425*** considered whether preventing a trans employee from using the toilet which aligned with their gender identity would constitute direct gender reassignment discrimination. The facts of that case were given in summary from the decision that "the applicant began her employment with the Post Office in March 1987. She was then a man and had been married and fathered three children. Her work involved driving a mail van to and from the Leicester sorting office and to and from another centre. The appellant had for many years had doubts about her sexuality and she sought medical advice in about August 1997. A medical specialist expressed the opinion in January 1998 that the applicant had long-standing gender dysphoria with awareness of female self-identity from an early age and regular cross-dressing. She was counselled about the difficulties in changing gender role and because she still wished to proceed was prescribed feminising hormones. In about April 1998, the applicant started to suggest to friends and colleagues that she was proposing to change to a female role. On 20 July, there was a meeting attended by the operations manager to discuss the plans to be implemented. It was recorded that the applicant proposed to attend work dressed as a woman from 24 August onwards."

567. It held that there was no absolute right engaged, and as in our view it assists in resolving some of the issues we face the Tribunal considers that it is helpful to set out some details of the decision in the Appendix.

568. The Equal Treatment Directive (which was recast as 2000/78/EC) was held to require Member States within the context of sex discrimination law to treat trans people not as a "third sex" but rather as men or as women in accordance with their reassigned gender, by the House of Lords in ***Chief Constable of West Yorkshire Police v A [2005] 1 AC 51,*** ("***West Yorkshire***"). That was a case described as being of a male to female transsexual, which we would refer to as a trans woman, where there had been both hormone treatment and surgery. Lord Bingham of Cornhill reviewed the domestic and European authorities and concluded as follows:

> "In my opinion, effect can be given to the clear thrust of Community law only by reading 'the same sex' in s 54(9) of the 1984 Act, and 'woman', 'man' and 'men' in ss 1, 2, 6 and 7 of the 1975 Act, as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search."

569. Baroness Hale of Richmond, as she then was, reviewed authorities from the European Court of Justice, as it was then called, in relation to the Directive and stated the following:

> "Thus, for the purposes of discrimination between men and women in the fields covered by the directive, a transperson is to be regarded as having the sexual identity of the gender to which he or she has been reassigned."

570. After considering ***KB v National Health Service Pensions Agency Case C-117/01 [2004] IRLR 240***, a decision of the Court of Justice of the European Union ("CJEU")**,** the following was added:

> "If in principle the trans partner of an employee must be recognised in the reassigned gender for the purpose of death benefits, the employee herself must in principle be recognised in the reassigned gender for the purpose of carrying out the duties of the post. This means that s 54(9) of the 1984 Act must be interpreted as applying to her in her reassigned gender, unless, as was acknowledged in *P v S,* there are strong public policy reasons to the contrary. It is difficult to argue that such public policy reasons existed in this case even in 1998."

571. Practical issues were then addressed including the roles of nurses and doctors in a hospital ward, commentary that there may be reasonable objections to treatment by a heterosexual person of the other sex or a homosexual person of the same sex, with the following then said:

> "it would not be rational to object on similar grounds to being nursed by a transperson of the same sex. In those circumstances it is not surprising that the employment tribunal held that an objection to being searched by a transperson would not be reasonable.
>
> Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these, for the reasons explained in *Bellinger*'s case*,* will be sensitive and difficult. That is presumably why the Court of Justice in *KB*'s case acknowledged the role of the national court in deciding whether the principle did in fact apply in the particular case. One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the acquired gender. (One could also envisage a relationship which was not as close to marriage as the relationship in that case.) The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the employment tribunals to make that judgment in a borderline case."

572. The case of ***KB*** concerned a claimant who was a woman who had worked for approximately 20 years for the NHS and was a member of its pension scheme. She had shared an emotional and domestic relationship for a number of years with R who had been born a woman but identified as male and who underwent surgical gender reassignment. In light of the law as it then was it had not been possible to amend R's birth certificate, and as a result, and contrary to their wishes, K.B. and R. were not able to marry. The European Court of Justice applied the jurisprudence from ***Goodwin***, and held that there had been a breach of Article 141 EC.

573. The Gender Recognition Act 2004 came into force on 1 April 2005. Its terms are referred to below.

574. In ***Richards v Secretary of State for Work and Pensions Case C – 423/04*** decided on 26 April 2006 there was a reference for a preliminary ruling concerning the interpretation of Articles 4 and 7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The claimant was a trans person who had undergone a gender reassignment operation regarding the refusal to award the claimant a retirement pension as from the 60th birthday, which at the time was that applicable for women. The CJEU held that there had been a breach of the Directive.

575. In ***Parry v United Kingdom Application no. 42971/05*** decided on 28 November 2006 the ECtHR held that an application was manifestly ill founded. The claimant had to end a marriage in order to obtain a gender recognition certificate, such that the choice was between gender or marriage. That there was the right to enter a civil partnership was held to be within the margin of appreciation for the State such that there had not been a breach of the Convention. The outcome was therefore the opposite of that in the previous case and demonstrates the importance of considering issues that arise under the Convention and those that arise under the Directive separately.

576. In ***Grant v United Kingdom 2007/44 ECHR 1*** decided on 8 January 2009 the ECtHR considered held that the rights of the claimant had been breached in the period from the Goodwin decision to the introduction of the 2004 Act. It held that the 2004 Act had been introduced with laudable expedition, and that the breach that had existed ended with the Act's introduction as legal recognition of the status of the trans gender person then was provided for.

577. In ***R(T) v Chief Constable of Greater Manchester Police [2015] AC 49*** the Supreme Court considered the nature of the State's obligation in relation to Article 8 rights, and said:

> "The European court has said repeatedly that, although the purpose of article 8 is essentially to protect the individual against

> arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals….."

578. In ***Garcon and Nicot v France (ECtHR) (Applications Nos. 79884/12, 52471/13 and 52596/13)*** decided on 6 April 2017, the following was said, again by the ECtHR:

> "The Court has stressed on numerous occasions that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (see, in particular, Van Kück v. Germany, no.35968/97, § 69, ECHR 2003-VII; Schlumpf v. Switzerland, no. 29002/06, § 77, 8 January 2009; and Y.Y. v. Turkey, cited above, § 56, and the references cited therein)."

579. The Supreme Court considered matters further in ***R (C) v Secretary of State for Work and Pensions [2017] UKSC 72,*** ("***Work and Pensions"***). Lady Hale, as she had become, said in the first paragraph of her speech that:

> "….. the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their right, to live, not as a member of a 'third sex', but as the person they have become, as fully a man or fully a woman as the case may be.…
>
> A person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

580. In ***MB v Secretary of State for Work and Pensions Case C – 46/16*** decided on 26 June 2018 the outcome was similar to that in ***Richards*** in

circumstances where a person had been assigned male at birth, had later married, had then commenced to transition to female, which had included surgery, but had not sought a gender reassignment certificate because that would have required to end the marriage which the claimant and the claimant's wife did not wish to do for religious reasons.

581. In ***R*** (***FDJ) v Secretary of State for Justice [2021] 1 WLR 5265*** the High Court dismissed an application for judicial review brought by a trans woman prisoner regarding the care and management of such prisoners. It commented on the lack of reliable evidence as to whether trans women prisoners were a greater risk than biological women prisoners, and that the statistical evidence before the court was unsatisfactory. After considering the evidence the court stated

> "I can accept, at any rate for present purposes, that the unconditional introduction of a transgender woman into the general population of a women's prison carries a statistically greater risk of sexual assault upon non-transgender prisoners than would be the case if a non-transgender woman were introduced. But that statistical conclusion takes no account of the risk assessment which the policies require.
>
> I fully understand the concerns advanced on behalf of the claimant. Many people may think it incongruous and inappropriate that a prisoner of masculine physique and male genitalia should be accommodated in a female prison in any circumstances. More importantly…….I also readily accept the proposition (for which Ms Hogarth provides evidence) that some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender woman who has male genitalia, that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women….
>
> However the subjective concerns of women prisoners are not the only concerns which the defendant had to consider in developing the policies: he also had to take account of the rights of transgender women in the prison system."

582. The Supreme Court addressed the meaning of "woman" in the 2010 Act in ***FWS*** and summarised its conclusion as follows:

> "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. Persons who share that protected characteristic for the purposes of the group-based rights and protections are persons of the same sex and provisions that refer to protection for women necessarily exclude men. Although the word "biological" does not appear in this

> definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women are on the face of the definition only differentiated as a grouping by the biology they share with their group."

583. The court also noted that gender reassignment is defined distinctly from sex, stating:

> "Accordingly, the EA 2010 recognises sex and gender reassignment as distinct and separate bases for discrimination and inequality, giving separate protection to each…….it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment, which is the common factor [for those under section 7] not the sex into which the person is reassigned."

584. After commenting that a Gender Recognition Certificate (GRC) is confidential to the person with the characteristic if held, the court added:

> "Moreover, in either case [with or without a GRC] the individual's biological sex may continue to be readily perceivable and may form the basis of unlawful discrimination."

585. It then referred to the fact that the difficulty a certificated sex interpretation "would create for service-providers, employers and other organisations in applying equality law to these groups is obvious." It concluded that under the Act certificated sex was not relevant to the definition of woman or man, and that the definition was biological sex from that assigned at birth.

586. In ***TH v Czech Republic (Application no. 33037/22)*** decided on 12 June 2025 the European Court of Human Rights noted that "trans-related and gender diverse identities are not conditions of mental ill-health [in the International Classification of Diseases]. Therefore, "transsexualism" has been replaced with "gender incongruence of adolescence and adulthood", which now appears in a new chapter "Conditions related to sexual health" and is characterised by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to "transition", in order to live and be accepted as a person of the experienced gender. This may involve hormonal treatment, surgery or other healthcare services to align the individual's body, as much as desired and to the extent possible, with the experienced gender."

587. It also referred to the change in terminology for the condition. There had been a reference in ***Goodwin*** to a previous version of the International Classification of Diseases (ICD) and to what Lord Nicholls had described as follows:

> "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. ……The aetiology of this condition remains uncertain. It is now generally recognized as a psychiatric disorder."

588. The changes in terminology led to the replacement of transsexualism with "gender incongruence of adolescence and adulthood" in the International Classification of Diseases version issued in 2024, such that it is not now regarded as a psychiatric disorder.

Manifestation of religion or belief

589. In ***Eweida and others v United Kingdom [2013] ECHR 37*** the ECtHR stated that to count as a manifestation within Article 9 ECHR, there must be a sufficiently close and direct nexus between the act and the underlying belief. It had the result that in a direct discrimination case an employer will not be found to have discriminated if the reason for its actions was not the belief but the manner in which it was manifested by the employee, where objection could justifiably be taken to that manner. That introduces what is in essence a test that includes proportionality, and a distinction between the belief and its manifestation which has been described as separability.

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

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

b. Is the measure rationally connected to the objective?

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

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

591. In ***Page v NHS Trust Development Authority [2021] EWCA Civ 255*** the Court of Appeal said the following:

> "In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is

> the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytization at work – Chondol v Liverpool City Council [2009] UKEAT 0298/08, Grace v Places for Children [2013] UKEAT 0217/13 and Wasteney v East London NHS Foundation Trust [2016] UKEAT 0157/15, [2016] ICR 643. In essence, the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately."

592. In ***Higgs v Farmor's School [2025] IRLR 368*** the Court of Appeal considered a claim of direct discrimination and harassment in the context of an employee expressing gender critical beliefs. As it is in our view another case of assistance in determining the issues before the Tribunal it will also be quoted from at length in the Appendix. The Supreme Court refused leave to appeal on 4 June 2025. The Court of Appeal noted the importance of the principle of free speech, as we address further below.

593. After analysing ***Page,*** including the distinction referred to therein between the absolute right to hold a belief and the qualified right to manifest it, the court said the following:

> "In summary, Page was decided on the basis that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something "objectionable" in the way in which the belief was manifested: it thus introduced a requirement of objective justification into the causation element in section 13 (1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention. I should clarify two points about language:
>
> (1) The word "objectionable" in para. 74 is evidently a (possibly rather inapt) shorthand for the phrase in para. 68 "to which objection could justifiably be taken". Both have the same effect as the word "inappropriate" which is also used.

> (2) The "way" in which the belief is manifested is a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs."

594. It then made five further points in relation to that authority. It also considered the guidance issued by the EAT in the case before it, and generally endorsed that guidance but with the following qualifying comments:

> "provided para. 94 is read as being limited to, as she says, a summary of the underlying principles, I would respectfully endorse it. I would only say, consistently with the caution already expressed, that it will not be necessary – or always even useful – for a tribunal to structure its reasoning by reference to the nine "considerations" enumerated in head (v). All of them are potentially relevant; but in practice, as the EHRC observed, the focus of the issues in any given case will only be on some of them, and there may be some cases where other considerations – or considerations which do not neatly fit into her formulation – may be relevant."

595. Paragraph 94 of the EAT decision, reported at ***Higgs v Farmor's School [2023] EAT 89,*** stated the following:

> "All that said, I can see that, within the employment context, it may be helpful for there to be at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.
>
> (1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.
>
> (2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.
>
> (3) Whether a limitation or restriction is objectively justified will always be context-specific. The fact that the issue arises within a

relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.

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

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by [the Archbishops' Council] are likely to be relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer."

596. The Court of Appeal further held that where allegations had been made it was permissible to investigate them, and to consider suspension, although it commented on the decision to make in that regard as follows:

"**The disciplinary process claim**

I can give my reasons on this point shortly. I have no doubt that the School was entitled to carry out an investigation of some kind in response to the complaint. The posts unquestionably used offensive language, even if it was evidently not the Claimant's own, and they had been seen by, and caused concern to, at least one parent who knew that she worked at the School. It would frankly have been irresponsible not to try to ascertain whether there was a risk of serious reputational damage or of the Claimant "bringing into school" the issues that she raised in the posts or holding attitudes that might affect how she treated gay or trans children. It is

> debatable whether that investigation needed to be disciplinary in character or, if it did, whether Ms Dorey was justified in finding a case to answer at the end of it. It is still more debatable whether it was necessary to suspend the Claimant: as to this, see the observations of Elias LJ in Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, [2012] IRLR 402, at para. 71. However, these are not questions to which I believe that this Court can provide a confident answer in circumstances where they were not explored by the ET or in the submissions to us."

597. The limitations on free speech included the following reference to the submission for the respondent

> "Mr Jones asked us to note in particular that the Court in *Lilliendahl* found that the language used by the applicant, coupled with the clear expression of disgust, was such as "to promote intolerance and detestation of homosexual persons". He relied on the case as authority for the proposition that article 10 rights, and thus also rights under article 9, did not extend unqualified protection to "insulting, holding up to ridicule or slandering specific groups of the population": whether speech of that kind was protected would depend on "the content of the expression and the manner of its delivery". I have no difficulty with that proposition, which is consistent with the approach endorsed in *Page*."

598. Further comments were made about whether a person might be transphobic from views expressed, and there was a comment on the importance of focussing on the words spoken as follows:

> "we are concerned only with whether the School's response to the posts was objectively justified. But it is just as necessary in that context to judge an employee's statement by what they actually say (albeit including any necessary implications) rather than by what some readers might choose illegitimately to read into them. That is particularly important in the current social media climate, where messages are often read hastily and sometimes by people who are partisan or even ill-intentioned or (more likely) simply succumb to the common human tendency to find in a communication what they expect to find rather than what is actually there."

599. The court distinguished the facts of the case before it, which essentially involved passing on messages on Facebook to others, with language the employee did not endorse, from those in ***Lilliendahl v Iceland 29297/18 [2020] ECHR 93***. In that case a person had made comments in relation to homosexuality using terms of sexual deviance, referred to further below. The Supreme Court in Iceland held that that was a crime, and the ECtHR

upheld that decision. The ECtHR's reasons are set out where relevant to this case in the Appendix.

600. The Code of Practice: Employment includes the following:

> "**Manifestation of religion or belief**
>
> 2.60 While people have an absolute right to hold a particular religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) or the right to freedom of expression (Article 10).
>
> 2.61 Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination.
>
> Example: An employer has a 'no headwear' policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion."

Equality and Human Rights Commission Codes and Guidance

601. Codes of Practice issued under section 14 of the Equality Act 2006 are to be taken into account by Tribunals in the circumstances set out in section 15(4) of that Act, which states as follows:

> "**15 Codes of practice: supplemental**
> …..
> (4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code—
> (a) shall be admissible in evidence in criminal or civil proceedings, and
> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.
> (5) Subsection (4)(b) does not apply in relation to a code issued under section 14(4)."

602. There are three separate Codes issued by the Equality and Human Rights Commission ("EHRC") which were brought into effect by The Equality Act

2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011.

603. A statutory Code of Practice is taken into account where that is required by the statute, and may be considered more generally if a non-statutory document, but each is a form of guidance and is not a statute. The basic principle was addressed by the House of Lords in ***SCA Packaging v Boyle [2009] ICR 1056***, That case concerned the definition of disability in a Northern Ireland case, on which there was departmental guidance issued, and Lord Rodger of Earlsferry said that "while the Guidance can helpfully illustrate the way that a provision may work in practice, it cannot be regarded as an authority on a point of statutory interpretation."

604. Statutory construction is a matter for the courts and tribunals. If the Tribunal considers that a Code or Guidance is a mis-statement or mis-application of what Parliament has enacted, it can and should disregard it.

605. The Code of Practice: Employment issued by the EHRS in 2011 is one such Code, and is relevant to issues of work under Part 5 of the Act. It is referred to as appropriate above and below.

606. Its provisions as to exclusions from the terms of Schedules 22 and 23 of the Act are mainly found in Chapter 13 which includes the following:

> "**Provision of services to the public**
>
> 13.46 The Act says that an employer who provides services to the public is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Act (the employment provisions) in relation to those services. Where a worker is discriminated against or victimised in relation to those services, their claim would be in the county court (or sheriff court in Scotland) under Part 3 of the Act relating to services and public functions.
>
> Example: If an employee of a women's clothing retailer is denied the services of the retailer because she is a transsexual woman, her claim would be made under the services provisions of the Act. This means she should bring her claim in the county court.
>
> 13.47 However, where the service provided under the terms and conditions of employment differs from that provided to other employees, or is related to training, the worker can bring a claim in the Employment Tribunal under the employment provisions (Part 5).
>
> Example: In the example above, the situation would be different if the same transsexual woman's employment contract provided her with a 20% discount on all clothes purchased from her employer, a discount not available to members of the public. If she tried to use

the discount and was refused, then she would bring her claim in the Employment Tribunal under the employment provisions of the Act……

"**Communal accommodation**

13.57. An employer does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting persons to communal accommodation or to providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied.

Sch. 23, para 3

13.58. Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex. It can also include shared sleeping accommodation for men and for women, ordinary sleeping accommodation and 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.

13.59. A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation.

13.60. Where accommodation or a benefit, facility or service is refused to a worker, alternative arrangements must be made in each case where reasonable so as to compensate the person concerned.

Example: At a worksite, the only sleeping accommodation provided is communal accommodation occupied by men. A female worker wishes to attend a training course at the worksite but is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable; for example, by arranging alternative accommodation near the worksite or an alternative course.

13.61. Sex or gender reassignment discrimination in admitting people to communal accommodation is not permitted unless the accommodation is managed in a way which is as fair as possible to both women and men.

13.62. In excluding a person because of sex or gender reassignment, the employer must take account of:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and
- the relative frequency of demand or need for the accommodation by persons of each sex.

13.63. The Act permits a provider of communal accommodation to exclude people who are proposing to undergo, undergoing or who have undergoing gender reassignment from this accommodation. However, to do so will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim. This must be considered on a case-by-case basis; in each case, the provider of communal accommodation must assess whether it is appropriate and necessary to exclude the transsexual person."

607. The EHRC has also issued the Code of Practice: Services again under section 14 of the 2006 Act. It did so under Part 3 of the 2010 Act, as it made clear at paragraph 1.6. It included the following wording:

"**Gender reassignment discrimination and separate and single-sex services**

13.57 If a service provider provides single- or separate-sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate [aim].

Schedule 3 para 28.

13.58 The intention is to ensure that the transsexual person is treated in a way that best meets their needs. Service providers need to be aware that transsexual people may need access to services relating to their birth sex which are otherwise provided only to people of that sex. For example, a transsexual man may need access to breast screening or gynaecological services. In order to protect the privacy of all users, it is recommended that the service provider should discuss with any transsexual service users the best way to enable them to have access to the service.

Example:

A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual

> woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles.
>
> 13.59 Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.
>
> 13.60 As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances. A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available."

608. The EHRC has also issued guidance. It does not have the status of a Code of Practice and the Tribunal is not bound to take it into account under section 15 of the 2006 Act. Following the Supreme Court decision in ***FWS*** the EHRC issued what it termed interim guidance on 25 April 2025, which included the following:

> "In relation to **workplaces**, requirements are set out in the Workplace (Health, Safety and Welfare) Regulations 1992. These require suitable and sufficient facilities to be provided including toilets and sometimes changing facilities and showers. Toilets, showers and changing facilities may be mixed-sex where they are in a separate room lockable from the inside. Where changing facilities are required under the regulations, and where it is necessary for reasons of propriety, there must be separate facilities for men and women or separate use of those facilities such as separate lockable rooms.
>
> It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the

Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.

In workplaces and services that are open to the public where separate single-sex facilities are lawfully provided:

- trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex
- in some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities
- however where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use
- where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided……."

609. That interim guidance was later amended to an extent, including that "Toilets, showers and changing facilities may be mixed-sex where they are in a separate room lockable from the inside.".

Liability of employee

610. The liability of an employer in relation to discrimination and victimisation is regulated principally by the terms of section 39 of the Act. There is a separate provision as to liability of the employer for harassment found in section 40. Sex discrimination arises either under section 13 or section 19 as provided for by section 25(8), such that the concepts of harassment and victimisation under sections 26 and 27 are not matters of discrimination. The vicarious liability of the employer for acts of an employee in the course of employment is provided for in section 109. There is a potential defence available to an employer against its liability in section 109(4) which the first respondent does not seek to rely on.

611. Individual liability of an employee is addressed in sections 110 – 112. ***Baldwin v Cleves School and others [2024] IRLR 637*** considered the terms of section 110 and held that there was no discretion on a Tribunal as to whether to make a finding of personal liability where the conditions under that section in relation to vicarious liability of the employer from the acts of the employee were met.

612. The act of making a request may not by itself suffice to confer personal liability, discussed in ***Nagarajan v Agnew [1995] ICR 520,*** although that was in the context of the other employee to whom the request was made not being employed by the same employer.

613. In ***NHS Trust Development Authority v Saiger [2018] ICR 297*** the EAT held that for there to be liability under section 111 there must be evidence of actual instruction, causation or inducement or attempt to cause or induce; and the conclusion that someone was in a position to do those things, was a party to a discussion, or played a material part in a decision, was not enough.

614. The liability of a third party was considered in ***Bailey v Stonewall Equality Ltd and another [2024] EAT 119***, a case in which argument has been heard in the Court of Appeal on 21 and 22 October 2025 but in which, as at the date of the Judgment being issued, no decision has been published. The EAT held in that case that the claim for liability of a third party had not been established, and reviewed the law in relation to the same.

615. The terms of sections 111 and 112 were considered by the EAT in ***Akester and others v Burlington Care (Yorkshire) Ltd and others [2025] EAT 111.*** The appeal was against a decision of the tribunal to strike out claims by well over 100 claimants against their employers which were also directed to the Secretary of State for Health and Social Care and the Department of Health and Social Care in relation to Guidance issued as to regulations made for care homes during the Covid-19 pandemic. Employees who were considered not to have either been vaccinated or had a clinical reason not to do so were dismissed. The Guidance was held not to be a basis on which there could be liability under either of those sections, and the appeal was dismissed. The law in relation to those provisions was summarised. The decision also considered the terms of Schedule 22 in the context of Part 5 of the Act.

616. In ***Miles v Gilbank and another [2006] ICR 1297*** the Court of Appeal held that, in order to 'aid' an act of discrimination under the predecessor provision to the 2010 Act, now in section 112, a person must do more than merely create an environment in which discrimination can occur, but that the manager had done so and was liable as an individual accordingly.

The Gender Recognition Act 2004

617. The Gender Recognition Act 2004 ("the 2004 Act") was passed following ***Goodwin*** and ***Bellinger*** – see the Supreme Court decision in ***FWS*** at paragraph 69. The main provisions of the 2004 Act relevant for this case (a) provided for applications to be made for a Gender Recognition Certificate ("GRC") and for the criteria to be applied and the evidence to be provided to obtain such a certificate: (b) established a Gender Recognition Panel ("the Panel") to determine those applications. Section

1 provides that a person aged 18 or over can apply for a GRC on the basis of "living in the other gender" or Section 2 provides that the Panel must grant the application if satisfied that the applicant satisfies four criteria, namely that the applicant: (i) has or has had gender dysphoria, (ii) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made, (iii) intends to continue to live in the acquired gender until death, and (iv) complies with the evidential requirements imposed by and under section 3. The evidence required under section 3 includes two medical reports, one of which must be by a registered medical practitioner or chartered psychologist practising in the field of gender dysphoria, and that report must include "details of the diagnosis of the applicant's gender dysphoria". Further, if the applicant has undergone or is undergoing or plans to undergo treatment to modify sexual characteristics, one of the reports must include details of that treatment. The applicant must also provide a statutory declaration that the applicant has lived in the acquired gender for two years and intends to do so until death.

The Workplace (Health, Safety and Welfare) Regulations 1992

618. The Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Regulations") were made under the Health and Safety at Work etc Act 1974, which implemented most of the provisions of European Council Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace. Regulations 20 and 24 provide:

> "**Sanitary Conveniences**
>
> **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……
> (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 the inside…..
>
> **Facilities for changing clothing**
>
> **24.**—(1) Suitable and sufficient facilities shall be provided for any person at work in the workplace to change clothing in all cases where—
> (a) the person has to wear special clothing for the purpose of work; and

(b) the person can not, for reasons of health or propriety, be expected to change in another room.

(2) Without prejudice to the generality of paragraph (1), the facilities mentioned in that paragraph shall not be suitable unless they include separate facilities for, or separate use of facilities by, men and women where necessary for reasons of propriety and the facilities are easily accessible, of sufficient capacity and provided with seating."

Evidence, judicial knowledge and related matters

619. Facts can held established by the Tribunal from four sources - (i) admissions in pleadings (ii) a Statement of Agreed Facts (iii) oral evidence including by reference to documentation before the Tribunal and (iv) judicial knowledge.

620. Oral evidence is generally of matters of fact within the knowledge of the witness, and that is addressed in a Practice Direction on use of written witness statements for example, but can be in the form of skilled (expert) evidence either of fact or of matters of opinion, as addressed below.

621. Proof of the provenance of each document in an Employment Tribunal is not required: ***Carabott v London Borough of Newham [2025] EAT 155*** referring to ***Hovis Ltd v Louton EAT 1023/20.*** Documents can be put to a party in evidence without leading the authors of them, for example. In our view however, and for the avoidance of doubt, if the document is relevant, and not one agreed between the parties, if it is not put to one of the witnesses at the hearing at the least it is not entered into the evidence, and if it is not put to the party against whom or which it is said to be relevant it is likely not to be fair or just under the overriding objective to place weight on it. We address the issue of how evidence is presented further below.

622. Rule 41(3) of the Rules states that "The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts" which means that opinion evidence or evidence from someone not skilled is admissible before the Tribunal, although may not be before a civil court as discussed below, but that is subject to the overriding objective in Rule 3 as to dealing with cases fairly and justly. In ***Snowball v Gardner Merchant Ltd [1987] ICR 719*** the EAT stated that:

> "In spite of the wide discretion which Parliament has entrusted to an [employment] tribunal, it must not, however, be exercised in a capricious fashion. In particular, a tribunal must not ignore nor totally disregard the well-established principles of law with reference to the admissibility of evidence."

623. In ***Aberdeen Steak Houses Group plc v Ibrahim [1988] IRLR 420*** the EAT made similar comments extending to issues of procedure as well as those of evidence, stating that:

> " … whilst recognising that tribunals have a wide discretion in these matters of procedure and evidence, it must be remembered that the rules of procedure and evidence have been built up over many years in order to guide courts and tribunals in the fairest and simplest way of dealing with and deciding issues. … Total informality and absence of generally recognised rules of procedure and evidence can be counter-productive in that parties may not feel that their cases have been fairly and appropriately dealt with."

624. These cases both pre-date the 2024 and indeed the 2013 Rules, and the version of the overriding objective in force in them is slightly different, but the principle is we consider still applicable when assessing evidence that is led.

625. In ***Connor v Chief Constable of South Yorkshire Police [2024] EAT 175*** it was held that skilled or expert evidence may not always be required, with that case being one that included disability discrimination under section 15 where the issues included what the condition of depression had caused:

> “Preparation of expert medical reports is an expensive exercise and one which in the more informal forum of the employment tribunal should only be required when clearly necessary. Where there is existing medical evidence due regard should be paid to that evidence. There was nothing other than the purpose for which the report was prepared, which the ET relied upon to undermine the diagnosis and conclusions. In my judgment where a report is prepared by a qualified person, which deals with issues that a tribunal are required to resolve, due regard ought to be paid to the conclusions. An employment tribunal is not bound to accept the conclusions of a medical expert but rejection requires substantive reasoning, not simply reference to the purpose for which a report was prepared.”

626. The Supreme Court has addressed the requirements of skilled evidence in ***Kennedy***, a case also referred to further below.

627. There is a wide variety of matters of fact and law within judicial knowledge which do not require evidence, and in court evidence on which would be inadmissible – ***Ross v Ross 1930 SC (HL) 1***. They include matters of scientific fact that are not disputed, or so obvious that there is no serious dispute about them – addressed for example in ***Ballard v North British Rly Co 1923 SC (HL) 43.*** In Walker and Walker on Evidence at 11.6 the

facts are said to include those "which are so notorious as to be indisputable". In the context of the criminal law the issue was addressed in ***di Pinto v PF, Glasgow [2024] HCJAC 7,*** where that textbook was referred to and the position summarised as "Facts within judicial knowledge were those that could be immediately ascertained from sources of indisputable accuracy or which were so notorious as to be indisputable."

628. Where the attributes of a particular person are in dispute, evidence is required - ***Kennedy v Smith 1975 SC 266***. The broadly equivalent concept is known as judicial notice in England and Wales, and was for example applied in employment tribunal proceedings in relation to the fact that women tend to undertake a greater burden in relation to child care than men in ***Dobson v North Cumbria Integrated Care NHS Foundation Trust UKEAT/0195/20***. The Tribunal may also draw on its ordinary practical knowledge and experience – ***Barke v SEETEC Business Technology Centre Ltd EAT 0917/04***. In ***McCafferty v Royal Mail Group Ltd EATS 0002/12*** the EAT stated that the lay members were entitled to draw on their valuable common sense and knowledge of what any employee would be expected to know.

Observations on the evidence

Claimant's witnesses

629. **The claimant** gave evidence that in some particular respects we did not consider to be credible. The first aspect of that was her evidence that she did not use the toilet cubicle to change for reasons of hygiene. That was contradicted by evidence from Ms Davidson and Ms Wishart who stated that she regularly did so. Ms Davidson's comment to Ms Glancey in the interview held in the investigation was that her past experience was that the claimant changed in the toilet, although she added that she [Ms Davidson] did not use that changing room on a day-to-day basis. At that stage Ms Davidson would not have known what the claimant's position on this would be or that it would be an issue, in our view. Ms Wishart was very clear in her evidence and we considered entirely credible. We accepted their evidence, and considered that on such an issue the claimant not being accurate about it was an issue of credibility not reliability. We also noted that the claimant referred in her evidence in chief to an intention to go to "the toilet" in order to change her clothing immediately prior to the incident on Christmas Eve, without stating that that was an exceptional circumstance for her, which we consider is indicative of a lack of credibility on this point.

630. The second aspect was her evidence that when referring to “the prisons incident” during the Christmas Eve incident she was not aware that that involved a rapist, as a broad summary of her evidence. That we considered to be not credible. There was an admitted fact that “C referred to the “women’s prison incident”, that is the Isla Bryson/Adam Graham case.” It is taken from the claimant’s pleadings, at paragraph 13 of the Response Table which the admitted fact cross references. In light of the circumstances of that case, which involved a person who as a man raped two women, who then commenced to transition to female including the change of name, and where an issue arose when initially placed in a women’s prison, which is a matter of particular concern, and of interest, to those with gender critical beliefs such as the claimant, that evidence seeking to distance herself from the remark which related to a rapist was we considered not credible.

631. The third aspect was her evidence given when recalled in relation to a message she had passed on to her group of friends which related to floods in Pakistan in the most highly offensive terms. She initially described the messages as “dark humour”. Her evidence later was that the message had been sent to provoke a reaction, in broad summary. We did not consider that latter evidence to be credible given the content of the message sent and her initial evidence about it. In our view it was an untruthful attempt to downplay what she had done, which she recognised as having included very offensive material. We consider that it was clear beyond serious argument that the author or authors of the original message considered the remarks humorous, and that the claimant had also considered them humorous which was why she had passed them on. That was supported in our view by her reference to dark humour.

632. A wider aspect of evidence we considered concerned an attack on her position in cross examination to the effect that she was generally trans-phobic, which she denied both when giving evidence initially and on recall (which is addressed further below). Some of the messages she sent are indicative of views which could be described as trans-phobic. In one dated 10 January 2024 the claimant described the second respondent as “it”. In an earlier part of the same message there is reference to the second respondent having a shadow (being in our view a reference to the appearance of stubble on the face) and a “pathetic voice”. These are disparaging remarks in relation to the second respondent in our view, because of the second respondent being a trans woman.

633. In another the second respondent is described as a “weirdo”, which the claimant sought to explain as someone acting weirdly, but which we did not accept as being what she had intended by use of that word. These remarks we consider to be consistent with other evidence of her making comments the second respondent was liable to find offensive that went

beyond the simple expression of a gender critical belief, but amounted to personal attacks on the second respondent.

634. During the Christmas Eve incident she referred to the second respondent undergoing some form of process, which we consider was indicative of a dismissive attitude towards gender reassignment as a protected characteristic. The view we formed from the evidence was that the claimant does not consider that a trans person is anything other than a male whatever the views of the second respondent.

635. These matters collectively could be described as transphobic, but transphobic is not a term of law, it is very generic, and there was other evidence for example of the claimant treating trans patients entirely appropriately, and with no complaints against her. Overall we did not consider this aspect sufficiently clear to be held to amount to a lack of credibility from her answer.

636. Some aspects of the attacks on the claimant's credibility and reliability we considered to be unfounded. There is we conclude nothing in the allegation of some form of prior criticism of the claimant's performance at work in relation to a colleague who was a more junior nurse – the evidence we did not consider came near to establishing any form of fault by the claimant over that. The evidence was of an unblemished thirty-year career until the Christmas Eve incident, and of there being no patient complaints of any kind.

637. Whilst her evidence as to some of the posts she made was rejected as discussed above, and they were potentially at least a breach of the NMC Code that is not a matter for us and the context was a private group of friends. Similarly there were a series of posts made by her husband which she was asked about. They were not ones she herself had made, and she denied sharing the views expressed in them. We did not consider them relevant to our determination of her credibility and reliability. They were not her posts, and there was insufficient to link her to them. She was also asked about the position of a close family member's sexual orientation. We did not consider that that matter was connected to issues of credibility and reliability in these proceedings.

638. It was also suggested by the respondents on the basis of these and similar matters that the claimant was bigoted generally, which as stated she denied. That is not the issue before us, and for similar reasons as in relation to the allegation of transphobia we did not find that as an issue of credibility. We considered that should not seek to determine the issues in this case on the basis of such very generalised allegations.

639. The claimant holds the belief that those who are biologically male cannot be female, and that the second respondent is a male person. That belief is, following ***Forstater***, a protected belief under section 10 of the Act.

Following ***FWS*** the claimant's belief that the second respondent is male is correct in law under the terms of section 11 of the Act, as we address further below.

640. Although we did conclude that during the Christmas Eve incident she had used language towards the second respondent that the claimant knew, or ought reasonably to have known, would be offensive, we also accepted that her concern that a person she regarded as male was entering a space she regarded as one that was private for those who were biologically female was entirely genuine.

641. She denied harassing the second respondent, stating that that was not her intention when interacting with the second respondent. This case is not, at least directly, one of a claim by the second respondent against the claimant that the claimant harassed the second respondent. The circumstances of their interactions are nevertheless relevant when considering the claims of harassment in particular, including as one of the sub-issues is whether the complaint by the second respondent was falsely made, as she claims.

642. It was put to the second respondent in cross examination that the evidence given on such matters was "a pack of lies", and that the intent had been to punish the claimant by securing her dismissal from employment and being struck off by her professional regulator. The conflict in their two positions was accordingly a stark one. Where there is dispute between the claimant and second respondent, which lies at the heart of the factual dispute in this case, we have preferred the evidence of the latter. That is as some aspects of the claimant's evidence we did not regard as being as reliable as that of the second respondent. The principal area of dispute between the claimant and second respondent was about what happened around midnight on Christmas Eve 2023, which we address fully below.

643. Other parts of the claimant's evidence were also in dispute and involved other witnesses. One was that she had spoken to Ms Davidson on about 25 October 2023 to say something to the effect that if it happened again that the second respondent was in the changing room she would have to say something. Ms Davidson did not have any recollection of that comment being made, and would not have reacted as the claimant suggested of not replying, and in our view it is more likely that it was not made. If it had been, we consider that Ms Davidson would have said something about it to her, and remembered it, which is also what she told Ms Glancey. She would not have encouraged the claimant to raise it directly with the second respondent given the risk of regulatory breach by the claimant.

644. The claimant's position was that she had not said to Ms Curran on 30 December 2023 that she had confronted the second respondent, but that was Ms Curran's evidence, which we preferred on that point. We

considered that Ms Curran was being fair and balanced when interacting with the claimant, and we did not consider that there was any mindset against the claimant in any way.

645. Similarly, it was the claimant's evidence, and put to Ms Davidson, that at the meeting they had held on 3 January 2024 at which she had informed the claimant that she was suspended that the claimant had been told that she did not need a representative this time, but maybe next time. Ms Davidson denied emphatically saying that, and we preferred her evidence to that of the claimant on that, although the claimant's recollection is likely to have been impacted by the fact that she was taken entirely by surprise at that meeting, having not had any advance notice of it.

646. The claimant accepted in cross examination that she could have raised matters with her union or by written grievance, although she said that she had not been involved in such a situation before. The claimant did also acknowledge in her evidence that she was not a "rookie", being someone with thirty years of experience. She could have raised her concern as a grievance either on or around 26 August 2023, or later when she was concerned at the lack of response or when she did know of the response from Ms Curran and then Ms Davidson.

647. That was also in the context of the second respondent saying to her during the Christmas Eve incident, as she accepts, something about protocols to follow by which was meant a reference to raising a grievance. The claimant had a limited opportunity to do so on 28 December 2023 when she was next at work, and shortly afterwards was placed on special leave, but neither then nor when later suspended did she raise any form of grievance about the second respondent being permitted by the first respondent to be in the changing room. That does nevertheless require to be considered in the context of the lack of a clear and written response to the claimant as to her complaint, or her being referred to HR or the relevant policies for example.

648. There are other aspects of the evidence given which did not have support from other witnesses who might have been called by the claimant. The claimant said that other members of staff were similarly concerned over the second respondent using the changing room, but there was no evidence of that called from those persons. Hearsay evidence was given by the claimant of the views expressed to the claimant by a small number of other staff. She said to the second respondent on Christmas Eve that lots of other staff felt intimidated as she did, but no evidence of such a feeling of intimidation was we consider presented.

649. Hearsay evidence is permissible but it is not the best evidence. The failure to call any witness to give support to what she claimed was we consider material to the reliability of her evidence. There was also internal inconsistency in her evidence. Initially the claimant claimed support from

four staff, one of whom was a male, but on recall the number increased to thirteen. That was a very surprising increase, which was not explained. Her evidence on recall was in essence a list of names, not all being complete names. Of the thirteen names given, four had male names, being Daniel, Michael, Kevin and Kenny and there was no suggestion that they would use the female changing room. Whilst they may have stated their agreement with the claimant, they are not within the group suffering disadvantage, or at least that was not in our view proved as we come to below.

650. There were also three other persons she referred to as working on reception (one of those said to be working there was included in the male names). It was not made clear in the evidence whether they used the changing room or not. Similarly we did not regard that as having been proved. Another was a female consultant, and of all those who might have been called to give evidence a consultant might normally be expected to be willing to do so if that was indeed her belief.

651. The question of group disadvantage in relation to indirect discrimination for those persons was not directly addressed in evidence, rather it appeared to us to be more in the nature of supporting the claimant. What the nature of that support was however was not specified in evidence. It could be somewhere between also suffering what was perceived to be disadvantage at one end of the spectrum, to supporting the claimant's raising of the issue, in essence supporting her perception and the right to believe as she wished to, at the other, or a point between the two.

652. We were concerned at how reliable that evidence from the claimant was for the issue of group disadvantage in such circumstances. There was very little indeed to support it in our view in the documents before us, including private group chats. There was a little support that could be inferred from the conversation with Sharlene, and from the group chat to a very small extent, and Dr Pitt referred to a meeting at which concern by some staff at the second respondent's use of the changing room was referred to, but in our view that is insufficient to prove that there is a group disadvantage. Had there been the level of support that the claimant alleged we would normally have expected to see some more clear written or oral evidence to that effect.

653. So far as the earlier incidents of what might be described as avoidance was concerned the dispute concerned two occasions on which the claimant is said by the second respondent to have left her position at work because of the presence of the second respondent as a trans woman. The evidence on that from the second respondent was we considered rather thin. Neither issue had been raised formally at the time by the second respondent, the first incident was not recorded in written form at the time, and there is partly inconsistent evidence from the statement taken from

Ms Ashraf for the third incident that does not support the second respondent's view that the claimant refused to speak save through that third party. It is possible that each matter was not the result of any animus held by the claimant against the second respondent or transgender persons in general terms, but for other and innocent reasons. It can only be very difficult for the claimant to comment on a matter that had not been raised with her at or around the time as an issue, and when it was raised considerably later. That was evident from unclear evidence as to when the missing patient matter happened, with the claimant suggesting that it was on 31 October 2023 and the second respondent disagreeing.

654. Whilst there had been some general references in written notes made by the second respondent to earlier incidents, and to an escalation, it was not clear exactly what that escalation was intended to refer to. The claimant agreed that on two occasions she had remained outside the changing room when the second respondent was present, but denied that she had acted as alleged on 26 August or between October and 18 December 2023 in a manner that adversely affected patient safety. In all the circumstances, particularly as if it were true that the claimant had left a position that might be detrimental to a patient that could affect patient safety, where no allegation formally was made at that time, and as the second respondent's phone note as to the missing patient incident stated in terms that it was not a matter of patient safety, we concluded that it is not likely that either matter happened in any manner that affected patient safety. No findings in fact on the matters in relation to any adverse impact on patient safety are made accordingly.

655. In summary there were some areas on which we accepted the claimant's evidence, and others on which we did not.

656. On a small point of detail the claimant gave evidence of a brief meeting with Ms Glancey about the investigation which she thought was in April 2024. The parties' pleadings admitted that there had been a meeting between them on 10 May 2024, but she was not asked about it in her evidence. No written record of that meeting was produced. We inferred from the evidence and admission that a brief meeting on that date took place, as set out in the findings in fact.

657. **Ms Forstater** had prepared a detailed written witness statement, and in that made reference to a number of publications some academic and others governmental. We were concerned about that evidence, and that of Mx Valentine for the respondents, as we shall come to further below. So far as this witness was concerned however we considered that on a number of occasions she did not give candid answers to the question asked, but sought to answer it in a manner that supported her general position which is gender critical. It was very clear that she had a strong and partial view.

