EMPLOYMENT TRIBUNALS

Claimants: **1. Ms B Hutchinson**
2. Ms K Danson
3. Joanne Bradbury
4. Ms M A Grundy
5. Ms L Lockley
6. Ms C Hoy
7. Ms T A Hooper
8. Ms J Peveller

Respondent: **County Durham and Darlington NHS Foundation Trust**

On: **20th – 24th, 27th - 31st October; 3rd – 5th, 7th, 10th – 11th November [deliberations 12th, 13th November and 2nd, 3rd December 2025 and 12 January 2026]**

At: **Newcastle Employment Tribunal (hybrid hearing)**

Before: **Employment Judge Sweeney**
Denise Newey
Malcolm Brain

Representation:
For the Claimants, Niazi Fetto KC
For the Respondent, Simon Cheetham KC

RESERVED JUDGMENT ON LIABILITY

The Judgment of the Tribunal is:

1. **The complaints of harassment related to sex and/or gender reassignment are well founded in part and succeed to the extent set out in paragraph 1.1 and 1.2 of this judgment:**

   1.1 By requiring the Claimants to share a changing room with a biological male trans woman as pleaded in paragraph 23(a) of the Amended Particulars of Claim, the Respondent engaged in unwanted conduct related to sex and gender reassignment which had the effect of violating the dignity of the Claimants and creating for the Claimants a hostile, humiliating and degrading environment.

   1.2 By not taking seriously and declining to address the Claimants' concerns of August and September 2023 and of 04 April 2024,

regarding that part of the Transition in the Workplace Policy that afforded biological males access to the female changing room, the Respondent engaged in unwanted conduct related to sex and gender reassignment which had the effect of creating for the Claimants a hostile and intimidating environment.

2. **The complaints of indirect sex discrimination are well founded and succeed.**

3. **The complaints of harassment in so far as they relate to the use of the female changing room by and the conduct of Rose Henderson whilst so using the changing room as pleaded in paragraph 23(b) of the Amended Particulars of Claim, are not well founded and are dismissed.**

4. **The complaints of harassment in so far as they relate to the conduct of Rose Henderson outside the changing room as pleaded in paragraph 23(e) of the Amended Particulars of Claim are not well founded and are dismissed.**

5. **The complaints of harassment in so far as they relate to the conduct of the Respondent pleaded in paragraph 23(d), (f), (h, (i), (j) and (k) are not well founded and are dismissed.**

6. **The complaints of victimisation are not well founded and are dismissed.**

7. **This judgment is in respect of all claimants with the exception of Joanne Bradbury, whose claim is currently stayed.**

REASONS

The Claimants' claims

1. There are eight claimants in these proceedings. Although their claims were combined to be heard together, each claim is a separate claim and we have considered them as such. Joanne Bradbury's claim is currently stayed. Therefore, no determination on it has been made by the Tribunal. Therefore, any reference in these reasons to the 'Claimants' is a reference to the seven claimants whose cases we heard.

2. The legal claims which have been brought by the claimants are as follows:

    2.1. Harassment related to sex and/or gender reassignment (26 Equality Act 2010).
    2.2. Victimisation (section 27 Equality Act 2010
    2.3. Indirect sex discrimination (section 19 Equality Act 2010).

3. The issues arising out of those claims were agreed and are set out in the **Appendix** at the end of these reasons. The version appended was amended in the course of the hearing.

4. At a preliminary hearing on **02 September 2025**, the Claimants were given permission for an expert witness to prepare a report limited to addressing the following questions:

    4.1. Are women generally more sensitive than men to being compelled to undress in front of a person of the opposite biological sex?

    4.2. Are women more likely than men to suffer fear, distress and/or humiliation if compelled to undress in front of a person of the opposite biological sex?

A brief summary of the claims

5. These claims are centrally about the operation by the County Durham and Darlington NHS Foundation Trust of a uniform policy and part of its Transition in the Workplace policy, which permits transgender staff to use the changing room of their choice and which corresponds to their affirmed gender. Under the uniform policy those staff who wear uniforms are not permitted to wear their uniforms to work or to leave work in their uniforms. They must change into and out of uniform at work. To facilitate this, the Trust provides changing facilities. One of its employees, Rose Henderson was permitted to use the female changing room. Rose is a biological male who identifies as female and has the protected characteristic of gender reassignment. The claimants claimed that by permitting Rose to use the changing room, the Trust contravened certain provisions of the Equality Act 2010, in particular, those provisions that prohibit harassment related to a protected characteristic and indirect sex discrimination. In addition, they claimed that certain aspects of Rose Henderson's conduct inside and outside the changing room infringed section 26 of the Equality Act (the harassment provision). They further claimed that the Trust, through its handling of their complaints and in other respects, contravened section 26 of the Act and section 27 (victimisation provision).

The Hearing

6. The cases were listed to be heard over twenty days. In the end, the Tribunal sat for sixteen days before adjourning for deliberations. We were provided with a substantial number of documents (just under 4,500 pages) consisting of six separate files ('bundles') as follows:

    6.1. **Bundle 1** (Pleadings, Tribunal Orders and Tribunal Correspondence), consisting of 257 pages. [**B1/1-257**]

    6.2. **Bundle 2** (Policies, Documents and Correspondence), consisting of 2,174 pages. [**B2/1-2174**]

    6.3. **Bundle 3** (Investigation Appendices), consisting of 1,275 pages. [**B3/1-1275**]

    6.4. **Supplemental Bundle** (Claimants), consisting of 435 pages. [**SB/1-435**]

6.5. **Media Bundle**, consisting of 15 pages.

6.6. **Legislation and Guidance Bundle**, consisting of 270 pages.

7. For the first four of these bundles, page references in these reasons follows the format: **B1/, B2/, B3/, SB/ page number.**. The occasional document was added during the hearing (for example, the Respondent's 'Policy for Trust Policies' document) and some bits of correspondence from solicitors but nothing that added significantly to the volume of documents described above.

Witness evidence

8. Sworn evidence was given by twenty-four witnesses. Although Joanne Bradbury's claim is stayed she had prepared a statement for the purposes of an investigation undertaken by the Respondent (the Resolution Procedure). We were invited to read this statement and