658. **Mr Darren Peggie, Ms Nicole Peggie** and **Mrs Sheila Bell** being the claimant's husband, daughter and mother respectively all gave brief evidence. They stated what the claimant told them on Christmas Day 2023 about the incident at around midnight. They spoke of the claimant's stating that she was embarrassed and had felt intimidated. There was an attack on Mr Peggie's evidence in cross examination by reference to various Facebook messages he had shared and one message about a particular posting that he had authored. Whilst the messages would be regarded by many as highly objectionable at the least, with comments that appeared to be transphobic, Islamophobic, and with a more general racial element, our task is to assess credibility and reliability for the issues before us. In that regard we considered that Mr Peggie's evidence, which was supported by his daughter and mother-in-law, was sufficiently corroborated to be accepted in relation to the claimant's reporting of the Christmas Eve incident, save that he said that the claimant felt scared, which Ms Peggie did not say in her own evidence and which we did not consider reliable accordingly.

659. **Mr Borwick** we considered did meet the ***Kennedy*** criteria for a skilled witness as a person able to assist the Tribunal in its task; he had the necessary knowledge and experience; and we considered that there is a reliable body of knowledge or experience to underpin the evidence given. The respondents challenged the reliability of his evidence and argued that it was not impartial, the final part of the ***Kennedy*** criteria. He accepted in hindsight that his comment that the second respondent was silent on the fact that the notes could be rearranged suggested that the second respondent was trying to mislead the Tribunal was irresponsible as it did not have a factual basis. We were concerned that that remark indicated that his impartiality was compromised, as it appeared to us that he was essentially advocating matters for the claimant. His comments in his report as to the fairness of the respondents producing evidence themselves, including not by the instruction of a forensic witness to do so independently, was he thought fair comment but again in our view goes beyond the proper province of a skilled witness and was not impartial. The fairness of matters is not a matter for such a witness, but the Tribunal.

660. These matters taken cumulatively led us to conclude that a material part of his evidence was not reliable. That included the issue of the screenshots which he suggested had been manipulated by the second respondent. We considered that, given that lack of impartiality and that this matter was an opinion he tendered as to what the screenshots as they had been sent to him meant, that aspect of his evidence was not reliable, a matter addressed further below. We assessed that aspect against the evidence we heard as a whole, and that of the second respondent as addressed below.

661. Taking his evidence as a whole, we concluded that the challenges to his reliability did not succeed completely. We did not consider that his impartiality had been so undermined that his evidence was to be disregarded entirely.

662. The area of his evidence we did accept was exactly what note, or part of a note, had been created on which date and at what time. That evidence came from the data that had been extracted from the phone. Mr Donaldson could not account for the date of creation of the 26 August 2023 part of the second respondent's notes not being on or around that date from the material before him, which he had helped to create, and Mr Donaldson did not seriously dispute Mr Borwick's findings in the sense of having another explanation for the date given. We required to assess that matter having regard to the evidence before us as a whole, as again we shall come to, but on this as there was no clear evidence from Mr Donaldson, who in any event was not a skilled witness as we address below, we concluded that Mr Borwick's evidence on this particular point was reliable and could be accepted. That extended also to the detail of the 18 December 2023 notes, and what parts of the notes had been created when on 25 December 2023.

663. **Ms Moore** was we considered seeking to give honest evidence, relaying a conversation she held with someone who had called Sex Matters for whom she is an Administrator, but it was entirely hearsay evidence from a person who had not given any name, who could not be identified as a member of staff of the first respondent accordingly, and who she accepted could have been someone making mischief. The evidence was so lacking in any form of provenance, and the detail said to have been given by the person to whom she spoke so obviously being beyond any form of ability to check whether it was accurate, that we considered that the evidence was not sufficiently reliable to be of any assistance to us in determining the issues before us.

664. **The claimant on recall** gave evidence in relation to messages she had posted which are addressed above. She denied that when she had given evidence in February and said that she was not racist she had not been telling the truth, or that she was being vindictive towards the second respondent.

665. She said that Ms Nicoll, Ms Wishart and Ms Curran had been lying about remarks attributed to her. We considered it more likely that they were not, and that the claimant's evidence was less reliable than theirs, but that was an issue of reliability and not directly relevant to a fact before this Tribunal.

666. We have referred above to the fact that the claimant gave thirteen names of those who thought as she did, not all complete ones. Argument in submission that there are a large number of female staff at the first respondent supporting the claimant's position, and that they are not

identifying themselves out of concern over the impact of that, is not evidence. Our decision is based on the evidence led before us. Where witness evidence could have been called to support the proposition, if necessary on witness order or documentary evidence recovered after securing a document order, and in light of our other findings as to credibility and reliability of the claimant's evidence, we did not consider the claimant's evidence sufficiently reliable to be accepted in this regard.

667. We add that the same principle of not accepting hearsay evidence when primary evidence could have been led was adopted for such hearsay evidence given for the respondents, for example that part of the evidence which was hearsay given by Ms Nicoll as to what she heard the claimant had said, which we address below.

Respondents' witnesses

668. **The second respondent** was we considered a credible and broadly a reliable witness. The second respondent was cross examined over a period of three days, with questions asked referring continually to the second respondent as a man, which the second respondent considers misgendering and offensive, and in other contexts could be held to be harassment under the Act. The cross examination went to the heart of how the second respondent held a sense of identity. In the context of the present dispute that was legitimate cross examination but we noted that the second respondent was affected by that, even if there was a clear attempt not to show that.

669. The second respondent answered all the questions in a calm and considered manner. The suggestions included that the second respondent was seeking to punish the claimant for standing up for her beliefs, to paraphrase a series of questions. They were all denied in entirely convincing terms. They were also supported by the written material. For example, in relation to the 18 December 2023 incident the second respondent wrote specifically in the document headed "Hate Incident 25/12/23" that that was "not a patient safety issue" and in the last sentence the second respondent made clear that what was sought was an apology and arrangements to ensure that it was not repeated such as changing shift arrangements. That is not in our view the action of someone seeking to punish the claimant, or have her dismissed, or struck off by the NMC, as was the claimant's argument. Nor is the failure to record at the time, and raise at the time, the incident on 31 October 2023.

670. We considered it instructive that the second respondent did not seek to have the claimant subject to regulatory proceedings, or a police investigation despite that being raised by Dr Searle. The second respondent did not pursue any claim against the claimant at the Employment Tribunal. When making the report to Dr Searle on 25 December 2023 the message ended by stating that the second

respondent was unsure of what the resolution would be, but the second respondent did not refer to dismissal of the claimant as a desired outcome. That was consistent with the comments made by the second respondent to Ms Glancey with regard to the use of the changing room, which referred in essence to the possibility of the first respondent objectively justifying excluding the second respondent from it. That attitude was also seen in the email sent to Ms Glancey who asked about the witnesses to earlier incidents to which the second respondent replied to the effect that for one the second respondent could not recall and would understand if that went no further.

671. In our view these matters supported our broad assessment of the second respondent as a credible and reliable witness.

672. There were however a number of matters where it was alleged by the claimant that the second respondent had lied to the Tribunal. The 26 August 2023 issue was not raised at the time. The 25 October 2023 was the subject of an entry made by using Google Notes on the second respondent's mobile telephone on 26 October 2023. From the evidence we heard we concluded that the second respondent had prepared the entry for both of those two issues shortly after the second incident, and in light of it. That the August 2023 incident had not been recorded in that manner at the time it occurred but later was one factor we considered. We concluded, from the evidence overall, that the second respondent had not lied to us about it, but that contrary to the second respondent's evidence the notes were not all made contemporaneously, as addressed further below.

673. The respondents were both aware from the report by Mr Borwick as to the timing of creation of these notes being an issue, but did not lead their own skilled evidence. They were aware that Mr Donaldson could not explain that matter of timing although he understood that the second respondent did not consider that the note for 26 August 2023 had been created on 26 October 2023. The second respondent had at least been asked about when these notes had been created in cross examination.

674. The Tribunal did not place any weight on Mr Donaldson's views on the second respondent's credibility, as that is a matter for the Tribunal itself, not a witness. For this aspect the best evidence would be by way of a skilled report by someone within the ***Kennedy*** criteria, which the respondents have not placed before the Tribunal. We concluded that which part of which note had been created when was accurately set out in Mr Borwick's report.

675. Some aspects of the evidence of the second respondent in relation to the phone notes were we therefore concluded not accurate. Firstly, the overall impression given in evidence was that each one was fairly contemporaneous. Whilst on occasion the evidence was that the second

respondent “would have” written them on the day or next day, on other occasions it was said specifically that they had been. The evidence from Mr Borwick, not seriously contested by Mr Donaldson, establishes, in our view, that the one of 26 August 2023 was not contemporaneous, but was created about two months later. That must be set in the context that the report from Mr Borwick was not prepared until after the second respondent had given evidence. The second respondent had not therefore been able to address Mr Borwick’s report in evidence. No application was made to recall the second respondent to do so.

676. Similarly the note of the 18 December 2023 incident was initially drafted that day, but changed again after the Christmas Eve incident, very early on Christmas morning, That had not been stated in the second respondent’s evidence.

677. The second respondent was also asked about preparing the note of the Christmas Eve incident. Initially at least it was said in cross examination to have been written in the car afterwards, and took about 20 - 25 minutes. Mr Borwick’s evidence in his report, which on this issue we accepted, was that it had been prepared and then changed on a number of occasions in the early hours of Christmas Day. At the least therefore that answer was incomplete.

678. The claimant argued that the evidence from Mr Borwick meant that the second respondent was lying. We concluded that that was not correct. It was inaccurate in part, but in our view honestly so. The second respondent, we infer from all the evidence we heard, had forgotten about the August note not being contemporaneous, and precisely how each of the notes had been prepared, and when. The evidence on it was given around eighteen months after the event.. It was clear to us from the evidence both of the second respondent and Dr Pitt that the second respondent had been severely impacted by the events. It is in our view unsurprising that when giving evidence these details were not recalled accurately.

679. Another chapter of the evidence was in relation to how the details of the notes were obtained by Mr Donaldson with the second respondent’s assistance and use of the mobile phone itself under his direction, and the provenance of some screenshots that were taken. It was argued that because of Mr Borwick’s report they were evidence of dishonesty by the second respondent. We did not accept that. Firstly for the reasons given above we did not consider that Mr Borwick’s evidence on that was reliable. It was we considered different in kind to that as to what note was created when. In light of when the events to create these documents took place they were not raised with the second respondent in evidence. Whilst how the process was conducted appeared to us somewhat odd, and Mr Donaldson accepted that it was about the fifth most accurate way of doing

so, it was part of a voluntary process that the second respondent did not require to participate in.

680. There is other evidence available beyond these notes which we consider support the view that the second respondent's evidence is reliable as to what occurred during the Christmas Eve incident. In particular there is the email to Dr Searle around three hours after the incident, and that to the BMA on the day afterwards. Both have lengthy accounts of what happened, as the second respondent described it, and each is broadly consistent both with each other and the notes, as well as the oral evidence given to us.

681. It appears to us that the evidence from Mr Borwick is not sufficient to establish that the second respondent had been giving perjured evidence, which is essentially what was argued. Nor did we consider that the second respondent had misled Mr Donaldson or through him, this Tribunal.

682. It was argued for the claimant that the second respondent had deliberately failed to produce the information that would prove the authenticity of the screenshots. But in our view that goes too far. Firstly the second respondent gave evidence in February 2025. Secondly the second respondent did so after the claimant had closed her evidence. Thirdly this case started with a Claim Form presented on 2 May 2024. There were a number of Preliminary Hearings, including one held in November 2024 with an application for a document order. The claimant did not at that stage seek any order for the said phone or its inspection.

683. The claimant thereafter did so on two occasions, and those applications were refused by the Tribunal for the reasons given in two Notes. If the second respondent had been seeking to conceal the improper use of the mobile phone for recording notes or otherwise it would have been possible to refuse to do anything in relation to it, and not offer to meet Mr Borwick, a meeting the claimant's team cancelled, or to undertake the meeting with Mr Donaldson. That the second respondent did so voluntarily in such circumstances is a factor we consider of materiality in considering this issue, and it is to be considered in the context of all of the evidence that we heard.

684. We have concluded therefore that these issues do not lead to a finding that the second respondent has been untruthful either in evidence or in relation to the documents submitted to Mr Donaldson and thence to the claimant and Tribunal. What they have done is to cause us to be particularly careful when assessing the reliability of the evidence given in relation to the notes taken by the second respondent, which we have attempted to do above and throughout. As we have noted, it is in our view important that those notes are not the only documentary evidence before us, and we have taken into account all of the material, both documentary and from oral evidence, available to us.

685. Ms Cunningham argued that if an incident such as what was summarised as the resus incident, or the missing patient incident, was a serious one of patient safety that the second respondent had a duty to raise formally at that time. Neither had been raised at the time either with a manager or by Datix or similar. There was no clear evidence on the resus incident, as what the claimant thought it may have been and what the second respondent thought it may have been appeared to be two different occasions.

686. The second respondent explained, in terms again that we considered convincing, that it was not at that time of the resus incident a matter the second respondent considered to be of patient safety as the patient's observations had been taken and the patient was settled. On reflection following the Christmas Eve incident the second respondent considered that as the issue was of adequate communication it should have been raised with Dr Searle as the supervisor. The second respondent did that on 29 December 2023, thus only after the Christmas Eve incident and not when it took place in or around November 2023.

687. In our view this issue is partly at least one of timing. Given what we consider is the understandable view the second respondent held at the time, not raising the resus or missing patient matters before Christmas 2023 is we consider not an issue affecting the witness's credibility or reliability. It is a matter of the degree to which they were thought serious at the relevant time. The claimant has argued that it was an exceptionally serious matter that ought to have been raised formally if true. But in our view, the evidence from the second respondent which we accepted was that at the time it was not considered to be such, rather it was perceived as an issue of lack of communication contrary to the manner the second respondent preferred, a form of avoidance of the second respondent by the claimant. It might have been raised both more quickly and formally, including by way of a Datix for example, but we did not accept the argument for the claimant that it had been made up deliberately by the second respondent to punish the claimant.

688. The missing patient incident was one where the evidence of Ms Ashraf did not fully support the second respondent's version of events. Her statement to Ms Glancey was that there had been a conversation. But who said what, and how, was not set out. We did not hear from her as no party called her. The second respondent prepared two notes of that incident, one on the day and the other on Christmas morning. The claimant argues that that was deliberately untruthful, but we do not consider that it was.

689. Ms Ashraf in her statement refers to a conversation. What the second respondent referred to in the note of the exchange is that the claimant had said that she had no concerns in answer in answer to a question asked by Ms Ashraf and the second respondent had said thanks, and that the detail

was needed for a letter. There is at least some consistency between Ms Ashraf saying that there was a conversation, in the sense that both the claimant and second respondent spoke, and the second respondent saying that the claimant had not acknowledged the second respondent as her answer was given to a question by Ms Ashraf. In our view therefore whilst the statement from Ms Ashraf does not support the second respondent's version fully nor does it entirely contradict it, and without the evidence from Ms Ashraf having been heard we are left only with the notes of the investigation meeting.

690. The statement from Ms Ashraf, and the note being done in two separate parts, does not in our view mean that the second respondent did not genuinely believe that matters had occurred as alleged by the second respondent, such that the evidence given on that is not credible. We consider that the second respondent had not addressed that missing patient incident at the time, and did not record it in the Google Notes, as it was another incident which was not considered particularly significant then, and only was perceived to be so after the Christmas Eve exchange in the second respondent's perception.

691. In our view that is supported by the terms of the second respondent's email to the BMA on 26 December 2023. In that there is reference both to the resus incident and the missing patient incident. The former is not dated in that email, but what happened is set out and is essentially that unusually the second respondent was asked to do the observations on a patient. It does not state in terms that it is not a patient safety issue, but it is not presented as a significant issue. The latter is stated in terms to be an instance of rudeness not of patient safety. This is in the context of a private message to the second respondent's union seeking advice. It is in our view most unlikely that when seeking advice in that situation the second respondent would fabricate these matters. It was a private message. It appears to us that it strongly supports the view we formed that the second respondent had a genuine perception of a lack of communication from the claimant, which was not a significant one of patient safety in the mind of the second respondent at the two times of those events. It was raised as background to the discussion on Christmas Eve.

692. Whilst the evidence of what occurred on both occasions is not entirely clear, partly as Ms Ashraf was not called to give evidence by either the claimant or the respondents, we do not consider that it was fabricated by the second respondent.

693. For reasons we address above and below in our view there was no patient safety issue in fact. It appears to us to have been a matter raised initially by Ms Davidson from the information known to her at the time, which was very limited indeed. But the words patient safety do not feature in the email to Dr Searle sent on 25 December 2023 or the Datix report.

694. If however the second respondent did have a mindset of seeking to punish the claimant for her views, as the claimant claimed, raising the issue of patient safety on or around the time it happened would have been one obvious way to do. It would have been both a matter for the first respondent, and potentially one for the NMC. That it was not raised by the second respondent in that manner we consider supports the evidence the second respondent gave. It would also have been possible for the second respondent to have raised a claim against the claimant [and first respondent] under section 26 of the Act after the Christmas Eve incident. No such claim was raised. What the second respondent stated in evidence, which we accepted, was that the purpose of raising the matter with Dr Searle was to avoid repetition of what had happened. That also is not consistent with someone seeking to punish the other party, as if so the obvious way to do so was to allege gross misconduct specifically so as to seek dismissal.

695. The claimant argued that the resus and missing patient incidents had been fabricated as part of the intention to punish the claimant. We did not agree. Considering all of the evidence we heard, we considered that the second respondent genuinely believed that each incident had occurred, that each was essentially one of the claimant avoiding being with the second respondent rather than directly one during which the safety of a patient had been adversely affected, and each was either recorded or reported at some point not wholly distant from the event as the second respondent perceived it. In addition to the email to the BMA, in the investigation meeting with Ms Glancey Ms Curran referred to a comment she had heard to the effect that the claimant was leaving an area when the second respondent was there. The source of that at best hearsay evidence was not probed in questioning, and it was not the basis on which we decided this point, but it is a minor adminicle of evidence which to a very small extent supports the view that the second respondent had not fabricated these two incidents.

696. There are other aspects worthy of comment in this chapter of evidence. Whilst it is factually true that the second respondent gave Ms Glancey a date range of October to December 2023 in the investigation meeting, and the second respondent was aware that it was between the 25 October and 18 December incidents which reduced that range, doing so in our view was not deliberately to prevent proper investigation of an incident that had been made up, as Ms Cunningham suggested. The second respondent was not asked by Ms Glancey for more details and refused to give them, for example.

697. The second respondent accepted in cross examination that the claimant may have had good reason to ask that the second respondent carry out the observations such that the sense that it was unusual may have been

misplaced. That concession again in our view supports the credibility and reliability of the second respondent's evidence.

698. We similarly did not consider it likely that the second respondent would start to fabricate allegations against the claimant when what was essentially being sought at that time was to avoid a repetition of the incident on Christmas Eve.

699. It was suggested that the second respondent's account of seeing the claimant on 28 December 2023 had been fabricated. We did not agree. It was in our view supported by the message to Dr Higgins, and then that as Dr Higgins was delayed the second respondent used the changing room alone. It is unsurprising that the second respondent noticed the claimant, but that the claimant did not notice the second respondent, in our view. Whilst exactly what happened was not entirely consistently described by the second respondent having regard to the evidence as a whole we accepted that evidence.

700. There were some rather unusual questions asked in cross examination, for example Ms Cunningham asked a question seeking to compare the second respondent to the torturer in the novel 1984, to which objection was taken and after the lunch adjournment but before a decision on that was made it was withdrawn. It ought not to have been asked, but does indicate the extent to which the second respondent's position was challenged in cross examination.

701. There was a disagreement between Ms Cunningham and the second respondent as to use of language for the second respondent, for whom the former used male pronouns and suggested that that was the second respondent's sex, and over issues as to biological sex and others. The premise of several questions was that the second respondent was male by sex, which the second respondent denied. The second respondent's position was that the sex of the second respondent was female. For reasons we shall come to we did not agree that that was the case under section 11, because of the ***FWS*** decision which was issued after the second respondent gave evidence, but we accepted that the second respondent's evidence on that expressed a personal and sincerely held belief both as to the sex held by a person, and on what basis sex can be determined.

702. The second respondent did not consider that there was an agreed definition of biological sex, and said that sex was a multi-faceted matter or at least a matter that could be considered from a number of different perspectives. The second respondent did not accept that a doctor deciding sex at birth for the purposes of providing a birth certificate stating sex was determinative, or necessarily reliable. The second respondent is wholly entitled to hold and express those beliefs before us, but they are not in our view the proper answer to the definition of sex as that word is used in the

2010 Act. That evidence was also not skilled evidence, as the second respondent was naturally in the circumstances not impartial. On the question of what sex the second respondent has for the purposes of the 2010 Act the ***FWS*** decision is determinative, and binding on us.

703. In summary there are some areas on which we accepted the second respondent's evidence, and others on which we did not, but in so far as the Christmas Eve incident is concerned, we preferred the evidence of the second respondent.

704. On a point of detail we should state that Ms Cunningham did not ask intrusive questions about the second respondent's body. That is not said as a point of criticism. No birth certificate for the second respondent was put before the Tribunal. But we inferred from the fact that the second respondent is, as agreed by the parties, a trans woman, the evidence of the second respondent that a trans woman is someone assigned male at birth and now wishes to live as a woman, and from the terms of the respondents' submission, that the sex stated on the second respondent's birth certificate shortly after birth was male.

705. **Ms Davidson** was we considered a credible and generally a reliable witness. She was clear and convincing in her replies to cross examination in particular, and expressed views that were not set against those of the claimant. For example Ms Davidson said that she was concerned that if the allegation were true and the two parties were again in contact there was a risk of the claimant acting in a manner that could be in breach of the NMC Code. We considered that that evidence was firstly what the witness genuinely did feel at the time, and secondly that there was concern for the position of the claimant, as well as for that of the second respondent. Another example is that it was put to her that she was afraid of the position of the board in relation to gender critical beliefs and was compelled to follow their line, which she entirely rejected, and stated simply that she treated everyone with respect. We accepted that evidence.

706. Ms Davidson's evidence, which we also accepted, was that the first time she had spoken to Ms Bumba was at the end of August 2023, and not at or before the second respondent started working for the first respondent in July 2023 as the respondents had pled. Ms Bumba had also however spoken to Dr Currer earlier, when a more general enquiry about trans persons was made.

707. It was suggested that in the second meeting with the claimant at which Ms Davidson had relayed the comments from Ms Bumba that the claimant had said something to the effect that she would have to raise that with the second respondent if it recurred, and that Ms Davidson had not replied. That was the claimant's evidence. Ms Davidson had no recollection of the claimant making such a comment, and said that if it had been made she

would have said to the claimant to remain professional. That is in essence what she said to Ms Glancey at her investigation meeting.

708. We preferred Ms Davidson's evidence on those points to those of the claimant as discussed above. In our view it is most unlikely that a manager would not have reacted to the comment that the claimant alleges she made. Ms Davidson's evidence on this was we considered honest in stating that she had no recollection of saying what was alleged, and her evidence overall was commendably balanced as between the views and positions of the claimant and second respondent. She was seeking to be broadly supportive of them both, in our view, during these events. This was before the incident on Christmas Eve, and therefore before any articulated direct dispute between them. We consider it much more likely that the comment the claimant alleged she had made about raising it with the second respondent was not made.

709. It was in our view clear that there was a long delay between the claimant raising the issue of the use of the changing room by the second respondent and her receiving any answer to that. Whilst that may partly be explained by Ms Davidson being on holiday for much of September 2023 it does not in our view fully explain it. Given the nature of that issue, if Ms Davidson was not able personally to speak to the claimant we consider that she ought to have asked Ms Curran or Ms Harris to do so. It was clearly a matter of importance to the claimant given what she had said, and although Ms Davidson believed that the claimant and second respondent would not be on shift together in the meantime that did not mean that the claimant was not entitled to a response to her query.

710. When that response was given on 25 October 2023 what Ms Davidson did not do, and which we consider any manager in such a position ought to have done, was to say something to the effect that if the claimant did not accept the position of the first respondent she should put her complaint in writing, including as a formal grievance under the relevant policies to which she could have been directed, or by being advised to contact HR.

711. It was also suggested that in the meeting on 3 January 2024 Ms Davidson had said, in answer to a question from the claimant as to whether she needed trade union representation, something to the effect of not this time but maybe next. She strongly denied that, as discussed above. Given the concern for the claimant that Ms Davidson had it is we consider most unlikely that she did say that. We did however have a concern that the oral evidence Ms Davidson gave, which was to the effect that the claimant stated that she did not wish to have representation at the meeting, is not consistent with the letter sent the following day by her, which referred to a decision to proceed with the meeting as representation would involve delay. It appears to us that neither Ms Davidson nor the claimant is fully accurate in their recollection. What is clear is that the guide to suspension

refers to representation for the employee where that is practicable, and it is possible for Ms Davidson to consider that in the circumstances representation was not practicable as the suspension was required that day, but that the claimant was not told in advance of the purpose of the meeting is in our view not best practice. But the circumstances were unusual, and Ms Davidson reasonably considered that swift action was necessary.

712. More generally we accepted Ms Davidson's evidence as to why she had suspended the claimant. When it was put to her that the claimant had simply stood her ground during the incident after which all hell broke loose she said "No. It was the manner of doing so", and we considered that reliable. It was put to her that other staff were frightened to report concerns over the use of the changing room, and her response was that she did not think that that was the case but that "you'd need to ask the staff". That was we considered a reliable answer, as was her rejection of a suggestion in cross examination that she was frightened herself as a commitment to the idea of gender trumping sex had a vice like grip at the first respondent. She presented as someone not seeking to punish the claimant for her views in any way, but to manage the situation as she understood it to be.

713. It was suggested that Ms Davidson was wrong that there were patient safety issues, including as they were not documented and as Ms Curran, who is said by her to have told her about them, denied that she knew anything more than the Christmas Eve incident. Ms Davidson was however adamant in her evidence that she did consider that there was an issue of patient safety. We consider that her evidence on what she considered at the time is reliable, although the historic factual basis for it as a matter of fact – that the interactions between the claimant and second respondent before Christmas Eve had involved a risk to patient safety – was not. In our view it was the combination of what the second respondent alleged from Christmas Eve, and the reference to escalation of prior behaviours which involved essentially not communicating effectively on the part of the claimant when working with the second respondent that led to her view that patient safety could be compromised in future. We consider that she did hold that view, and that it was a genuine one.

714. We consider that it is material that her view was supported by evidence of others, particularly but not only Dr Searle. If it was true that the claimant was not communicating adequately with the second respondent there might have been an impact on the safety of a patient. Whether or not there had been a lack of adequate communication and what had happened on Christmas Eve was to be investigated, but we accepted Ms Davidson's evidence that there were two reasons for suspension, and one was her concern over patient safety, even if that was not documented by her at the time either in the suspension record, or when informing the claimant orally, or in the letter of 4 January 2024.

715. We also accepted Ms Davidson's evidence that she had had a conversation with Dr Currer, who had received similar advice from Ms Bumba, and that Dr Currer had said that she had sought that advice before the second respondent started at the department. Dr Currer could not recall the timing, and Ms Bumba did not recall speaking to Dr Currer, but taking the evidence as a whole we consider Ms Davidson was likely to be accurate on what Dr Currer had said at the time.

716. We considered that Ms Davidson should have communicated more fully to Ms Bumba exactly what the claimant had said, and it might well have been better to have written it down given its importance.

717. Ms Davidson can also be criticised for not completing a written risk assessment for the suspension. It appears to us that she confused the checklist with the risk assessment. She thought that a written risk assessment had been passed to Ms Glancey, but Ms Glancey was clear that she had not seen it. From the evidence before us it appears likely that the written risk assessment document was not completed. That does not mean however that a risk assessment process was not undertaken, but that it was not properly documented.

718. These are matters to be set in the context of a very busy department, with for example evidence given in evidence in chief of her practice of reading emails during what was supposed to be her break, and the benefit of hindsight. Ms Davidson had also very recently been promoted into her position and was unfamiliar with the full terms of the process, in our view.

719. **Ms Bumba** was we considered a credible witness, who was clearly giving honest evidence. There were some areas she could not recall, or not recall in detail. That included the conversation with Ms Davidson which she placed as summer 2023, where her evidence differed from that of Ms Davidson. She thought that details of the gender identity of the person involved had not been provided, but that was not consistent with an email from Mr Doyle on 29 August 2023 which referred to the advice, that a transgender woman was involved, and that the second respondent (although not named) had a right to use the female changing room. That contemporaneous record more closely aligned with Ms Davidson's evidence on this than Ms Bumba's.

720. Ms Bumba said that she had said to colleagues that it could be deemed discrimination not to allow access to changing room facilities which aligned with the chosen gender or something to that effect, but the evidence of Ms Davidson, supported by that of Ms Currer and the email of 29 August 2023, was that the advice had been of the trans person having the right to use such facilities. We considered that the advice had been specifically that there had been a right to do so rather than less clearly that it could be discrimination not to allow it.

721. She could not recall exactly which policy documents for other Boards or Trusts she had viewed such that when asked about those in the document Bundle could not say if she had seen them, particularly from the (English) Trusts, although she recalled some of them. A number had been added to the productions for the July hearings. It appeared to us likely that she had seen that for NHS Lanarkshire, but the other policies she was asked about we considered were not established as likely to have been viewed by her. Her evidence was to the effect that the policies were broadly to the same effect, and we made findings in fact in light of her evidence.

722. She explained that she had considered the CoP: Services but it was not clear whether she had fully considered the relevant provisions in all of paragraph 13.57 particularly the sentence starting “However” and those in the following three paragraphs, which all make clear that it is competent to refuse access to a space such as a changing room to a trans person if a proportionate means of achieving a legitimate aim, such that it would not be correct to say that a trans person had the right to access the changing room aligning with the gender they identified as having. That there was she thought a right is, in essentials, what we consider her advice to Ms Davidson had been.

723. Ms Bumba had had not considered the terms of the 2010 Act referenced in paragraph 13.57 in the margin, being paragraph 28 of Schedule 3 which qualifies section 29 as we shall come to further below, and did not at that time directly address the issue of the protected characteristic of belief under section 10, being that held by the claimant described as gender critical. She had rather assumed from the policies referred to that trans persons should access the changing room aligning with their preferred gender. That was the very broad import of the various other policies that were considered, even if she could not recall exactly which ones she had seen at the time. There was a general consistency amongst those policies raised with her in evidence in chief, even if NHS Highland had provisions that appeared to go considerably further. These are however simply matters of background as she could not recall seeing each of them at the time.

724. Her consideration of the CoP: Services was entirely understandable in relation to a policy being considered for patients, as it fell within the provision of services by a service provider under Part 3 of the Act. But the changing room being considered was for staff only, and that fell under Part 5 as to which the Code of Practice: Employment was relevant. She had not visited the changing room being considered, and may not have known that the sign said female staff only, although it would seem obvious that that would be the case. What may not have been so obvious was who used it and what other facilities to change clothing there might be.

725. We considered that she had not turned her mind to the position of a member of staff in the changing room, as opposed to the provision of services. That must however be set in context. The query was raised as a general one, at a time when she was not aware of any dispute or difference of view, beyond that someone was uncomfortable. More had been said by the claimant than that, however, of which she was not fully aware.

726. Whilst she might with the benefit of hindsight have sought HR or legal advice given the complexity of the point being raised we consider that it was not obvious to her at the time that the matter was one liable to lead to Tribunal proceedings such that at the time she simply followed her understanding of a form of general policy. The issue she had been asked about is one of substantial complexity, where opinions as to what the law is differ markedly. That is seen from the very different submissions before us, and our analysis of them below.

727. She considered that there was no policy within the first respondent on which single sex facilities trans staff should use as it was not written, but did agree that the practice was that each trans person should use the facility that aligned with their gender identity. We considered that her evidence of there not being the kind of policy PCP2 addresses was not reliable. PCP2 accords with how matters were handled in practice, in our view, and there was no specific evidence of how other trans staff had been dealt with in regard to the use of changing rooms. We were satisfied that had a similar query been raised for another member of staff the same answer would have been provided, and that the first respondent did have a PCP that trans staff should use the changing room (and other similar facilities) which aligned with the gender that they had chosen and not the sex assigned at birth, if they wished to.

728. **Ms Malone** was we considered a credible witness, who was broadly reliable. She had never met the claimant. She could not recall some of the details, such as whether or not she had seen a risk assessment carried out by Ms Davidson before the decision to suspend was taken, which she stated as Ms Davidson's decision to take although she had given advice on it. She explained her role in the process, and made reference to Mr Doyle's role initially as Clinical Nurse Manager, and from January 2024 as Head of Nursing in Acute Services, another area to her own (she also being Head of Nursing for Medical Directorate). It was difficult to understand her role in giving advice about suspension, for which she said she must have had sight of the risk assessment as advice could not be given without it, and not in relation to the investigation as she might be on the panel if matters went to a disciplinary hearing. But overall we considered that she answered questions candidly and directly, and her explanation that the suspension followed the Datix, and its reference to the manner in which the claimant had raised issues directly with the

second respondent on Christmas Eve, which she regarded as unacceptable from the report set out there, was compelling.

729. That was also in the context of her accepting that the emails sent by Dr Searle in particular to consultant colleagues commenting on the allegations should not have been sent, and breached the confidentiality of the investigation**.** Whilst that investigation may not formally have started, it was we considered obvious that one would be required, and Ms Malone's criticism of that, and other similar messages, we considered supported our assessment of the reliability of her evidence.

730. **Dr Pitt** we considered an obviously credible and reliable witness, who gave her evidence in an exemplary manner. We accepted her evidence in its entirety. She explained the discussion held with the second respondent shortly after the Christmas Eve incident, and about the degree of distress exhibited by the second respondent which included an appearance she described as being startled, and sobbing. She explained that in her view consultants in the department required to be informed if there was to be any change to rotas, or something that might affect a doctor at work, in relation to Dr Searle's email of 29 December 2023. We accepted that evidence.

731. **Ms Curran** we considered to be a credible and reliable witness. We considered that she was balanced and fair in what she said, and had sought to address the matter reported to her in a manner that addressed the impact on the claimant, for whom she was the line manager. We rejected any suggestion that she was part of a conspiracy on the part of the first respondent to punish the claimant for expressing her beliefs. As she was involved in the initial stages including suspension her role in any such conspiracy would have been important, but we accepted her evidence that she simply acted to address the issues when they arose.

732. She stated that Mr Doyle decided to place the claimant on special leave, and that was to allow time for advice to be obtained. Whilst Mr Doyle was not called we accepted her evidence on that, which is consistent with the written record and a measure of common sense.

733. She spoke to her interactions with the claimant, and the claimant's comment she had noted that the claimant had confronted the second respondent. It was suggested in cross examination that that is not what the claimant had said but Ms Curran's descriptive word. We accepted her evidence that that was the word the claimant had used. We also accepted her evidence that the claimant had been informed in around October 2023 that there were alternative places to change if she wished to use them, including the changing room in the main building and a well-being room in the department which any staff member could use which had a locked door.

734. She gave evidence that the claimant could have raised her concerns with her managers, either in written form or by a formal grievance, rather than by doing so with the second respondent directly. We accepted her evidence on that issue. She denied that the claimant had been placed on special leave for raising her beliefs, saying that it was because of the manner in which she had done so. Whilst that is more properly characterised as an allegation that the claimant had done so we accepted that evidence subject to that clarification.

735. She said that the claimant had at least on occasion changed her clothes in the toilet cubicle of the changing room. That was later supported by Ms Wishart's evidence, and we accepted it.

736. **Ms Myles** was we considered a credible and reliable witness. She addressed the review of the claimant's suspension, and decided that it should be lifted, and a phased return put into place. It was clearly her decision, not one dictated to her by others, and indeed her evidence that Dr Searle, Dr Currer, Ms Davidson and Ms Curran did not agree with it emphasised the impartial way in which she had conducted it. Her evidence was we considered supportive of the claimant's position that no patient safety issue had arisen. We did not consider that Ms Myles' actions in this regard could possibly be part of some wider conspiracy, and the independent manner in which she dealt with matters was a strong indicator that no such conspiracy had existed.

737. She considered that there was no risk of the claimant impacting on patient safety after having met her when the claimant gave her reassurance on that, and decided that the claimant should return to work on a phased basis when there was a senior nurse available for support. That required it to be on day shift, and a compromise was reached on when that should be. We accepted her evidence as to the reasons for those matters.

738. She had not had sight of any risk assessment initially carried out, and had little documentation before her when she met the claimant, but considered that helpful as leaving her with an open mind. It was not clear what document she had in mind when stating on the risk assessment form that no derogatory comments had been made by the claimant to the second respondent. She had not found all of the documents provided to her. It may have been the Datix summary, or the document titled "Hate Incident" or neither of them. There was limited information given to her and far more available to us.

739. She did not accept some of the points put to her in cross examination, but did accept others, and the manner she did so we considered clear, compelling and convincing. She had not been aware of the full circumstances of the issue to do with the rapist in a prison, but was informed of it later. Her view was that the terms used were not derogatory,

but part of a dispute over who said what where there was no independent witness.

740. She considered that the allegations as to patient safety were not raised formally at the time, were not documented, and that that indicated that the allegations were in effect not reliable. She informed those who challenged her decision of that, and they had not argued to the contrary with her. In our view that was important evidence on those matters, and we accepted it concluding that those allegations were not established on the facts as noted above.

741. **Dr Searle** was we considered a credible, and subject to the restricted qualifications we shall come to, a reliable witness. The qualifications are firstly that she did not recall any discussion with Ms Myles regarding the review of suspension, and some of the detail around the searches made for documentation in accordance with the Order of 3 January 2025, and secondly that she accepted that she was a supporter of the second respondent. She was candid as to her role in that, considering that it was part of her role as the medical and educational supervisor.

742. We considered that it was more likely that Ms Myles had been spoken to by Dr Searle who disagreed with the decision to revoke the suspension, partly as that is confirmed in an written answer to a question asked by the claimant, but mainly as we accepted Ms Myle's evidence on that. Dr Searle's actions in speaking to Ms Ashraf, a witness potential and that despite the terms of the 14 April 2024 letter to her from Ms Glancey, were not appropriate. She accepted that was the case on reflection about it during cross examination, as she did other aspects of what she had done which indicated that she had not maintained the confidentiality of the process.

743. Overall however and subject to those qualifications we considered the evidence Dr Searle gave as reliable. She responded to questions clearly and convincingly. She accepted in a number of respects that messages she had sent in relation to the investigation process, and actions she had taken, were not appropriate, as addressed in the preceding paragraph.

744. She explained what the second respondent had told her at their meeting on 29 December 2023 and why she regarded that as a hate incident. She explained why she considered that the claimant's actions had been harassment, which was a combination of what she said was waiting for the second respondent to be alone in the changing room, challenging the second respondent repeatedly, making what were she considered derogatory and offensive remarks. She stated that saying to someone who identifies as a woman that the person was not was offensive, as it went to the heart of who they considered they were. Similarly a comment as to chromosomes was offensive in her view.

745. She commented on the context of the remark about the prisons incident, which she considered was a comparison between the second respondent and a person who was a convicted rapist, who had after the offences commenced a transition to a female, and where there had been a contentious placing in a female prison initially. These and other matters led her to the view that what had happened was a hate incident, from the content of the remarks, and the manner in which they had been made.

746. We considered that compelling evidence. Whilst the fact that she was a supporter of the second respondent, and to an extent acted as a representative for the second respondent both when speaking to a potential witness, and attending as a companion for the second respondent at the investigation meeting meant that she was not impartial, we considered her evidence reliable. We also considered it reliable in her view that where an issue of concern arose there were proper methods of raising that, in essence formally through line management or other channels, and not directly with the second respondent in person. We considered that consistent with the letter of outcome from the first respondent to the claimant, but also more widely our own views as to what was appropriate, as we discuss below.

747. Dr Searle said had she had no reason to disbelieve what the second respondent told her on 29 December 2023 and she described the degree of upset felt by the second respondent at that time. That was consistent with Dr Pitt's evidence from 25 December 2023. In her role as supervisor it was we considered an understandable human reaction to seek to comfort the second respondent and offer assistance. Dr Searle's acts were not in our view part of a conspiracy against the claimant or anything similar to that.

748. It was alleged in particular that Dr Searle had been involved in a deliberate attempt to cover up the email of 5 January 2024 from Dr Currer, and that her upset in evidence was not genuinely because of concern for a colleague but was concern for herself. We accepted Dr Searle's evidence on both matters, which was to deny them. The first respondent's failure to comply with the document order of 3 January 2025 is widespread and concerning, but so far as Dr Searle was concerned was not deliberate flouting of it. There was no conspiracy to withhold evidence in our view.

749. **Ms Harris** we considered to be an obviously credible and reliable witness. She had a limited role to play, passing on a message from Ms Malone as instructed, and when doing so enquired as to the claimant's well-being. We accepted her evidence that she had not been involved in any attempt to cover up the 5 January 2024 email.

750. **Ms Glancey** we considered to be a credible and subject to some qualifications a reliable witness. Her role was as investigator from when appointed on 29 February 2024, but it took until 13 December 2024 to

finalise the report. That was an exceptionally long period of time. In January 2024 the sensitivity of the matters raised was noted by senior managers of the first respondent. On 16 April 2024 it was being said by the Central Legal Office who were in effect acting for the first respondent that it was a matter of urgency, and that was passed on internally. In our view however it was not treated as that. There were a number of reasons for the delay, and some of them were entirely justified. For example, an investigation meeting was proposed with the claimant on 2 August 2024 and she wished it to be delayed. But why it took until 2 August 2024 to arrange that meeting was not we considered properly explained.

751. The investigation policy refers to having a meeting with the person complained about at a relatively early stage as a possibility. Once the second respondent's statement was received on 23 January 2024 there was an understanding of what was being alleged. Ms Glancey had that when she was appointed. There was a delay until the letter inviting the claimant to a meeting and setting out the allegations on 12 April 2024. It followed a period of annual leave of two weeks. The period of most of March 2024 does not appear to have involved any action on the investigation, despite the circumstances referred to. Why that was we consider was not explained.

752. Why other arrangements were not made when Ms Sinclair-Forrow was off work through illness were not explained. We would have expected any employer of any material size, quite apart from one as large as the first respondent, in such a situation not only to recognise the importance of the matter but to act on that by giving it a priority for as full and quick an investigation as possible, when memories were as fresh as possible. That was not done, again for reasons not fully explained.

753. There were witnesses who might have been interviewed who were not, such as the person known as Shwayts and Ms Wishart. The position as to the allegations over patient safety was at best unclear. It was not initially included in the allegations, but latterly was, where the evidential basis for that was not clear to us, nor was it fully explained.

754. Ms Glancey denied the various suggestions put to her of a form of conspiracy both to punish the claimant for challenging the view that the second respondent was a woman, and to cover up documentation and decision making around that, including in relation to patient safety concerns. We accepted her evidence rejecting those and other criticisms. Whilst the time taken, and how each of the claimant and second respondent were kept informed of the process, was markedly different we considered that Ms Glancey sought to investigate the issues raised impartially.

755. **Ms Hamilton** was we considered a credible and reliable witness. Her role had been a form of temporary one, standing in on some of the occasions

when a colleague Ms Sinclair-Forrow was not available through illness or otherwise. She was not directly involved in the detail of the matter. She also rejected the allegations of the first respondent wishing to punish the claimant, or of the conspiracy to conceal documentation. We considered that her evidence was clear and convincing, and we accepted it. We did however consider it not explained by the first respondent why she, or a colleague, could not have been involved in the investigation more fully when Ms Sinclair-Forrow was unable to.

756. **Mr Donaldson** we considered to be a credible witness. He did not meet the criteria in ***Kennedy*** for a skilled witness as he was employed by the first respondent. If his evidence had been simply that detail of dates of creation and editing of notes on Google Notes had been obtained, that would have been a matter of fact. His evidence sought however to go beyond that, even to giving an opinion on the second respondent's credibility.

757. He was not able to provide an explanation for the Google Notes record to the effect that the entry in the second respondent's notes which had the heading "Weird incident 28 August 2023" was created on 26 October 2023, and later edited. His belief that the second respondent was surprised when that was ascertained during their Teams meeting, and was believed by him, is of very little evidential value. Both respondents having had information from Mr Donaldson and sight of Mr Borwick's report did not tender their own skilled witness who did meet the said criteria. They must have been aware that Mr Donaldson could not offer an explanation for what they argued as a potential anomaly as to dates of creation. As he accepted in his evidence, one possible explanation for that was that the second respondent had not accurately reported when the note was created, or had been dishonest about it, and another was that there was an unexplained issue with how the creation date and dates of editing had been recorded electronically. The evidence Mr Donaldson gave was therefore materially limited both generally and particularly when set against the evidence of Mr Borwick.

758. **Dr Currer** was we considered a credible and generally reliable witness, with that reliability subject to one qualification. She candidly accepted that her email of 5 January 2024 which contained a comment that the claimant had been referred to the NMC was factually inaccurate, and that she knew that at the time. She had no explanation for it being there. The fact of there being such an important detail so obviously inaccurate, however candidly accepted as such, was a qualification to the extent to which her evidence could be accepted, but we considered that the evidence otherwise given was reliable. The email to which we have referred sought in our view to address the management of the dispute between the second respondent and the claimant. Dr Currer did not have any form of line management responsibility for a nurse, but was involved in that to an extent for a doctor,

such as the second respondent. She was a senior member of the team of consultants.

759. She gave evidence about matters of biology which we accepted. She accepted a number of propositions put to her in cross examination in a commendably candid and clear manner. We considered her evidence on those matters to be entirely reliable. She had a degree of knowledge that was greater than that of Dr Searle who accepted that it was not her area of particular knowledge. Although Dr Currer was not a skilled witness in the ***Kennedy*** sense, as she is employed by the first respondent, it appeared to us that the evidence should be accepted coming from a senior consultant whose experience and qualifications she spoke to in her evidence, on which we consider there is support from ***Connor.*** She denied some of the allegations put to her, including that she had attempted to mislead the Tribunal from her evidence in chief, and we accepted those denials as credible and reliable.

760. **Ms Wishart** was we considered credible, but on a number of questions she was asked in examination in chief could not remember what had happened. For example she remembered no detail of what happened during her presence in the changing room on 24 December 2023, which is not surprising given the passage of time and that she was not interviewed in the investigation by the first respondent, and she could not recall what derogatory comment about the second respondent she said that the claimant had made at a lunch in September 2023 when others were present, but had been told what those comments were afterwards. That was we considered hearsay evidence which was not the best evidence, as we addressed above.

761. She said that she thought that the claimant did have the same views as were put to her in social media posts of the claimant's husband, but her view on that is not we considered reliable evidence. One aspect in examination in chief was a remark the claimant, she said, had made about a mosque being built in Kirkcaldy where the claimant was alleged to have said that she had a good mind to post bacon through it. When that was said to have happened however was not something that she recalled. This was an issue of potential relevance to credibility of the claimant, but was so vague as we considered of no evidential value.

762. The aspects of the evidence Ms Wishart gave which we did consider reliable included that the second respondent changed in the changing room in a modest manner by turning the second respondent's back when doing so, and in cross examination when she stated that she had seen the claimant change her clothes in the toilet cubicle of the changing room on a number of occasions. That was evidence consistent with that given by Ms Curran and not consistent with that of the claimant who had denied that. The manner in which that detail was given and the clarity with which

it was done was both credible and reliable in our view. We also considered that had the second respondent not changed out of scrubs at the same time as Ms Wishart and Shwayts that was the kind of matter that Ms Wishart was likely to have recalled.

763. **Ms Nicoll** gave evidence we considered credible and generally reliable. She had made a number of comments in writing which were indicative of a view contrary to that of the claimant, including a comment on two occasions to the effect that she hoped that the claimant would be struck off. We were however of the view that she was candid in her answers, accepted criticism of what she had said on a number of occasions, and we accepted both that the claimant had made comments Ms Nicoll perceived as racist, and that the claimant had called the second respondent a "weirdo". That was something that was not so much disputed in cross examination but suggested as a form of fair comment. It was suggested that Ms Nicoll was simply out to get the claimant struck off, and that her evidence was an attack on the claimant. We concluded that that was because Ms Nicoll so vehemently disagreed with the views the claimant had expressed, including by sending a series of racially offensive supposed jokes but also by her comments in relation to the second respondent. Whilst we required to treat her evidence with substantial caution in light of the adverse commentary against the claimant, we accepted her evidence that the claimant had called the second respondent a weirdo, which was consistent with a message the claimant had sent. More generally however for reasons addressed above we did not consider that her evidence affected the assessment of credibility and reliability of the evidence of the claimant.

Witnesses not called

764. Parties did not call witnesses who might have been tendered. As noted above for the claimant that included one or more of those of her colleagues on the issue of group disadvantage for the claim of indirect discrimination. It also includes Ms Ashraf. If the claimant believed that she could give evidence helpful to her she could have been called if necessary on witness order, although the point arises more forcefully for the first respondent. She did not call Mr Fraser.

765. For the respondents the list is longer and includes the person known as Shwayts, Mr Doyle who is said to have decided special leave and had some form of role in the investigation process, knew of the complaint that the claimant had made to Ms Davidson but did not seem to raise that as a concern over her acting as investigator, Ms Shepherd who was involved in the suspension and related matters, Ms Beveridge who commented on reputational damage, Ms Raynor who suggested reminding the claimant about confidentiality, those from HR such as Ms Sinclair-Forrow who was principally involved in the investigation, and those who commented on the

suspension particularly Ms Herkes, Ms Ashraf who was interviewed in the investigation, and a skilled witness in relation to the mobile telephone in so far as Mr Borwick's evidence was to be challenged. There are a number of questions that might well have been asked of such witnesses, including simply by way of example the reasons for the suspension and the absence of a written risk assessment document of Ms Shepherd, and of Ms Sinclair-Forrow why she wrote in the terms she did on 14 May 2024 which was after the Claim Form had been presented, which included the reason said to be for attending the changing room in paragraph 11, which was contrary to what her letter suggested.

766. We can if we consider it appropriate draw inferences from the absence of such a witness. As the Supreme Court addressed in ***Efobi,*** whether inferences should be drawn from the failure to call a witness depends on all of the evidence and circumstances.

Evidence generally

767. Where a document was not referred to in the oral evidence, or within the written witness statements of Ms Forstater or Mx Valentine, we did not consider it. It was simply a document that had been tendered, and the risks of considering a document only on that basis were illustrated by a dispute over a letter dated 15 May 2024 that the first respondent said had been sent to the claimant which the claimant said had not been received.

768. In our view this is trite law in Scotland, but we refer to Employment Tribunal Practice in Scotland at paragraph 8 – 170 [that being a publication of which the Judge is one of the two current editors but where this paragraph long predates his involvement] which states:

> "It is of crucial importance to note that productions do not become part of the evidence in the case until they have been referred to at the hearing and admitted in evidence. It is not unusual for a party to proceed on the misunderstanding that any documents which are included in the volume of productions will be taken into account by the Tribunal. This is not the case."

769. The exception to that is where there was email correspondence between the parties solicitors, which they had arranged for inclusion within the Bundle, some of which was spoken to in evidence, and we inferred from these facts that the parties had agreed that the emails between their representatives which had been produced before us had been sent and received.

770. The claimant in her first written submission referred to issues concerning the second respondent's registration with the General Medical Council. It included reference to the former names used by the second respondent

prior to commencing to transition to female. That had not been addressed in any of the evidence led in the case.

771. When an issue arose between the parties as to whether the submissions ought to be made publicly available the Tribunal enquired of the claimant through her solicitors about when the evidence on those matters had been given. The reply dated 12 August 2025 accepted that the point had not been put to witnesses but stated that, as it was from a public record and they thought it was not in dispute, there was no need to (paraphrasing the message). The claimant's representatives were invited to provide authority for that proposition, and did so by reference to commentary in Walker on matters of public record, with further comment that the record in question is available online. The paragraph of Walker founded on states as follows:

> "19.28.1.Authorised copies of registers or lists kept under statute relative to the practice of certain professions or certificates granted by persons appointed to keep these records are generally sufficient
>
> evidence (although the statutory provisions are not all uniform); the appearance of a person's name in them is evidence of his name having been duly registered or entered. The absence of a person's name from the list or a certificate to that effect is equally evidence of non-registration of that person. Examples of professions whose registers or rolls are in this position are architects, dentists, medical practitioners, nurses and midwives, osteopaths, solicitors and veterinary surgeons."

772. The claimant argued further that the GMC Register constitutes a list kept under statute, it being a register required by operation of sections 2 and.34 of the Medical Act 1983. Copies of entries said to be from that Register were produced.

773. In the view of the Tribunal, the proposition suggested by the claimant is not correct. A fact that is not admitted, or within judicial knowledge, requires to be proved. A basic minimum of evidence is needed to do so. The Tribunal cannot hope to know what evidence a party wishes to rely on without that being put before it, whether it is said to be as a matter of public record or otherwise. The other party does not have any fair notice of what document is sought to be relied upon. ***Finlayson v McMahon [2022] EAT 30*** held that a case management order as to documents to be relied upon required to be complied with, and that documents could not, in effect and using words not in the EAT report, be sprung on the other party. The GMC records referred to were not in the documentation before the Tribunal, nor were they referred to in evidence at all.

774. The Tribunal did not consider that the matters within such a record, provided only at the stage of submission, had been proved as facts. The

extract from Walker states firstly that an authorised copy is required, which we did not consider had been done, and secondly that where that is done they are "generally sufficient evidence", which we take to mean that a witness from the register is not required to speak to them, but if a copy of the part of the register is provided as a production in the case the evidence from that professional register is sufficiently proved.

775. The start of the chapter in which paragraph 19.28 appears explains that whether the document itself requires to be proved and whether and to what extent it is evidence of the facts stated in it must be considered in relation to individual categories of documents rather than generally, and refers to ***Kapri v Lord Advocate 2014 SLT 557*** which stated that "there is no general provision which allows the court to hold as proof of fact, merely by their publication, the contents of reports or other papers emanating from government departments, international governmental or non – governmental bodies, or academic or research institutions." In our view that supports the conclusion that where a public record of this nature is to be founded upon it requires to be produced, or if not produced for the fact within it to be addressed in oral evidence.

776. In ***British Transport Police v Norman UKEAT/0348/14*** it was said that there may be cases where the facts were agreed or the matter could rest solely on submission, adding "where however a contentious factual matter is relied on there has to be some evidential basis for it (assuming no agreement as to how it should be treated)." Albeit in a somewhat different area the need for a minimum level of evidence before inferences can be drawn was raised in ***Andrew and another v NHS Education Scotland [2025] EAT 115***.

777. The claimant however had not produced that within the documentation before the Tribunal until after the evidence for all parties had been closed, nor had she asked the second respondent about such matters when the second respondent gave evidence. The facts that the claimant sought to argue had been established by reference to the register at submission the Tribunal did not consider had been sufficiently established before it, it rejected the claimant's argument in that regard, and the matters the claimant raised in that regard were not included in the facts as found above as a result.

778. Not dissimilarly in the final written submission made by the respondents there was reference to the second respondent's circumstances in paragraph 18, which had not been any part of the evidence. That is, as we have noted above, impermissible. We did not include those matters in the findings in fact accordingly.

779. On 13 and 16 October 2025 the claimant sought to introduce what was new evidence in the form of a policy of the first respondent, which policy we did not take into account, again for the reasons given above.

Discussion

780. This Tribunal was constituted as a full Panel, with each of the three members contributing to the decision, which was unanimous.

781. It is we consider important to make the general point that this case is not a form of public inquiry into gender critical beliefs as a protected characteristic, the rights of those with the protected characteristic of gender reassignment, or how the NHS as a whole has responded to managing the differences there may be between those with those two protected characteristics. Some parts of the evidence led for the claimant appeared to us to be more relevant to arguments in the public domain, or at a political level. That was so particularly in the evidence of Ms Forstater and Mx Valentine, and from some of the documentation produced and referred to in their written witness statements. It is also not our function to decide wider policy issues such as whether the 2010 Act is in the most appropriate terms, or could benefit from amendment. Those are issues for the legislature. We must construe the Act in the terms in which it has been enacted.

782. The case has at its heart the conflicting beliefs of the claimant and second respondent, the separate protected characteristics each holds, what has happened in interactions between them, and how the first respondent acted in that context. The claimant challenges the permission she admits that the first respondent gave the second respondent to use the changing room, arguing that it was necessarily unlawful under the Act. For reasons we shall come to it appeared to us that that matter does require to be determined in order properly to analyse the claims made: for example as part of the background to what is reasonable as a perception, and an aspect of the other circumstances, under section 26(4) of the Act. We shall consider that issue initially, and then some of the other more significant areas of dispute between the parties, before addressing the matters from the List of Issues prepared by the parties.

Was the first respondent's grant of permission to the second respondent to use the female changing room inherently unlawful under the Equality Act 2010?

783. The second respondent did have a legal right to use the changing room on one rather simple basis, from being given permission by the first respondent as the owner of it, but whether or not it was lawful under the Act is a separate question. The claimant was in our view correct to say that this issue is of central importance in the case. The claimant (and interveners For Women Scotland) argued in basic summary that it was the inevitable outcome of the decision of the Supreme Court in ***FWS.*** The respondents argued in basic summary that the Supreme Court decision did not have the effect contended for by the claimant, and that the permission was lawful as it followed the guidance in the CoP: Services.

784. We therefore start our analysis by considering the Supreme Court decision. The context for that case was a claim initially pursued in the Outer House of the Court of Session for judicial review of a decision of the Scottish Government to issue statutory guidance as to the Gender Representation on Public Boards (Scotland) Act 2018 ("the 2018 Act"). That Act set an objective that 50% of the non-executive members were women, and women were defined essentially to include those with the protected characteristic of gender reassignment under the 2010 Act. After an initial successful challenge by judicial review new guidance was issued that a person with a Gender Recognition Certificate ("GRC") under the 2004 Act in the acquired gender of female was a woman for the 2018 Act.

785. It was argued by the Petitioners, in very brief summary for the aspect relevant to the present case, that the part of the guidance which included a trans woman within those who are women for the purposes of the 2018 Act was unlawful. The argument was made under Part 3 of the 2010 Act in relation to public services. It was not accordingly a case within the context of a claim by an employee against an employer, made under Part 5 of the Act, as we address further below.

786. The Supreme Court noted that the central issue in the appeal before it was whether the terms "sex", "woman" and "female" in the 2010 Act are to be interpreted as including those with a GRC in the acquired gender of female. It considered what it termed biological sex and certificated sex, where the person had been issued a GRC. The decision commented on the distinction between individual rights and group rights, as well as individual and group duties.

787. It held that the terms "sex", "woman" and "female", and the male equivalents, when used throughout the Act were to be construed as a matter of biology, and that sex was binary and immutable. It held that a trans woman retained the sex assigned at birth for the purposes of section 11, which was male, and that the person was not a woman for the purposes of the Act. It meant that the grant of a GRC under the 2004 did not determine the position of sex under the 2010 Act. The statutory guidance was held to be unlawful.

788. It follows from that decision, and the evidence we heard, that the sex of the second respondent for the purposes of section 11 is male, that being the second respondent's biological sex (as that term is explained in ***FWS***).

Analysis of claimant's argument

(i) The Supreme Court decision

789. The question that arises from that conclusion is whether the application of the Supreme Court decision must mean that, under the provisions over which this Tribunal has jurisdiction under the 2010 Act as to work, the

second respondent as a biological male required to be excluded from the female changing room, such that the permission given by the first respondent to do so was necessarily unlawful under those provisions. We have concluded that the answer is in the negative.

790. Firstly the court did not seek to address that question. That is unsurprising as it was not the question before it. It answered a different question as to the interpretation of the words “woman” “man and “sex” in the Act in the context of a case pursued under Part 3 in respect of public services. The Supreme Court did not address the different question of how an employer should determine matters where two or more protected characteristics are in conflict under Part 5, where there are material differences from the provisions applicable to public services, as we address in the next section.

791. Secondly, there are different protected characteristics under the Act but there is nothing stated specifically within the Act itself, or the court’s decision, that one protected characteristic takes precedence over any other. In ***Forstater v CDG Europe and others UKEAT/0105/20*** the Employment Appeal Tribunal stated:

> “This judgment does not mean that those with gender-critical beliefs can ‘misgender’ trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.”

We consider that quotation provides support for the proposition that the Equality Act 2010 does not create a hierarchy of protected characteristics

792. The Supreme Court endorsed that decision as “a comprehensive and impressive judgment”. We consider that the court would not have made that unqualified comment if it did intend to create a hierarchy of protected characteristics with sex at the top of that hierarchy. Had doing so been intended, we consider that that would have been stated explicitly.

793. That one protected characteristic does not take precedence over any other is also consistent with how different human rights are addressed, which is also equally. In ***Lee v Ashers Baking Co Ltd [2018] UKSC 49***, the Supreme Court similarly highlighted the necessity of balancing competing human rights without holding that one has priority over any other. The court noted:

> "The rights to freedom of thought, conscience and religion, and to freedom of expression, enshrined in articles 9 and 10 of the European Convention on Human Rights, are protected by sections 6 and 13 of the Human Rights Act 1998. The rights to respect for

> private and family life, and to freedom from discrimination, protected by articles 8 and 14, are also engaged. There is no hierarchy of rights; all are to be treated with equal respect."

794. The concept that each right is to be treated with equal respect is echoed in Article 1 of the Convention which confirms that the rights apply to all within the jurisdiction of the state. The claimant's Article 8 or other rights do not necessarily take precedence over the Article 8 or other rights of the second respondent, or *vice versa*. We did not consider that the Supreme Court sought to give the Article 8 rights of a woman any priority over the Article 8 rights of a trans person. If it had intended to do so in our view not only would that have been made explicit but the court would also have explained why it was required and was a departure from case law both under the Act and in relation to the human rights provisions we have referred to above.

795. Although the respondents' submission addressed the extent to which the decision created a hierarchy of rights, the Supreme Court decision did not in our view purport to do so. What it did was to define the terms, not how the protected characteristic of sex was to be assessed in relation to other protected characteristics where they applied.

796. Thirdly, the claimant's contention was in our view not consistent with the court's comment that

> "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)."

797. After that comment the court explained that a person with gender reassignment as a protected characteristic could pursue a claim of direct or indirect discrimination, or of harassment, if the circumstances so warranted. There was no qualification to it to the effect that that was not applicable in, for example, the context of a single sex space under Part 5 of the Act. If their decision had been that all trans persons must be excluded from the changing rooms or toilets for the sex they identify with because it was not the sex assigned at birth, and may also be excluded from the changing rooms or toilets of their biological sex, that in our view certainly does impact on their rights under section 7.

798. Were the claimant's contention to be correct that would have the effect of materially reducing the extent to which that protected characteristic could be relied on by trans persons, to their disadvantage. What was desired by the trans person when living their life may not be permitted in a large number of practical instances, and would not have been consistent with the view expressed by Lady Hale in ***Work and Pensions,*** and the line of authority in relation to human rights. Such a construction in our view would

also not be consistent with the interpretation of the Equal Treatment Directive from the CJEU and its predecessor as referred to above, which remains as assimilated law, and would not be consistent with a purposive interpretation still required. The development of the law in relation to what is now the protected characteristic of gender reassignment is set out above. At the very least we would have expected these considerations to have been addressed specifically.

799. Fourthly the rights relied on by the claimant are different and each requires separate analysis, in this case being under sections 13, 19, 26 and 27. There is nothing specific within any of those provisions that necessarily requires that the construction argued for by the claimant be followed, and as we shall come to the provisions relevant to those sections are materially different to the provisions relevant to public services.

800. Fifthly the Supreme Court in making its analysis held that "an interpretation that produces unworkable, impractical, anomalous or illogical results is unlikely to have been intended by the legislature". We take from that comment that the Act is, so far as possible, to be construed so as to make it workable as the Parliamentary intention is likely to have been to do so.

801. If the claimant's construction was right, it would strictly have the effect that no male plumber, tiler, electrician or other tradesperson could enter the female changing room or toilet to make repairs, and no female tradesperson could enter the male changing room or toilet to do so. It would similarly mean that no cleaner could enter those rooms to clean them where they were of the opposite sex of that for the facility. It would also mean that a trans man who had had surgery and medical treatment to align that person's body as far as possible with that of a male could be required to use the female changing room as that aligned with their biological sex, or excluded from the female facilities because of the appearance as a male as well as being excluded from the male facility in light of their biological sex, which would effectively exclude a trans man in such a situation from work unless there were other single user facilities that existed or were to be constructed.

802. The outcomes that flow from the claimant's argument are in our view not consistent with the Supreme Court decision being workable. We appreciate that there is a practical distinction between permission to enter a changing room for maintenance or cleaning on a particular occasion, and to do so more generally in order to use it to change clothes, but that distinction does not appear from the terms of the Act itself.

803. Sixthly after addressing the dilemma faced by a trans woman "who presents fully as a woman" the decision states that

> "such women may in practice choose to use female-only facilities in a way which does not in fact compromise the privacy and dignity of other women users….."

804. That is we consider contrary to the construction argued for by the claimant, which is that trans women do not have any choice in that regard – they cannot use the female facility. That comment suggests to us that, if this be appropriate, the trans woman using female-only facilities may be lawful under the Act, although the trans woman does not have any absolute right to do so. That phrase suggested in our view that the privacy and dignity of other women users was a factor to take into account but not an absolute bar to its use.

805. Seventhly and somewhat similarly to the previous point, the court referred to ***Croft***, in which the Court of Appeal held that there could be circumstances under which a trans woman might in effect be treated as a woman and we inferred from the comments that a trans woman can be permitted to use a place such as a female changing room in principle – dependent on circumstances as we address below - and that decision was not adversely commented upon in any way by the Supreme Court. It is not consistent with the claimant's argument. The phraseology does require amendment in light of ***FWS*** as we address below, but in our view the principle remains valid.

806. Eighthly even if the view is taken that the terms of Schedule 3 are relevant to determining issues arising under Part 5, which is not the view we hold for reasons we address in the section following, the court did not speak in terms that were mandatory, but rather were permissive. The Court made the following comments, under the heading of separate and single-sex services, to which we have added our own emphases by underlining them:

> "[in relation to the exemptions in Schedule 3] some of these <u>permit</u> what would otherwise constitute gender reassignment discrimination but make no similar provision for persons issued with a full GRC. Other provisions <u>permit</u> carve-outs from what would otherwise constitute sex discrimination under the EA 2010. In enacting these exemptions, the intention must have been to <u>allow</u> for the exclusion of those with the protected characteristic of gender reassignment, regardless of the possession of a GRC, in order to maintain the provision of single or separate services for women and men as distinct groups <u>in appropriate circumstances</u>……..
>
> In enacting these exemptions, the intention must have been <u>to allow for the exclusion of those with the protected characteristic of gender reassignment</u>, regardless of the possession of a GRC, in order to maintain the provision of single or separate services for women and men as distinct groups <u>in appropriate circumstances</u>. These provisions are directed at maintaining the availability of

separate or single spaces or services for women (or men) as a group – for example changing rooms, homeless hostels, segregated swimming areas (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) or medical or counselling services provided only to women (or men) – for example cervical cancer screening for women or prostate cancer screening for men, or counselling for women only as victims of rape or domestic violence…….

The gateway conditions in paragraph 27(2) to (7) cannot be coherently applied if sex does not carry its biological meaning because it is hard to see how the condition in paragraph 27(2) (that only persons of one sex have need of the particular service) can be satisfied if each sex includes members of the opposite biological sex in possession of a GRC and excludes members of the same biological sex with a GRC. ……

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.....

The references in this paragraph only make sense as references to biological sex. Provided it is proportionate, paragraph 28 exempts gender reassignment discrimination but only in the context of the provision of separate services for men and women or single services to one sex…….

Nor is the EHRC correct to assert that paragraph 28 is redundant on a biological interpretation of sex. On the contrary, if sex means biological sex, then provided it is proportionate, the female only nature of the service would engage paragraph 27 and would permit

> the exclusion of all males including males living in the female gender regardless of GRC status. Moreover, women living in the male gender could also be excluded under paragraph 28 without this amounting to gender reassignment discrimination. This might be considered proportionate where reasonable objection is taken to their presence, for example, because the gender reassignment process has given them a masculine appearance or attributes to which reasonable objection might be taken in the context of the women-only service being provided. Their exclusion would amount to unlawful gender reassignment discrimination not sex discrimination absent this exception."

807. The reference to the reasonableness of an objection would have been otiose, as whether someone objected or not would not be a question of reasonableness, but would be an entitlement of the person objecting. The use of the word reasonableness indicates that there is a test to apply beyond that of what the biological sex is.

808. What is perhaps the clearest example of the inconsistency relevant to the circumstances of the present case is paragraph 213. It states:

> "If sex has its biological meaning in this paragraph [26 in Schedule 3] then a service-provider can separate male and female users as obvious and distinct groups. For example, a homeless shelter could have separate hostels for men and women provided this pursued a legitimate aim, which might be the safety and security of women users of their privacy and dignity (and the same for male users). By contrast, if sex means certificated sex, the service provider would have to allow access to trans women with a GRC (in other words biological males who are female according to section 9(1)), to the women's hostel."

809. These comments are in our view directly contrary to the construction argued for by the claimant. The words "provided this pursued a legitimate aim" would not have been added if the claimant's position were accurate (on the hypothesis above). Those words are consistent with an ability to decide what to do and the need to apply a test of objective justification to that decision, not that there is a mandated answer in the context of a single sex space. If the claimant's argument was right we would have expected the Supreme Court to have said in terms that as sex has a biological meaning, men and women had to be separated in relation to such a space, access being refused other than to the facility aligning with biological sex.

810. Ninthly there are other instances of the appellate courts and tribunals seeking to find a solution where two different characteristics are relied on and are in some form of conflict, as we shall come to, such as to point away from having one single answer. The Supreme Court referred to those cases in paragraph 151, in which it stated that the Act:

> "seeks to strike a balance between the rights of one group and another, rights that can conflict with or contradict one another in some circumstances. An obvious example of such conflict emerges in employment cases concerning the protected characteristic of religion or belief on the one hand and sexual orientation on the other; see for example ***Islington London Borough Council v Ladele [200] EWCA Civ 1357***….."

811. Lastly on this matter, we make some additional points for completeness. Paragraph 260 of ***FWS*** referred to persons being protected by section 19 where the protected characteristic was gender reassignment, and a PCP based on the claimant's argument, which would have the ffect of excluding trans persons from both male and female changing rooms, is clearly liable to amount to indirect discrimination, which is likely to be very hard indeed to justify as proportionate, and if the trans person were to be told not to use any single sex space where there are no other alternatives that may, depending on the view taken of causation, be direct discrimination which cannot be justified.

812. Such a construction of the decision as the claimant argues for would in our view be likely (in at least some cases, although not in our view the present case) to put the United Kingdom in breach of its obligations under the Convention, in light of the case law of the ECtHR to which we referred above, and a construction of the decision that does so should be if possible avoided. That is a useful cross check in our view. Indeed doing so may be required under the 1998 Act in such cases. It is similarly inconsistent with the obligations arising as assimilated law, having regard to the CJEU authorities and those of the House of Lords and Supreme Court referred to above.

813. It would mean that the circumstances of those trans persons who have had medical treatment and surgery to align their bodies as closely as practicable to that of the sex or gender they identify as having could be excluded from any facility. That would in practical terms in many cases mean that the person could not continue to be employed, or only be able to do so by using facilities outwith the workplace, where the same issues are liable to arise albeit within a different statutory framework under Part 3. A construction which, particularly in the context of work, permits a discretion to be exercised to balance the differing protected characteristics, human rights, and rights under assimilated law of those concerned, as we address further below, is in our view to be preferred so that there is not a contravention of human rights in particular. Again we consider that to be a useful cross check.

814. Although the position of the second respondent was on the evidence not the same as those who are intersex or with differences of sexual development, we consider that the conclusion we have reached is

supported by the position of someone who is, such as in broadly the same circumstances of ***Sempill-Forbes***. If such a person having been assigned female at birth considers in later life their gender and sex to be male, presents as male, and has a body consistent with that of a male to the extent of the evidence in that case, it appears to us to be very likely to be a breach of the UK's obligations under the Convention and not consistent with assimilated law were that person to be excluded from both male facilities because of biological sex, and female facilities because of the presentation as a male. The conclusion we have reached allows for the management of such complex and difficult cases by allowing that person to use the male changing room, provided that that is done in an objectively proportionate manner against tests we shall address below. These cases are very rare indeed, but a construction that permits an answer to them not in breach of human rights is we consider once again a useful cross-check.

815. The claimant's argument included that the protected characteristic of gender reassignment would not be engaged unless the second respondent established a positive right in law to use the changing room, which the claimant argued did not exist. That argument goes too far in our view, as it appeared to us to be based on an argument that there required to be some form of statutory authority for the permission granted, which we considered is not correct. The second respondent did have the right in law from being given permission, the reason for that permission was the protected characteristic of gender reassignment, and the question is whether that was or was not in breach of the Act. The claimant was in effect seeking to ignore the protected characteristic of gender reassignment. That was consistent with her argument that the first respondent's position on how trans persons should be treated was delusional.

816. The first respondent could not ignore the protected characteristic of gender reassignment held by the second respondent without risk of breach of the Act at least under section 26 and possibly others. In light of the terms of the Act, and the case law on the protections given to those who are trans persons from the ECtHR and CJEU or its predecessor, consideration does require to be given to how to decide where a trans person should change clothing, or which toilet facility to use. Whether the first respondent made a lawful decision or not in the circumstances is a separate question we address below.

817. In relation to human rights the claimant founded on ***R (on the application of James (Dowsett) v Secretary of State for Justice 2013 EWHC 687 (Admin)*** referred to above, after asserting that Article 8 protects an individual's interest in bodily privacy and the bodily autonomy and dignity interests that that entails. It asserted that authorities recognise that women

have a particular interest in asserting the right to bodily privacy as against the opposite sex.

818. ***Dowsett*** is a decision of the High Court, and not binding on this Tribunal. It was also a decision on section 29 and Part 3, which this Tribunal does not have jurisdiction over, as addressed above. The circumstances of a prison where searches of the person are undertaken are entirely different to those in this case. The setting of this case is both legally (by virtue of Part 5) and factually (two employees at a workplace) materially different such that we did not consider that the case supported the claimant's argument.

819. The claimant also argued that biological sex is real, but this is not the question before us. It is more of a political argument than one under the 2010 Act. The definition of sex under section 11 has been clarified by the Supreme Court. It is sufficient for this case that the sex of the second respondent is that assigned at birth, and is male. What sex there is for other purposes or in other contexts where the facts may be materially different, such as in ***Sempill-Forbes***, is not directly relevant to the issues we face, and only is useful as a means of cross checking matters. Gender reassignment is a protected characteristic such that those with it have protections in law independent of their biological sex. That has arisen from the development of the law in that regard, as set out above. How an employer is to decide an issue where two employees each have conflicting protected characteristics we address below.

820. In summary we rejected the claimant's argument. The Supreme Court's decision has the conclusion that a trans woman is not a woman for the purposes of sex under section 11. For a question of which changing room to use that is not in our view determinative. The protected characteristic of gender reassignment is not to be wholly disregarded as it is of equal status to sex (as are the respective beliefs of the claimant and second respondent). It may be lawful to grant permission to a trans person to use the changing room that aligns with the sex and gender they identify as having, dependent on the circumstances. Whether or not it was in relation to the second respondent, and how that is to be determined, are separate points which we address below.

(ii) The distinction between public services and work under the Act

821. The provisions in the Act applicable to a workplace, being those material to the case before us, are substantially different from those applicable to the provision of public services, and the Supreme Court was we consider obviously aware of the distinction between these sets of provisions. It made explicit its being aware that the provisions in Schedule 3, which qualified the terms of section 29 in Part 3, were applicable only to Part 3 (and not section 39 in Part 5 relevant to work), by its examination of the

structure of the Act, and the roles of its different parts. It was made clear from its comments that:

> "The EA is arranged over 16 parts and 28 schedules…….
>
> Part 3 of the EA 2010 regulates the provision of services and public functions, and we have set out above the terms of the prohibition in section 29 (making it unlawful, among other things, to discriminate in the provision of a service or the exercise of a public function). Schedule 3 contains exemptions from this general prohibition. As we shall explain, some of these permit what would otherwise constitute gender reassignment discrimination but make no similar provision for persons issued with a full GRC…..
>
> Part 5 (see also Schedules 6,7,8,and 9) makes it unlawful to discriminate against, harass or victimise a person at work or in some forms of employment….
>
> Part 14 (see also Schedules 22 and 23) establishes exceptions to certain prohibitions in the earlier Parts [one of which is Part 5]."

822. The series of exceptions to section 29 provided for in Schedule 3 (amongst others) which the court addresses in detail include provisions for single sex services in paragraphs 26 - 28. There is specific reference to single sex spaces in paragraph 211 of the Supreme Court judgment in that context, which included that "These provisions are directed at maintaining the availability of separate or single sex spaces for women (or men) as a group – for example changing rooms….."

823. There are exceptions to the provisions in Part 5 in a number of Schedules. Schedules 6 - 9 do so but are not we considered possibly of relevance to the issues in this case. Schedules 22 and 23 also do so. They have effect for Part 5 by sections 191 and 196 respectively. Their terms are substantially different to those found in Schedule 3. There is nothing in them similar to paragraphs 26 – 28 of Schedule 3 in our view.

824. The Supreme Court referred to Schedule 23 in its decision. That Schedule applies to both Parts 3 and 5, but the provisions as to communal accommodation in the Schedule do not have any application to the facts of the case before us. The changing room was no part of any communal accommodation from the evidence we heard. We did not therefore consider the terms of Schedule 23 to be of relevance to the case before us.

825. Schedule 22, which the Supreme Court did not specifically refer to save by its reference to Part 14, contains exceptions relevant to Part 5 and to other Parts. It consists of two parts. The first part is headed "Statutory authority" and is in relation to compliance with statutory duty. It is subject

to the provisions that the Schedule sets out for certain protected characteristics. But the first part does not provide for an exception in the context of work where the protected characteristic is sex, or to that of gender reassignment at all. We did not consider therefore that the first part of Schedule 22 provides any exception to the protections for those with the protected characteristic of gender reassignment, nor any additional exception relevant to those with the protected characteristic of sex applicable to work in Part 5, that could be relevant to the case before us. Schedule 22 we concluded is not relevant to the case before us.

826. The second part of the Schedule is headed “Protection of women” and includes provisions related to risks specifically affecting women, as is there defined. The claimant argued that the 1992 Regulations fell within that category, but in our view there is nothing to indicate that the Regulations founded on, being Regulations 20 and 24, were made to address risks specifically affecting women. Those Regulations both apply to facilities for men and women, with no differentiator between the sexes.

827. The general provision in Schedule 22 as to risks specifically affecting women follows that in relation to pregnancy or maternity, and the word “any other circumstances” appears before “giving rise to risks”. We do not consider that provision for changing rooms for females and males fell within that definition. Regulation 24 refers specifically to “reasons of propriety” which in our view is not a term consistent with risks.

828. In summary in our view the 1992 Regulations do not fall within the terms of the second part of Schedule 22 as they are not made for the protection of women within the terms of that Schedule. We concluded that Schedule 22 is also not relevant to the case before us.

829. In any event even if contrary to our view it were to be considered relevant we did not read Schedule 22 as requiring, as opposed to permitting, the first respondent not to allow a person male by sex to use the female changing room. In our view, on this hypothesis, the second part rendered lawful under the Act what otherwise may be a breach of one of the provisions in the event that the first respondent decided to exclude trans women from a single-sex space because it considered that it had a duty to do so under the 1992 Regulations. The first respondent did not so decide. On the hypothesis therefore the second part was not engaged. We therefore concluded that Schedule 23 was not relevant to the case before us.

830. We further considered that Parts 3 and 5 of the Act are to be construed independently from each other and that this is made clear from the terms of section 32(2) which states that Part 3 does not apply to discrimination, harassment or victimisation prohibited by Part 5. The provisions in the two Parts are we considered mutually exclusive in this regard.

831. That mutual exclusivity is also found in the provisions for enforcement which are separated between civil courts for Part 3 found in section 114 and Employment Tribunals for Part 5 found in section 120. Section 114 is why ***FWS*** was commenced in the Outer House. If an issue as to public services arises it cannot be litigated in the Employment Tribunal, but only the civil courts, and if an issue as to work arises it cannot be litigated in the civil courts, only the Employment Tribunal.

832. These distinctions between how public services and work have respectively been treated are in our view important. Parliament could have made specific provision to have effect for single sex spaces at work such as changing rooms and toilets in Part 5 had it wished to, either by similar terms to those in paragraphs 26 – 28 of Schedule 3, doing so within Schedule 22 or otherwise, but it did not. It could also have provided specifically for the protected characteristic of sex in the context of work, and of gender reassignment more widely, as exceptions in Schedule 22, but did not. Given the structure of the Act with its separate Parts and independent provisions for jurisdiction it is we consider clear that that difference of treatment for such spaces between work and public services was the Parliamentary intention.

833. We considered that it is clear that the Supreme Court was aware of these distinctions between provisions relevant to Parts 3 and 5 respectively from other paragraphs of its decision in addition to the references above, for example paragraphs 114, 118, 120, 180 and 185.

834. This analysis of the Act was we considered a further reason why the claimant's argument so far as founded on ***FWS*** was not correct.

Analysis of the respondent's argument

835. The argument for the respondents was, in essence, that once a person has the protected characteristic of gender reassignment it is necessarily lawful to regard that person as having the sex they identify as having, in this case female, and allow access to facilities such as the changing room on that basis. They sought support for their position from the terms of the CoP: Services on which the decision to grant permission was based. We did not consider that argument to be correct in law.

836. Whilst the respondents argued before us that biological sex was not defined in the decision, the meaning of that term was explained by the Supreme Court as follows:

> "We also use the expression "biological sex" which is used widely, including in the judgments of the Court of Session, to describe the sex of a person at birth."

837. Reading the decision as a whole, we considered that that is a reference in practical terms to the sex as determined on the birth certificate issued shortly after birth. In light of our analysis of ***FWS*** above we did not consider that it was necessarily lawful to grant permission to someone with the protected characteristic of gender reassignment to use the changing room of the sex or gender they identify as having.

838. We have addressed above the structure of the Act and the provisions that are applicable to work relevant to the case before us. The claim in this case is in relation to use of a changing room which was for staff only, as the sign provided on the door to enter it stated. It was in an area of the department to which staff had access only by means of a card. It was not open to or used by the public. If it had been an issue of service to the public that would not have been within the jurisdiction of the Tribunal to determine in any event.

839. In the context of work as discussed above there is no specific statutory provision in the Act directing employers and employees (as defined in the Act) on their use, or providing an exception to discrimination or harassment on the protected characteristics of sex or gender reassignment, and we concluded from that distinction that Parliament intended that changing rooms and toilets should be treated differently in the context of work to the context of public services. Schedule 3 and the CoP:Services are not a basis on which it is we considered competent to decide the issues in this case, which arise solely under Part 5. The CoP:Services was produced by the EHRC, as its terms make clear, under and solely for the purposes of Part 3 of the Act and in our view has no relevance to Part 5.

840. We therefore did not accept the respondents' argument that the decision was lawful as it was based on the CoP: Services. The respondents' submission in any event misunderstood what the Code said, and the terms of the paragraph relied on, even if it were to be relevant, contrary to our view. The pleadings for the respondents did not quote the full terms of the paragraph in question, only its initial part and not that starting "However" or those which followed it. It did not take account of that part which referred to "normally" subject to "unless there are strong reasons to the contrary." That part of the Code did not therefore provide for only one answer as to how a trans person should be treated.

841. A Code is in any event not to be equated to the terms of the Act, but to be taken into account if the Tribunal considers it appropriate to do so. We did not consider that the CoP:Services was appropriate to take into account in this case. In our view the answer to the issues in the case must be found from the terms of the Act, applying the principles of statutory interpretation and the case law relevant to it. Account can also be taken of the Code of

Practice: Employment which was made under Part 5, although its terms do not in our view provide any assistance to the issue before us.

842. The respondents also sought to argue that where the Supreme Court decision was not binding we could apply instead the definition of a woman ***in A v Chief Constable*** which addressed the Sex Discrimination Act 1975. We did not consider that could be right as the decision is clearly binding on us as to the definition of woman under the Act. But even if it were not the 1975 Act was repealed. In some respects it was replaced with the 2010 Act but that latter Act included reform of the provisions on discrimination not merely their restatement, and brought within one statute other protected characteristics. There have been material changes to the relevant provisions even within the context of discrimination on grounds of sex. The Supreme Court considered the construction of the 2010 Act as a whole, and the terms of that Act are, obviously, entirely different from the terms of the 1975 Act. The definition of woman in that case from the 1975 Act does not we consider survive the passing of the 2010 Act.

843. The respondents also referred to three cases at the CJEU or its predecessor being ***KB, Richards*** and ***MB***. But the factual and legal context of each of those cases is entirely different to that before us. They do not address the circumstances of the present case, where there was no evidence of surgery or medical treatment to align physiological aspects of sex with those of the desired sex, for example. The respondents state in their principal written submission that "it is acknowledged that there is a potential tension between those authorities and ***FWS***". But that is not the position in this case and, even if it was, it is not in our view competent for an Employment Tribunal to ignore the Supreme Court decision on the construction of a statute on the basis that it might be said to an extent to conflict with those CJEU authorities as assimilated law, or human rights provisions. So far as the 2010 Act is concerned, we required to construe it as to the meaning of the terms set out above on the basis of the Supreme Court decision as a matter of judicial precedent.

844. The respondents' submission referred to those who are intersex, and referred both to ***Elan-Crane*** and ***Semenya v Switzerland (Application N. 109431/21),*** but as has been referred to above there was no suggestion in the evidence that that was the circumstance of the second respondent. They can be used as a cross reference only in our view. At paragraphs 52 – 53 of their final written submission they seek to refer to matters that were not raised in evidence, and we did not consider that it was competent to do so. In our view we can consider aspects beyond the facts of this case again as a form of cross check for statutory construction, but not beyond that.

845. The rhetorical question was asked by the respondents: how can enforcing the binary position on sex be policed? The Supreme Court has given its

answer, which is that one applies the sex on the birth certificate issued shortly after birth. In any event it is not for us to question the effectiveness of the terms of a statute, or their desirability in more general terms. Those are matters for the Legislature, not for us. We address below how to resolve a conflict between protected characteristics.

846. The respondents separately argued that there are nuances as to sex, that there is no definition of what biological sex means, and that there are some with intersex of other conditions of unusual chromosomes. In addition there was some evidence led before us on matters of biology. Dr Searle gave evidence that not all persons have either XX or XY chromosomes, and about differences of sexual development. Dr Currer gave more detailed evidence to similar effect, but agreed that sex was binary. As a question of biology it may be unduly simplistic to say that every human being is either male or female, although the incidence of those without what may be termed a standard chromosomal presentation is from the evidence we heard of the order of up to around 0.3%.

847. But whatever may be the position in biology, which may be relevant in other legal contexts, we cannot disapply the conclusion of the Supreme Court on the meaning of a term in the Act, which is binding on us, and there was in any event no evidence that the second respondent was someone who had non-typical chromosomes or physiology.

848. Issues of biology were addressed in ***Bellinger***, in the quotations in the Appendix, which included that from Lord Hope to the effect that sex cannot be changed, which are comments the Supreme Court will have been aware of and which are contradictory to the respondent's argument in this respect, which is a further if unnecessary reason to reject it.

849. The respondents also argued that the sex of the second respondent is male "unless she is perceived as a woman", but the claimant did not perceive the claimant as a woman, nor was that (entirely sensibly) raised in cross examination of her. It had not been pled by the respondents. There was no evidence as to the second respondent being perceived as a woman being the reason for the permission given. It is not we consider an argument open in submission as it has no evidential basis, or in the pleaded case.

850. Although we were provided by the respondents with materials which included what appeared to us to be criticism of some aspects at least of the Supreme Court decision, and by the claimant with commentary on the 1992 Regulations from an IDS publication, were we consider of no assistance to us. These materials are not authority, and we are bound by the Supreme Court decision given the doctrine of judicial precedent. The argument for TransLucent to the effect that ***FWS*** was wrongly decided we also reject as not being a finding we are entitled to make.

851. We did not accordingly accept these arguments for the respondents, or the submission by TransLucent.

Summary

852. In our view the parties had approached matters on a misconception of rights. Both the claimant and second respondent founded on the protected characteristics they each held, as well as their own human rights, and it is understandable that each concentrated on their view of the rights they had as an individual. But all individuals have human rights, the claimant and second respondent each had protected characteristics, and each appeared not to consider the human rights or protected characteristics of the other, or at least did so insufficiently. Where these rights and characteristics come into conflict it is incumbent on each person, and in this regard also the first respondent as employer of both, to have regard to the rights of the other person. It may be difficult to do so where beliefs may be polarised and in opposition to each other but that is precisely the circumstance when consideration of the fact that each individual has human rights is in our view what the law requires.

853. We therefore considered that the claimant's argument was wrong partly as it failed to take account of the protected characteristics that the second respondent held, and the human rights of the second respondent, and that the respondents' argument was wrong partly as it failed to take account of the protected characteristics that the claimant held, and her human rights. In each case the human rights position is effectively the same in relation to the respective rights of the claimant and second respondent under assimilated law.

854. We concluded that it is potentially but not necessarily lawful under the Act to permit a trans woman to use a female only space, such as the changing room, in the context of work. We considered that the construction of the Act in light of the Supreme Court decision relevant to this case was that the claimant can argue both before an employer and at the Tribunal the claims of direct and indirect discrimination and of harassment as she has made in this claim if a trans woman is granted permission to use the female changing room, but also that the second respondent can make arguments both before an employer and at the Tribunal of indirect discrimination and harassment if excluded from that same changing room. How an employer may attempt to resolve these competing arguments and the protected characteristics on which they are based we address below.

The 1992 Regulations

855. The claimant accepted that the Tribunal does not have any jurisdiction to determine an issue under the 1992 Regulations but argued in effect that they were an aid to the construction of the 2010 Act, and required the first respondent not to give the permission it had to the second respondent.

856. The 1992 Regulations confer criminal liability if breached. Following the passing of the Enterprise and Regulatory Reform Act 2013 the 1992 Regulations do not confer civil liability unless a particular statutory provision is enacted to do so. Section 69 of that Act provides as follows:

> "**69 Civil liability for breach of health and safety duties**
> (1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7).
> (2) In subsection (1), omit paragraph (b) (including the "or" at the end of that paragraph).
> (3) For subsection (2) substitute—
> "(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
> (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions)……"

857. The parties did not make submissions on this matter, but we have not found any statutory provision relevant to the 1992 Regulations conferring civil liability for a breach. We concluded that the 1992 Regulations do not confer any civil right in law on any person, and are purely criminal in nature. We do not consider that the claimant was right to argue before us that she has a right under the 1992 Regulations to a single sex space accordingly.

858. In our view the claimant's attempts to persuade us that the Regulations required a single sex space from which all biological males required to be excluded because the definitions in ***FWS*** should be read across to the 1992 Regulations went beyond an issue we are able to determine, as it is a matter arising only under the criminal law.

859. The 1992 Regulations do not have a definition of men or women***. FWS*** does not determine the meaning of words in the 1992 Regulations. As stated above its analysis of the meaning of words such as "woman" was specifically confined to the 2010 Act itself. The terms of that decision therefore contradict the claimant's argument.

860. There are arguments both for and against the claimant's position that the same approach should be followed, and for and against the respondents' position that a definition of women which is inclusive of those who are

trans women is appropriate in order to construe the 1992 Regulations consistently with Article 8. In our view these arguments are not ones that we can competently address.

861. The claimant founded on the ability of a Tribunal to determine contractual issues. That was as we understood it a reference to ***Cleeve Link Ltd v Bryla [2014] ICR 264***, in which the EAT held that a Tribunal could consider and apply ordinary contract law principles. The context of that case was one for unlawful deductions from wages where the claimant argued that the term relied on by the employer to make the deduction was an unenforceable penalty clause. That is an entirely different context, in our view, to the case before us. There is a substantial difference between applying ordinary principles of the law of contract to such a claim where jurisdiction is conferred by the Employment Rights Act 1996 and seeking to define a term in the 1992 Regulations so as to determine whether or not the first respondent's grant of permission to the second respondent to use the changing room amounted to a criminal offence.

862. It must be a matter for the Procurator Fiscal, the police or HSE if desired, in the first instance as to whether or not to commence a criminal investigation should a complaint be made, then for the Procurator Fiscal to decide whether to commence a prosecution, and then for a Sheriff to decide if there has been a breach of the law if a prosecution is commenced.

863. An Employment Judge is not appointed to that role, and has not been authorised by any statutory provision to take such a decision. It is a decision taken by Sheriff who does have that authority, who also sits alone and not, as with this Tribunal, including lay members. In our view it is not simply outside our jurisdiction to decide whether the 1992 Regulations were breached or not, but also beyond our competence as a statutory body appointed for entirely different purposes. The position is entirely different to that where an employer considers that it does require to act in order to comply with a statutory duty, such as that in the 1992 Regulations, and relies on Schedule 22 as a defence to a claim. In that different context we would have jurisdiction to the extent of determining whether the employer's view was genuinely held, but that is both a different question to the one raised by the claimant's argument and not the factual context before us.

864. In summary we did not consider that the 1992 Regulations were of any assistance in determining the claims before us, and we rejected the claimant's arguments on the basis of them.

A "sex-based rule"

865. The claimant also argued that there was a "sex-based rule" from the sign on the door of the changing room which stated "female staff only". She

submitted that that was required not only by the 1992 Regulations, but also because it was something that the first respondent had provided only for its female staff. The claimant's argument in that respect we did not accept. The only basis for it we consider there could be under the Act is as a PCP, and the two PCPs in the case have been identified. Otherwise what is provided, to whom and in what circumstances, and whether that created reasonable expectations or otherwise, are all questions of fact to be determined so far as relevant to the sections of the Act relied upon. None of them, or the other provisions relevant to them, are a basis for an argument of there being a sex based rule as is contended, in our view.

866. The facility was provided for staff, and had the sign referred to. What was not clear was whether that sign was intended to be female by biological sex, or by gender, or by also including those who identified as female and had the protected characteristic of gender reassignment on which basis they were permitted to use it by the first respondent. In practice the sign was treated as one including gender reassignment, as the first respondent fairly shortly after the second respondent started working at the department gave permission to the second respondent to use it, which was not unlawful save for a specific period as we shall come to. We did not consider that a sign on a door created any rule under the 2010 Act or otherwise that only biological women could use it, and we rejected the claimant's argument on that.

The parties' respective beliefs

867. The EAT held in ***Forstater*** that what are generally referred to as gender critical beliefs, which are also referred to as sex realist beliefs, fall within the terms of section 10. The decision also sets out in general terms the context in which decisions such as those we take is undertaken, which includes the following:

> "We wish to make clear at the outset that it is not the role of this Employment Appeal Tribunal to express any view as to the merits of either side of that debate (which we shall refer to as the "transgender debate"); its role is simply to determine whether, in reaching the conclusion that it did, the Tribunal erred in law. Our judgment should not therefore be read as providing support for or diminishing the views of either side in that debate.
>
> In taking that approach, we do not in any way seek to ignore or downplay the difficulties faced by trans persons seeking merely to live their lives peacefully in the gender with which they identify, irrespective of their natal sex. The regrettable reality for many trans persons, however, is that something which most take for granted - the sense of self and autonomy in identity – is under constant challenge and attack.

> [There was then a quotation from the Equal Treatment Bench Book] The vulnerability of many trans persons is something we bear very much in mind. "

868. ***Forstater*** was followed by the EAT in ***Mackereth v Department for Work and Pensions [2022] ICR 1609*** in which, after an extensive review of authority, it was held that a belief in the truth of Genesis 1:27, that a person cannot change their sex or gender at will and attempting to do so is pointless, self-destructive and sinful, and a belief that it would be irresponsible and dishonest for a health professional to accommodate or encourage a patient's 'impersonation' of the opposite sex, both qualified for protection. The EAT also held that in assessing whether a belief is worthy of respect in a democratic society, not incompatible with human dignity, and not in conflict with the fundamental rights of others, it is wrong to take account of the circumstances of the claimant's employment and whether making statements while at work in accordance with the belief might amount to discrimination against, or harassment of, others.

869. In ***Thomas v Surrey and Borders Partnership NHS Foundation Trust and Brett [2024] IRLR 938,*** the EAT considered case law from the ECtHR and suggested that it is possible that a belief might not be protected under the Equality Act 2010 even if it fell short of the ***Forstater*** standard of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, if the belief espoused intolerance or discrimination. This would be because such beliefs might, according to some of the ECtHR case law, also offend against article 17 of the Convention and lie outside its protection.

870. In both ***Forstater*** and ***Thomas*** the EAT held that a belief being a protected characteristic under section 10 is not conclusive, as the manifestation of beliefs can be restricted under articles 9(2) and 10(2) and thus restrictions on what people say at work may be justified indirect discrimination. Saying things which reflect the speaker's belief, an example of which being 'misgendering' someone, could amount to harassment of that person as a holder of such a belief is subject to the same prohibitions on discrimination, victimisation and harassment under the Act as all others. The fact that the act of misgendering was a manifestation of a protected belief would not operate automatically to amount to a defence. In ***Forstater*** the then President added that the harassment claim might be based on one or more grounds including a philosophical belief that gender identity is paramount and that a trans woman is woman.

871. The claimant's gender critical or sex realist belief is therefore one that is protected under the Act, and one that she is entitled to hold as a matter of her human rights, but where the manifestation of that belief can be restricted dependent on the circumstances. She is entitled to believe that

a trans woman is a man, and that that is all that matters (which is what we understood her belief to be). It is protected notwithstanding that it is not consistent with the authorities from the courts both domestic and European with regard to the rights of trans persons, and the bringing into effect in UK law of protections for trans persons.

872. ***FWS*** also held that those with the protected characteristic of gender re-assignment retained the protections against discrimination or harassment in the 2010 Act, specifically referring to paragraphs 103 and 104 of ***Forstater*** and the possibility but not certainty that "refusing to refer to a trans person by their preferred pronoun …could amount to unlawful harassment in some circumstances". That clarified that the fact of misgendering may or may not be harassment, and whether it is in breach of section 26 will be dependent on all the circumstances.

873. Applying the guidance in ***Forstater*** and the cases cited therein, it appeared to us that the belief held by the second respondent, that the second respondent's gender and sex are female, is protected notwithstanding that the Supreme Court held that sex under section 11 is biological. We considered that it would not be logical to protect the claimant's gender critical belief, but not that of the second respondent. In short, although the beliefs of each of the claimant and second respondent are not consistent with how the law determines sex and gender reassignment respectively the law also protects those beliefs in a qualified manner.

874. We concluded that the beliefs held by the claimant and the second respondent respectively are therefore protected in law under section 10. Each is entitled to respect, and each is to be considered in the context of their human rights.

The protected characteristic of gender reassignment

875. Although the protected characteristic is termed "gender reassignment", gender is not defined in the Act, and is not itself a protected characteristic. The concept of gender is explained in ***Elan-Crane***. Unlike sex gender is not binary, and some people do not regard themselves as either male or female by gender with the claimant in that case being an example of someone who regards their gender as non-binary. The second respondent considers the gender held to be female, and is entitled to believe that. The claimant's argument is that gender is irrelevant to the issues in this case, but that is not easy to square with how the PCP2 for the indirect discrimination claim is framed, a matter addressed below. In any event the focus in this regard is on the protected characteristic.

876. Gender re-assignment is a protected characteristic which is different to and distinct from that of sex under the Act, as the Supreme Court made clear in ***FWS*** when stating that "there is no conflation of these separate

characteristics". Section 7 defines gender re-assignment by reference to a process which has "the purpose of reassigning the person's sex by changing physiological or other attributes of sex." What are the physiological or other attributes of sex is not defined. The section in this regard however uses the word "sex" and not "gender".

877. The foundation of the protected characteristic of gender reassignment is the process of transition to the sex into which the person seeks to be reassigned. That is in the context, again as addressed by the Supreme Court, that the person's "biological sex may continue to be readily perceivable" with it being possible that there is "no change in outward appearance." That the Supreme Court used the word "may" indicates that not always will biological sex be readily perceivable. That is also a matter addressed in other authorities, including Supreme Court ones such as ***West Yorkshire***.

878. As a result of the terms physiological and non-physiological attributes of sex not being defined in the Act we considered it at least helpful, if not necessary, to making findings in fact about what they were. We have done so partly from the evidence heard where that was accepted, and partly where considered necessary and appropriate to do so on the basis of judicial knowledge. There is an obvious danger in making what may be regarded as somewhat sweeping generalisations on matters relating to sex and gender in those findings, for example by referring to women wearing dresses and men wearing trousers, or women having longer hair than men, as non-physiological attributes of sex. The differences between individuals can be endless, the differences of attitude between different generations or circumstances can be very significant, and there are risks in using stereotypical examples of the non-physiological attributes of sex in particular. In light of the definition in section 7 however the Tribunal considered it appropriate to proceed on at least some evidential basis in order to address fully the issues arising in the case.

879. There is a degree of tension between someone's sex, which is a matter of biology assessed at birth, and therefore immutable under the 2010 Act as held by the Supreme Court, and the basis of the protected characteristic for those persons to whom section 7 applies. Gender reassignment is where a process has the purpose of reassigning sex under that section but in light of ***FWS*** that purpose cannot in law be achieved.

880. Section 7 must nevertheless be read in a manner that is consistent with the Supreme Court decision. It appeared to us that section 7 must be construed such that the word "purpose" should be read as if to mean intended outcome, such that it aligns with the person's belief referred to in the previous section. If that fact is established, and one of the three aspects of the process also established, the protected characteristic is held by the person.

881. In cross examination and submissions the claimant raised a fictional person “Pete”. Witnesses were asked what the position would be if that person entered the changing room, refused to leave, and claimed to have a female gender identity. The argument was essentially of a man using the façade of gender reassignment for improper purposes, including for sexual gratification or as a threat to women. As a matter of fact that is not the position in the case before us, but we addressed it as it was a material part of the claimant’s case, in particular it was argued that this fictional person was legally indistinguishable from the second respondent. It was therefore a cross check proposed by the claimant.

882. Who may fall within the definition of section 7 was addressed in ***R (AA and others) v National Health Service Commissioning Board [2023] EWHC 43 (Admin)***, (later upheld in the Court of Appeal ***[2023] EWCA Civ 902***), in which the High Court considered that there are three important aspects to the definition in section 7:

> "First, … the process will not necessarily be a medical one. It may involve changing non-physiological aspects of sex, such as one's name and/or how one dresses, or wears one's hair, or speaks, or acts.
>
> Second, the reference to “a process (or any part of a process)” reflects the fact that trans people will give effect to their gender identity in a variety of ways. Some will embark on a process which they intend will include hormone treatment and surgery, or other forms of medical intervention—as well as changing some of the non-physiological aspects of gender. But some may decide, on reflection, that they only wish to make some of these changes.…
>
> Third, the reference to those who are “proposing to undergo”, as well as those who are undergoing or have undergone, this process (or part of it) shows that Parliament intended the protection to start before the process (or any part of it) has started. All that is required is that they propose to undergo at least a part of such a process. The word “proposing” connotes a conscious decision, which can properly be described as settled, to adopt some aspect of the identity of a gender different from that assigned at birth. A passing whim will not do, but nor is an intention required that the change should be permanent.'

883. That argument is we considered convincing. It is persuasive rather than binding, but strongly so in our view, and suggests that the fictional Pete may not be someone with that protected characteristic at all, as merely by stating that the person identifies as female is insufficient. A passing whim or disingenuous comment does not confer the protected characteristic of gender reassignment. The decision suggests that there requires to be some disclosed intention with at least a basic level of evidence to support

it. We respectfully agreed with the comments in that case and concluded that there is a distinction in law between the fictional Pete and the second respondent, or anyone having the protected characteristic of gender reassignment. Pete does not have that protected characteristic in the absence of a genuine intention within the section. The second respondent does.

How is a conflict between protected characteristics to be determined under the Act?

884. There is in the case before us a conflict between protected characteristics held by two employees, none of which takes precedence over any other *per se*. The first respondent as employer had to decide how to resolve that conflict. The Act does not specifically provide any mechanism to do so. We consider that there must be one in order for the Act to be workable, as otherwise whatever the employer does can be held to be a breach of the Act as we address further below. Only by ascertaining what that mechanism is can the lawfulness of the decision taken be determined, unless the employer is to be faced with a dilemma for which there is no lawful solution.

885. We required to decide the question of how to resolve that conflict on the basis of the guidance we can derive by inference from the terms of the Act, using the principles of statutory construction and applying relevant case law. As the submissions from the parties in this area have not been upheld we did not have specific argument from them on whether a potentially lawful decision was or was not lawful in the circumstances of this case. We considered that it was nevertheless part of our role to answer this aspect in order to be able to answer some of the issues in the case, in particular the circumstances and reasonableness of the claimant's perception for the claim of harassment when the second respondent was in the same changing room she was using. It is a matter to which we return at the conclusion of this judgment.

Context

886. We considered that it is helpful to set out first of all our view of the context for the decision, as in our view that assists in identifying what test is appropriate to apply from the terms of the Act.

887. We did not accept the second respondent's evidence that "my identity is female, ergo without wanting to appeal to the dictionary too much I am biologically female". That is not how the Supreme Court considered the issue of sex under the Act, although it should be noted that its decision was issued after the second respondent gave evidence. It held that sex under the Act is not fundamentally a matter of the sense of identity as a matter of psychology, which inevitably arises later in life, but of the nature of the body as a matter of biology as perceived about the time of birth by

a medical professional. As we held above, the second respondent's sex under section 11 is male.

888. But section 11 is not the only section of relevance in determining the issues before us in light of our analysis of the impact of ***FWS***. Section 7 is equally relevant, and unlike the binary position of sex has a range of possible circumstances that fall within it.

889. We considered the basic facts of the case. The second respondent has the protected characteristic of gender reassignment, and as we shall come to has changed essentially all the non-physiological attributes of sex. There was no evidence before us of any of the physiological attributes of sex having changed. The second respondent was therefore someone further along the transition process than the claimant in ***Croft***, but not from the evidence before us at the stage of having had and completed surgery and medical treatment in cases such as ***Goodwin, Bellinger*** and others.

890. At the initial stages the understanding of the first respondent was that the second respondent had been using the changing room when in the department before formally joining that department. The second respondent was not aware of any issue having arisen. The first respondent granted permission in circumstances where from the evidence before us it was not apparent to it that there would be a complaint made. It granted permission in accordance with its general position as set out in its Equality, Diversity and Human Rights policy which is, to summarise it very briefly, that it seeks to be inclusive for all persons. The general position of the first respondent was also spoken to by Ms Bumba.

891. The claimant did have an issue with the second respondent, who she believed to be male, using a space she considered to be capable of use only by biological females, and raised that with Ms Davidson on 26 August 2023. That was an entirely proper approach for her to take given her protected belief. The claimant was fully entitled to raise her concerns, and she did so at that stage in the manner that would be expected, by going to her line manager (technically the manager above her line manager but that distinction is irrelevant for these purposes).

892. The claimant was later informed by Ms Davidson that there was no basis to exclude the second respondent from the changing room. When told that the first respondent in effect did not agree with her own position, the claimant did not raise that matter formally as a grievance, although she could have done so. But the claimant did at least make clear her view that the presence of the second respondent in the female changing room was not appropriate both to Ms Davidson and also Ms Curran. Even if the claimant was the sole person making that point and doing so in that informal manner it was a matter that required consideration. The first respondent knew of it.

893. As there was no change to the permission there was the possibility of the claimant and second respondent being in the changing room at the same time, and that occurred on two occasions following the claimant's making of her complaints.

894. After the Christmas Eve incident, and following a not inconsiderable period, the first respondent found a solution which involved arranging rotas such that the claimant and second respondent were not at work at the same time, and thus there was no realistic risk of either of them being in the changing room at the same time as the other. The claimant returned to work on 14 April 2024 on that basis. Throughout the period from August 2023 to April 2024 and beyond the only complaint about use by the second respondent of the changing room made to a manager of the first respondent came from the claimant.

The employer's dilemma

895. Where there is a conflict of protected characteristics and of beliefs of the nature that arises in this case an employer is faced with an exceptionally difficult matter to address. Whatever decision it takes can be challenged as unlawful under the Act, most obviously as one of harassment, but potentially direct or indirect discrimination in addition. Dependent on the facts there may be others (alluded to in ***Forstater***)

896. The difficulties in taking a decision can be impacted by other factors. The terms of section 7 are we consider indicative of there not being a simple and single answer to how to resolve the conflict, as it does not require any presentation in the chosen gender, if it is made sufficiently clear that the person is proposing to undergo the process referred to. As the definition of gender reassignment includes the prospective therefore future intention, the presently undergoing, and the historic which may have completed and may but need not include surgery and other medical interventions effecting changes to physiological attributes of sex, the circumstances and visual appearances of those with that protected characteristic can vary substantially.

897. A trans person who is biologically of one sex may present to those who are unaware of the background which may include surgery, hormonal and other treatment, entirely as of the other sex. A trans person may well, and from the evidence considered at the Tribunal and as addressed in ***Bellinger*** (in the part in the Appendix to this Judgment) will, retain some elements of the biology of the sex assigned at birth despite that surgery and the hormonal and other treatment. How a trans person thinks that they are perceived by others may or may not be how all do so. A trans person may also choose not to have surgery or hormonal or other treatment, or may be waiting for that to commence or to conclude.

898. The person may present fully in the gender after transition, or to an extent in the gender desired. If the latter that may be where most or some people looking at the person would be able to recognise aspects of physiological attributes of the sex as assigned at birth. There is not always a simple answer to the issue of appearance. Some such as the claimant regarded the second respondent from what she observed as male. Others who may observe the second respondent may regard the second respondent as a female, as set out in our findings in fact.

899. A trans person may wish to retain as private details of what changes to physiological attributes of sex have been made, or choose to disclose as to some or all of them. A trans woman who wishes to live life fully in the gender that the person has transitioned to, or is transitioning to, may well have a desire to use female spaces such as toilets or changing rooms as a part of doing so, and to use the changing room for males may well be seen as direct discrimination or harassment as it is so contrary to their perception of identity. The difficulties may be increased if an individual has differences of sexual development, or has been assigned one sex at birth with a body which changed after puberty.

900. The range of different circumstances for those with the protected characteristic, and what they choose to reveal to others about very private matters of their transition, is potentially therefore very wide. These considerations taken together would tend to suggest that a number of different considerations will require to be taken into account, and that there may be no solution which will please all concerned.

901. Places such as changing rooms and toilets at work premises can cause particular difficulties in this already very complex area. They are places where persons using them will normally wish to have a degree of privacy. They may be in a state of at least partial undress when changing. They may feel vulnerable or a sense of embarrassment or similar from that fact. There may be a desire to be present only with those who share their same sex and biology. This was essentially the claimant's position.

902. As the evidence in the case indicated, some staff who could have used the changing room chose not to do so, and we infer that that was because they preferred to have greater privacy when changing than would be the case in a communal space.

903. The claimant did not wish to be in a changing room with a person biologically male, a matter likely to have been affected as she had experienced inappropriate behaviour when relatively young. That experience had not been articulated to anyone at work at the material time. The private feelings and concerns of employees may only therefore be known to each one individually and privately, and for entirely good reasons they may not wish to discuss them with anyone at work. That exacerbates the difficulties facing an employer.

904. It appears to us that what staff choose to tell the employer is a material factor in assessing the decision. For a test to be workable it appears to us that the employer can only make a decision on the basis of what it knows or ought reasonably to know, whether from the trans person or any other member of the staff.

905. If there are no alternative toilet facilities, such that there is only a choice between using a male or a female toilet at a location, practical questions arise as to which one to use for a trans person whilst at work, which may well be for a shift period of eight hours or longer. The dilemma facing a trans person is something that the Supreme Court referred to in ***FWS***, rather than the dilemma facing the employer, but the court's use of the word dilemma recognises in our view the fact that there is a difficult choice to be made when such issues arise.

906. Whichever single sex facility is used, where there is a binary choice of male or female facilities as there are no other options, can be open to challenge – if a trans woman uses the female facility that can be argued to be harassment by a biological woman as the sex of the trans woman under the 2010 Act is male, and if the male facility is used by a trans woman that can be argued to be harassment by those within it particularly perhaps when the appearance of the trans woman is wholly perceived by them as a female. The trans woman is as addressed above likely to regard the treatment of being required to use the male changing room, and not the female one as is desired, as a detriment, potentially a matter of direct discrimination if there is treatment such as an instruction to use the male changing room, and otherwise as harassment and indirect discrimination.

907. Whilst indirect discrimination has the objective justification defence in section 19(2)(d) there is no such defence for a harassment claim under section 26. The qualifiers are whether it is related to a protected characteristic, whether the perception of harassment is reasonable, and the other circumstances. But on at least one view it may be reasonable for the claimant to perceive harassment from the presence of the second respondent in the changing room, and reasonable for the second respondent to perceive harassment if excluded from it, with in each case the harassment related to a protected characteristic.

908. If a trans man, with the appearance of a man effected by surgery and hormonal and other treatment, having facial hair, a flat chest, a low voice, as well as traditionally male choices in hair styling, clothing, and lack of any make-up or jewellery (and therefore in effect similar in presentation to the hypothetical comparator of "Pete" but someone who is a trans man with the protected characteristic) attends the female toilets, which on the claimant's view of the Supreme Court decision is on the face of it appropriate as their sex is female, that may be thought harassment by a biological woman related to sex who perceives the person as a male from

that appearance and is unaware of the gender reassignment protected characteristic.

909. All those in each facility of either sex may therefore argue that their rights under the Act have been breached however the employer decides to proceed where there are only male and female facilities, and there may be either no or very limited defences to those claims. If there is no solution, the employer will be liable in law whatever it does.

910. In other circumstances there may be other facilities available, such as a toilet or room that can be used alone by either sex. It seems to us that the extent of the options available, or that there are only male or female facilities and no other at that time, is a factor that can be relevant.

911. There is a practical difference between the circumstances of the workplace, and those of public services. For a workplace the employer knows who is to be present. The employer has the ability to give reasonable instructions to its employees. The relationship is underpinned by contractual obligations each owes the other. Where public services are being provided it is not clear who is to be using them, when and how. There is a different relationship between the service provider and service user to that of employer and employee.

912. There are other areas where two sets of protected characteristics are in conflict. An example was given in ***FWS*** by reference to ***Ladele*** at the Court of Appeal. Those at work have many varied and at times contrary beliefs on issues such as religion and politics. Work is generally speaking not an appropriate place to air such beliefs, particularly with those who do not share them. That principle in our view underlies the cases about proselytizing at work, which are addressed more fully below.

913. But conflict is not always to be expected. There may be circumstances where all staff are content that a trans person uses the facilities of the sex they have the intention to transition to at whatever stage that transition has reached. There may be other circumstances where staff feel uncomfortable to some extent with a trans person being present in the changing room but not wish to make any complaint or issue about it. If there are no complaints or issues raised, that would be an indicator that the wishes of the trans person on which facility to use can be accommodated. The complaint may be raised formally or informally. The nature of the responses of other staff, or lack of same, which may differ from one workplace to another, in our view is a further factor to consider.

914. In addition to the issue of protected characteristics there is a conflict between human rights and the rights each has under the Directive account of which is to be taken when construing the Act purposively in each case. We considered that the claimant's Article 8 right was engaged. When in a changing room and in a state of partial undress, or where others could be,

there was she considered an impact on her sense of privacy and dignity. There is some general support for that in paragraph 52 of ***FWS***, which although in the context of the 1975 Act rather than human rights refers to a reasonable expectation where people are undressing that considerations of privacy and decency required separate facilities to be permitted for men and women. There is also support from the case of ***YF***. Her rights under Articles 9 and 10 were also engaged, that in summary being her gender critical belief.

915. We considered that the second respondent's Article 8 rights were also engaged. The second respondent wished to present to the world in the gender identified with, a matter referred to in authority both European and domestic. It is a part of the aspect of being a trans person, some support for which is seen in ***Work and Pensions***. The second respondent had declared an intention to live in that gender, and had assumed the non-physiological attributes of the female sex for a material period. The second respondent believed that the second respondent was a woman, and believed in a right to live as a woman. That also engaged Article 9 and10 rights.

916. Each of the claimant and second respondent had rights under the Equal Treatment Directive as assimilated law, which in essentials can be treated as the not materially different to their respective human rights.

917. Both the claimant and second respondent therefore had different protected characteristics and different aspects of the same human rights, and rights arising under assimilated law, and those two sets of provisions were largely and in relation to use of the changing room wholly in conflict. That each of them can point to at least some support from comments made by the highest court in the UK emphasises in our view the substantial difficulty these matters create for the employer in seeking to find a solution.

The test to apply

918. We considered that the Parliamentary intention must have been that an employer can act lawfully when faced with such a dilemma. If there is no way of doing so the Act becomes in our view unworkable, and for the reasons addressed above we did not consider that that was likely to have been the Parliamentary intention. There is we consider some general support for doing so from ***Pemberton,*** although in that case there was a defence specifically provided for in the Act and its context is different.

919. As the Act does not specifically provide a test to apply in circumstances where employees each rely on protected characteristics in the manner of this case in our view it must be inferred. In light of our analysis above that there are a number of differing factors and circumstances to take into account, it must be one that can address those. It appeared to us from the

quotation from paragraph 151 of ***FWS*** that it is also a test which can balance the conflicting rights.

920. We consider that the test to apply is that found in ***Bank Mellat***, which was applied to a different aspect of the 2010 Act in ***Page*** and ***Higgs***. The test in ***Bank Bellat*** was articulated in circumstances where there was a challenge to the lawfulness of a statutory instrument on the basis of Convention and other rights, and (as addressed in ***Higgs***) is in relation to the distinction between belief and impermissible manifestation for a direct discrimination claim under the 2010 Act. In our view the test can be applied more widely to the resolution of a conflict between protected characteristics. That is so as there is at least to some extent a correlation between the protected characteristics founded on by the parties on the one hand, and their human rights and assimilated law rights on the other, and in light of the Court of Appeal applying that test in order to construe the Act in another respect under the Act, with the Supreme Court not granting permission to appeal that decision.

921. The test is the most appropriate basis we have found to resolve the conflict between protected characteristics held by employees. It has four elements, being:

    (i) Is the objective of the measure sufficiently important to justify the limitation of a protected right,

    (ii) Is the measure rationally connected to the objective,

    (iii) Could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and

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

922. In each case the test is an objective one. Either the test is met in all four of its elements, or it is not. It is for the first respondent as employer to prove that it has been. If they fail to do so for any element, the decision was not lawful.

923. In ***Higgs*** Lord Justice Underhill considered how that test had been applied in ***Page,*** and said that

> “my formulation does not directly apply the four-step process identified in Bank Mellat, but it is a compressed version of the same exercise, involving (a) the identification of a feature of the employee's conduct to which the employer could legitimately object (broadly corresponding to step (1)), and (b) an assessment of

whether the employer's response to that feature was proportionate (broadly corresponding to steps (2)–(4)). It is no doubt best practice to consider each of the Bank Mellat steps separately, but it is well recognised that there is a considerable degree of overlap between them."

924. That was a comment in the specific context of the separability of belief and manifestation, and although it could have been replicated for present purposes we considered that it is preferable, in the context of resolving a conflict between protected characteristics, simply to follow the ***Bank Mellat*** test, rather than to seek to compress the elements of it. Whilst there is a considerable degree of overlap between the second to fourth steps or elements they are distinct ones and given the complexity of the question before us it appeared to us to be helpful to follow each element as the Supreme Court set out. It is nevertheless similar to the test of objective justification in section 19(2)(d), as we shall address in that context below. The outcome is liable to be the same in almost all cases in our view. ***Bank Mellat*** is in essence a slightly more developed example of an objective justification test.

Application to this case

925. We then applied the ***Bank Mellat*** test to the facts of this case. The first respondent's position as to the first element appears, it seemed to us, from the aims it sought to pursue in relation to the section 19 claim which were identified as (a) protecting and upholding the rights of the second respondent under the Human Rights Act 1998 and the 2010 Act, (b) promoting and upholding diversity and inclusion in the workplace; and (c) appropriate use and provision of available facilities in the workplace. The claimant accepted that these were legitimate aims for that purpose, and they are consistent with other evidence we heard, including the terms of the EDHR policy.

926. It appeared to us that relabelling those aims as objectives they met the first element of the test. It also appeared to us that the measure of granting permission to use the changing room was rationally connected to the objectives, which met the second element.

927. There are then the third and fourth elements to be considered, which are whether a less intrusive measure was possible and would achieve the objectives, and the balancing of the severity of the measure on the party concerned, in this case the claimant, against the importance of the objective to the first respondent. We shall identify them by the shorthand of the measure test and balance test respectively.

(i) Measure test

928. In our view this test is to be applied in three different periods, each of which is to be considered separately. We considered that the commentary of the Supreme Court in ***FWS*** in relation to indirect discrimination and what the employer knew or ought reasonably to have appreciated be applied in this different context as well. It stated

> "For indirect discrimination to be established, it must be possible to reach general conclusions or make general assumptions about a group with a particular protected characteristic such that an employer or other duty-bearer ought reasonably to be able to appreciate that any particular PCP applied to their workforce or service users may have a disproportionately adverse impact on the group……..
>
> [after giving two examples] In both cases, the employer can reasonably be expected to anticipate these consequences for women as a group in the workforce and can therefore be expected to justify the PCP before imposing it."

(a) 2 August to 15 September 2023

929. The first period is when permission was initially granted from when the second respondent started at the department up to the point at which the claimant made her complaint. Until then it appeared to us that the first respondent was entitled to proceed on the basis of there not being an issue in contention as it was not aware, and could not reasonably have been aware, that there was likely to be a perception of harassment by other staff.

930. The second respondent had been present in the department on occasion for a period before joining it, although that the detail of that was not given in evidence. The second respondent told the first respondent that female changing rooms and toilets had been used previously by the second respondent without issue, and that was both as an employee of the first respondent and earlier with a former employer Lothian Health Board. There was no evidence before us, including Ms Bumba's research both on written material and from discussions with those holding equivalent positions to her in other Boards or Trusts, that indicated an issue from the policies that existed which were broadly consistent.

931. The claimant gave a little evidence of a suspicion of an issue that arose with regard to the second respondent, and sought to obtain further information about it from a colleague, but it appears without response. In any event that did not appear to us to be in relation to use of a changing room at all. We did not consider that there was any evidence of something that should have put the first respondent on reasonable notice at that time that an issue of the nature that did later arise was liable to do so.

932. In those circumstances, we considered that granting permission in early August 2023 was the least intrusive measure. It was not known, nor was it reasonable to expect that it be known, that it would lead to an adverse impact on another employee as it had not been an issue raised with the first respondent, or more widely identified as an issue within the NHS in Scotland. From that, it appeared to be a matter operating without materially affecting other staff adversely. That was in the context of there being both two trans women and a trans man employed by the first respondent from the evidence we heard. Once a complaint was made it then required investigation and a decision. For this initial period we consider that the first respondent met the measure test. The reason for the date of 15 September 2023 we address in the next period.

(b) 16 September 2023 to 13 April 2024

933. After the claimant's complaint was made initially to Ms Davidson it seemed to us that the view as to measures at that stage must be informed by a common sense consideration of what the options were. There is nothing special about the changing room in this case – it is a fairly standard form of provision found in many workplaces. Whilst most often a person who uses it is able to use one of the toilet cubicles if fully changing clothing or simply if they prefer to, not all do. In some workplaces there is effectively only a choice between male or female facilities. In others, there may be a greater range. In this case there were options beyond the male and female changing rooms, including ones that a few female members of staff had chosen to use instead of the changing room, and that range included single user spaces such as a well-being room, or a store area, with both having lockable doors. They were not places to store clothing that the locker room did, but could be used to change, albeit that that could be at a measure of inconvenience if the staff member preferred to use a changing room.

934. In the present case there were therefore choices that could be made. They had been provided to the claimant by Ms Davidson and Ms Curran. The claimant could have chosen to use other spaces than the changing room, as other staff did such as the well-being room or store room, assuming that they were free. But equally that choice could have been provided to the second respondent, suggested on an interim basis until a more permanent solution was found. Given what the second respondent stated after the Christmas Eve incident to the effect that it might be proportionate not to use that changing room we consider that on such a basis the second respondent would have been open to such an option.

935. There was another possibility in our view, being that the second respondent be permitted to use the room or one of the rooms that the consultants used to change their clothes, again on an interim basis. That was not directly addressed in evidence, but we infer it from the evidence

we did hear and the clear support for the second respondent from the consultants as a whole, and those who gave evidence before us in particular.

936. After the claimant raised her complaint how to address it required investigation and consideration. It would have involved discussion with the claimant and then the second respondent, discussion with managers of each of them, consideration of the options and then a decision. We considered that that process would have taken about three weeks and therefore until 16 September 2023, on which date the decision to permit the second respondent to use the female changing room ought to have been revoked pending a more long-term solution being found.

937. We considered that there was a strong likelihood that at least one of these options would have been a practical solution as an interim measure, and any one of them, or a combination of them, would have been less intrusive but still met the overall objective more widely. That was as the objectives are general ones, and do not include the second respondent having an unqualified right to use the changing room that is preferred. Interim steps of such a nature in our view do still meet the objectives set out. We consider that the second respondent would be likely to have accepted such a decision on that interim basis from the evidence we heard on matters more widely. As the first respondent had not in our view proved that the grant of permission was the least intrusive measure to achieve the objective they fail the measure test in part at this stage.

(c) From 14 April 2024 onwards

938. The third period is once a solution to rotas had been found such that after the claimant returned to work on 14 April 2024 the claimant and second respondent did not attend work and would not use the changing room at the same time. At that point in our view the measure test was met. Changing rotas to effect that was the least intrusive measure, with no appreciable adverse impact on either the claimant or second respondent. At that stage it was not anticipated that any other member of staff was adversely impacted. No one other than the claimant made a complaint to the first respondent, from the evidence we heard. The claimant's evidence of what others thought we have addressed above. We considered that the first respondent met the measure test from that date onwards.

939. The claimant sought to argue in effect that all women felt as she did, or could have a view on disadvantage as she did, such that the permission should be permanently withheld to the second respondent. We did not accept that argument. It was contrary to the evidence we heard. As stated, with the exception of the claimant no female witness gave evidence of any concern over the second respondent using the changing room and there was evidence that other staff did not object to the second respondent being in the changing room. Some of those who gave evidence for the first

respondent who were female supported the second respondent's use of the changing room. The weight of evidence we heard contradicted the claimant's argument in this regard.

940. We also rejected the argument of the claimant that a climate of fear prevented the evidence being led. There was no proper evidential basis for it, as we have addressed. Whilst the claimant argued that those with religious views or otherwise might share the claimant's beliefs no others gave evidence of that. It was a form of speculation and not the facts of this case. Our analysis of matters above led to a conclusion that what matters when making these very difficult decisions is fact and circumstance which includes what the employer knows or ought reasonably to know. That depends on what employees tell it. That is the only way to make such matters workable.

(ii) Balance test

941. We address the balance test separately although as has been noted there is some crossover with the measure test. The severity of the measure was, from the evidence we heard and have accepted, confined to the claimant, but she had explained her position to Ms Davidson. She perceived the presence of the second respondent as a man in the changing room as intimidatory, and it caused her to feel a sense of embarrassment. It affected her sense of privacy and dignity. As a matter of the sex of the second respondent under the Act her consideration of the second respondent as a man was accurate from ***FWS.*** Her perception of the impact on her is one factor to consider. It was not minor or trivial, such that it can be considered substantial as that term is defined in the Act.

942. We also consider that the terms of section 7 are instructive. Whilst sex is binary, as we noted above, the position of someone who has the protected characteristic of gender reassignment is not. We also noted above that there are three tenses used in the section – the future (proposing to undergo), the present (is undergoing) and the past (has undergone). That suggested to us in the present context that the stage at which the transition has reached, assuming it has commenced, is another relevant factor.

943. The definition in section 7 of the Act also refers separately to physiological and non-physiological attributes of sex. In our view the terms of the section suggest that in this context, the use of a place as a changing room where staff are at least partly undressed where there is one for females and another for males, that what if any change to a trans person's physiological attributes of sex have been made, to the extent that the trans person chooses to disclose them, is also a relevant factor.

944. In ***West* Yorks*hire*** it was the completion of the transition process that was the basis for the decision. To repeat what Lady Hale there said "a transperson is to be regarded as having the sexual identity of the gender

to which he or she has been reassigned." That is in the past tense, and appears to us to apply where there has been completion of such a process similar to the circumstances of that case. ECtHR and CJEU decisions are to similar effect. It is not determinative of the question, but it is in our view an indicator that the balance test may be met in respect of such granting of permission where the physiological attributes of sex have been changed than where they have not, either fully or at all.

945. It appeared to us to follow that if the person has not completed that transition process, who retains the physiological attributes of sex at birth either wholly or to a material extent, that is a factor to weigh in the balance. If the person's body remains male that may well be a contra-indicator to the grant of permission to use a female changing room where one or more of the female staff using it have a reasonable concern of an impact on their sense of dignity. That is close to the circumstances addressed in ***Croft***, and is broadly consistent with its reasoning on not allowing use of the female changing room where the person had recently started the process of transition.

946. We considered that ***Croft*** remained of assistance to an extent in determining some of the issues before us, although it does not appear to us that all of it survives ***FWS.*** The Court of Appeal decision states that the Tribunal must make a judgment when someone born male with the protected characteristic of gender reassignment "becomes a woman". That is not consistent with the Supreme Court decision that a person retains the sex assigned at birth. A trans woman does not, and cannot, become a woman under section 11 in light of that decision. But ***Croft*** supports the proposition that an employer and then a Tribunal where a claim is presented can take into account the stage of transition the trans person has reached. But in an area where there is little direct assistance from authority we consider that it can be taken into account so far as not inconsistent with ***FWS***.

947. There having been no evidence led before us that any of the physiological attributes of the second respondent's sex had changed we concluded that the second respondent had only changed the non-physiological attributes of sex to those that were female, such that the physiological attributes of sex remained male.

948. In the context of balancing the two sets of rights, the claimant having the sex of a female had as a matter of common sense a clear and reasonable expectation to use the female changing room, she had been doing that for about twelve years, and doing so was she considered an aspect of her dignity. Had the Supreme Court held that a trans woman was a woman for the purposes of the Act the second respondent would have had an equally clear and reasonable expectation to use the female changing rom, but as

it did not the indication is that it is at the least more nuanced than the position of a biological female.

949. It appeared to us that the extent of objections by other staff to a trans person in a changing room and the reason for that is also a factor to consider. Here all that the employer was aware of at the time was an informal complaint from one member of staff, the claimant herself, on 26 August 2023, repeated informally in October 2023 twice. But that can be, and in our view in this case is, sufficient. In our view the issue of who complains and when is material, as also discussed in ***Mba***. That there is one complainant may make finding a solution easier than if there are many. Where there are many complainants that may affect what options are practical and which can be considered. Conversely if there are no complainants at all a solution may more simply be found by doing what the trans person wishes.

950. We considered whether the terms of the 2004 Act were of some assistance in determining the stage a person might reach before it was appropriate to permit use of the changing room for the aligned gender. It was introduced to comply with the Convention, which the United Kingdom was in breach of as found in ***Goodwin,*** and has a process to certify status. The decision in ***FWS,*** and the conclusion that it did not determine a person's sex under the 2010 Act, indicated to us that it is not. In our view the terms of the 2004 Act are not relevant when seeking to balance the competing rights in this case, given the Supreme Court decision. It confirms that certification may have value, but in the context of the dispute in the present case it did not appear to us to do so, and in any event there was no evidence of the second respondent having such a certificate, and the evidence indicated that the conditions for securing it, in particular living in the acquired gender for at least two years, may not have been met at the material time.

951. There was no evidence that the first respondent had conducted any form of equality impact assessment, or considered how other staff might view matters and consulted with them. There is no specific duty to consult, and the public sector equality duty under section 149 is not a matter that an employee can directly rely on before us. At best it is a matter of background. But that background may be relevant as addressed by the Court of Appeal in ***R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213.*** Not having conducted such an assessment is liable to make proving compliance with the balance test more difficult for an employer, but it is not determinative.

952. We concluded from all the above that whether to permit a trans woman to use a particular single sex space such as a changing room which meets the balance test depends on all the circumstances and includes factors such as the views of other staff as expressed to the employer, how many

do so and in what terms, the stage of transition that the trans person has reached including what if any changes to the physiological attributes of sex the person have been made and which the trans person chooses to inform the employer of, the trans person's appearance as can be observed by others, the wishes of the trans person, the options where other facilities exist and what the employer knows or ought reasonably to know.

953. Our analysis indicated that as circumstances change, so can the lawfulness of the decision. We therefore applied the test to the facts before us.

(a) 2 August to 15 September 2023

954. In the first period for the reasons given above there was no complaint until that by the claimant, there was not understood to be any detrimental impact on another employee, nor was it reasonable to consider that that ought to have been understood, and we considered that the first respondent had proved that the balance test was met at that stage and for the period for investigation and decision.

(b) 16 September 2023 to 13 April 2024

955. We concluded that the first respondent had not shown that its decision met the balance test for the second period, during which the permission ought to have been revoked. At that point the claimant had explained her view that the second respondent was a male, and there was nothing before the first respondent to suggest that the second respondent's physiology was other than male. The second respondent's observable appearance was liable to be considered female by some and male by others. There were options to consider, as noted above, which allowed time for a more permanent solution to be found. Taking an interim step of revoking the permission would we consider have been entertained by the second respondent.

956. That meant, once again but for this separate reason, that the permission that had been given ought to have been revoked for the time being. By not doing so there was at the least a material possibility of the second respondent using the changing room at the same time as the claimant, as did occur on two occasions. The severity of the impact on the claimant was in our view, having regard to the Supreme Court comments on reasonable objection, not overridden by the objective. It was substantial as we have explained.

957. It is stating the obvious to say that it is a difficult balancing exercise, and when the events took place the guidance from the Supreme Court was not available, but that judgment has clarified what the Act provided for from its inception. We did not consider that the first respondent had established

that the balance test can be said to be met at that second stage on the objective basis we have described.

(c) 14 April 2024 onwards

958. Once a solution to the crossover of dates on their respective rotas could be found such that the possibility of their coming into contact in the changing room was avoided, the third stage, any detrimental impact on the claimant directly ended, and the evidence we heard was that no further complaints or issues arose. It appeared to us, in light of that, that from the time of the claimant's return to work on 14 April 2024 there was an appropriate balancing of the rights of those concerned. At that point the balance test was met in our view. We rejected the claimant's arguments in relation to how other female staff felt or would be disadvantaged for the same reasons as in relation to the measure test.

General comments

959. There are some further matters which we considered required comment. The claimant argued that ***West Yorkshire*** has been entirely superseded by the passing of the 2004 Act and the terms of ***FWS***. We did not agree. ***West Yorkshire*** is a case which addressed in part obligations which remain a relevant matter to take into account. Separately as ***FWS*** has held that the terms of the 2004 Act are not material for the purposes of the 2010 Act in its construction of the terms man and woman, it appeared to us that the Supreme Court's decision in that earlier case remains valuable guidance for issues in this case, in circumstances where guidance is not easily to be found. Similarly although the claimant argued that ***Croft*** should also be entirely disregarded we did not agree as discussed above, particularly as it is referred to by the Supreme Court without critical comment.

960. We had regard to the case of ***R(T) v Chief Constable of Greater Manchester Police [2015] AC 49***, on which the claimant founded, but in our view that case is distinguished on its facts. The circumstances of this case are very different as there are at least two, and in our view three, separate protected characteristics involved, and as we address in this Judgment they all require to be considered.

961. We did not find assistance in determining the issues from the Advocate General's Opinion in ***Coleman v Attridge Law ECLI:EU:C:2006:61*** relied on by the respondents. Each of the claimant and second respondent argued that their human rights were breached. Each is entitled to dignity and personal autonomy. The context in this case was work. The extent of autonomy one can expect is affected by that fact.

962. We also did not find assistance from ***SB v Governors of Denbigh High School [2006] UKHL 15*** on which the respondents also founded***.*** Again

the context of that case was very different, being the educational circumstances of a child. This case is not about social cohesion in that same circumstance. Here the claimant accepts that the aims the first respondent relied on are legitimate ones. That is not the issue – it is whether the grant of permission was lawful or not.

963. If and to the extent that the terms of that Schedule might assist the determination of the issue, which as we stated above we did not consider was the case, on such a hypothesis they are we consider broadly consistent with the approach we have taken.

Conclusion on the *Bank Mellat* test

964. We concluded that the first respondent had not met the measure test that there was not a less intrusive measure than the grant of permission, for the period from when a decision should have been made after the claimant's first complaint until a solution that involved rotas not crossing over was found. The permission granted for that period did not meet the balance test in relation to the rights and interests of the claimant and second respondent. Before and after that period, the test was met in each case.

965. On that basis we concluded that for the period 16 September 2023 to 13 April 2024 the grant of permission by the first respondent to the second respondent was not lawful under the 2010 Act, and as a result the claimant's perception of harassment when the second respondent was in the changing room on two occasions within those dates was reasonable in the circumstances. Outwith those dates the grant of permission was lawful under the 2010 Act, as her perception of harassment was not reasonable in the circumstances. We address further aspects of the claims of harassment below.

What happened around midnight on Christmas Eve 2023?

966. Not all of the matters were disputed. The claimant accepts that she initiated the conversation. Whilst what exactly was said was disputed, it is not in dispute that the central message conveyed by the claimant was to the effect that she believed that the second respondent had no right to be there as the second respondent was not a woman. There was reference to the second respondent undergoing a process. There was a reference to the case involving a trans person in prison. There was reference to the claimant feeling intimidated.

967. The parts disputed were firstly a comment about the second respondent's chromosomes. We were satisfied that that comment had been made as addressed above. The second was whether the claimant had repeated her points, in a form of what can be described as a badgering conversation including cutting across the second respondent. We are satisfied that that

occurred. The second respondent stated in evidence that that was after the second respondent's comments about understanding the claimant or words to that effect. The claimant said in her own evidence that the second respondent did not understand. It appears likely to us that as the claimant felt that the second respondent did not understand that she would have spoken to the second respondent as the second respondent stated in evidence.

968. The third dispute was over whether the two of them were mainly not looking at each other, as the claimant stated, or were doing so, as the second respondent stated. We accepted the evidence of the second respondent, which appeared to us to be substantially more likely. It would have been a very odd introduction to a discussion for it to have happened as the claimant alleged, and for it to have continued with neither looking at the other.

969. The fourth was over what was happening during the conversation. We accepted that the second respondent was at the basin when it started, that the second respondent later moved towards the door, and that during the conversation the second respondent had already changed out of scrubs and into clothes to go home. The claimant claimed that the second respondent was in scrubs, and changed after she had started speaking. That would have meant that the conversation took place while the second respondent was changing clothes. She said that she did not see that as her head was turned away and heard what she thought was changing of clothes, initially trousers. We concluded that that was likely to have been the second respondent putting on a jacket prior to going outside.

970. In that regard it is surprising that the two staff members named in the second respondent's notes being Shwayts and Fiona were not interviewed in the investigation. This was a disputed question of fact on which either or both of them could confirm whether the second respondent was right that by the time the second respondent entered the toilet, when at least one of them was still present, the second respondent was wearing scrubs or casual clothes. Ms Wishart could not, when giving evidence, recall that. That is not unexpected given the very long passage of time.

971. Somewhat similarly for the incident on or about 27 August 2023 the claimant said that she was alone with the second respondent whereas the second respondent said that Sarah Richardson was present as well. Ms Richardson was not interviewed or called as a witness.

972. The second respondent's account of the incidents and in particular that on Christmas Eve 2023 and into the following morning was given clearly and candidly. We have concluded that the second respondent's version of events set out in the email to Dr Searle at 3.17am on 25 December 2023 is generally an accurate description of what happened between the claimant and second respondent during their interaction about three hours

beforehand. It is not a transcript, and it is likely that the memories of each of the claimant and second respondent are imperfect because of the stress from such an exchange. It was however sent specifically for the purpose of recording what had happened, was reasonably shortly after the events, and is in our view not tainted by attempting to do so in a light favourable to the second respondent, for reasons we shall come to.

973. We took into account that the second respondent had spoken to Dr Searle on 23 October 2023 and had mentioned the August 2023 incident but not in a manner to complain, instead to make the second respondent's supervisor aware lest matters escalate. That we considered indicated a careful and considerate response to the situation as it developed, which was seen both on 8 December 2023 and again during the Christmas Eve incident.

974. During that last incident the claimant challenged the second respondent on very personal matters going to a sense of identity, but the second respondent sought to indicate a sense of empathy. The second respondent stated, entirely reasonably in our view, that that was not the time or place to make such comments, and that there was a formal process that could be followed. We accepted the second respondent's evidence on those matters, which we considered were clearly an attempt to de-escalate the situation, but which the claimant did not act upon.

975. The claimant did not make a written record of what had happened at or about the time, and required to rely on her memory of what was obviously, for both the claimant and second respondent, an upsetting exchange, when she did give accounts of what happened. The first written account from the claimant was in a message to a friend which referred to her shaking like a leaf but otherwise gave no detail. The first more detailed written account is the email intimating a claim from her solicitor on 15 February 2024. Its context is that, at that point, the claimant had not been given any real detail of the complaint made against her. She had not then seen the Datix report for example, which was sent to her six days later.

976. It has within it some matters we considered to be not accurate, as follows:

(i) the date of the first incident is given as on or about mid November 2023, but we have found that it was on 26 August 2023

(ii) It alleges that Ms Davidson in the first discussion stated that she would get the matter sorted, which we have found was not what was said.

(iii) It alleges that Ms Davidson in the second discussion had said she had raised the matter with HR but "never got anywhere". Again that is not what we have found was said.

(iv) It is stated that the claimant found herself alone in the female changing room with the second respondent on Christmas Eve. That is in our view misleading – as the claimant has accepted that when she first attended the room there were two other members of staff present as well as the second respondent. She spoke to Ms Wishart. She was not alone at that time, but she remained effectively waiting for the second respondent to come out of the toilet. She did not find herself in that situation, but acted in order to bring it about.

(v) The narrative in the email starts with telling the second respondent that the claimant found the second respondent undressing in front of her unacceptable. That is materially different to the oral evidence, which did not refer to any comment about the second respondent undressing and is a matter we considered would more likely have been raised had that been the trigger for a comment. For reasons we address elsewhere we did not accept the claimant's evidence that the second respondent undressed in front of her – that changing out of scrubs had been carried out after the second respondent entered the room with two colleagues and before the second respondent entered the toilet.

(vi) The narrative refers to the second respondent being indifferent to the claimant's upset. In oral evidence she accepted that the second respondent had responded to her by expressing sympathy to her which is not consistent with being indifferent in our view.

(vii) There is no mention at all of the claimant's reference to the prisons incident, which the claimant admits she made.

(viii) There is no reference to a comment about a bad experience with a male, which again the claimant admits she made.

(ix) There is no reference to asking about the second respondent's chromosomes, which we have found was made.

(x) There was no reference to the second respondent stating that the meeting was not being the appropriate time or place to raise her issues, which the claimant admitted was said by the second respondent.

977. The next written account for the claimant is in her Claim Form. In relation to "Facts" it is notable that there is no mention of the second respondent going into the toilet cubicle, or coming out and washing hands. It states that the second respondent was "fully dressed in his uniform" and once the two other colleagues left "started to undress." It then narrates what the

claimant says was discussed, says that she told the second respondent "that she found the situation unacceptable" and referred to the "women's prisons incident" which was " a reference to the Isla Bryson/Adam Graham case." It refers to her having had "a previous bad experience with a male" but not to any question as to chromosomes. There are other details given, so the foregoing is a part only of those pleadings, but there are we consider inconsistencies between the email of claim, and the Claim Form.

978. The first oral account given by the claimant to the first respondent was to Ms Glancey, initially in written form probably around late July 2023 and then in person on 30 August 2023. That was a particularly long period of time from the incident, and it is not surprising that the claimant's recollection of it may be imperfect. There are however inconsistencies between what is stated in that August 2023 interview ("the initial statement"), what is pled, and what the claimant said in her oral evidence before us, including –

(i) The claimant in her initial statement stated that she was standing with her back to her locker, and when she entered she saw two colleagues, not the second respondent whom she did not see until the second respondent left the toilet. In her evidence in chief she said that when she arrived in the changing room the second respondent was coming out of the toilet.

(ii) What she said in the initial statement as to how the conversation started was that "I told Beth I was feeling embarrassed and intimidated, because Beth was in the room" and in evidence was "I think its unacceptable that you are in here." That is also very different to the terms of the email of 15 February 2024.

(iii) In her oral evidence she agreed she had said that the second respondent was a man, but that was not in the initial statement.

(iv) In the initial statement she stated "I can't remember saying to him anything about my past but obviously I did because he has mentioned it in his statement", which on the face of it is an admission both of an imperfect recollection and that the comments in the second respondent's written record were accurate. In her oral evidence she had said that she told the second respondent that she had previously had a bad experience with a man, not referring to the earlier failure of recollection. That earlier experience was also not mentioned in the email of 15 February 2024.

(v) In the initial statement the claimant said “eventually he just said there were protocols I could follow” in the context of what in oral evidence the claimant described as a short conversation of about two minutes duration, with the use of the word “eventually” appearing to us to be more in accordance with the second respondent’s description of a more lengthy series of exchanges between them of between five and ten minutes than the claimant’s evidence that it was about two minutes.

979. There are some aspects of the claimant’s evidence we consider not credible as noted above in relation to the prisons incident which is particularly relevant in this context, with other matters relevant more widely.

980. There are other aspects we considered not reliable including her evidence that she had not remained in the changing room at Christmas to confront the second respondent. In this respect, the two lay members relied on their experience. Their view was that in the circumstances described by the claimant the conduct expected of any woman in such a situation would be to get clean clothing from the locker and proceed at that time to change in the second and vacant toilet cubicle, rather than to do so in the presence of anyone else whoever they were. That is also consistent with the claimant’s evidence in chief that she was hurriedly going to the toilet, and other evidence that she had changed in the cubicle in the past.

981. That the claimant did not go to the vacant cubicle to do that, but waited for the second respondent to leave the other toilet cubicle, was we considered more likely than not to have been as the claimant wished to confront the second respondent. That was in circumstances of the claimant being in a vulnerable position herself, which we take into account, but by not taking what was the obvious step of entering the other cubicle, and then probably remaining in the cubicle until the second respondent had left the changing room. We concluded that the claimant’s evidence was not reliable on this point, and noted further the inconsistency with the wording of the email of 15 February 2024 that the claimant had found herself alone with the second respondent.

982. That was all the more so given the two earlier circumstances when the claimant waited outside, and when there were two other female staff initially present as well. The claimant could have spoken to the second respondent when those two others were present, but waited until they were alone together, which is also we consider consistent with a wish to confront the second respondent, as well as to do so in private.

983. The intent to confront the second respondent is in our view also supported by the timing, and earlier history when the claimant had avoided the second respondent in the changing room. On this occasion the claimant

did not leave. The second respondent was or had changed out of work clothes (addressed below). The claimant said in her oral evidence that when she arrived in the changing room the second respondent was coming out of the toilet, whilst the other staff were still there. That timing does not appear to us to be likely to be correct, as by the time the second respondent left the cubicle the other staff had, on the second respondent's account, left which we considered far more likely to be accurate.

984. The claimant said in oral evidence that her first words to the second respondent were as noted above - "I think it's unacceptable that you're in here.". In essentials it is we concluded how the conversation started, although the words were "not appropriate". We consider those words, and the circumstance of the claimant waiting to be with the second respondent alone in the changing room, also to be consistent with confronting the second respondent. It did not refer to her feelings of intimidation or embarrassment, rather that the second respondent should not have entered, although the claimant was aware that permission to do so had been given. The words used are consistent with the claimant taking the matter into her own hands, when the decision of who was permitted to be present was for the first respondent, not her.

985. The third aspect is that the claimant said that the exchange lasted about two minutes. We are satisfied that that was her genuine perception of the exchange, and it is broadly consistent with what she told family members the following day which was a brief commentary on what had happened. We did not consider that her estimate likely to be correct. There were various matters addressed between them in our view, and the second respondent's evidence of a longer period of time we consider much more likely to be accurate, and we have noted the use of the word "eventually" above.

986. The fourth aspect is that the evidence of Ms Curran was that the claimant had said that she had "confronted" the second respondent. The claimant did not accept using that word, but we consider Ms Curran's evidence likely to be right on that, and that the claimant had used that word. It is supported by the claimant saying in the investigation meeting with Ms Glancey that she told Ms Davidson in October 2023 that she would "have it out" with the second respondent if it happened again. Ms Davidson did not recall that, and said to Ms Glancey that had the claimant said something to that effect she would have discussed the appropriateness of that and sought to de-escalate the situation. That appears to us to be more likely, and the claimant's evidence that she did say that to Ms Davidson not reliable. But that was the claimant's evidence and it supports the concept of a confrontation, in our view.

987. The fifth aspect is that the claimant's evidence is that the conversation took place whilst the second respondent was changing out of scrubs and

into casual clothes. The second respondent's evidence was that that change into casual clothes had taken place before entering the toilet. We preferred the second respondent's evidence as

(i) The claimant said that she had looked away from the second respondent, and looked at the second respondent to see a jacket being zipped up. It does not appear that the claimant consistently alleges that she directly saw any changing take place, partly as she said on one occasion that she did so out of the corner of her eye and that in oral evidence she understood that the second respondent was changing from listening, with the pleading stating that she "had her back to the second respondent throughout this exchange".

(ii) It appears to us contrary to common sense that someone being spoken to as the claimant accepts that she did would simply have carried on removing clothing and changing into casual clothes. Leaving aside the disputed words, the claimant said that the second respondent should not be in the room as the second respondent was not a woman, that the claimant felt intimidated and embarrassed, and that it was like the prisons incident. The claimant accepted that that reference may have been taken as an allegation of being a sexual predator, although she said that it was not her intention to do so. To continue undressing in such a situation is not we consider at all likely. What was being said would in our view have stopped the person doing what they had been, and to engage with the discussion as it was in effect a direct challenge to them.

(iii) We consider that the second respondent's evidence of entering the changing room with two female colleagues was most likely to be right, and is consistent with the claimant's evidence of there being three people in the room at or shortly after the point when she entered. This was before midnight on Christmas Eve. The two other colleagues left the room not long afterwards, as both the claimant and second respondent agree although the timing of when they did so is not agreed upon.

988. We infer from that evidence that the two members of staff had entered the changing room in scrubs after the end of their shifts, changed into work clothing, and then left. That is entirely as one would expect given that this was approaching Christmas Day, when the expectation is that staff finishing a shift would wish to get home as quickly as possible. It seems to us to be consistent with that overall background that the second respondent will have done the same, which is to change out of scrubs into casual clothes when the two colleagues did so, preparing to leave without delay. It would have been unusual for the second respondent not to have done so, and had that happened we consider it likely to have been noticed as such by Ms Wishart. That she remembered nothing unusual is we consider consistent with the second respondent doing effectively the same as the other colleagues in changing into casual clothing.

989. The final aspect is that the claimant said in evidence that she had to wait until the second respondent referred to raising protocols and her agreeing to that before the second respondent left, and that she had wanted the conversation to end. It was however one that she had initiated.

990. It appeared to us that the most reliable evidence of the exchange is partly from the notes made at around 12.45am, less than an hour after the exchange, although with some detailed amendments set out in the Borwick report, and then more particularly the email sent by the second respondent to Dr Searle a little over three hours after the incident ended. It states that it seeks to give the best recollection. It was broadly consistent with the phone notes.

991. It did not appear to us, on its terms, to do other than set out what happened. For example it stated that the conversation started when the second respondent was at the sink washing hands. That detail is not one that would be expected to be one liable to be disputed, although it turned out that it was. It appeared to us to be a simple point of that detail given at the time. It refers to the two colleagues and what had happened such that if there was any issue the first respondent could (and in our view should) have sought to interview them and check their recollection with that of the second respondent. That giving of their names is we considered more likely to be consistent with the second respondent giving an honest recollection from the time.

992. It ended with a commentary about resolving the issue, not directly as any form of attack on the claimant. We took into account the degree of distress that had been experienced which can obviously affect recall, and the circumstances, but overall we considered that it is more likely to be a reasonably accurate and recently given account.

993. Where there were disputes between the claimant and second respondent on the conversation on 24/25 December 2023 we considered that the overall evidence, and applying a measure of common sense, supports the second respondent. Simply by way of one example, the second respondent was asked in examination in chief how long the interaction with the claimant on 24 December 2023 had taken, and in summary said that it was between 5 and 10 minutes but that in such a situation which was stressful and upsetting the second respondent found it hard to judge time. That was in contrast to the claimant whose own time estimate was of 2 minutes. Having regard to the evidence as a whole we considered that the estimate of between 5 and 10 minutes was broadly likely to be accurate, with it being closer to 5 minutes than 10.

994. The second respondent spoke in evidence of the use by the claimant of words to the effect “what are your chromosomes?” The claimant did not recall using such words, but did not state in terms that she definitely did not say those words or ones like that. We considered it far more likely that

she did. Firstly the note taken shortly afterwards records that, as does the email to Dr Searle sent a little over three hours after the incident. Secondly the second respondent was very clear in evidence to us including during cross examination that those words had been used. Thirdly they would be odd words to fabricate. The comment is unlikely to have been made up in our view. Fourthly they are consistent with the general tenor of the claimant's remarks that, in her view, the second respondent was a man not a woman, which was raised as a matter of biological sex of which chromosomes are one element. Fifthly the language used by the claimant was in other respects also challenging of the second respondent, such as the comment that the second respondent was not entitled to be in the changing room, and the reference to the incident in prisons. Having regard to the evidence as a whole we were satisfied that those words had been used by the claimant. We concluded that in what must have been for both participants a highly charged and stressful event the claimant's recollection was not reliable.

995. We considered that the notes on the mobile phone were generally recorded as accurately as the second respondent could achieve. Some were undertaken after the end of a shift, but that on 24 December 2023 was recorded fairly shortly afterwards and in some detail. The resus incident was not recorded contemporaneously and there are issues over those where the dates do not coincide with the entry, as noted in Mr Borwick's report. But the resus incident was set out in the 26 December 2023 email to the BMA.

996. The written record of the Christmas Eve incident, not just from the notes on the mobile but also the email to Dr Searle about three hours after it took place, being near-contemporaneous, from a person who had not initiated the conversation, and who had been in the changing room as permission in effect to do so had been given when Dr Searle spoke with the second respondent on 16 August 2023, was we considered far more likely to be accurate as a record than that of the claimant who had not taken any contemporaneous notes for issues where there was a dispute, and whose first record in writing of what happened was given in the letter of 15 February 2024, and from the claimant's own words directly in the investigation meeting with Ms Glancey held many months later.

997. There are other aspects of the evidence that we considered support the second respondent's version. The claimant's evidence to the effect that she simply raised her beliefs with the second respondent in a brief way without repetition and aggression is we consider contradicted by the evidence given by Dr Pitt of the second respondent being startled, fearful, and so upset as to be sobbing. If the exchange had happened as the claimant said, we did not consider it at all likely that the second respondent would have presented in such a manner. We accepted Dr Pitt's evidence on this. That evidence was also supported to an extent by Dr Searle, who

noted a similar if less severe reaction by the second respondent on 29 December 2023.

998. We have commented above on the overall assessment of the evidence of the claimant and second respondent. We also had regard to the demeanour of each of those witnesses before us. In our view the second respondent was both clearer, more candid in answering questions, and more convincing in the description of the exchange than the claimant.

999. Taking account of all of the evidence we have heard and how it was given we concluded that the evidence of the second respondent on matters of fact in dispute between them should be preferred to that of the claimant as being more reliable and materially more cohesive in nature having regard to all of the evidence, the overall weight of which favours that of the second respondent.

Did the claimant manifest her beliefs in a manner that was objectively impermissible?

1000. The Tribunal dealt separately with the issues of pleading and from the List of Issues in relation to this point, such that the question is one before us. The onus is on the first respondent to establish that the claimant manifested her beliefs in a way that was objectively impermissible. It can be labelled in different ways, as the Note issued in relation to this matter sets out.

1001. The Tribunal considered the position from the Court of Appeal decision ***Higgs***, and whether or not the claimant's comments were, as she argued, simply an expression of her belief permissibly carried out, or were manifestations of that belief that were justifiably considered objectionable, which is summarised as the heading set out above.

1002. The first question is: has the respondent proved that the treatment of the claimant was the objectionable manner in which it been manifested, assessed objectively? The second question is, if so, was the treatment of the claimant proportionate, in the sense of objectively justified?

1003. The following was said by the Court of Appeal:

> "In summary, *Page* was decided on the basis that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something "objectionable" in the way in which the belief was manifested: it thus introduced a requirement of objective justification into the causation element in section 13 (1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention."

1004. The decision was the subject of an attempted appeal, but the Supreme Court did not give permission for that. In light of that, and the fact that the issues are Great Britain wide rather than an area where Scots Law is any different, in our view ***Higgs*** is to be regarded as binding on us.

1005. The first respondent accepted that it bears the burden of proving that the requirements of Article 8(2) are met, as being in accordance with law and necessary in a democratic society, with the claimant relying on ***R v Shayler [2003] AC 247*** and ***Handyside v United Kingdom [1976] 1 EHRR 737***.

1006. Firstly the Tribunal concluded that the discussion between them did involve the claimant making what was an attack on the sense of identity of the second respondent, or putting it another way the second respondent's psychological integrity, by stating that the second respondent was not a woman, or was a man, on several occasions. That went beyond expressing her belief and into an argument that the second respondent's own belief as to personal identity was wrong.

1007. The claimant did so in an intrusive and confrontational way firstly by asking about chromosomes which is in our view a clear invasion of privacy, and secondly by referring to the "prisons incident", which was admitted to be a reference to the case of Isla Bryson/Adam Graham. It was we concluded known to the claimant that the prisons incident was a reference to a convicted rapist. It was to be expected that the second respondent would take that reference to be an allegation that the second respondent was also some form of sexual predator.

1008. The claimant further not only argued her points but contradicted and interrupted the second respondent, for example when the second respondent referred to having sympathy for the claimant.

1009. The conversation took place in the circumstances we have described, which was when they were both at work, and included that the claimant knew of the permission granted to the second respondent, and sought to confront the second respondent about it as she did not agree with it. She was arguing that the second respondent should act differently, and not on the basis of the permission that had been given. That was as discussed above her taking matters into her own hands when her argument ought to have been with the first respondent which had given the permission, and is a part of the context for assessment of the permissibility or otherwise of the manifestation of her belief.

1010. That it was the claimant's genuine and honest belief that the second respondent was a man, and one that she was entitled to hold not least as it conforms to the definition in section 11 explained in ***FWS***, does not lessen the impact of such a series of remarks on the second respondent and on the belief that the second respondent also genuinely and honestly

held. It was in essence seeking to impose her beliefs on those of the second respondent.

1011. When balancing the rights each has under Article 8, it appeared to us that it is relevant that it was to another employee directly, which is entirely different to the claimant expressing her beliefs formally (or informally) to managers of the first respondent, to HR, or by complaint in writing, which would not have been such a direct attack on the second respondent as an individual.

1012. We considered the claimant's submission that the protected characteristic of gender reassignment "has no relevance unless and to the extent that he could rely on it to establish a positive right of access to a female-only space". We did not consider that that was correct.

1013. What was to happen about the use of the changing room was not a matter for decision by the second respondent. Nor was it a matter for decision by the claimant. It was a matter for decision by the first respondent, subject to the constraints of the law. In our view, Article 8 of the Convention gives protection to the personal sphere of each individual, including the right to establish details of their identity as individual human being. That applies both to the claimant and the second respondent.

1014. Applying the ***Bank Mellat*** test to the decision to investigate the allegations, and matters connected to that as a matter of general principle, which lay at the heart of how the second respondent's complaint was managed, we considered as follows:

(i) The rights of the second respondent to dignity and a private life are such that what might be described as the importance test is met

(ii) The steps taken by the first respondent were, in general and subject to the qualifications below, such that what might be described as the connection test is met

(iii) The measure test was met in relation to the requirement to investigate, but was partly breached in three other and later respects for the reasons addressed further below

(iv) The balance test was met in relation to the requirement to investigate, but partly breached in those same three respects also as addressed further below

1015. In submission it was argued that even if the claimant had been aware that the prisons incident concerned a convicted rapist it was a stretch to infer comparison of the second respondent with that person. We did not agree. Firstly that is how the second respondent took it, and perceived the comment to be. Secondly, that perception was reasonable in our view. Thirdly what was said to be the point the claimant was seeking to make

was that a prison and a changing room in a hospital were places women should be able to be confident they will not encounter men. That is not however what she said. The words she used conveyed an entirely different meaning when considered objectively.

1016. The claimant said in her evidence that she had not intended to offend, but in matters of harassment both under section 26 and the first respondent's bullying and harassment policy the focus is not on intent but on the perception of the person harassed, provided that that perception is reasonable. In our view in this particular respect it was reasonable of the second respondent to consider the comment to be harassing under the terms of the first respondent's policy, and it was, so far as this is relevant, harassment related to gender reassignment and the second respondent's belief about being able to live as a woman under section 26 of the Act .

1017. The claimant's comments in our view were broadly similar to cases where proselytizing which led to dismissal was held to be lawful and not discrimination because of religion or belief in ***Chondol v Liverpool City Council [2009] UKEAT 0298/08, Grace v Places for Children [2013] UKEAT 0217/13*** and ***Wasteney v East London NHS Foundation Trust [2016] ICR 643*** the first and third of which the Court of Appeal approved in ***Kuteh v Dartford and Gravesham NHS Trust [2019] EWCA Civ 818*** as were all three again by the Court of Appeal in ***Higgs.*** What the claimant was doing in our view was seeking to impose her view on the second respondent that the second respondent should not be in the changing room.

1018. The case of ***Wasteney*** included the following:

> "An important aspect of the claimant's case is that Article 9 does not merely protect the right to hold a particular belief but also to manifest it. That is obviously right: without the right to express and practise beliefs, the freedom of religion guaranteed by Article 9 would be rendered hollow. Seeking to translate that principle into the language of domestic law, in *Grace v Places for Children* UKEAT/0217/13/GE, 5 November, unreported, the EAT (Mitting J presiding) observed:
>
> > '6. We agree … there is no clear dividing line between holding and manifesting a belief and … an *unjustified* unfavourable treatment because an employee has manifested his or her religion *may* amount to unlawful discrimination …' (Original emphasis.)

1019. In our view the claimant was seeking to persuade a colleague that her view was right, and should be followed by the second respondent, contrary to the wishes and beliefs of the second respondent, and contrary to the permission given by the first respondent. She was in effect challenging its

decision directly with the person affected and doing so not with the first respondent which had made the decision. Proselytizing can be defined as attempting to convert someone from one religion, belief, or opinion to another. It is a term normally used in the religious context, but is not confined to that context. In our view in essentials that is what the claimant sought to do.

1020. In the work setting, such proselytizing has obvious difficulties and dangers. People may hold sincerely very strong personal beliefs of all manner of kinds. They may be similar to, or very different from, those of others. Seeking to persuade a colleague who does not share one's belief that they are wrong and you are right is an area of conflict that is not consistent with a workplace that functions effectively. That is all the more clear in an area such as a hospital where working as part of a team is so clearly important.

1021. The circumstances of the conduct and words of the claimant were far closer to those in ***Lilliendahl*** than those in ***Higgs*** in our view, and although that is not determinative it assists in seeking to characterise what happened. The words used by the claimant were not written but spoken, in reasonably close proximity between two members of staff who were otherwise alone, and included terms in part the second respondent entirely reasonably found intrusive and highly offensive. They went beyond a simple expression of belief and the concern the claimant felt, and included comparison with a convicted person in prison who was a rapist. Doing so in such a manner on that scenario did we consider amount to the kind of environment ***Lilliendahl*** refers to.

1022. We also considered the list of factors the EAT in ***Higgs*** referred to, noting that they are not exhaustive and may not all apply as the Court of Appeal confirmed. We have noted the context of a face to face meeting at work in the circumstances referred to, above. We concluded for those parts we considered relevant as follows, retaining the original numbering:

> (i) the content of the manifestation included highly intrusive and damaging comments;
>
> (iii) the extent of the manifestation was in our view reasonably significant in that the claimant made a number of separate points, doing so in some respects on more than one occasion;
>
> (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business – the intrusion on the rights of the second respondent was we consider highly significant, creating material and continuing distress
>
> (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are

> intruded upon – there is in our view very little relevance in this area. The claimant was a nurse and not in the same line management as the second respondent, who was a doctor
>
> (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients – the setting of a hospital is in our view relevant, given that it will include the treatment of trans patients, and that there are other trans staff, and
>
> (ix) whether the limitation imposed is the least intrusive measure open to the employer – we address this separately below.

1023. Having undertaken that exercise we remained of the view that the conclusion was appropriate. Our conclusion was in our view also supported by the comments in ***Forstater*** with regard to the possibility of harassment if a person with the protected characteristic of gender reassignment is misgendered. To repeat the EAT comments in that regard:

> "That does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person."

1024. That is we consider essentially another way of expressing the distinction between permissible and impermissible manifestations of belief. To use non female descriptors for the second respondent was not what the second respondent wished. As stated in ***Forstater***, a protected belief does not give carte blanche to say whatever the person holding those beliefs wishes. What was said in that case about misgendering potentially being harassment applies *a fortiori* to what the claimant said in these regards, in our view. Given the context of the workplace, and against the background of the first respondent having given permission to the second respondent which the claimant was aware of, it appears to us to fall clearly within the description of what could be harassment set out by the EAT in that decision.

1025. The EAT also in that case in a footnote to paragraph 99 set out the protected characteristics which such harassment may be related to that a trans person could pursue under the Act in such circumstances as follows

> "A trans person could potentially bring a claim for harassment related to gender reassignment (where the definition under s.7(2) is satisfied), sex (see e.g. P v S and Cornwall County Council [1996] ICR 795 at paras 17 to 22), disability based on the conditions of Gender Dysphoria or Gender Identity Disorder (see EHRC Code

at para 2.28), or even a philosophical belief that gender identity is paramount and that a trans woman is woman."

1026. As we have noted above, that decision was approved by the Supreme Court. The belief that is referred to is, from the decision of the EAT, protected even if in conflict with the definition of woman that the Supreme Court provided, just as a gender critical belief is protected even if not consistent with the terms of section 7, the Equal Treatment Directive, Article 8 of the Convention, and case law deriving from those sources. What the second respondent did in the various oral and written complaints made in our view was to raise with the employer an allegation that another employee had acted in a manner that constituted harassment.

1027. What was not entirely clear from the second respondent's complaints and how the first respondent addressed them was whether it was alleged that all that the claimant said was said to be that, or only parts and if so which parts. That lack of clarity remained from the evidence of how the first respondent addressed matters. It was not entirely dispelled from submissions. We consider that, as explained in ***Higgs***, it is necessary to identify what was said, and apply the test as to whether the respondents have proved that that was impermissible manifestation.

1028. The result of our analysis is that not all of the claimant's comments were impermissible manifestations of her belief. Telling the second respondent that she did not think it appropriate for the second respondent to use the changing room is an expression of her belief, and permissible. Explaining that she felt intimidated is an expression again of how she felt and is permissible. Saying that she had no problem with the second respondent and referring to going through some form of process is somewhat disparaging but we consider should not be held to be objectively impermissible. Saying that maybe she was the only member of staff who felt able to raise the issue and referring to a bad history with men is not objectively impermissible. Saying that it would help if the second respondent did not change in the changing room is not objectively impermissible. Saying that women have a right to feel safe is not objectively impermissible. Saying that she would raise the matter is also not objectively impermissible.

1029. So far as her other comments are concerned, they were impermissible manifestations of her belief and were in our view what amounted to an incident of harassment by the claimant of the second respondent related to the protected characteristic of gender reassignment, reasonably perceived by the second respondent to be so, and were a breach by the claimant of section 26 of the Act and of the Bullying and Harassment Policy. The second respondent was entitled to view the actions of the claimant in those particular regards as being such harassment, or as a "hate incident" within the policy, and the first respondent was entitled in

principle to act on the complaint made, but the detail of how it did so depends on all the circumstances as more fully addressed below. The second respondent was also entitled to regard the claimant's actions as a breach of the second respondent's Article 8 rights, so far as the claimant's expression of her beliefs was impermissible.

1030. The claimant's evidence on what was said, and for how long, reflects in our view a lack of recognition of the extent to which she challenged the second respondent on several occasions. That may well have been as the second respondent did not agree with her, although rather than argue the point the second respondent we consider was seeking to de-escalate it by comments that it was not the right time to raise it, and that there were protocols to do so (by which the second respondent meant formal grievance processes). There was an impact on the claimant, but in our view materially more limited than the impact her words and how she said them had on the second respondent. There is a clear contrast to the evidence of Dr Pitt of the second respondent's demeanour when they met a little after the incident, and that of Ms Curran who saw the claimant later on in her shift and did not notice anything by way of difference to her presentation prior to the incident. The claimant did not speak to Ms Curran during the shift after midnight that day to inform her of the incident.

1031. That the claimant did not recognise the impact her words had on the second respondent was also we considered exemplified by a message to a friend about the interaction she said that she "did not even bully", and that was her genuine perception. But it was not accurate in our view.

1032. We appreciate that our conclusion that what the claimant did amounted to harassment and that is not the outcome of the first respondent's disciplinary hearing which held that there had not been sufficient evidence to uphold the complaint made, but it appeared to us that deciding the context in which matters unfolded is essential to determining the issues in the case, one of which is whether the second respondent made a false complaint against the claimant. Unlike the first respondent in its process with the claimant we had the benefit of evidence from both the claimant and second respondent, given on oath, with representation and documentation that we have assessed in light of all the evidence.

1033. We separately considered whether our conclusion should be different given our finding that had the first respondent ought to have revoked the permission to the second respondent on 16 September 2023 until arrangements for rotas that did not cross over were made it is likely that what occurred on Christmas Eve that year would have been avoided. We concluded that that would not be in accordance with the purpose of the Act. As the Supreme Court emphasised in ***FWS*** each of the protected characteristics is separate. Whilst it is necessary to consider how to resolve a conflict between those as to sex and gender reassignment or of

two different and conflicting beliefs, in this regard the question is more narrow and solely concerns the protected characteristic of belief. In our view it would not be in accordance with the purpose of the Act to assess whether the belief was impermissibly manifested by an extraneous matter.

1034. We also considered that the claimant had acted deliberately to be able to challenge the second respondent whilst they were alone. What she did was to wait until other members of staff had left the changing room, and for the second respondent to leave the cubicle, before raising her own beliefs directly with the second respondent in the manner we have set out.

1035. Whilst the claimant had not been informed as promptly and in the detail we considered appropriate, and the first respondent did not consider whether to revoke permission at all, the claimant did not herself raise any formal grievance under the policy. She is an experienced member of staff who had access to union advice. She knew, or ought reasonably to have known, that the first respondent having granted permission to the second respondent she required to have raised her concerns with the first respondent as the decision-maker rather than with the colleague to whom it had been granted, and in any event ought not to have done so in the manner that she did.

1036. What occurred on Christmas Eve did take place, and it is not we considered appropriate to expunge it from consideration because of our findings as to the permission granted by the first respondent to the second respondent. We therefore did not consider that what the claimant said during the incident at that point required to be entirely disregarded. The comments were in our view part of the factual matrix to consider when determining whether the claimant's claims under the Act succeeded or not.

1037. We address the issues over the proportionality of the treatment separately in relation to each matter founded on by the claimant below, as the circumstances in each case are different.

Evidence from Ms Forstater and Mx Valentine

1038. We turn to address the evidence from Ms Forstater and Mx Valentine, which the parties had described as "research evidence". That is not, so far as we are aware, a term of law. Nothing was cited to support the use of that term. It is not skilled evidence as explained below, and the parties did not suggest that either witness was skilled or expert in that sense. It was not necessarily inadmissible, given the terms of Rule 41, and until read and considered the extent to which it might be relevant could not be assessed, but the weight to attach to it was a different consideration.

1039. We considered the written witness statements comprising the evidence in chief, the oral evidence of Ms Forstater, the supplementary witness statement of Mx Valentine, and the contents of the Supplementary Bundle.

The original Bundle contained 58 different documents (the numbering of the documents was incorrect) with a variety of academic papers, governmental documents and, documents from organisations appearing to have an other than impartial view. The documents were from Scotland in a few instances, England and Wales in more, some were from European or international organisations such as the United Nations, and others from the United States of America or other countries such as Sweden and Finland. Those in the supplementary Bundle added slightly to that total.

1040. In many respects the evidence in the statements was more in the nature of material for the public debate on wider issues as to what the law should be, and on occasion it appeared to us to be polemic, rather than evidence relevant to the issues at an Employment Tribunal.

1041. Opinion evidence was addressed in Walker and Walker on Evidence, Fifth Edition ("Walker"), which explained the distinction between evidence of fact, and of belief or opinion. Opinion evidence may be led from what Walker describes as an ordinary witness (the classification of witnesses is between ordinary and skilled), and examples of that are given.

Ms Forstater

1042. The statement from Ms Forstater was not presented as impartial evidence, but specifically as one given in support of the claimant. It had at paragraph 10 an argument as to facts, of which Ms Forstater said that she was certain. They are however we consider not facts, but expressions of her opinion. The assertion at 10 (b) for example was "Sex is in general readily perceptible and is salient to other people." That we consider cannot be other than her opinion, for which no support from any document in the Supplementary Bundle appeared to be referred to in her written witness statement. It was contradicted by other evidence, and the terms of a Note issued by EJ Tinnion on 5 January 2025 in relation to the second respondent. It did not appear to be an assertion related to the second respondent in particular, but as a more general proposition.

1043. The assertion at (d) had a further series of propositions which were opinions although presented as facts. They commenced with "Provisions to maintain relevant spaces and interactions as "same sex" are in order to protect dignity, privacy and safety are particularly important to women because:……". That is both an expression of opinion and raises the question of what provisions are being referred to. If the 1992 Regulations, then as discussed they are not within this Tribunal's jurisdiction, and the comment appears to be an argument over the policy of the law, or how the law should be interpreted, neither of which are relevant evidence before us.

1044. The sub-paragraphs include, by way of example, (ii) "women are in general more fearful of men than men are of women, for good reason."

That is again an expression of opinion without cross reference to any document in the Supplementary Bundle. Sub-paragraph (v) was "unless rules about single-sex spaces are clearly stated and enforced it leaves women open to risk of sexual harassment and assault, and makes these spaces feel unsafe." That again is an expression of opinion. The witness statement purports to expand on the comments at paragraph 10 stating that the facts stated are true. In our view they are not reliable as evidence from a person not a skilled witness on the propositions that are advanced.

1045. Where there was reference to documentation it is in our view both partial and incomplete. Part of it is based on research undertaken by Sex Matters, an organisation of which she is the Chief Executive Officer. It is a campaigning organisation, as set out in paragraph 4. There is an obvious risk that that research is impacted by the nature of it, which is not suggested to be an independent academic study with the controls one normally expects to see. The reliability of the study is therefore at the least unclear. There are references to various documents under the heading "Transition does not change sex" and references to what are termed "male type crimes." The argument appears to be made that a person who is a trans woman, having been assigned male at birth, is at greater risk of offending, including by committing sexual crimes against women, than a woman identified as female at birth. What the witness states is "This is not to say that all men who identify as women are criminals or sex offenders, in the same way that not all men are criminals or sex offenders. But there is certainly no reason to think they are *less* likely to be than other men are, or that they exhibit female patterns of offending and risk."

1046. If such an argument is to be made in relation to the propositions in paragraph 10 of the statement, however, it appears to us that that is the kind of evidence that can only be accepted by an Employment Tribunal applying the terms of the overriding objective if given by a skilled witness, which in Scotland means following the guidance in ***Kennedy,*** addressed below. In our view it would not be dealing with a case fairly or justly to rely on expressions of opinion from a person campaigning on one side of the argument on such an issue. We did not consider that the case of ***Connor*** on which the claimant founded***,*** cited above and which indicated that in some situations evidence which was not expert in nature could be sufficient, was applicable to such a matter.

1047. Our review of the literature referred to by Ms Forstater reveals that the broad generalisations she seeks to take from it are not sufficiently supported by the document or document founded on, both from the terms of the document and the other documents in relation to the same broad issue, to be treated as reliable evidence. By way of one example, a reasonable degree of weight was sought to be attached to the study in Sweden by Dhejne and others in 2011. It examined a cohort of 324 persons "who underwent sex reassignment surgery and were assigned a

new legal sex between 1973 and 2003." There were two groups within that cohort, effectively one prior to 1989 and one after then. The following was stated "Transsexual individuals were at increased risk of being convicted for any crime or violent crime after sex reassignment (Table 2); this, however was only significant in the group who underwent sex reassignment before 1989." A section headed "Strengths and limitations of the study" included that the statistical power was limited."

1048. One of the documents in the Supplementary Bundle was three pages from a report by an organisation called Fair Play For Women dated 12 December 2020. It was not complete, in that it referred to an Appendix which was not included. It referred to statistics from 2018 issued by the Ministry of Justice and stated that they showed that "half of the people in prison who declare themselves transgender have been sentenced with one or more sexual offence." It then states that there is new data confirming that the vast majority were born male. What that data is however is not specified. The 2018 statistics referred to and the new data which may be 2019 statistics were not, so far as we could ascertain, within the Supplementary Bundle. They may have been obtained from what appears to be hyperlinks in the report but it is not appropriate for us to seek out evidence not presented by the parties.

1049. In our view, having read all of the documents, there is very far from sufficient reliable evidence to establish as a fact that a trans woman who is legally and biologically male is a greater risk to any person assigned female at birth within a changing room environment at a workplace than another woman assigned female at birth.

1050. Some of the documents referred to themselves refer to the need for further research. Whether that is appropriate is not for this Tribunal to say, but we do consider that what has been presented to us from Ms Forstater is not evidence we can regard as reliable. She is of course fully entitled to hold her views, and to express them, and to campaign about them, but as evidence before us we do not consider that it can be relied upon.

1051. We note that as the claimant did not wish to cross-examine Mx Valentine, the evidence given by that witness, so far as was relevant, was not challenged. That included what amounted to disputes with Ms Forstater over some of her evidence. By way of example, Mx Valentine stated in relation to what was described as the second issue, following numbered paragraph 16, under the second bullet point

> "There is no evidence that policies that allow trans people to access changing rooms and toilets in line with their gender identities decreases the safety of, or increases the risk of violence faced by, others (McKay et al, Hasenbash et al, Barnet et al, Scottish Government paragraphs 17 and 19 – 22 of my statement below)".

1052. The Scottish Government research was referenced at paragraphs 21 and 22 of the witness statement of Mx Valentine. That evidence was not disputed by the claimant because of the absence of cross examination, although it is in direct contradiction to the arguments put forward by Ms Forstater in her statement and oral evidence.

1053. There is a further difficulty with the evidence which is in our view highlighted by the terms of the Statement of Truth which the statement included. It included standard words as set out below but is not what the witness had done. Her written witness statement went very far beyond that descriptor, and included reference to the matters we have addressed above. The solicitor has provided written confirmation of compliance with the Practice Direction notwithstanding the disparity between the content of the written witness statement and what we consider to be the requirements of the Practice Direction. We address this further below, as it is a matter relevant to both of these witnesses, although the detail in each case is different.

Mx Valentine

1054. We turn to the evidence of Mx Valentine, which is in a similar context to that of Ms Forstater in that they (using Mx Valentine's preferred pronouns) work for the Equality Network which includes advancing and promoting the rights of trans people, and Mx Valentine is a trans person. There is no reference to academic qualifications. The statement includes an analysis of risks faced by trans people, but the relevance of that general evidence to the case before us is at best unclear. There is a reference to a lack of evidence of allowing trans people to access sex-segregated spaces increasing the risk of violence to others, which is supported by reference to one paper by McKay and others published in 2017. What was provided in the Supplementary Bundle however was a single page abstract of that paper, rather than the full paper, which abstract in any event referred to the need for further studies. It did not appear to us that we could safely place reliance on that single page (it was also referred to in an Annexe but that did not materially add to the abstract itself).

1055. There was also reference to a survey in 2024 conducted by Scottish Trans, which appears to be an organisation Mx Valentine is a member of from the use of the words "we conducted" in relation to the survey and report. That focussed on the experiences of some trans people in relation to crime, or harassment and abuse, including in public toilets. Whilst the circumstances of the events between the claimant and second respondent are relevant we did not consider that the results of such a survey, which is not suggested to be an academic study with the controls one normally expects to see, are reliable as evidence before us.

1056. There was reference to a number of other studies in the written witness statement, which included Scottish Government internal research from

November 2019, which included the comment that "No evidence was identified to support the claim that trans women are more likely than cisgender women to sexually assault other women in women-only spaces. This lack of evidence is reiterated by other sources." It was however a literature search of existing publications, which appeared to produce thirteen documents under the heading "references" some but not all of which were in the Supplementary Bundle.

1057. Whilst the conclusion of no evidence may be controversial, given the reliance by some on the Dhejne and others report to which reference is made above, that the Scottish Government (or those acting on its instructions) had not identified evidence did to a very small extent support the view we formed that there was insufficient evidence led before us in a manner we could accept to make a positive finding of fact, although that conclusion would have been reached had Mx Valentine's evidence not been before us. For very largely the same reasons as for the evidence of Ms Forstater, albeit from the other end of the spectrum of views between gender critical and trans supporting beliefs, we did not regard the evidence of Mx Valentine to be sufficiently reliable to make positive findings in fact, nor did we consider that the case of ***Connor*** was applicable for the same reasons as given in respect of Ms Forstater.

1058. There was reference to a number of international documents in relation to gender identity. It was not clear to us on what basis those documents would be of assistance to us in our determinations. We must apply the law as we find it to be. We do not make that law. It did not appear to us that those documents were an aid to construction of the legislation before us.

1059. The confirmation part of the witness statement was not the same as the Statement of Truth given by Ms Forstater. Mx Valentine had amended the standard wording to reflect perhaps a different view of what the purpose of the statement was. It has a confirmation section commencing:

> "I understand that the purpose of this witness statement is to present the findings and conclusions of my research. This statement is based solely on my professional knowledge, experience, and the research I have carried out. I have not been asked or encouraged by anyone to include in this statement anything that is not, to the best of my ability and understanding, an accurate representation of my research, findings and conclusions."

1060. The solicitor has provided written confirmation of compliance with the Practice Direction notwithstanding the difference of terminology used between the statement and the terms of that Direction. There is in our view no warrant for doing so within the terms of the Direction itself. The amended wording does not comply with the Practice Direction to which we now turn.

The role of a skilled (expert) witness and the Practice Direction

1061. The comments about the wording of the Statement of both of those witnesses in our view highlights an issue in regard to the evidence presented by them. The Practice Direction excludes from its ambit evidence from an expert witness, such that for those witnesses the terms of the Direction would not necessarily be appropriate. But these two witnesses have not been presented as expert witnesses.

1062. Rule 41 states inter alia that rules as to admissibility of evidence do not apply in the Tribunal. The overriding objective includes dealing with a case fairly and justly, and avoiding unnecessary formality. We were however concerned that what was presented initially as two witnesses giving evidence of fact in the form of research papers, governmental studies and other material of a similar nature were to a material extent giving their opinions, providing selective material to support their views on matters related to sex and gender, and to a material extent purporting to act as if skilled or expert witnesses (skilled being the term used in the case in the Supreme Court referred to below, and expert being the term used in English cases, although the term is also used in Scotland).

1063. The EAT has addressed the issue of expert evidence in Tribunals. In England the Civil Procedure Rules ("CPR") have detailed provisions on experts, including that the evidence is permitted where reasonably required to resolve the proceedings, that it requires the approval of the court, and in many cases there may be a requirement to instruction a single expert jointly. The EAT has applied principles from the CPR to proceedings in England and Wales such as in ***De Keyser Ltd v Wilson [2001] IRLR 324*** and ***Morgan v Abertawe Bro Morgannwg University Local Health Board [2020] ICR 1043*** in which it held that it was appropriate for the Tribunal to apply the test in Rule 35.1 of the CPR when considering whether to grant permission to lead expert evidence.

1064. The CPR do not apply in Scotland. The rules of procedure in the Scottish civil courts are materially different, and for example there is no requirement to seek court authority to lead skilled witness evidence in the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, although as a matter of practice the court can exclude proposed evidence if not relevant to the issues before it.

1065. We consider that a Tribunal in this jurisdiction should have regard to the Supreme Court decision in ***Kennedy v Cordia Services LLP 2016 SC (UKSC) 59.*** That the law in the two jurisdictions is different in this respect was commented on in ***Tesco Stores Ltd v Element and others [2025] EAT 26*** in which the EAT distinguished ***Kennedy*** in an appeal from an English Tribunal on the basis that it was not binding in England and Wales as it was a Supreme Court decision in a Scottish appeal. The EAT in that

case derived assistance from the CPR and related authority. In our view, taking an equivalent approach, an Employment Tribunal in Scotland derives assistance from ***Kennedy,*** rather than cases such as ***De Keyser*** and the provisions of the CPR***.***

1066. In ***Kennedy*** Lord Reed and Lord Hodge gave a joint speech which included explaining the differences in procedure between the two jurisdictions, and addressed the law in Scotland in regard to such evidence. The speech included the following:

> "Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue. An example of such evidence in this case is Mr Greasly's [the skilled witness for the pursuer] evidence of the slope of the pavement on which Miss Kennedy lost her footing. There are no special rules governing the admissibility of such factual evidence from a skilled witness.
>
> Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject-matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact……."

1067. The following extracts are also we consider relevant:

> "….. a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent……

> An expert must explain the basis of his or her evidence when it is not personal observation or sensation…….expert witnesses cannot usurp the functions of the jury or judge sitting as a jury…..
>
> The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence…….
>
> If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible…..”

1068. Whilst that case was about the admissibility of evidence in civil proceedings, and the Tribunal considers matters through the lens of the 2024 Rules of Procedure, we consider that the guidance from those remarks is strongly persuasive. Whilst the claimant argued that Ms Forstater was not presented as an expert witness, in our view that is essentially what she was doing. She was giving evidence on matters of opinion dressed up as matters of fact. They were not what she had done herself, or had seen or heard others do or say. The respondents similarly appeared to argue that Mx Valentine was not an expert witness but had been led in response to the evidence from Ms Forstater.

1069. In ***AW v Greater Glasgow Health Board [2017] CSIH 58*** the Inner House addressed the issue of expert evidence and how it is to be assessed. The context was a claim of clinical negligence pursued in the Outer House. It included the following comments:

> “Expert evidence is never evidence of primary facts; it invariably proceeds on versions of the primary facts, sometimes including matters of inference, that are derived from the evidence of the witnesses of fact. The task of the expert is to assess that primary evidence and come to a view as to certain specific matters that are relevant to the outcome of the litigation……In every case however the views of the expert witnesses as to the application of a legal test are not binding on the court. Instead the judge must evaluate the expert evidence as a whole…..
>
> In evaluating expert evidence, both a judge at first instance and an appellate court are in our opinion entitled to apply ordinary standards of logic and common sense……That will frequently involve consideration of literature in the field, but that literature must itself be scrutinized carefully to discover how soundly it is based and to determine whether it is indeed relevant to the particular case under consideration…..

[after referring to two cases one of which was ***Kennedy]*** in assessing expert evidence courts should have regard to the explanations that are given for the views advanced, rather than to the mere fact that a view is widely held, or the apparent distinction of the person expressing the view. Critical assessment of the reasoning underlying expert evidence, and of the premises on which it is based, is essential."

1070. That is in our view guidance on how such expert or skilled evidence where presented should be assessed that is relevant in an Employment Tribunal, and importantly emphasises that even with such evidence critical assessment of it is necessary. That applies in our view with even more force where the evidence does not meet the ***Kennedy*** criteria.

1071. The evidence of both witnesses we considered not to be reliable, and did not assist us (save for one aspect), for the following reasons:

(i) There are only two categories of witness, those who are skilled or expert, and those who are not (sometimes called ordinary witnesses). That is clear from ***Kennedy,*** and the comment in Walker. It is in our view of no weight for these witnesses to give evidence of opinion as if they were expert, as the Supreme Court held above in the phrase commencing "unlike other witnesses". There is no third category of research witness. Whilst these are provisions from the civil courts, it appears to us that they also apply to evidence before the Tribunal under the overriding objective.

(ii) We were not satisfied that either witness had the necessary knowledge or experience such that their evidence was of assistance to the Tribunal. Ms Forstater had a degree in agriculture. Mx Valentine's academic or professional qualifications were not given.

(iii) Neither witness was impartial, on the contrary each was highly partial and had taken a clear position on the issues of sex and gender reassignment and matters related to those issues being considered.

(iv) We did not consider that we had evidence that there is a reliable body of knowledge or experience to underpin the evidence either gave. The review of the Supplementary Bundle indicated to us that there remains a dispute over the entire area of what may be summarized as the gender critical debate. Statistics are disputed. At times they are simply unclear, for example whether a trans woman was included within categories of male or female and if so which of those. Much of the material is from countries outwith Great Britain, and the extent to which the conditions in those countries is or is not broadly equivalent to those in Great Britan not clear. Some

of the material is far from recent. Where there are governmental statistics or similar the concerns are of course alleviated but the same concerns over the lack of clarity of the data and what each category does nor does not include remains, as does what if anything to infer from such data. Although a decision in the context of the criminal law, where the underpinning is not sufficient the evidence is not reliable: ***Young v HMA [2013] HCJAC 145.***

(v) It is possible that part of the evidence could have been relevant for certain issues such as in relation to indirect discrimination. But in that context we did not consider that any of it was sufficiently clear and reliable as to be a proper basis to make a finding in fact, for example on the issue of group disadvantage as we address below. Material from Ms Forstater's organisation and the surveys it conducted was in our view obviously liable to be materially distorted by those liable to be responding to questions raised, who were more likely to support its aims and objectives, such as not to be reliable as an indicator of views held in the population at large, and the female population specifically, and it had no bearing on the groups of staff relevant for PCPs 1 and 2 as we address below more fully.

(vi) The evidence does not meet the critical assessment test referred to by the Inner House. Much of it is by way of assertion of a view. There is a wholescale failure to provide clear and convincing argument to support the views expressed. The evidence was on matters far removed from those which relate to events participated in by the witness, or from what they had seen or heard. Such opinion evidence is regularly given in Tribunals by those who are not expert or skilled in the legal sense, for example on whether what had happened amounted to gross misconduct, or whether the penalty of dismissal was reasonable. Doing so is evidence which the Tribunal can and does regularly consider, but in no sense is bound by. The matters in respect of which these witnesses gave their evidence however is not of that kind.

1072. The Practice Direction on the use of written witness statements in Scotland states that the evidence of the witness [after addressing more practical matters] should only be "about matters of fact of which the witness has personal knowledge (which can include what they were told by another person) that are relevant to the issues to be determined at the hearing."

1073. In our view they were each not giving that form of evidence from their personal knowledge. The use of the word "personal" in our view is significant in this context. Paragraph 29 sets out the requirement for making a statement, which includes with the following:

> "I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. This witness statement does set out only my personal knowledge and recollection, in my own words.
>
> I have not been asked or encouraged by anyone to include in this statement anything that is not, to the best of my ability and recollection, my own account, in my own words, of events I witnessed or matters of which I have personal knowledge. ,,,,,"

1074. Ms Forstater's evidence went far beyond such constraints, as did Mx Valentine's who also did not apply the wording from the Practice Direction but an amended version of it which is not consistent with it. A material part of the evidence of each of them appeared to the Tribunal to be more suited to consideration in a political or other forum. Whilst therefore the Tribunal considered the evidence given, including spending very lengthy periods of time reading and considering their written statements, Ms Forstater's oral evidence, and the contents of the Supplementary Bundle with its additional documents, it came to the conclusion that the evidence of each and of the documents within that Bundle did not assist it in determining any of the issues, save in so far as reference was made to government statistics or reports.

Answers on the issues

1075. The Tribunal dealt with each of the issues identified by the parties as follows, with some changes in the wording from the list of issues drafted by the parties as explained below:

Harassment under Section 26 of the Equality Act 2010 ("EqA")

(i) Did R2, when using the female changing room on the three occasions referred to at paragraphs 7,9 and 12 to 15 of the Form ET1 Paper Apart, engage in unwanted conduct relating to the relevant protected characteristic within the meaning of S.26 (1) EqA?

1076. The issue as framed by the parties uses the word "the" and not that of "a" prior to protected characteristic. The section uses the latter, and the issue is amended to that effect. The protected characteristic relied on is sex. That for belief is addressed separately below.

1077. There is no dispute that the second respondent used the female changing room on three occasions when the claimant was present and aware of the second respondent being there. To the extent that there is a dispute that the act of the second respondent entering and using the female changing room to change clothes was unwanted conduct from the perspective of the claimant, as she considered the claimant to be a male person not entitled to use the female changing room, that it violated her dignity and

she felt intimidated and embarrassed by that happening, we accept the claimant's evidence on that.

1078. The next issue in dispute focusses on whether the use by the second respondent of the changing room was related to a relevant protected characteristic. That issue starts with consideration of whether the question is the sex of the claimant, that of the second respondent or simply the protected characteristic of sex in more general terms. It appeared to us that the statute made sense only if it was the third of those possible meanings, as the section uses the indefinite article. That is in our view the import of the Supreme Court decision in ***FWS,*** particularly in paragraph 255

1079. The protected characteristic of sex is defined in section 11 as a reference to a man or a woman. "Related to" is a term of wide import, but not without limits, as the review of authority above sets out. The case law does not always reveal a clearly consistent pattern, but to emphasise that it is an area where context and the facts and circumstances of the case are particularly important. We have concluded that the use of the changing room by the second respondent when the claimant was also present was unwanted conduct related to a protected characteristic, sex, for the following reasons:

(i) Sex is a binary concept, with all persons either female or male under the 2010 Act, and the claimant and second respondent did not share sex on that binary.

(ii) The incident was within the female changing room, which the claimant had a reasonable expectation of being able to use with female members of staff from the sign on the door unless others had been permitted to do so by the first respondent lawfully under the 2010 Act.

(iii) Permission was given to the second respondent as the second respondent was a trans woman, identifying as a woman, and the second respondent acted on that permission.

(iv) The claimant and those within it used the space primarily for changing their clothes. They were on occasion in a state of partial undress.

(v) The bodies of males and females are different, each sex sharing the same physiological attributes with those of their sex save for extremely rare exceptions.

(vi) The claimant considered the second respondent to be a male person from visible appearance, and had a reasonable basis for that belief.

(vii) There was no evidence of the second respondent's physiological attributes of sex being other than male.

1080. This issue, as modified, is answered in the affirmative.

(ii) Did R2 engage in unwanted conduct of a sexual nature within the meaning of S.26 (2) EqA in using the female changing room on the three occasions referred to at paragraphs 7,9 and 12 to 15 of the Form ET1 Paper Apart?

1081. In our view there was no evidence that we accepted that could constitute conduct of a sexual nature. The words "sexual nature" are not defined in the Act. There is some limited assistance from the Code. Sexual harassment requires in our view some sexual element to the harassment, not just the protected characteristic of sex under section 11. It connotes an element of sexual gratification or similar on the part of the harasser, and some form of perception of a sexual element to the harassment by the victim.

1082. On the first occasion the second respondent entered the changing room when the claimant was present the claimant was partly undressed, but there was no evidence we accepted that the second respondent did so on that or on the second occasion in any way that could be regarded as having given it any sexual element. There was no evidence of the second respondent doing so for any sexual purpose, on the contrary the clear evidence, which we accepted, was that the second respondent did so after the grant of permission, and in order simply to change before or after a shift. That was an entirely normal and unexceptional act, and had no sexual element to it of any kind.

1083. The claimant relies on the second respondent's removal of clothing as she perceived it to be in relation to the third occasion on Christmas Eve, but we did not consider her evidence on that reliable. The second respondent was fully clothed throughout their exchange, having changed into casual clothing before it commenced. The second respondent latterly put on a jacket, but that does not in our view affect the analysis. The factual basis of this claim is not established. There was nothing of any form of sexual element in the exchange between them, and in so far as the claimant considered that there was her perception to that effect was we considered not reasonable. As she was aware, the reason for the second respondent's presence in the changing room was the permission granted by the first respondent to someone with the protected characteristic of gender reassignment. In so far as clothing had been or could be changed that followed from that permission.

1084. To the extent that the claimant had the perception that the harassment was sexual, that perception was not in our view reasonable. This issue is

answered in the negative and the claim under section 26(2) is therefore dismissed.

(iii) If the answer to questions 1 or 2 above is 'yes', did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her pursuant to section 26(1) (b) and (2) (b) taking into account the matters set out at section 26(4) EqA?

1085. We considered that the evidence is clear that the second respondent did not have as a purpose creating the form of environment referred to in the section. The claimant alleged that that was indeed the purpose, but we rejected that. The second respondent's purpose was simply to live life in the sex and gender that the second respondent identified as having. Nor did the first respondent have such a purpose when granting the permission it did. Its purpose was compliance with the general policies on equality and diversity, as Ms Bumba and Dr Searle understood them.

1086. The next question is whether the second respondent accessing the female changing room on the basis of the permission given by the first respondent had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment. The question of effect does not depend to any extent on the motive of the person alleged as the harasser.

1087. On this point, as to violation of dignity or creating the environment referred to, as outlined above we considered that the evidence of the claimant as to her own perception was credible and reliable. Her view was that she was sharing a changing room, in a state of partial undress on 25 October 2023, with someone she regarded as male, and that doing so violated her dignity, and was intimidating for her. It was supported by the fact of the informal issue she raised with her line manager which she did shortly after the first incident, and the message sent not long afterwards to her friend. Her comment to the second respondent at the Christmas Eve incident was that she found the second respondent's presence intimidating. Although she said that she would raise the matter formally, she did not in fact do so by internal grievance, and instead raised a Claim at this Tribunal. She told her family that there had been an incident later on Christmas Day 2023, and their evidence supports her own evidence as to the feeling of intimidation and distress from that incident. The evidence was not that she was scared, however.

1088. The claimant's reaction to the second respondent being in the female changing room was we concluded genuinely one of a sense of violation of dignity, and of intimidation in circumstances of embarrassment and also in the context of her having suffered what she considered to be sexual abuse when a teenager, which created the kind of environment that falls within the section. It was not of the minor or trivial extents that are to be

excluded from protection. Whilst embarrassment is not within the statutory terminology of the Act it is relevant to the assessment of the impact on the claimant. There is some support for the claimant's position from the Supreme Court comments in ***FWS*** that many women might reasonably object to the presence of a trans woman in the changing room. Had the claimant only felt embarrassment that in our view would not have been sufficient, but it went beyond that so as to fall within the terms of the section.

1089. We then considered the other provisions of section 26(4), which are the other circumstances and the reasonableness of the claimant's perception. The claimant's principal written submission argued that what the second respondent had done was "persisting in invading what should have been a female-only space in the teeth of C's clear discomfort….." We did not consider that to be an accurate description of matters. The second respondent had permission to use that space. There was no invasion of it as it has been characterised. The claimant had previously avoided using it at the same time as the second respondent but that we consider was properly taken by the second respondent as how the claimant wished to deal with the matter. The claimant did make her discomfort about that known at the time of the Christmas Eve incident, but raising it with the second respondent not the first respondent who had granted the permission was not the appropriate way to do so as addressed above, and in light of the manner by which she did so the second respondent had little practical option other than to engage with her. The second respondent did so in a manner we consider unobjectionable in all the circumstances.

1090. We have held above that the first respondent has not discharged the burden of proof that the continued grant of permission was the least intrusive measure and an appropriate balance of the rights and interests of the claimant and respondents for the period from 16 September 2023 to the return to work on 14 April 2024. What the first respondent did, after the matter was considered including how to manage shift patterns, was to find a solution, which was that the claimant and second respondent did not work on shifts that crossed over.

1091. In light of all the circumstances we have concluded that the claimant's perception of harassment from the second respondent using the changing room, because of the permission given, on 25 October 2023 and over Christmas Eve that year was reasonable in so far as it relates to the first respondent's grant of permission. The perception of harassment that is reasonable in our view arose from the first respondent not meeting the ***Bank Mellat*** tests.

1092. For the dates arising before and after that period the claimant's perception of harassment was we consider not reasonable under that sub-section. The grant of permission for the reasons given above did meet those tests.

The claimant did not suffer personally any violation of dignity or intimidation or similar for the period after the return to work. Putting it simply she and the second respondent were not from that point on in the changing room together, and there was no realistic prospect that they would given the changed rotas. To the extent that the claimant had the perception that permission should not be given to the second respondent to use the changing room even when she would not be present in it and that that was harassment of her under the section, her perception we regarded as not reasonable. The section concerns harassment of a person, not the harassment of others, in our view. It is an individual matter. The claimant was the only person complaining to the first respondent, and her complaint had at that point been effectively addressed in our view.

1093. So far as what the second respondent did on those two dates (25 October and Christmas Eve 2023) is concerned in our view there was nothing said or done (beyond acting on the permission given by entering the changing room) by the second respondent during either of the incidents that would cause a reasonable person to feel harassed within the terms of section 26. The second respondent responded to the claimant's comments during the Christmas Eve incident in an appropriate manner, acknowledging the concerns expressed by the claimant, and stating that there were other processes to address them. There was no actual threat to the claimant's safety from the second respondent being present, and the second respondent did not act in any way which would give the claimant reasonable cause to consider that there was. In her evidence she accepted that she had not felt scared at the time.

1094. The claimant argued that the second respondent could simply have left, and that latterly the second respondent was nearer to the door so could do so. In our view that is not a reasonable interpretation of what happened. The claimant initiated the conversation, pursued it, continued to contradict the second respondent, and did not until the very end accept the comment that this was not the time or place to raise the matter. In our view that did not give the second respondent a reasonable opportunity to leave without, as the second respondent said in evidence, that then being raised as a failure to listen or similar.

1095. The claimant also argued that the second respondent being a male was a greater threat to her than a biological woman would be. We did not consider that such a perception was reasonable if it had been held. There had been nothing done or said by the second respondent on any of the interactions between the claimant and second respondent about which we heard evidence that could give anyone in the claimant's circumstances a reasonable perception of there being a threat to her safety. In any event, it was we considered contrary to her in fact having such a perception that she delayed making any comment until after the other two staff members had left and waited deliberately until the second respondent came out of

the cubicle. The claimant could simply have left the room, or entered the other cubicle which was vacant, had she genuinely had any sense of lack of safety. That she did not do so indicated to us that she did not feel a sense of threat from the presence of a male as her submission sought to characterise it.

1096. We address further below the issue of the second respondent's liability in law. For the reasons given above, and below in relation to the second respondent, we answer this question in the affirmative in relation to the first respondent to the extent set out above, and otherwise in the negative, including in the negative in relation to the second respondent.

(iv) Is the claimant's objection to R2's use of the female changing room an aspect of her protected belief?

1097. The evidence was clear that the claimant did object to the second respondent being present in the female changing room and that that was a part of her belief, which is described by the shorthand of gender critical or sex realist. The issue in law however is whether the use of the changing room by the second respondent was related to the claimant's protected characteristic of belief, which is addressed in the issue below. To the extent however that this issue is relevant, it is answered in the affirmative.

(v) Did R1 engage in unwanted conduct relating to the claimant's protected gender critical belief and in the case of (f) also, or alternatively sex) by:-

a) Placing her on special leave on 30 December 2023;

aa. Making her the subject of the emails referred to at 15A and 17A of the ET1

b) Suspending her on 4 January 2024;

bb. Referring her to the NMC on or around 5 January 2024 and telling her colleagues that she had been referred to the NMC as described at 17A of the ET1

c) Treating R2's complaint as meriting a disciplinary investigation;

d) Continuing her suspension on 2 February 2024;

e) Seeking to persuade her, at a meeting on 7 March 2024, to return to a different workplace from the Victoria Hospital;

f) Refusing to guarantee that men or R2 would not be permitted to use the women's changing room in its A&E department;

g) Extending her suspension pending agreement on the shifts that she was to return to;

h) Insisting that she must return to work initially on day shifts in order to enable her interactions with colleagues and patients to be supervised by senior staff;

i) Intimating, on 28 March 2024, that part of the investigation related to an allegation about the care of patients;

j) Failing to progress the disciplinary investigation with reasonable promptness; and

k) Prohibiting her from discussing her legal claims/issues of concern in the workplace.

1098. We shall consider whether the first respondent has established that the detriment in each case was not related to the claimant's belief, but the impermissible manifestation of belief. It is we consider most convenient to answer that point at this stage rather than as the first respondent proposes in the amendment to the List of Issues, although it is largely a matter of placement in the list.

1099. In addressing this question ***Higgs*** has made clear the distinction between manifesting beliefs permissibly, and doing so impermissibly or as otherwise described objectionably. There is a reasonable degree of latitude in manifesting beliefs. Constraints on doing so must not be so great as to deprive a person of the ability to do so. It is only where the manner of manifesting beliefs is objectionable to a sufficient extent that it is necessary to protect the rights of others that it is not protected. Where the line is to be drawn between that which is permissible and that which is objectionable depends on all the circumstances.

1100. The court gave a warning that the Tribunal requires to be alert to cases where the reason advanced by the employer for the treatment of the claimant hid the true reason of a mindset against the belief held. That in essentials is what the claimant argued, which was that her belief was regarded as heretical and so contrary to those of the first respondent in promoting the rights of trans persons within the context of its equality and diversity policies that she was punished for expressing them. This was said by the Court of Appeal:

> "It is worth clarifying one point that came up in the submissions before us. There will be cases where the treatment complained of by the employee was ostensibly on the ground of conduct which manifested a religious or other belief but where it is found that the real reason was an animus against the belief in question. Such a finding may be straightforwardly because the employer's account of its reasons is disbelieved; but it may also be because, as I put it in McFarlane v Relate Avon Ltd [2009] UKEAT 0106/09/3011, [2010] ICR 507, it is in the circumstances of the particular case

> "impossible to see any basis for the objection other than an objection to the belief which it manifests" so that "[the employer's claim] to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference" (see para. 18). Neither kind of case is in truth a manifestation case at all, because the employer is motivated simply by the fact that the employee holds the belief. In a manifestation case proper the employer genuinely has no objection to the employee holding the belief and is motivated only by the conduct which constitutes its manifestation. Most claims of discrimination on the ground of religion or belief are likely to be genuine manifestation cases of this kind."

1101. In addition to the onus falling on the first respondent following the analysis in ***Higgs***, there are evidential reasons for the onus to fall on the first respondent which we consider require to be taken into account in assessing whether or not the onus is discharged. That arises from

(i) the first respondent's substantial breaches of the document order, and the late provision of a large number of relevant documents

(ii) prejudgment of the matter by Ms Davidson in her emails to the second respondent, she being for a period the investigator,

(iii) prejudgment of the allegations by a large number of the first respondent's other employees, many of them senior managers to whom the complaints or one of them were sent, who indicated support for the second respondent before any investigation of the allegation had been undertaken

(iv) the manner in which the allegations of patient care were addressed, in particular that they were not articulated in the investigation process initially, were mentioned for the first time by Ms Myles in a different context, and had at best for the first respondent little evidential base at any stage

(v) the disparity between the messages to keep the second respondent informed of the investigation process as against the messages sent to the claimant to do so

(vi) what was submitted to the Tribunal in the early part of the Final Hearing to the effect that Ms Davidson was not the investigator which was not accurate,

(vii) breaches of the policy as to the investigation in not providing initially the details of the allegations made against the claimant, they not being provided until 12 April 2024 and then later changing, and the investigation not being conducted in a timely manner despite that being the term of the policy. That lack of timeliness included the delay from Ms Davidson being appointed investigator when she was involved in the earlier incidents and

clearly had a conflict of interest as she was a witness and had made or at least passed on a decision on the matter complained about by the claimant, that being known to Mr Doyle who in our view should have intervened early in the process to address that but did not, and he did not appear before us to explain that, and from the email from Dr Currer of 5 January 2024 which stated in terms that Ms Davidson should not conduct the investigation, Ms Davidson having been one of those to whom it was sent and there being no evidence from her that she did not see it as the first respondent did not produce that email timeously and she was not recalled,

(viii) The lack of support provided to the claimant after she raised her concerns on 26 August 2023. She was fully entitled to do so as stated above. Whilst Ms Bumba had given advice, and there appeared to be a fairly widespread similar view within the NHS both in Scotland and in England and Wales, it was or ought reasonably to have been apparent that the claimant was raising her own belief and arguing that the second respondent ought not to be given permission to use the female changing room. The claimant was not however given a clear response either initially or when she raised it again in October 2023, nor was anything put in writing. She was not given HR support, or referred to the policies with regard to the matter – including that for Equality, Diversity and Human Rights (EDHR). In reality her concerns were brushed off rather than being adequately considered and responded to. In our view the lack of support for the claimant was a failure by the first respondent. There ought to have been a timeous and more full response provided to the claimant, which included how else she could raise her concerns, with whom and how. She should have been spoken to by an HR officer of some kind, and given a copy of the grievance policy as well as the EDHR policy. Had that been done a more sophisticated process might well have taken place. The lack of support given to the claimant throughout does stand in stark contrast to the materially higher level support given to the second respondent after the Christmas Eve incident both by expressions of that to the second respondent and by being regularly updated on what was happening. The legal position is very far from simple. Ms Bumba is not a lawyer. Her advice was given in good faith. Ms Bumba was not however told of the full details of the claimant's complaint to Ms Davidson. Had she been told them we consider it more likely that she would have sought advice, either within HR or from the legal department. The first respondent is a very large organisation with about 10,000 employees. It is part of NHS Scotland which has a Central Legal Office, now acting for the respondents. The issue raised by the claimant was one that ought to have been recognised by the first respondent as a belief worthy of respect and considered in light of that. It did not appear to us that the first respondent did so.

(ix) the unreasonable length of time the process of investigation took as addressed separately.

1102. In our view the cumulative effect of these matters is reasonably heavy.

1103. We have found above that the claimant did in part manifest her beliefs in an impermissible way. We shall consider firstly whether the respondent has proved that the conduct in each case was because of that impermissible manifestation of belief, and secondly if so as the first two of the ***Bank Mellat*** tests are we consider established, then apply the measure and balance tests. We require to address each of the individual matters separately as each has a different context and circumstance.

a) Placing her on special leave on 30 December 2023;

1104. We consider that the first respondent has proved that this was undertaken solely because of what the second respondent had complained about, which in essence was that the belief had been manifested impermissibly. What was objectionable about the events was the language said to have been used by the claimant to the extent we have referred to above. Ms Curran gave evidence on this which we accept. She said that Mr Doyle had made the decision, and he did not give evidence, but we were satisfied from the evidence she gave to us on this point. We consider that at the very least there was sufficient for the first respondent properly to consider the second respondent's allegation as a serious one, which if true could amount to gross misconduct as bullying or harassment or both. Whilst the step of special leave was an unusual one, for which there is not basis in a written policy, it was taken because of the seriousness of the complaint made, and that it was at a time just after Christmas when advice from HR could not immediately be obtained. Doing so in our view met the measure test as no less intrusive measure would have met the objective and it met the balance test in the circumstances.

aa. The email of 29 December 2023

1105. The claimant reserves her position in light of ***Greasley-Adams***, and we therefore make no finding.

b) Suspending her on 4 January 2024;

1106. We consider that this was undertaken solely because of what the second respondent had complained about, said to be impermissible manifestation of the belief in effect, and was not related to the claimant's belief itself. The allegation was of a relatively serious level of what could, if true, be bullying and harassment causing a material level of distress. It could have been regarded as gross misconduct as we stated above. In essence it was also a complaint by the second respondent of a breach by the claimant of section 26 in relation to gender reassignment.

1107. There was a factual issue over whether a written risk assessment had been carried out or not before that suspension was decided upon. No written risk assessment was provided in evidence. It had been raised in

email correspondence with Ms Davidson, who suggested that it had been given to Ms Glancey, but Ms Sinclair-Forrow stated in a reply that there was a muddling up of that risk assessment with the checklist. On balance we concluded that the document had not been created, but that Ms Davidson had conducted a form of mental risk assessment and did genuinely consider that an issue of patient safety arose as part of her consideration of whether to suspend. We concluded that she wrongly thought that the checklist was the risk assessment.

1108. Precisely where those concerns as to patient safety came from was also not entirely clear. Her evidence was that it came from Ms Curran who had been told by Dr Searle, and that that was on 31 December 2023. Ms Curran's evidence did not support that, and she said that she was not at work that day. It did appear to us however that Dr Searle had been told of at least one occasion when the claimant had left a patient when the second respondent had appeared. It seems to us very likely that that allegation was verbally transmitted to Ms Davidson by Dr Searle in discussion.

1109. The material on which to base such a decision was scant. But there was a reference by the second respondent to an escalation of past behaviours which had been discussed with Dr Searle, there was also the potential, if the allegation were true, that a similar comment be made to a patient which had not been raised at that point with the claimant but we consider was likely to have been in the mind of Ms Davidson. That is supported by comments from HR in emails sent around that time.

1110. It is true that the issue of patient safety was not referred to in the meeting with the claimant, or in the letter confirming suspension sent to her, or the written reasons for suspension Ms Davidson completed, but on balance we have accepted Ms Davidson's evidence.

1111. With the benefit of all the evidence before us, and including that from the investigation, it is now clear that the alleged patient care matters that were historic at that point were not fundamentally ones of patient care. There was no direct evidence that established that patient care was adversely affected at all. The two matters were not raised contemporaneously, and the claimant was obviously prejudiced by being asked much later on about matters. When Ms Ashraf was asked as an independent witness the evidence was equivocal to an extent but did not support what the second respondent had said. The second respondent had said about the resus incident that no names of witnesses were known and appreciated that the allegation may not go further, and in the mobile phone had recorded that the missing patient incident was not one of patient safety. It is therefore not clear why there was a formal allegation as to patient care, rather than as one of not interacting with a trans woman, later during the investigation process.

1112. Given that the issue of patient care was part of the reason for suspension it is not clear why Ms Davidson asked the second respondent to provide a statement only about the Christmas Eve incident, and not also about the patient care matters. At that time she was acting as investigator, rather than as the decision-maker for the suspension with suspension having been decided on but as suspension was to be reconsidered under the policy we concluded that best practice was to find out as much as could be about it as early as possible. That that was not done was a matter we took into account.

1113. At the stage when suspension was considered there were no statements, no details in full, and her view that it was part of the reason to suspend are we conclude was genuine, and not affected to any extent at all by the claimant's sex or belief. It was we concluded essentially a prospective risk as to what may happen in the future. This is also not a binary matter – both Ms Myles and Ms Davidson, who was supported in her view by others including Dr Searle and others, can hold reasonable but different views on this. Ms Davidson and Dr Searle are medical practitioners. Those in HR did not agree with the decision, and gave advice it appears from the written material before us that was to the effect that suspension was not warranted, but the decision was not for HR.

1114. In all the circumstances we have accepted Ms Davidson's evidence on this, and concluded that the first respondent had proved that the decision was not because of the belief held by the claimant or her expression of it, but from the manner in which she had done so as was alleged, and the concern over patient care.

1115. The claimant also alleged that suspension needed a better excuse than the Christmas Eve incident, which could have been managed by avoiding the parties being on the same shift. That however was not the evidence of Ms Davidson, which we accepted.

1116. We considered whether a less intrusive measure might have been utilised which still met the needs of the first respondent but concluded that in light of the apparent seriousness of the allegations of bullying and harassment alone that there was not. HR had their view, but that is not determinative, and both Ms Davidson and Ms Malone were in our view entitled to believe that suspension was the only appropriate step. That was in the context that an investigation was required, the circumstances were not fully known but were believed to include the possibility of patient care having earlier been impacted to some extent, or may in future be affected if the claimant repeated what was alleged to have been said. Those were genuine views that had a reasonable basis at the time of the suspension decision. That meant that deciding how to proceed was not solely an issue of ascertaining rotas, but also considering what might happen if the claimant

was not suspended. We concluded that Ms Davidson acted in accordance with the balance test in suspending, given those circumstances.

bb. *The email of 5 January 2024*

1117. We understand that the claimant also reserves her position on this email. We therefore make no finding about it.

c) Treating R2's complaint as meriting a disciplinary investigation;

1118. The evidence was that Ms Malone decided that an investigation was required in view of the seriousness of the allegations. She believed that they could amount to bullying and harassment. We have addressed above that the complaint could, if true, amount to gross misconduct under the Conduct Policy, a breach of the Bullying and Harassment Policy, and amount to harassment under section 26, by the claimant. As the Supreme Court decision in ***FWS*** stressed, those with the protected characteristic of gender reassignment, such as the second respondent, retain protections against, inter alia, such harassment. That decision also endorsed the comments in ***Forstater*** that actions including use of non-preferred pronouns, and other actions might, dependent on the circumstances, amount to harassment. In essence that is what the second respondent claimed when raising with the first respondent what the second respondent alleged had happened. The allegation was materially more serious than one of misgendering given its terms. In our view given the allegations made it was obvious that an investigation was required and there is support for that general view, albeit in different factual circumstances, in ***Higgs***. We consider that the first respondent has provide that this was done solely because of what the second respondent had complained about as impermissible manifestation. Doing so in our view met the measure test as no less intrusive measure would have met the objective and it met the balance test in the circumstances.

d) Continuing her suspension on 2 February 2024;

1119. The sole reason for the continuation was that the claimant had not attended OH at that point. The first respondent had sought that to be satisfied that the claimant was fit to attend an investigatory interview. That was standard practice, and there was no connection with issues as to the belief the claimant had or the issue of manifestation. We consider that that suffices to determine that particular issue in light of those circumstances.

e) Seeking to persuade her, at a meeting on 7 March 2024, to return to a different workplace from the Victoria Hospital;

1120. We did not consider that there was anything proved in regard to this allegation – Ms Myles did not seek to persuade the claimant to return to a different workplace but mentioned that as an option, as was a matter of practice. The alleged act of attempted persuasion did not therefore occur.

In any event it was proved to be entirely unconnected to the claimant's belief. Doing so in our view met the measure test as no less intrusive measure would have met the objective and it met the balance test in the circumstances.

f) Refusing to guarantee that men or R2 would not be permitted to use the women's changing room in its A&E department;

1121. The first respondent did refuse to guarantee that men or the second respondent would not be permitted to use the female changing room. The claimant believed that the first respondent should have given that guarantee. From our analysis of the law above there is no legal requirement under the Act that all trans women be excluded, or that the second respondent be excluded, from such a facility at work. At this stage the issue is whether the refusal referred to was related to the claimant's belief, or her sex. It was neither. It was solely a decision based on the first respondent's view of how it should treat those with the protected characteristic of gender reassignment, such that they considered, and in principle could consider, that a biological male with that protected characteristic could be given permission to use the female changing room in appropriate circumstances, as could a biological female with the protected characteristic of gender reassignment in appropriate circumstances be given permission to use the male changing room.

1122. In our view the first respondent has proved that its decision was solely taken because what the claimant sought was not its understanding of the Act, on which we consider they were correct for the reasons given above (albeit that those are different reasons to those held by the first respondent at the time). This is therefore addressed separately as it is not a matter of belief or impermissible manifestation at all in our view, and even if it were, the decision met the measure test as no less intrusive measure would have met the objective and it met the balance test in the circumstances.

1123. In relation to the protected characteristic of sex, it was similarly a decision taken solely on the first respondent's view as to how to treat those with the protected characteristic of gender reassignment, and separately it was in any event not reasonable for the claimant to perceive the refusal as harassment under section 26(4) in light of the analysis of the law we have referred to.

g) Extending her suspension pending agreement on the shifts that she was to return to;

1124. We considered that the first respondent has proved that this was solely because of the claimant's impermissible manifestation of belief. There was a practical matter as to shifts that required to be addressed unrelated to the belief. Shifts for junior doctors were prepared in six monthly blocks, and were difficult to change. Those for nurses were prepared separately.

Whilst it took rather a long time there were not simple issues of rota planning to resolve between a nurse and doctor on different rotas managed differently, and a difference later resolved over whether the return on a phased basis would be on day shift or not. We accepted the first respondent's evidence on these matters. We did not have before us in the evidence all of the shifts of the claimant and second respondent for the relevant periods, essentially between January and April 2024 inclusive, but we consider that there was an obvious advantage of finding shift patterns whereby the claimant and second respondent did not work together and would not have a risk of coming into contact. Ms Myles was clearly doing her best to find such a solution, and to do so as quickly as was practicable. That was in circumstances where the only complainant was the claimant, and if the shift patterns could be made to work in that regard there was no risk of a repeat of the Christmas Eve incident. The step met the measure test as no less intrusive measure would have met the objective and it met the balance test in the circumstances.

h) Insisting that she must return to work initially on day shifts in order to enable her interactions with colleagues and patients to be supervised by senior staff;

1125. We considered that the first respondent proved that this was solely because of the impermissible manifestation of belief. We accepted Ms Myles' evidence as to this being to ensure that there was a member of the supervisory staff present with the claimant, which Ms Myles considered was partly for the claimant's benefit if any additional issue was said to have arisen after she returned to work, and partly to ensure that the return to work went without impact on patient care or other staff. It was in our view solely to manage the return to work in light of all the circumstances, which included the on-going investigation. There was no less intrusive measure that would have met the first respondent's needs in this regard, and it met the balance test in our view in the circumstances.

(i) Intimating, on 28 March 2024, that part of the investigation related to an allegation about the care of patients;

1126. Firstly it is the case that the allegations being discussed within the first respondent included ones of patient care, and that the message from Ms Myles was the first intimation of this to the claimant. The details of the allegation were not provided to the claimant until the formal letter calling her to an investigation sent later on 12 April 2024. The policy as to this is that the person complained about should have details of the allegations sent to them, and that that took well over four months is very surprising indeed. That should have been undertaken in early January 2024, either by Ms Davidson or someone else. HR should have made reference to this in their discussions with Ms Davidson. Ms Myles simply passed to the claimant her understanding of the matters being investigated, formal

notice of which followed later. The problem arose because the first respondent had not provided the claimant with notice that this matter was being investigated when the investigation commenced, which we consider to be a breach of the Investigations policy.

1127. Secondly as that was a matter under investigation it had the potential to impact on the arrangements to return to work although once the rotas had been managed in fact the claimant did return to work at the department. In our view it was proportionate for Ms Myles to pass this information to the claimant, not least as she had until then been unaware of it. The patient care allegations were at that stage part of what was being considered in the context of lifting suspension, and it was appropriate for the claimant to be aware of that so that she could make any comment she wished to. That was particularly relevant where she had been suspended, and that was to be reconsidered.

1128. It is however remarkable that that is how the claimant was informed of them. That is so not least as the claimant's solicitor shortly afterwards raised the issue with the respondents' solicitor, who agreed that the claimant was entitled to clarity. The respondents' solicitor does not appear to have given that clarity which in our view the claimant was perfectly entitled to ask for. No explanation for the lack of response to that request was given in the evidence. We consider that these further specific factors should be taken into account when considering whether the first respondent has discharged the onus.

1129. The claimant argued that neither respondent had any appetite for a thorough or effective investigation of the resus allegation as they guessed (first respondent) and knew (second respondent) that it was untrue. We did not accept that. We considered that it had been mentioned as part of the background, that there was a genuine belief that patient safety could be compromised by what was alleged, and there was a genuine if imperfect attempt to investigate it. The history of the patient care allegations appearing in the documentation is, as the claimant argued, far from consistent, but we have concluded that that was because of a less than competent process of investigation and not as a form of conspiracy. The allegations were not included in the letter of 12 April 2024. They were mentioned in a letter of 15 May 2024 but the claimant did not receive it. They were mentioned but not until July 2024, although the letter doing so is not specifically challenged by the claimant.

1130. The issue before us refers solely to the comment by Ms Myles on 28 March 2024, and not the later introduction of patient care allegations as a disciplinary allegation. In our view the lack of clarity over why that patient care allegation was mentioned then, and the circumstances we describe about including what was being discussed between those at the first respondent, at a time when Ms Glancey was formally the investigator but

had not it seems done very much if anything, means that the first respondent has not discharged the onus on it. We find that the first respondent has not proved that this was related solely impermissible manifestation and separately they have not satisfied the measure or balance tests, although the fault for that was not in our view that of Ms Myles. She was simply reporting what she was aware of, but when not aware of the terms of the investigation itself. We consider that for the claimant to have learned of this aspect of allegations against her in this manner was a detriment. On this matter we therefore find for the claimant.

j) Failing to progress the disciplinary investigation with reasonable promptness;

1131. The investigation was not conducted with reasonable promptness, and doing so was in essentials what the investigations policy required. We were not satisfied that the explanation for delay was as given by the first respondent, with time taken to identify who would conduct the investigation, then meeting a relatively large number of witnesses, coordinating diaries to do so, and finalising a statement taking considerably longer than could reasonably be justified. It accounted in our view for a part of the period but not all of it. We were concerned that the process took almost a year to complete, which was far longer than the Tribunal would expect given the circumstances of this case. The investigation was treated it appears to us as if there was no urgency, when there was. It should have been conducted far more quickly.

1132. In this regard we did not consider that the first respondent had discharged the onus on it of establishing that the reason for treatment was the manner of the manifestation being objectionable rather than the manifestation of the belief. We did not consider that the treatment of the claimant in this regard was proportionate. The first period is from 5 January 2024 to 29 February 2024 during which Ms Davidson was, but ought not to have been as had been recognised by at least some within the first respondent on that earlier date, the investigator. As noted above Mr Doyle appeared to us to have sufficient information to know that and ought to have intervened, and as he did not give evidence to us there is no explanation to the contrary.

1133. Ms Glancey took over on 29 February 2024. She had a holiday for about two weeks, but it was not in our view explained why it took until 12 April 2024 to frame the letter to the claimant commencing the process. That ought to have been done about three months earlier in our view from the terms of the policy.

1134. There was an apology for the time taken by the respondents' solicitor at around the time Ms Glancey took over, and again in the letter of 12 April 2024, but each was vague in what it described as the reason and from then it took a further period of over seven months. For issues such as

those in this case, and given the resources for an employer of the size of the first respondent, that requires a materially fuller explanation in our view. Neither in the letter to the claimant nor in evidence was that given.

1135. We simply did not understand the supposed reasons for all the time taken thereafter. It was in the context of the claimant's letter of claim on 15 February 2024 stating that her mental health was being impacted by the allegations. That is not a surprising matter to have raised. We did not consider that Ms Sinclair-Forrow's absences were sufficient to explain the delays, and in any event it was wholly unclear why another HR person could not have been brought in. There was a general lack of urgency in how matters were addressed by the first respondent despite that, and the various messages from the claimant's solicitor, as well as at least one indication of concern for progress from the first respondent's solicitor.

1136. The length of time was not in our view proportionate. In simple terms it was far too long, and was unreasonably so. There were not that many staff to interview, and the explanations for the delays involved were not we considered to be accepted. We appreciate that the context was an Emergency Department, that that was busy for all concerned, and shifts for those involved required to be worked around, together with the terms of the policy for conducting such an investigation but that does not explain all this unusually lengthy delay.

1137. This takes us to the allegation of a conspiracy against the claimant as she expressed a belief as to sex, essentially that a trans woman was not a woman, that the first respondent did not agree with which we addressed partly above. It was described by Ms Cunningham as that the claimant had an heretical view, which we took to mean one contrary to the stated aims in the EDHR policy and elsewhere both within the first respondent and the NHS more widely.

1138. We have come to the conclusion that there was no such conspiracy. We were concerned not just by the widespread failures to comply with the document order, but also that it was said to us that Ms Davidson had done in effect nothing of relevance in the investigation, and that documents not produced were administrative. In fact Ms Davidson was involved in the investigation until the end of February 2024 and a number of documents of obvious materiality were provided later. They included the email from Dr Searle on 29 December 2023 and the email from Dr Currer on 5 January 2024 referring to a small group including those who were witnesses, that the claimant had been referred to the NMC and passing information. Matters then took an unduly long period of time.

1139. We have concluded that this was an example of incompetence not conspiracy. If the first respondent had been seeking to punish the claimant as alleged, we do not consider it would have been handled in the manner it was – taking such a time to complete the investigation let alone

reaching a decision which was not disciplinary in character. Suspension was effected reasonably quickly on the basis of what was alleged, as is normal in such a situation, but was reviewed and reversed. Arrangements to return the claimant to work were made and acted upon. If there had been a desire to punish, the obvious way to do so was a swift investigation, a report, a disciplinary hearing and then a penalty of some form, which on the basis of the Christmas Eve incident had the potential to include consideration of dismissal. That such a course of events did not take place does not support the argument of a conspiracy in our view.

1140. The claimant argued that the only explanation for the long delays and periods of silence was turmoil over how to deal with the allegations and a stark tension between the need for a credible foundation for the suspension and the second respondent's interest in ensuring that the resus allegation was not the subject of a thorough investigation. We did not accept that. Ms Glancey gave an explanation for the delays and periods of silence. It was not objectively a reasonable explanation against the test of good practice, but it was honest. It took time to arrange HR involvement, and meetings with staff co-ordinating diaries, amongst other reasons given.

1141. The claimant also argued that the second respondent was involved in the conspiracy. In our view the second respondent was not, and the allegation is unfounded. The second respondent did not seek to prevent the investigation of the resus incident as was alleged. The second respondent gave information, and answered the questions about it. As stated previously it had been raised on 26 December 2023 with the BMA. The claimant argued that the second respondent had deleted notes on the mobile phone, but we did not consider that that had happened. We accepted the evidence of the second respondent on this. There was no evidence that that had happened in our view.

1142. There was clear prejudgment of the allegations by Drs Searle and Currer, and other medical staff involved, but they were not those who managed the investigation or suspension. Nursing staff did so, as would be expected given the line management structure. Ms Davidson and others did also engage in what amounted to prejudgment in the commentary, but ultimately Ms Glancey was the investigator, and we did not consider that she had prejudged matters.

1143. So far as the investigation is concerned our conclusion is that the first respondent has not proved that its unreasonable length was because of the impermissible manifestation, and we find that they have not met the measure or balance tests. Instructing someone other than Ms Davidson initially was clearly required as she had a conflict of interest having spoken to the claimant and intimated a response to her informal complaint, which would have saved about eight weeks of the delay, and concluding the

investigation in no more than six months was we consider the extent of delay that can be explained by the respondent. That takes account of delay at the claimant's request for the date of the investigation meeting with her to be changed. The period up to the production of the Investigation Report was materially longer than that. In our view it was unreasonable to that extent, and as the first respondent has not discharged the onus on it. On this matter we find for the claimant.

k) Prohibiting her from discussing her legal claims/issues of concern in the workplace.

1144. We considered that the issues raised were, as with most investigations conducted under disciplinary or grievance procedures, ones generally to be treated in confidence. Employers frequently seek to require those who are suspended not to speak with other employees for example, save perhaps with prior permission. The standard letter sent to employees about an investigation refers to the confidential nature of it.

1145. In practice employees in some situations do speak about such matters, both within and outwith work. In this case however matters were different to the norm, not least as the Claim Form had been presented by this point. Ms Harris acted on instruction from Ms Malone. She used the words from a standard letter in an investigation which referred to "the case". But the difficulty is that that context of investigation was not the only context in which that discussion took place. There had been various press reports about the suspension of the claimant [although not produced before us individually] which had been raised with the first respondent and discussed internally. The claimant may have been suspected as the source of those reports but that is not necessarily the case. They could have arisen from the claim made. A Claim Form is a public document (unless an order for privacy is made, which was not the case here).

1146. When the claimant was told not to discuss the case with colleagues that "case" could have been the investigation or the Claim. That ambiguity means in our view that the first respondent has not discharged the onus on it. In our view the fault for that is not Ms Harris, who was one of those asked to pass the message on, but those who framed that message. We consider that care was required given the circumstances of the Claim being commenced.

1147. The claimant told Ms Harris that she had been seeking to find support for her case when she involved the media. She is entitled to do so, although we noted that that did not bear fruit in the form of any witness who was called before us.

1148. There was not so much a "prohibition" as an instruction, but we have concluded that the first respondent has not discharged the onus on it and it was not the least intrusive measure for the period from 3 July to 22 July

2024. We consider that that does amount to a detriment. The claimant's solicitor had raised the issue, and on the latter date the first respondent's solicitor confirmed that it related solely to the investigation. At that point the ambiguity ceased, and from then onwards both the measure and balance tests were met. For that initial period accordingly we found in favour of the claimant.

(vi) If the answer to any of the questions at the subparagraphs of 5 above is yes, did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her pursuant to section 26(1) EqA having regard to the matters set out in section 26(4)?

1149. In respect of the length of time for the disciplinary investigation we did consider that the conduct had the effect required by the Act, in particular it created an hostile environment, and her perception of that is in our view reasonable in all the circumstances for the period given above. The reference to patient care did also cause an hostile environment and the claimant's perception of that was reasonable. An allegation as to patient care has the possibility of a reference to the NMC, and an impact on future career. Finally the message conveyed by Ms Harris did create an hostile environment for a relatively brief period, as the claimant perceived it as an attempt to prevent her from discussing the claim with potential witnesses, who might share her beliefs, which was reasonable. These aspects we have concluded are all instances of harassment related to belief contrary to section 26 in light of these findings.

1150. In conclusion we have set out at paragraph 1 of the judgment our findings that the claimant was harassed by the first respondent in four particular respects, and that claim succeeds to that extent. For the matters that were alleged beyond those four aspects the claim does not succeed and is dismissed.

Direct sex discrimination (section 13 of the EqA)

(vii) In permitting R2 to use the female changing room, did R1 treat the claimant less favourably than it did treat or would have treated a male user of that room?

1151. Before addressing this issue as framed we noted that the claimant had pled direct discrimination also on the protected characteristic of belief. That did not feature in the List of Issues the parties had prepared, and nor did it feature in the written or oral submissions made on behalf of the claimant. We have concluded that the claimant has not pursued the claim in the basis of that protected characteristic, and it is therefore dismissed.

1152. We turn to the claim of direct discrimination on the protected characteristic of sex. Section 13 requires that the employer A "treats" B, the claimant,

less favourably than it treats or would treat others in order to be engaged. By giving the second respondent permission to use the changing room the first respondent did not treat the claimant in any such manner. In our view there was no evidence of treatment of the claimant as that term is to be understood in section 13. The claimant had not been required to use the changing room, or not to do so, for example. So far as there was treatment, it was of the second respondent when permission was given. That there was an impact on the claimant, as she claims, is in our view insufficient – that is a potential matter of indirect discrimination. Direct and indirect discrimination are mutually exclusive concepts.

1153. The facts of this care are materially different to the position in cases founded on by the claimant. In the first, ***Smith v Safeway*** (cited above), the respondent had introduced a policy on appearance, which was applied to the male claimant. There were parts of the policy applicable only to males, and other parts applicable only to females. That was a difference in treatment, with the treatment of the male claimant being application of that policy to him. His claim was refused on the ground that the policy was to be examined as a whole, and some differences of detail between men and women did not make it discriminatory. The following was said by the Court of Appeal:

> "There is an important distinction between discrimination between the sexes and discrimination against one or other of the sexes. It is the latter that is forbidden by the Sex Discrimination Act 1975. Discrimination is defined as being treated less favourably. In my judgment, this is plainly the meaning of discrimination in Directive 76/207, and the 1975 Act fully reflects that Directive. In many instances, discrimination between the sexes will result in treating one more favourably than the other, but this will not necessarily be the case. If discrimination is to be established, it is necessary to show not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other. That is the starting point of the reasoning adopted in *Schmidt* [1977] IRLR 360, and in my judgment it is plainly correct."

1154. The second is ***R (Coll) v Secretary of State for Justice 2017 UKSC 40***. That was a case pursued under section 29 of the Equality Act 2010 in relation to the provision of premises which have been approved by the Secretary of State under the Offender Management Act 2007. The case was one of judicial review, where it was argued that there was direct discrimination as the claimant had been required to live in approved premises situated far from her home, and that had she been male she would have been in premises closer to her home as there were far more of such approved premises for men. The treatment for her was being

required to live in such approved premises at one of only a few locations, which was to her detriment. Its facts and legal context are entirely different.

1155. The third is ***Miller*** (again cited above) where the issue concerned the toilet facilities provided to a female employee. Whilst there was a female toilet that was not always free, and in a case of urgency the claimant was required to use, with the respondent's permission, the male toilet. The treatment of the claimant was that provision which on occasion required use of the male facility, and "if the treatment is assessed as being the provision of toilet facilities that are appropriate to a person's requirements the analysis may differ." The treatment was inherent in the circumstances. Where that arises, and the case law in relation to that was referred to by the EAT in that decision, the mental processes of the respondent are not relevant. The issue of causation arises from the facts themselves (for example the lack of provision of a sanitary bin which is a matter only affecting female bodies not male bodies).

1156. In our view, the facts of that case are to be distinguished from those in this case. The changing room was not provided in a manner that involved inherently unfavourable treatment to a woman, as it had been in ***Miller***. What the claimant complains about is the permission to allow the second respondent to use it. If that permission had been to a male without the protected characteristic of gender reassignment that may have been an argument. But the second respondent does have, and did at the material time have, that protected characteristic and that was a matter that the first respondent required to take into account. It required a form of balancing between two or more protected characteristics as we have addressed. In the present case we did not conclude that discrimination was inherent from the circumstances.

1157. Finally the claimant refers to ***Abbas v ISS Facility Services Employment Tribunal case number 8000146/2023***. That is a decision of another Employment Tribunal and therefore not binding, but in any event it is apparent that the claimant there relied on the allegation that she was told to use the disabled washroom as there was no women's washroom on site. That was the treatment of her relevant for that case. It was held to be less favourable, following ***Miller***. In our view the facts of the present case are materially different. There was no treatment of the claimant under section 13. She was not told for example that she had to use the same changing room as the second respondent, nor was she required to use any particular facility, on the contrary other places to change were specifically mentioned to her on more than one occasion.

1158. To equate the permission given to the second respondent with treatment of the claimant is in our view to elide the separate definitions of direct and indirect discrimination. If the claimant were right, that distinction would be irrelevant, and we did not consider that would be consistent with authority.

We did not consider that this aspect of the test had been proved, and in the absence of such treatment of the claimant the claim under section 13 must be dismissed.

1159. Lest we were wrong about that we then considered the second aspect of whether the permission granted to the second respondent was because of the protected characteristic of sex. It was not. The sole reason for it was the second respondent's protected characteristic of gender reassignment. That is a different protected characteristic to that of sex, as the Supreme Court confirmed. On that basis alone we consider that the claimant's argument is to be rejected.

1160. We considered separately, again lest we were wrong, who was the correct comparator. What the detail of the relevant circumstances are is itself in dispute. The comparator could either be (i) a man in the female changing room as the claimant argued or (ii) a trans man in a male changing room, the trans man being a person who was biologically female, assigned that at birth, who had changed non-physiological attributes of sex to male to the same extent as had the second respondent to female, as the respondents argued.

1161. The comparator is under section 23 a real or hypothetical person who did not share the protected characteristic relied on whose circumstances are not materially different. The Supreme Court confirmed that in its decision in ***FWS*** at paragraph 134:

> "Where sex is the protected characteristic, a woman relying on section 13(1) must compare her treatment with the treatment that was or would have been afforded to a man whose circumstances are not materially different to hers; in other words a similarly situated man."

1162. The characteristic the claimant relies on is sex. The claimant is female. It appears to us to follow that the comparator is a person who does not share that protected characteristic, being a male, in essentially the same circumstances as the claimant was, which for a male was being in the changing room that was marked male staff only.

1163. To determine that further we considered what the relevant circumstances are. It appears to us that in this case they are centred around where there is a person with the protected characteristic of gender reassignment, the second respondent, who was permitted by the employer the first respondent to be present in the changing room of the sex or gender that the second respondent identified as having. That is the essence of the dispute in this case, and to ignore the protected characteristic which was why the second respondent was present in the changing room is to omit a material element. Were it not for the fact of gender reassignment the second respondent would not have been permitted to use the female

changing room by the first respondent. The permission was given solely from the first respondent's belief that the second respondent had the right to do so from having that protected characteristic.

1164. In such a situation it appears to us clear from the evidence that the first respondent would have treated the hypothetical comparator in the same way that it treated the claimant by granting the trans man permission to use the male changing room. We did not find evidence of less favourable treatment because of the protected characteristic of sex for that reason. It was because of the belief of the first respondent that a person undergoing transition can use the changing room that aligns with their identity.

1165. The identity of the correct comparator point was addressed in the claimant's submission by reference to ***R (Green) v Secretary of State for Justice [2013] EWHC 3491 (Admin)*** in which the High Court held, in a judicial review case which involved a trans woman in prison, that the only possible comparator was to a male prisoner who was not undergoing gender reassignment, as the claimant in the case was male, and the protected characteristic relied on was gender reassignment. A similar conclusion was reached in the County Court case of ***Haynes v Thomson and others, Claim no. K01CT207 1 August 2025.***

1166. Neither case relied on the protected characteristic of sex, and each is distinguished on that basis. Separately neither is binding on a Tribunal in Scotland in any event. The circumstances and context of those two cases are we consider entirely different to those before us. We did not consider those cases of assistance to us in our assessment of the issues we faced.

1167. In evidence and submission the claimant spent much time raising the circumstances of a fictitious person given the name "Pete", discussed above. In very brief summary, Pete had all the appearance of a male, described as a manly man, who entered the female changing room and refused to leave. It was suggested that such a person would rightly be told to leave by a female member of staff there, and the person's presence objected to.

1168. We did not consider that such a hypothetical person was a comparator for the purposes of the Act. If that person was a man by sex at birth, and had no genuine intention of undergoing gender reassignment but disingenuously said that he was as a ruse to enter the space for sexual or other gratification, that person is not within the definition in section 7 for reasons addressed above. That is a material distinction to the circumstances of the present case.

1169. It is possible that the hypothetical person was a trans man, having been assigned female and birth and then undergone gender reassignment treatment and surgery. Such a person is, under the Supreme Court decision in ***FWS,*** a female by sex, and on the claimant's argument entitled

to use the female changing room unless exclusion was objectively justified. If such a person did use the changing room the sharing of the same sex as the claimant means that the person is not a valid comparator for that claim. A comparator must not share the protected characteristic relied on.

1170. The claimant also put forward another comparator "Simon" who was a man who also had been using the female changing room. But the basis that person did so was not clear, and that clarity is important. If that hypothetical person had the protected characteristic of gender reassignment the analysis is the same as above. If the person did not there would have been no proper reason to use the changing room unless for an entirely different reasons such as to effect a repair, and if it was for improper purposes such as being a voyeur permission to do so would not have been granted by the first respondent. These are again material distinctions with the circumstance of the second respondent. We did not consider such a person to be a comparator under the Act.

1171. We did not consider from the facts found that there had been unconscious bias. It was not addressed in submission.

1172. For these reasons the claim of direct discrimination on the protected characteristic of sex fails and is dismissed.

(viii) If yes, was that less favourable treatment to C's detriment?

1173. This issue does not now arise. Had less favourable treatment been found it would have been held to be to the claimant's detriment. Her evidence that she found the presence of a person she considered male, as the second respondent was by sex under section 11, caused her to feel intimidated and embarrassed as addressed above, which we consider would fall within the definition of detriment set out above.

The onus of proof

1174. The list of issues did not directly address the onus of proof under section 136, nor was the list required to do so, but we address it for completeness. In any claim of direct discrimination the initial onus of establishing primary facts from which direct discrimination could be inferred falls on the claimant. In this regard we did not consider that the claimant had proved sufficient primary facts to do so.

Indirect discrimination on the grounds of sex (Section 19 of the EqA)

PCP 1 (permitting R2 to use the female changing room in R1's A&E Department).

(ix) R1 accepts that PCP1 is capable of being a PCP and that it adopted PCP1.

(x) Does PCP1 put women at a particular disadvantage compared to men in that they are deprived of a single-sex room in which to change?

1175. The Tribunal considered that issue (x) as framed is not correctly stated. For the purposes of the 2010 Act the second respondent has the sex of male, and was permitted to use the female changing room when not having the sex of female because of the protected characteristic of gender reassignment. The pool that is relevant for that matter we consider to be those female employees of the department who used the female changing room, not all women or all female staff of the first respondent.

1176. There was no specific evidence on the numbers doing so. Not all members of staff who might have, did – the evidence was that some nurses and all bar one of the consultants changed elsewhere. The position of Healthcare Workers and other support staff such as receptionists was not addressed in evidence. The position was therefore not clear from the evidence, and not fully addressed before us. The issue of how the female staff who use the changing room consider the permission given to the second respondent by the first respondent is not one where we consider that a view can be taken from judicial knowledge or similar. It is not a matter like childrearing responsibilities. Opinions differ, and the point is contested. That was clear from the evidence we heard, including that other staff did not make any form of complaint, and that other nurses did not share the claimant's belief as referred to above.

1177. We did not find that there was sufficient evidence of what is normally referred to as group disadvantage. The evidence that there was on that came from the claimant, who gave us a number of names of those she said had a similar view, but as addressed above none of whom gave evidence before us, and the numbers changed materially from initial evidence to her evidence on recall. There was very little direct documentary support from the social media group or other similar sources presented as noted above. The other evidence put forward for the claimant was Ms Forstater, but for reasons given above that is we consider not reliable.

1178. It was put to some of the first respondent's witnesses that the treatment of the claimant explained the lack of support. We did not consider that that was the position. Firstly the claimant named a relatively small number of staff. Secondly the documents produced to use that might support the claimant's views were very limited indeed. There were only a small number of social media or similar messages before us with any form of indication of support, and each was somewhat limited in what was stated. We consider that if the claimant had the level of support she claimed substantially more documentary evidence from social media groups or

otherwise would most likely have been capable of being produced, quite apart from a witness to speak to them.

1179. We considered the comments of Lady Hale in ***Essop***, which do not directly address the issue before us but which we consider assist in making clear that the group disadvantage requires that many within the pool have the potential to be disadvantage. How many is sufficient is not made explicit. The Code clarifies that it does not require to be a majority. The onus of proof falls on the claimant.

1180. It was not clear how many female staff used the changing room, as some did not, but inferring from the evidence we heard that the large majority did, that means that somewhere around 150 people did so from time to time. At best for the claimant, if her evidence is fully accepted, she proved that up to nine of those who might have used the said changing room supported her views to some extent. We did not consider that the evidence of something of the order of 6% of the pool would meet the requirement of there being "many" of the group.

1181. Even if it did, what is required is proof of disadvantage. Supporting the views of the claimant is not the same as suffering disadvantage. It might do, but equally it might be supporting her right to hold the belief that she does and to challenge the decision. What each person thought by way of personal disadvantage was in our view simply not given in the evidence from the claimant and as none were called what they thought and why could not be raised with them.

1182. We also took into account that there was no evidence of any complaint or issue experienced by any other female member of staff not only prior to the Christmas 2023 incident but also after the claimant returned to work.

1183. We further took into account the terms of ***FWS*** which to some extent support the proposition that women may be disadvantaged by an adult man being in the changing room. What was not clear however is the extent of disadvantage when the person in the room is a trans woman. There was no evidence we regarded as reliable on that aspect.

1184. Ms Bumba was asked about some of the issues relevant to group disadvantage. Her answers did not fully dispute them, but did not wholly concede them. They were that (i) men are on average bigger and stronger than women (ii) men are on average significantly more given to violence than women (iii) men are in particular much more given to sexual crime than women and (iv) men are in general a greater threat physically to women than women are to men.

1185. These propositions however fail to address the issue in this case which is that the second respondent has the protected characteristic of gender reassignment, is living in the female gender as has been described, and

doing so is a part of Article 8 rights, and rights under the ETD. Those factors are behind the first respondent giving permission to the second respondent to use the changing room. In our view it is not sufficient that the second respondent has the sex of a man for section 11 to constitute group disadvantage for the purposes of section 19. It is a matter that requires sufficient evidence, which in our view the claimant has not led.

1186. The claimant argued that disadvantage to women (which we take to mean female users of the changing room as discussed above) was clear "as a matter of inexorable logic". We do not accept that. It is a question of fact and degree, and as explained above the evidence we heard contradicted the claimant's argument with evidence of female members of staff not considering that there was a disadvantage.

1187. The claimant also argued that even if a single sex changing room was not required by law, the first respondent had chosen to confer that on its female staff and by allowing the second respondent to use it the effect was to withdraw that benefit from all the female staff who used the changing room. In our view there is a flaw in that argument. Not all female staff did consider it that way, as only the claimant complained, as we have described. The only evidence we heard from a witness on this directly was the claimant herself, and others who gave evidence contradicted her. In this regard the claimant is in our view seeking to speak for all female staff, but there is no evidence we regard as reliable entitling her to do so.

1188. As the detail of the claimant's evidence was hearsay when other witnesses might have been called, was so limited in extent and contradicted by other evidence, together with the findings as to credibility and reliability more generally made above, we did not find that the claimant had proved how many staff did share a disadvantage and on that basis dismissed the claim under section 19.

(xi) Did PCP1 put the claimant at that disadvantage?

1189. We considered this lest we are wrong on the former issue. It is clear that the claimant was disadvantaged by PCP1. She felt the upset and anxiety that we have addressed above. It was genuine as we have addressed above.

(xii) R1 relies on the aims of

(a) Protecting and upholding the rights of R2 under the HRA and the EqA,

(b) Promoting and upholding Diversity and Inclusion in the workplace; and

(c) Appropriate use and provision of available facilities in the workplace which the claimant admits are legitimate aims: is PCP1 directed to that aim?

(xiii) The claimant admits that this aim is legitimate

(xiv) Is PCP1 directed to that aim?

1190. In our view it is. That derives from Ms Bumba's evidence, supported by that of Dr Searle who did her own researches, and of Ms Davidson who again conducted some research of her own. It generally accords with the terms of the EDHR policy.

(xv) Is PCP1 a proportionate means of achieving that aim?

1191. For essentially the reasons addressed above when applying the ***Bank Mellat*** test we concluded that the first respondent has not discharged the onus of proof on it and therefore it was not proportionate for the period between 16 September 2023 and 13 April 2024. The test for section 19(2)(d) is not precisely the same as that in ***Bank Mellat***, as the former includes the concept of reasonable necessity as explained in authority, but in our view the two tests are very similar in impact, and the same outcome arises for this issue as for the analysis of the balance test, and for essentially the same reasons.

1192. The respondents asserted that blanket exclusionary policies (that a trans person must use the toilet [and changing room] of their biological sex regardless of the protected characteristic of gender reassignment) are likely to breach Article 8. But whether or not there is a breach of Article 8 depends on the facts and circumstances which include the rights of others. Each of the claimant and second respondent has a right to privacy and dignity under Article 8. The resolution of the conflict between those rights we addressed above.

1193. As the European Court of Human Rights put it in ***Goodwin***

> "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.'

1194. In this case, society includes the claimant and second respondent. It is appreciated that any decision means tolerating inconvenience, but that for the second respondent from our conclusion is in our view limited, the matter had latterly been resolved by changing rotas from the evidence before us, and in all the circumstances of this case we have concluded that the inconvenience was greater for the claimant than that which would

be required of the second respondent if permission was, or had been, revoked on an interim basis until rotas were rearranged.

1195. The Tribunal also considered the claimant's supplementary submissions of 13 and 16 October 2025. It sought to introduce evidence, albeit not evidence that she could have provided during the Final Hearing itself. The impact assessment is said by the claimant to be one in relation to the public sector equality duty, which is not directly raised as a claim by the claimant. As it was not within the evidence before us, we consider it not appropriate to consider the document. To do so would in our view require additional evidence to be led, that would involve further time and expense, and even if one of the parties sought that (which none has) that application we consider would not be within the overriding objective to grant. The lack of an impact assessment at the material time is a matter that the Tribunal can and has considered, and the supplementary submission does not in our view add to that. Even if one assumes that the assessment does state as the claimant suggests in her supplementary submission, in our view that does not decide the issue of proportionality as she claims. We did not therefore accept the supplementary submission.

1196. In all the circumstances we have concluded from the evidence before us that the first respondent discharged the onus of proof on it that the grant of permission was proportionate in the period of 2 August 2023 to 15 September 2023 and from and after 14 April 2024, in respect of which we answer the question in the affirmative, but not for the period 16 September 2023 to 13 April 2024. To that extent we answer the question in the negative.

PCP2 (permitting staff to use the changing room that aligns with their gender identity)

(xvi) R1 accepts that PCP2 is capable of being a PCP

(xvii) Did R1 operate PCP2?

1197. The first respondent pled that the issue was addressed on a case by case basis, and Ms Bumba and Dr Currer gave general evidence on that. There was however no evidence from the first respondent of what the other cases of trans staff were or how they had been dealt with. The evidence was therefore extremely thin in this regard. Ms Bumba's evidence was that a trans person of either gender had the right to use the changing room of the gender they identify with, provided that they had taken some steps towards their new gender, to paraphrase. Dr Currer said that there would be an assessment on the basis of balance of risk, any concerns by others, and where the person undergoing transition was on that process.

1198. It seemed to us that although there was not a written policy what PCP2 states was in effect what was done. It is what would have been the advice

and action had another case arisen, provided that the person in question has the protected characteristic of gender reassignment, such that that person is either a trans woman or trans man. It appeared to us to meet the definition of a PCP in such circumstances, as long as the person did have the protected characteristic of gender reassignment, such that having that protected characteristic is to be taken as the meaning of their "gender identity". On that amended basis the issue is answered in the affirmative.

(xviii) If the answer to question 15 is yes, did PCP2 put women at a particular disadvantage compared to men? Specifically:

(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 substantially more likely to be guilty of crimes of violence, sexual assault, indecent exposure and voyeurism than women?

(d) Do women generally feel taboos about physical modesty more powerfully than men?

1199. It appeared to us that the reference to question 15 (xv) is a typographical error and should be to issue 17 (xvii). This issue requires to be considered with a different pool to that in PCP1. The pool for PCP2 we considered must be all staff of the first respondent, of both sexes, excluding those who have the protected characteristic of gender reassignment. The pool was therefore all staff of the first respondent who were not either trans women or trans men. There was no evidence led on the details of that pool.

1200. We considered it helpful to follow the structure of the section. The first question is: did the first respondent apply the PCP to those within the pool with whom the claimant does not share the protected characteristic, and we considered that they did. It was a policy applied to all women and men.

1201. The second question is: did or would that PCP create a particular disadvantage for women within that pool in comparison to men? In this regard we considered it important that PCP2 did not simply allow all men to use the female facility, and all women to use the male facility. In each case the permission was only to be granted if they were trans women or trans men respectively. It appeared to us that given the terms of that PCP it is not only their biological sex that must be considered, but also the protected characteristic of gender reassignment, and it is the combination of those two elements that must be what puts or would put female staff of the first respondent at a particular disadvantage when compared to male staff (where those female and male staff do not have the protected characteristic of gender reassignment).

1202. The four sub-issues are not directed to that essential component of PCP2 that the permission is given to a trans woman or trans man. They are solely directed to the issue of sex, and the binary of male and female. We did not consider that the sub-issues were relevantly framed for PCP2 in light of that.

1203. Those sub-issues are however specifics of the more general question of disadvantage set out in the question posed above. We considered whether that should be answered in the affirmative or negative, and for that considered what evidence the claimant led. We have commented above that the evidence of Ms Forstater which was not accepted save as to government statistics or similar. Ms Forstater's evidence did not in our view establish the disadvantage.

1204. The only other evidence about group disadvantage to support the position of the claimant came from the claimant herself. She of course had her views as to what the disadvantage was for her, but we did not consider that we should infer from that that there was a particular disadvantage to other female staff of the first respondent. That is partly because of the concerns over the reliability of the claimant's evidence, partly because of the absence of evidence that we consider could have been led by the claimant and was not, being any one or more of those of her colleagues she spoke about, and partly because there was contradictory evidence from the first respondent which we accepted.

1205. That contradictory evidence came from several of the first respondents' witnesses who stated that there had been no other concerns raised, or which they were aware of more informally, and whose evidence was to the effect that the staff had accepted the second respondent's identity and use of the changing room, in particular from Ms Davidson and Ms Curran, both of whose evidence the Tribunal accepted. Ms Davidson said that the use of the changing room by the second respondent did not seem to have bothered other nurses. The female staff of the first respondent who gave evidence to us did not suggest that the presence of the second respondent in the changing room caused them any disadvantage, and on the contrary several of them supported the second respondent doing so.

1206. ***Dobson*** gave guidance on how group disadvantage may be proved. It set out four possibilities, not on an exclusive basis. The first was statistical or other tangible evidence of disadvantage. We did not have any directed to the position of trans women or trans men for the purposes of PCP2. That does not mean that the claim fails, and we can consider the evidence on which we made a finding in fact of the higher percentage of conviction rates for males over females, although the figures in relation to those who were trans were not provided at least in a manner we regarded as intelligible and reliable.

1207. The second is where it can be inferred from the fact that there is a particular disadvantage in the individual case, but as addressed above we did not consider that that was appropriate in this case. The third is that the disadvantage may be inherent in the PCP in question, and the claimant argued that it was self-evidently so. But in our view as the evidence in the case contradicted that proposition, it was not. The fourth is where the disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial knowledge should be taken. That depends on the nature of the PCP and how it relates to the matters on which judicial knowledge is applicable. We consider that judicial knowledge does not extend to disadvantage caused by PCP2, and it is a matter that is materially different from those such as childcare disparity.

1208. Had the claimant led evidence from others within the pool on this issue, or skilled evidence question we posed above, matters may have been different. As it was not however, we concluded that the claimant had not established group disadvantage. Arguments of staff being fearful as an explanation for the lack of supporting witnesses made by the claimant's counsel we rejected as there was an absence of any evidence we accepted about that. It was a point raised in submission without evidential foundation in our view.

1209. Even on such an argument, which was based on how the first respondent treated the claimant and which was characterised as retribution which in turn had caused others not to come forward, that can only have been from the time of the special leave, and then shortly afterwards with the suspension of the claimant. There was a period of about five months prior to that when the second respondent used the changing room. That in our view there was no complaint at all in that period save from the claimant is contrary to the argument made of fear of retribution being why no other member of staff complained. Until very early in 2024 there could be no argument of retribution. In so far as there could be thereafter, for the reasons given we did not accept that there had been.

1210. We then considered the sub-issues. In our view each of (a), (b) and (d) is framed in a manner in which the meaning is unduly ambiguous. What is meant by the words "generally" or "in general" we consider to be unclear, whether that is by majority of the group, or for most of the time for all of the group, or on many occasions for most of the group for example. What is meant by taboos about physical modesty we did not consider clear.

1211. In relation to each of those sub-issues there is we consider in addition a measure of dispute over them, and the test for accepting them as being within judicial knowledge was not met. We have not therefore made findings as to sub-issues (a), (b) or (d) on the basis proposed by the claimant as they were not proved, and are not within judicial knowledge.

1212. On (c) there was as noted above some material from governmental agencies supporting the proposition to an extent, and a finding in fact is made on the basis of that but subject to the qualification that there was not sufficient evidence to make a finding in relation to those with the protected characteristic of gender reassignment.

1213. We considered that there is not a sufficient evidential basis on which to make any finding that those in the position of the second respondent, with the sex of male under section 11 and with the protected characteristic of gender reassignment under section 7, are statistically or otherwise more likely to be guilty of the crimes specified than biological women, or a risk to biological women greater than those who are biological women. It is in our view not a matter within judicial knowledge.

1214. In regard to what had been proved we also took into account our assessment of the second respondent from the manner of giving evidence before us, and the facts overall. We did not consider that there was any risk to the safety of the claimant from the presence of the second respondent in the changing room, and that that was a contra indicator to using the evidence of the claimant as a basis to conclude that group disadvantage could be inferred.

1215. Even if we had accepted as facts the propositions in the sub-issues they did not in our view address an essential aspect of the disadvantage from the PCP, that permission was given to those who had the protected characteristic of gender reassignment, for the reasons given above, and because of that would not have been sufficient to establish group disadvantage.

1216. Having made the findings in fact that we have, including those on the basis of judicial knowledge to the limited extent that we have, we concluded that the claimant had not established group disadvantage arising from PCP2. The issue is answered in the negative accordingly.

(xix) *Did PCP2 put the claimant to that disadvantage?*

1217. Again we address this issue lest we are wrong on the foregoing issue, and we answer it in the affirmative. The claimant was disadvantaged by the permission granted to a biological male because of her perception that it was intimidating and embarrassing for her as explained above.

(xx) The aim relied on by R1 is the same as for PCP 1 but pertaining to the rights of trans staff generally rather than only specifically R2. Without admission as to what constitutes an inclusive and safe working environment for all staff or the content of the rights of trans staff under that legislation, the claimant admits that this is a legitimate aim.

(xxi) Is PCP2 directed to that aim?

1218. We considered that it was, largely for the same reasons as PCP1 but in the context of a wider group than the second respondent as an individual as we explain above.

(xxii) Was PCP2 a proportionate means of achieving that aim?

1219. For essentially the same reasons as for PCP1 we answered this in the negative for the period between 16 September 2023 and 13 April 2024 and otherwise in the affirmative. In our view the extent of complaints, or their absence, is a material factor in the proportionality test, and as the claimant has been the only member of staff raising any complaint to the first respondent we concluded that the defence under section 19(2)(d) had been established.

1220. In light of the foregoing findings the claim under section 19 is dismissed.

Victimisation (Section 27 of the EqA)

(xxiii) Did the claimant's conversation with R2 referred to at paragraphs 13 to 15 of the Form ET1 Paper Apart constitute a protected act within the meaning of Section 27(2)(d) of the EqA?

1221. We considered that the claimant had not proved that a protected act had taken place. In our view the circumstances are to be taken into account as explained in ***Kokomane***, although that was in a different context. The circumstances relevant to the present case in our view included that the claimant and second respondent were in the female changing room at the material time because of the permission given to the second respondent of which the claimant was aware. What the claimant said was a form of protest that the second respondent was present in it, that the second respondent was in the claimant's view not a woman, that to be present in that room was unacceptable, and doing so made her feel intimidated and embarrassed. She set out her views on the position as explained above.

1222. In our view that is not sufficient to amount to a protected act as the claimant did not complain to the first respondent. What the claimant did was to argue with the second respondent that the second respondent could not and should not be in the changing room. The second respondent was not the person who decided the issue of permission, but acted on the permission. The claimant in our view made personal comments to the second respondent as an individual, and doing so was not a complaint to the first respondent. In our view it is not enough that the second respondent is an employee of the same employer. The second respondent was not in any line management role for the claimant, nor in a role for which handling complaints was a part of the duty, such as someone on HR, from which it could be inferred that the complaint was made to the first respondent.

1223. In this regard we took account of the fact that the second respondent did not keep the matter as private, but quickly involved a consultant, and raised matters by way of complaint against the claimant. That then engaged higher levels of management, and those in human resources. But that was not in the nature of conveying a complaint by the claimant, it was solely as a complaint of harassment against her. That is the context in which matters were raised by the second respondent. In our view it is not consistent with the purpose of the Act and authority set out above to construe a complaint that the claimant had harassed the second respondent made to the first respondent as if a complaint by the claimant of a breach of the Act by the first respondent, or by the second respondent for which the first respondent is vicariously liable.

1224. There is no authority we have found, or to which we were referred, addressing specifically the question of to whom a complaint is to be made. It is from the cases we have referred to above normally obviously made to the employer. Here however we have concluded that it was not, and as the onus of proving that there was a protected act falls on the claimant the claimant has not proved that there was a protected act. We therefore dismissed the claim under section 27.

1225. We then addressed matters on the basis that we were wrong and that the discussion on Christmas Eve was a protected act.

> *(xxiv) If yes, are the following detriments made out by the evidence, and, if so, did R1 victimise the claimant by subjecting her to these detriments? -*
>
> *a) Placing her on special leave on 30 December 2023;*
>
> aa. She was the subject of the emails referred to at 15A and 17A of the ET1
>
> *b) Ms Curran informing her that there had been a serious complaint that she had bullied a colleague;*
>
> *c) Suspending her on 4 January 2024;*
>
> cc. *She was referred to the NMC on or around 5 January 2024, and her colleagues were told that she had been referred to the NMC as described at 17A of the ET1.*
>
> *d) Advising her of an investigation into her "alleged unwanted behaviours" towards another member of NHS Fife staff;*
>
> *e) Reviewing and continuing her suspension on 2 February 2024;*
>
> *f) Ms Davidson and Ms Myles seeking to persuade her to return to work after her suspension at a different workplace;*

g) Informing her that because she was unable to work day shifts in place of her usual night shifts, her suspension would be reinstated;

h) Pressurising her into returning to work during April 2024 on weekend day shifts;

i) Ms Myles' letter of 28 March 2024 referring to a need for "proper oversight" of her return to work, including oversight of her interactions with staff and patients;

j) Ms Myles' statement that part of the investigation related to the care of patients; and

k) The prohibition on discussing her legal claim/issues of concern in the workplace?

1226. Again in our view this issue does not accurately set out the test to be applied. The question is whether a detriment was suffered because the claimant had done a protected act. It is a question of causation. We considered whether primary facts had been established from which we could conclude that such an act was the cause of the alleged detriments such as the shift the onus to the first respondent. The facts that we considered in this respect are the same as taken into account in relation to belief or impermissible manifestation. They are naturally in a context that is different to that of the distinction between belief and manifestation of belief impermissibly, but the evidence is we consider sufficiently material and similar for the same conclusion to be reached.

1227. We therefore found that the onus passed to the first respondent to prove that, if a protected act had taken place, the reason for each of the detriments referred to was not the protected act to any significant extent (or that it had sufficient weight to do so as explained in authority above). For essentially the same reasons as given above we consider that the first respondent has not proved that the making of any protected act was not to any significant extent the reason for matters (i), (j) and (k), and on that we would have found for the claimant if there was a protected act, but otherwise the first respondent had discharged the onus on it. The reasons for the acts are as set out above. Matters (i), (j) and (k) would have fallen within the definition of detriment in our view if there had been a protected act on the basis of our findings above.

(xxv) Was the claimant subjected to a detriment by the following acts of R2 on the ground that the claimant had done a protected act pursuant to s.27(2) EqA: -

a) By refusing to leave the women's changing room when challenged by her on 24/25 December 2023; and

b) By making a complaint of bullying against her, which was false in the respects referred to at paragraph 19 of the Form ET1 Paper Apart?

1228. In our view this issue, as framed by the parties, does not properly set out the test to be applied. The word used in the Act is "because". That may be semantics, but in our view it is appropriate to make that correction.

1229. We did not consider that the second respondent did "refuse to leave" the changing room as this issue proposes. We have accepted the second respondent's evidence in relation to the incident. The second respondent left when the second respondent felt able to, which was when the claimant had agreed to raise matters by the protocols referred to as referred to above and had ceased making her arguments to the second respondent. The reason the second respondent did not leave immediately is that the claimant continued to make her arguments in the manner we have described. It was the claimant who prolonged it, rather than the second respondent. The background is also that the second respondent believed that the second respondent had a right to be there having been informed so by the first respondent, and as addressed above that permission was not inherently unlawful.

1230. The second respondent is not responsible for the permission being in part contrary to the Act, a matter addressed in more detail below. The second respondent's acts were wholly unrelated to the claimant doing any protected act, in our view. We do not consider that any reasonable employee would consider what the second respondent did during the Christmas Eve incident to be a detriment. So far as the detriment is alleged against the second respondent it is not established on the evidence.

1231. The making of the complaint of (harassment and) bullying was because of the view the second respondent took of what had occurred at the meeting between them, which the second respondent genuinely considered to be bullying by the claimant, and harassment related to gender reassignment such as to be a hate incident within the first respondent's policy, and not to any extent at all on the ground of the making of any protected disclosure. As we have found above, there was harassment of the second respondent by the claimant related to gender reassignment to the extent set out above. The detriment as alleged of a false complaint is not established on the evidence, and it was not something any reasonable employee would consider to be a detriment. On this issue we answer the issue in the negative.

1232. We therefore dismissed the claim under section 27 of the Act.

Harassment within the meaning of s.26(3)

(xxvi) Did the claimant's conversation with R2 referred to at paragraphs 13 to 15 of the Form ET1 Paper Apart constitute a rejection of R2's harassment of her within the meaning of section 26(3) of the EqA?

1233. In our view it did not. The second respondent did not reject the claimant's allegation of harassment, but sought to respond to what the claimant was saying in the manner we have described above, which we consider not properly objectionable. The response in basic summary was to refer to the permission given, to state that there were protocols to address her concerns, and that doing so as she did at that time and place was not appropriate. The second respondent was sympathetic to what the claimant said, although the claimant did not appear to accept that at the time. On the facts we consider that this allegation is not established, we answer it in the negative and the claim under section 26(3) is dismissed.

(xxvii) Did R1 subject C to the detriments referred to at subparagraphs (a)-(e) and (g) to (k) of issue 5 above because she had rejected R2's harassment of her?

1234. In our view the answer to this question is also in the negative as there was no harassment of the claimant by the second respondent for the reasons given above. The claimant did not allege that she had rejected harassment until that claim was added by amendment, until which time it appears to us that the first respondent was unaware of that allegation, and there was no evidence we heard on which it could be said that the first respondent ought reasonably to have been aware of it. On that basis it appears to us that rejection of harassment cannot have been any part of the reason for the acts referred to. In our view the claimant has not proved primary facts from which the inference can be drawn. This claim is also dismissed accordingly.

(xxviii) Did R2 subject the claimant to a detriment by the following acts of R2 because she had rejected R2's harassment of her?

a) By refusing to leave the women's changing room when challenged by her on 24/25 December 2023; and

b) By making an unfounded complaint of bullying against her, which was false in the respects referred to at paragraph 19 of the Form ET1 Paper Apart.

1235. For essentially the same reasons as given above we did not consider that the detriments founded on had been established. The second respondent did not refuse to leave the changing room when challenged, and the allegation of bullying that was made by the second respondent was not unfounded or false. We answer this issue in the negative.

Jurisdiction

(xxix) Is any matter outwith the jurisdiction of the Tribunal?

1236. As addressed above we added this issue which it requires to do where its own jurisdiction is concerned, although it was not a matter raised in parties' submissions. A Tribunal does not have jurisdiction over any issue that may arise under section 29 of the 2010 Act, or the 1992 Regulations. The harassment we have found occurred partly within the Tribunal's jurisdiction under section 123, but an issue does arise for the incident on 25 October 2023 which was more than three months prior to the commencement of Early Conciliation.

1237. The Tribunal concluded that there had been conduct extending over a period as the events followed the grant of permission to the second respondent which itself continued throughout, but if not that it was just and equitable to allow the claim to be heard. The respondents did not raise the issue, or argue that there had been any impairment to a fair trial in the submission. We concluded that we do have jurisdiction under section 123 for that incident accordingly.

Liability, if any, of second respondent

(xxx) Is the second respondent liable for any of the acts of harassment found?

1238. There is a further issue we considered we required to address. We noted during deliberations that the parties' List of Issues had not engaged with the provisions under the Act by which the second respondent may or may not have personal liability in the event of any finding in favour of the claimant.

1239. The background to our doing so is that neither in the pleadings nor in submission did the claimant identify the basis for personal liability of the second respondent. It appeared to be assumed that if the second respondent had acted as alleged by the claimant personal liability followed. Had the findings been to that effect that is probably the case, although a basis in law for the finding would necessarily have been required, and would in our view have been on the basis of section 110. But the findings are substantially different, and on the materially more limited basis that we have identified above.

1240. The background is also that the second respondent has not set out in pleadings or submission (made of course jointly with the first respondent) any argument in that regard either. The second respondent has been included in the Claim made by the claimant from its inception, and this issue is we considered one we required to address because of that, even if not addressed by any of the parties. We cannot make a finding against a party without identifying the basis in law on which that is done.

1241. The claimant has not set out any specific argument before us on which to make a finding to the effect that there is personal liability of the second respondent. In ***Yoosefinejad v East Space Ltd: [2025] EAT 150*** the EAT held that a tribunal had been wrong to make a decision on a claim of breach of contract on a basis not argued before it, relying on Court of Appeal authority from a civil cause in so doing, being ***Phones 4U Ltd (in administration) v EE Ltd & Others [2025] EWCA Civ 869.***

1242. The position in Scottish civil procedure is not precisely the same as set out in that English civil case, in our view. In ***Wyman-Gordon Ltd v Proclad International Ltd 2011 SC 338*** the Inner House held as follows, in a commercial cause in which the Judge had decided a matter not pled, raised in evidence or addressed in submission:

> "As was said by the late Lord Macphail in his work, Sheriff Court Practice , 3rd Ed. at paragraph 17.28:
>
> > "It is generally incorrect to decide any matter raised on record which the parties have declined to argue. It is incorrect to decide any matter in dispute on a ground which has not been explored in evidence or argument."
>
> In support of that proposition, with which we agree, the case of Kay v Ayrshire & Arran Health Board is cited. In that connection the observations of Lord President Emslie at page 153 are apt. There he said:
>
> > "It is one thing for a judge to lend his assistance to a party litigant to present his case in evidence. That is entirely proper. It is quite another thing and wholly improper for a judge to neglect the principle of doing justice between the parties and of fairness to both parties by going further and giving a decision in favour of one party upon a ground of his own devising which has not been the subject of consideration and exploration at the proof, and of which the opposing party has had no notice whatever. The result, and the inevitable result, of what the Lord Ordinary has done in this case is that the judgment which he has given in the pursuer's favour is quite indefensible and must be recalled."
>
> In our view, if, following a legal debate or a proof, some matter, whether it be an authority not relied upon, or some issue not the subject of any submissions before him, occurs to a judge to be material to his decision, the proper course would be, before giving judgment, to put the case out By Order, explaining to the parties why he has taken that course and affording to them the opportunity

> to make any motion, or present any submission, to him on the topic in question before he reaches his conclusions and delivers judgment. That is a course which could and should have been followed in the present case, if the commercial judge considered that it was necessary to enter into consideration of the possibility of the implication of a term in the contract between the parties."

1243. It appeared to us to follow from that that the position under Scottish civil practice is that a case can be decided beyond the parties pleadings and submissions where that is appropriate, although that is rarely the case. Whilst the Inner House case and authorities cited in it are not directly binding in this regard, they guide us in what is fair and just under Rule 3. That is in the context that the rules of pleading in the Employment Tribunal are entirely unlike those in the civil courts, and there are material distinctions in the procedural rules for the Employment Tribunal and civil courts with, for example, no equivalent in the Scottish civil courts to the terms of Rule 3 or to the process of reconsideration, as we shall come to.

1244. In the claim before us there was a case pursued against the second respondent as an individual, but the basis in law for that was not specifically addressed either in the pleadings or in submission. We considered that pleading and argument on this matter is normally required from the claimant, and there has been none put before us. No reason for that has been provided, and this is not one of the obvious cases where liability can be said not to require explanation. It does, and has not been given. It appeared to us that in light of that the claim against the second respondent must fail.

1245. We considered the position lest we were wrong in that conclusion. The statutory terms are as we note below, the evidence has been heard, and we considered that it is an issue that we are able to determine. As the claimant has not specified what the relevant sections of the Act are we shall address all those we considered could be applicable.

1246. In our view the consideration of this matter starts with section 26 and the definition of harassment. That does not of itself confer a right of action to the person harassed against the alleged harasser. A combination of sections 40, 113 and 120 give the Employment Tribunal jurisdiction to determine issues of harassment. Section 40 refers only to an employer not harassing, not to an employee save as the person harassed. Section 40 therefore does not itself give a right of action against an individual employee for what that person does.

1247. The provisions relevant to the liability of an employee are found in sections 109 – 112. Section 109 in effect confers vicarious liability under the Act on the employer for acts of the employee in the course of employment unless

the defence in sub-section (4) is established, which is not a defence the first respondent seeks to rely on in this case. Section 110 confers personal liability on an employee if their act in the course of employment is treated as having been done by the employer and amounts to a contravention of the Act under section 40, such that if vicarious liability applies under section 109 the employee responsible for that has personal liability. Section 111 applies where the employee instructs, causes or induces another person to do something that breaches the Act. It includes indirect inducement and attempting to instruct, cause or induce the breach. Section 112 applies where the employee knowingly helps another person to contravene the Act.

1248. In our view given the facts that we have found the liability of the first respondent does not arise because of its vicarious liability for the acts of the second respondent. The reason we have found harassment was the permission given to the second respondent to use the changing room for the period set out above as that did not meet the ***Bank Mellat*** test. It was a decision of the first respondent and not the second respondent. Both incidents on 25 October and Christmas Eve 2023 only took place in light of the grant of permission to use the female changing room by the first respondent. The claimant was aware of that permission. That such permission had been granted was an agreed fact.

1249. Nothing from what the second respondent said or did in either incident in our view could have been reasonably perceived as harassment by the second respondent, given that the second respondent was simply acting on the basis of permission given by the first respondent. We did not consider that section 110 applied in the facts of this case.

1250. We considered separately whether the defence in section 110(3) applied in the circumstances in the event that section 110 was engaged, contrary to our finding. It was not pled by the second respondent but as we are considering these issues on the basis set out above in respect of the claimant we considered that it was fair and just to do so from the perspective of the second respondent similarly.

1251. We found no authority on this provision. The sub-section is mentioned in ***Bailey***, but only in passing and not discussed in the context of when it does or does not apply. More widely however the EAT made the following comment in that case:

> ""There is a clear statutory intention to outlaw conduct that is discriminatory on proscribed grounds, whatever the form in which Parliament has been able to anticipate it occurring. Where there is any doubt about the meaning of the relevant provisions, they should therefore be given a construction which recognises the broad scope which Parliament intended the legislation to have. This has for many years been recognised in cases involving antidiscrimination

legislation, such as *Jones v Tower Boot Co Ltd* [1997] ICR 254 CA (page 262D per Waite LJ)."

1252. It appeared to us that where the permission had been given that it should be considered of the same effect as a statement that the Act was not being breached. That is because the second respondent has the protected characteristic of gender reassignment under the Act, and it was that protected characteristic that was the reason for the grant of permission. The grant of permission was consistent with the corporate view of the first respondent that makes up PCP2. It was initially, and latterly, lawful as we have addressed above. As the second respondent had that protected characteristic the protections that could arise from sections 19 or 26, and possibly others, might have been engaged had permission not been granted, all again as addressed above.

1253. The protected characteristic itself arose from case law domestic and European in relation to human rights and the Equal Treatment Directive. It is perhaps most clearly expressed by reference to the desire to live life fully in the acquired gender in ***Work and Pensions,*** but also in references to the personal sphere of each individual and the right to establish details of their identity including personal development and to physical and moral security in the full sense enjoyed by others in society in ***Goodwin***; a person's psychological integrity in ***Nicot***; and to the description of gender incongruence in ***TH*** which included the desire to live and be accepted as a person of the experienced gender. It appears to us that that is what lay behind the second respondent's discussion with Dr Searle on this issue, and the earlier use by the second respondent of female changing rooms prior to joining the department but after commencing the process of gender reassignment.

1254. In light of that context we considered it permissible to read across from the authorities on what is a protected act under section 27 that specific reference to the Act or terms such as discrimination or harassment are not essential to determining the issue under section 110(3). It appeared to us that it would be construing the Act too narrowly to be workable if the subsection required the employer to say in terms something very similar to "your acting on this permission is not a breach of the Equality Act 2010".

1255. What matters both as to the protected act and for section 110(3) is substance, not form, in our view. If it is made reasonably clear to the employee that permission to act is being given, it appears to us that that is sufficient provided that it was objectively reasonable for the employee to take what was said as that, and the employee then acts within the scope of the permission granted. It appears to us that that is in accordance with a purposive construction of the Act. We considered that it was objectively reasonable for the second respondent to have understood that permission

was given in terms that inferred that acting on the permission would not amount to a breach of the 2010 Act.

1256. In our view what the second respondent did on each of the incidents when the claimant and second respondent were together in the changing room simply followed the grant of permission to do so. The second respondent acted within the ambit of the permission granted. We concluded that it would not be in accordance with the intention of Parliament not to apply the defence in section 110(3) in these circumstances. Accordingly even if section 110 is engaged initially, contrary to the conclusion we reached, we consider that the terms of the sub-section apply and the second respondent is not liable as an individual under that provision. For that separate reason section 110 does not confer personal liability on the second respondent.

1257. We then considered whether section 111 was engaged. In our view it was not. There is in our view no basis from the evidence to suggest that the second respondent instructed the grant of permission. In so far as the second respondent can be said to have made a request of Dr Searle when they met in mid-August 2023 to use the [female] changing room, or raise that as something that was desired, that is not sufficient, as the case law referred to above we consider establishes. The decision was taken, it appears to us, by Dr Searle, acting on advice and after discussion with others. The question focusses in our view firstly on whether the second respondent induced, or attempted to induce, the breach. In ***Bailey*** induce was held to be synonymous with persuade, and its meaning was also discussed in ***Akester.***

1258. We considered that the second respondent did not induce the first respondent to grant the permission, or attempt so to do. The decision was one for the first respondent. The first respondent might have made a different decision, and we are satisfied that the second respondent would have complied with that. That was evident from the second respondent's position after the Christmas Eve incident that did not seek to insist on using that room to change.

1259. In ***Bailey*** the EAT said the following after discussing the terms of section 111:

> "I conclude that Person A must intentionally induce person B to carry out an act or omission which contains all the elements of the statutory tort that is a basic contravention, including any mental element of the basic contravention."

1260. We considered secondly the issue of causing the contravention. In its discussion of the interpretation of the word "cause" in the section the EAT stated

> "This is to be done by having regard to the Parliamentary intention of rooting out and eradicating discrimination on proscribed grounds, and by applying common sense……. once "but for" causation has been established, the question is whether, having regard to the statutory context and to all the facts, it is fair or reasonable or just to find person A liable for causing person B's contravention of the 2010 Act. No doubt foreseeability will often be a relevant area of enquiry, but all will depend on the facts."

1261. The claimant has not discharged the onus on her of establishing that the second respondent is liable under this aspect of the section. The second respondent did not cause or attempt to cause the contravention. All that the second respondent did was to discuss the issue of which facilities to use, and then act on receipt of permission. Nothing that the second respondent said or did, in our view, was a basis on which to make a finding of harassment under section 26 as either inducing or causing the harassment, or attempting to do so. In the circumstances of the case it is not fair, or reasonable, or just, to make any such finding against the second respondent, applying the wording from ***Bailey.***

1262. Section 112 requires the second respondent to have knowingly helped the first respondent to commit the harassment we have found. There was in our view no evidence to that effect. Again the decision in ***Akester*** in our view supports to a small extent the conclusion that section 112 is not engaged in this case.

1263. In light of all these findings there is no basis under the Act on which personal liability on the part of the second respondent might be established and the claim against the second respondent is dismissed.

Interventions

1264. For completeness we make reference to the written submission made to it by those permitted to do so under Rule 36. That for the first intervener, For Women Scotland which was to the effect that the Supreme Court decision in FWS, in which it was the Petitioner, led inevitably to a finding for the claimant we rejected for the reasons set out above. The submission by the second intervener, Not for Gays, was not directed specifically to an issue in the case, and we did not require to address directly given the manner in which we have assessed the evidence.

1265. The third application under Rule 36 was from TransLucent. In essential terms it argued that the definition of women in the 1992 Regulations required a different interpretation to that from by the Supreme Court in ***FWS*** under the 2010 Act, so as to include a trans woman, and argued that that decision had been wrongly decided, but as we discuss above the Tribunal cannot competently decide an issue of the interpretation of that term under those Regulations, and we are bound by the Supreme Court

decision in so far as it decided the issue of the definition of woman for the purposes of section 11 of the Act such that we did not accept the submission that ***FWS*** had been wrongly decided. Much of the submission had in any event been addressed in the respondents' submission. Although we considered the submission it was not of assistance to us in determining the issues in this case.

Conclusion

1266. The Tribunal accordingly found in favour of the claimant in relation to the claim under section 26(1) as against the first respondent to the extent set out in the Judgment, and otherwise dismissed her claims against both respondents.

1267. There is a final matter to raise. Some of the references to authority or specific statutory provisions made above were not addressed directly or fully by parties in their submissions. Some of the issues have been reframed to an extent, we have determined separately from parts of the the submissions how the Act should be construed, and the issue of the personal liability of the second respondent has been raised and addressed in the manner we have explained.

1268. We considered whether to raise these matters with the parties prior to taking a decision, particularly in light of ***Wyman-Gordon***. That would have involved sending a message to the parties in a rough equivalent to putting a case out by order/ We concluded that seeking to do so without having the framework of this Judgment to set them in context would be extremely difficult if not impossible to do effectively. It would have required an explanation of those matters that the parties were to be invited to comment on before any facts had been found. It appeared to us that making a decision on these facts first is to all intents and purposes essential in order for parties to be aware of the context for determination of these matter.

1269. Separately even if we had managed to explain matters to parties prior to finding facts, time for the representatives to take instructions and respond would be required, and assuming that that then required an oral hearing time, as would be likely, for the date or dates of the same to be fixed. That was most likely to lead to a delay of several months whilst the diaries of counsel and the Tribunal members were co-ordinated, during all of which time the parties would remain unaware of any outcome of the case where there has already been a material delay between the February and July hearing dates.

1270. We also considered sending the parties our judgment in draft form for their further submission, but there is no Rule permitting that, we are unaware of any practice as to that having taken place, and we did not consider that it fell within the Rules to do so.

1271. We concluded that it was in the unusual circumstances of this case in accordance with the overriding objective to issue this Judgment so that the matters could be seen in that full context and to avoid delay in a case which has already had a substantial delay between the start and conclusion of the Final Hearing. If any party considers that it has been prejudiced by this, the party can apply for reconsideration of the Judgment referring to the issue, provision or authority it considers it had not had an opportunity fully to address and making submissions on the same, which the Tribunal can then consider under Rules 68 – 71 of the Rules. This approach was considered in general terms, albeit very different circumstances, in ***Tesco Stores Ltd v Element [2025] EAT 112 (***a decision and possibility not commented upon in ***Yoosefinejad*****).** There is no equivalent in Scottish civil procedure to reconsideration, which in our view is a material consideration in deciding how to decide the question of procedure fairly and justly, and the Tribunal considered that in all the circumstances proceeding in this manner within the context of this case was preferable to the alternatives.

Further procedure

1272. The Tribunal will address separately with the parties the arrangements for holding a Final Hearing on the issue of remedy, and what case management orders are required for that.

Date sent to parties **11 December 2025**

Appendix

1. Sempill-Forbes

The circumstances of the person whose sex was in dispute were described as those of an hermaphrodite, meaning having sex organs or other sexual characteristics that are not clearly male or female (which may now be characterised as a difference of sexual development).

The Outer House said the following:

> "According to the evidence in the present case, the main medical criteria of sex, according to present knowledge, are fourfold,

> namely chromosomal sex, gonadal sex, apparent or phenotypical sex, and psychological sex. The first three of these criteria were sometimes grouped together in the evidence under the descriptions "physical sex" or "anatomical sex"…..
>
> [after dealing with evidence as to testicular tissue] Whatever the true explanation of these matters may be, I am satisfied that, at any rate in the case of a true hermaphrodite, chromosomal sex is the least valuable of the available criteria, when the matter under consideration is not a medical and parental decision as to the social sex in which an infant should be reared, which decision may involve, amongst other things, surgical interference with the genitalia and treatment with hormones, but the legal identification of sex in an adult……
>
> I now turn to apparent or phenotypical sex. ……The matter must in the end of the day be one of impression and degree based on the whole available evidence……
>
> The final criterion which falls to be considered is what is called in the evidence psychological sex. There was a considerable argument before me as to whether it could ever be proper to take this aspect of the matter into account when the question was the legal identification of sex, as contrasted, for example, with the making of a decision as to the best medical, surgical or psychiatric treatment in cases of intersex or trans-sexualism. I am far from saying, to take an example, that a finding that the psychological sex of an individual was male would ever justify a conclusion that a person was legally male although the physical sex of that person was clearly female, but, in a case where a person can function sexually as a male to the extent which the Second Petitioner is able to do, and where there can be found in that person's body male gonadal tissue from which masculine attributes, behaviour and desires, both sexual and otherwise, as well as masculine physical characteristics, may reasonably be assumed to have emanated, directly or indirectly, the fact that the psychological sex is male is in my opinion an adminicle of evidence of some importance."

2. ***Bellinger***

Lord Nicholls of Birkenhead made the following remarks in his speech:

> "The indicia of human sex or gender (for present purposes the two terms are interchangeable) can be listed, in no particular order, as follows. (1) Chromosomes: XY pattern in males, XX in females. (2) Gonads: testes in males, ovaries in females. (3) Internal sex organs other than the gonads: for instance, sperm ducts in males, uterus

> in females. (4) External genitalia. (5) Hormonal patterns and secondary sexual characteristics, such as facial hair and body shape: no one suggests these criteria should be a primary factor in assigning sex. (6) Style of upbringing and living. (7) Self-perception. Some medical research has suggested that this factor is not exclusively psychological. Rather, it is associated with biological differentiation within the brain. The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative…….
>
> Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. 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. They experience themselves as being of the opposite sex…….
>
> Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. Some blurring already exists, unavoidably, in the case of inter-sexual persons. When assessing the gender of inter-sexual persons, matters taken into account include self-perception and style of upbringing and living. Recognition of gender reassignment will involve further blurring. It will mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex……
>
> It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to “turn a man into a woman” or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 477.
>
> These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible the criteria should be capable of being applied readily so as to produce a reasonably clear answer. “

Lord Hope of Craighead in his speech considered that a complete change of sex from male to female was not possible as some characteristics of

the original sex such as chromosomes remained, and he made the following remarks:

> "The essence of the problem, as I see it, lies in the impossibility of changing completely the sex which individuals acquire when they are born. A great deal can be done to remove the physical features of the sex from which the transsexual wishes to escape and to reproduce those of the sex which he or she wishes to acquire. The body can be altered to produce all the characteristics that the individual needs to feel comfortable, and there are no steps that cannot be taken to adopt a way of life that will enable him or her to enter into a satisfactory and loving heterosexual relationship. But medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man. That is not what the treatment seeks to do after all, although it is described as gender reassignment surgery. It is not just that the chromosomes that are present at birth are incapable of being changed. The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment. Although it is often described as a sex change, the process is inevitably incomplete. A complete change of sex is, strictly speaking, unachievable…….
>
> I need hardly say that I entirely agree with the Australian judges that the words "male" and "female" in section 11(c) of the 1973 Act [the Matrimonial Causes Act 1973], which is the provision with which we are faced in this case, are not technical terms and that they must be given their ordinary, everyday meaning in the English language. But no evidence was placed before us to suggest that in contemporary usage in this country, on whichever date one might wish to select-23 May 1973 when the 1973 Act was enacted, 2 May 1981 when Mr and Mrs Bellinger entered into their marriage ceremony or the date of this judgment, these words can be taken to include post-operative transsexual persons. The definition of "male" in the *New Shorter Oxford English Dictionary* (1993) tells us that its primary meaning when used as an adjective is "of, pertaining to, or designating the sex which can beget offspring". No mention is made anywhere in the extended definition of the word of transsexual persons. The word "transsexual" is defined as "having the physical characteristics of one sex but a strong and persistent desire to belong to the other". I see no escape from the conclusion that these definitions, with which the decision in *Corbett v Corbett [1971] P 83* and the views of the majority in the Court of Appeal in this case are consistent, are both complete and accurate. The fact

is that the ordinary meaning of the word “male” is incapable, without more, of accommodating the transsexual person within its scope. The Australian cases show that a distinction has to be drawn, even according to the contemporary usage of the word in Australia, between pre-operative and post-operative transsexuals. Distinctions of that kind raise questions of fact and degree which are absent from the ordinary meaning of the word “male” in this country. Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently “male” for the purpose of entering into a valid marriage ceremony.

In *Goodwin v United Kingdom* 35 EHRR 447, 474, paras 82–83 the European Court of Human Rights noted that it remains the case, as the court held in *Sheffield and Horsham v United Kingdom* 27 EHRR 163, that a transsexual cannot acquire all the biological characteristics of the assigned sex. It went on to say that it was not apparent in the light of increasingly sophisticated surgery and hormonal techniques that the chromosomal element, which is the principal unchanging biological aspect of gender identity, must inevitably take on decisive significance for the purpose of legal attribution of gender identity for post-operative transsexuals. So it was not persuaded that the state of medical science or scientific knowledge provided any determining argument as regards the legal recognition of transsexuals on grounds of social and legal policy. But this approach is not at all inconsistent with the view which I would take of the facts. The question which the court was asking itself was not whether the applicant, who was of the male sex when she was born, was now female. Post-operative transsexuals were assumed to fall into a distinct category. The question was whether it was a breach of their Convention rights for legal recognition to be denied to their new sexual identity.

Of course, it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one's own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words “male” and female” in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. I think that section 5(4)(e) of the Marriage (Scotland) Act 1977, which provides there is a legal impediment to a marriage in Scots law where the parties “are of the same sex”, has to be read and understood in the same

way. I do not see how, on the ordinary methods of interpretation, the words “male” and “female” in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals.”

3. ***Croft***

Lord Justice Pill said the following:

“The primary submissions of both parties are, as Mr Rose put it, counterintuitive. It produces a surprising result if the applicant, at the material time, could be required to use a male toilet, but, submits Mr Rose, it is no less counterintuitive to find that a person who is anatomically male must be treated, for toileting purposes, as female, if she asserts a female role. A voyeur or transvestite might do that. Mr Rose relies upon the view of Lord Hope in *Bellinger* (paragraph 62) that a distinction has to be drawn between pre-operative and post-operative transsexuals. 'Any attempt to enlarge its meaning [the meaning of the word 'male' in this context] would be bound to lead to difficulty as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently “male” for the purpose of entering into a valid marriage ceremony.' Lord Hobhouse stated, at paragraph 76, that 'there are cogent arguments against adopting any specific criterion' when deciding 'how far the person must go to qualify as a transsexual'.

Accepting that it is for Parliament to lay down the test of sexuality as provided in *Bellinger*, 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 and I agree with the submission of Mr Rose about the unattractiveness of the primary submission of each party. 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, what Lord Nicholls described as self-definition presents a serious practical problem in this context…….

By virtue of the definition in s.82 of the Act, the category includes persons at all stages of gender reassignment under medical supervision but it does not follow that all such persons are entitled immediately to be treated as members of the sex to which they aspire. Nor does it follow that, until the final stage is reached, they can necessarily be required, in relation to lavatories, to behave as

if they were not undergoing gender reassignment. Given the unacceptability of either approach the court must consider what amounts to less favourable treatment in the context of a person within the definition in s.82 and whether any such less favourable treatment is on the ground that the applicant is undergoing gender reassignment.

The basic points are:

(i) At the material time the applicant was a transsexual.

(ii) She had reached the stage of gender reassignment where she had begun, but not long begun, to present as a woman attempting a 'real life test'

(iii) The applicant was in good faith in wishing to become female….."

The decision also included the following analysis:

"Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks. I would accept, applying the statement of Lord Nicholls in *Bellinger*, paragraph 41, and *Goodwin* paragraph 90, that a permanent refusal to refuse that choice to someone presenting to the world as a woman could be an act of discrimination even if the person had not undergone the final surgical intervention.

However, 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 described by Lord Nicholls. The tribunal has to make a judgment as to when the employee becomes a woman and entitled to the same facilities as other women though that judgment must have regard to the applicant's self-definition and cannot be determined by the views of other employees.

The employee did not have less favourable treatment than a man, who could not claim to use the female toilets. The employee is not being treated less favourably than other women employees unless and until the employee can establish that she should be treated as a woman. The court should have regard to the particular difficulties which arise with respect to toilet facilities, the obligation and the

need for separate facilities for men and women, and the fact that acquiring the status of a transsexual does not carry with it the right to choose which toilets to use.

With respect to other facilities, the employee's self-definition may be a very important factor in determining the sex in which the employee is entitled to be treated. In the case of toilet facilities, for reasons given, it is less important and the employer is not bound by it when making a judgment as to when the change has occurred.

For most purposes, s.2A of the 1975 Act permits a clear application. With respect to toilet facilities, there is a problem in that separate facilities for men and women have to be provided. Transsexuals are not a third sex. In any event, providing a third set of toilets for transsexuals would not solve the problem about which the applicant complains. She presents as a female and wishes to use the female toilets. The respondents submit that anatomically she is male and cannot complain if she is not permitted to use the female toilets.

The applicant has reached a stage of gender reassignment at which the problems of recognition, analysed by Lord Nicholls in *Bellinger*, are difficult to solve and particularly with respect to toilet facilities, for reasons already given. The choice claimed is different from the choice of schools considered in *Birmingham* because toilet facilities are necessarily sexually based. Presentation as a female does not necessarily make the applicant a female entitled to use female toilet facilities. Such presentation does not enable her to claim sexual discrimination because she is not permitted to exercise a female's right to use the female lavatories (as a male's to use the male lavatories). Moreover, she is not discriminated against 'on the ground' that she is undergoing gender reassignment. The toilet facilities are accepted to be adequate; it is the label they are given which is claimed to be unacceptable. 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.

What those arrangements are must inevitably depend on the circumstances and both employer and employee must recognise the difficulties involved and act reasonably to overcome them. The

> employer must respect the dignity and freedom of the employee (*P v S*, paragraph 22) and must enable the employee 'to live in dignity and worth' (*Goodwin*, paragraph 91). However, I see nothing unlawful, having regard to the stage reached by the applicant, that is the step of embarking on the 'real life test' expected by doctors usually to last for two years, in requiring the use of separate facilities.
>
> The moment at which a person in the applicant's position is entitled to use female toilets depends on all the circumstances, including her conduct and that of the employers. The employers must take into account the stage reached in treatment, including the employee's own assessment and presentation. They are entitled to take into account, though not to be governed by, the susceptibilities of other members of the workforce. She must not be treated less favourably than other employed transsexuals but that is not in issue in this case. Her complaint is that being treated less favourably than the female workforce requires prior determination of the question whether she is entitled to be treated as a female, an approach reinforced by the statutory recognition of the existence of transsexuals."

Lord Justice Jonathan Parker added that "In my judgment the true comparators in the circumstances of the instant case are employees of the respondent (whether male or female) who are not persons to whom s.2A applies: that is to say, employees of either sex who are not transsexual." The second was whether a requirement that for the time being the claimant use disabled facilities not the female toilet was not less favourable treatment:

> "I am quite unable to see how the requirement that for the time being the applicant use the disabled facilities, rather than the female facilities, could be said to constitute less favourable treatment of the applicant for the purposes of s.2A(1). On the contrary, it seems to me that it provided an admirably practical solution to what the respondent rightly recognised, and rightly treated, as a delicate issue requiring a low-key and sensitive approach."

4. ***Higgs***

The Court of Appeal also stated the following:

> "The protection of the right of free speech, including speech expressing a person's religious or other beliefs, has always been regarded as a cardinal principle of the common law, and it is of course now also protected by the incorporation by the 1998 Act of

articles 9 and 10 of the Convention. There are many decisions of the highest authority expounding the relevant principles, but I do not need to recapitulate them here. I only note three points to which Mr O'Dair, and the FSU in its written submissions, attached particular importance.

First, freedom of speech necessarily entails the freedom to express opinions that may shock and offend. The most authoritative statement to this effect is probably that of the ECtHR at para. 46 of its judgment in Vajnai v. Hungary [2008] ECHR 1910, where it said:

> "The Court further reiterates that freedom of expression, as secured in Article 10 §1 of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 §2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broad-mindedness, without which there is no 'democratic society' … . Although freedom of expression may be subject to exceptions, they 'must be narrowly interpreted' and 'the necessity for any restrictions must be convincingly established' (see, for instance, Observer and Guardian v the United Kingdom, 26 November 1991, §59, Series A no. 216)."

A very frequently-cited domestic authority to the same effect is Redmond-Bate v Director of Public Prosecutions [1999] EWHC Admin 733, where Sedley LJ, sitting with Collins J in the Divisional Court said, at para. 20:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ..."

Second, the protection of freedom of speech is particularly important in the case of "political speech" – that is, expression of opinion on matters of public and political interest. At para. 47 of its judgment in Vajnai the ECtHR stressed "that there is little scope under Article 10 §2 of the Convention for restrictions on political speech or on the debate of questions of public interest".

Third, in any given case it is important to be alive not just to the effect of restrictions on freedom of speech in that case but to their

chilling effect more widely. In R (Miller) v College of Policing [2021] EWCA Civ 1926, [2022] 1 WLR 4987, Sharp P said, at para. 68:

> "The concept of a chilling effect in the context of freedom of expression is an extremely important one. It often arises in discussions about what if any restrictions on journalistic activity are lawful; but in my judgment it is equally important when considering the rights of private citizens to express their views within the limits of the law, including and one might say in particular, on controversial matters of public interest."

These are principles which any court or tribunal must have at the forefront of its mind in considering a case involving freedom of speech, including the expression of religious or other beliefs. It should be noted, however, that in each of those cases the Court was concerned with limitations on free speech imposed by a public authority. The present case is concerned with an interference with free speech on the part of an employer against an employee, and it is necessary to assess whether the interference was justified in the context of the employment relationship and the law applicable to it. The relevant principles in such a case were considered by this Court in the case of Page v NHS Trust Development Authority [2021] EWCA Civ 255, [2021] ICR 941, which was central to the decision of the EAT and to which I now turn."

5. ***Lilliendahl***

The ECtHR said the following

> "The Supreme Court held that the applicant's comments, which were made publicly, were "serious, severely hurtful and prejudicial" and that protecting certain groups from such attacks to ensure their enjoyment of their human rights equally to others was compatible with the national democratic tradition. It also reasoned that the comments had little to no relevance to criticism of the municipal council's decision and that their prejudicial content was by no means necessary for the applicant to engage in the ongoing public discussion. It therefore found that the private life interests at play in the case outweighed the applicant's freedom of expression in the circumstances of the case and that curbing that freedom was both justified and necessary in order to counteract the sort of prejudice, hatred and contempt against certain social groups which his comments could promote (see paragraphs 16-17 above).
>
> The Court accepts the finding of the Supreme Court that the applicant's comments were "serious, severely hurtful and

prejudicial". In this context, the Court recalls that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (see, *inter alia*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI). Furthermore, both statutory bodies of the Council of Europe have called for the protection of gender and sexual minorities from hateful and discriminatory speech (see paragraphs 21-22 above), citing the marginalization and victimization to which they have historically been, and continue to be, subjected.

As the Supreme Court noted, the prejudicial and intolerant nature of the comments – which were made publicly – does not seem to have been justified or triggered by the municipal decision which originally sparked the debate. Against this background, and in the circumstances of the case, the Court finds that the Supreme Court gave relevant and sufficient reasons for the applicant's conviction. Furthermore, the Court notes that the applicant was not sentenced to imprisonment, although the crime of which he was convicted carries a penalty of up to two years' imprisonment. Instead, a fine of approximately EUR 800 was imposed on him. The Court does not find this penalty excessive in the circumstances.

In view of the above, the Court finds that the Supreme Court took into account the criteria set out in the Court's case-law and acted within its margin of appreciation. The Court considers that the Supreme Court's assessment of the nature and severity of the comments was not manifestly unreasonable (see, *a contrario*, *Egill Einarsson v. Iceland*, no. 24703/15, § 52, 17 November 2017) and it adequately balanced the applicant's personal interests against the more general public interest in the case encompassing the rights of gender and sexual minorities. Therefore, in light of its existing case-law and the principle of subsidiarity (see paragraph 31 above), it is not for the Court to substitute its own assessment of the merits for that of the Supreme Court. Thus, no strong reasons militate in favour of the Court reaching a different conclusion.

The Court therefore finds the complaint under Article 10 of the Convention to be manifestly ill-founded and rejects it in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

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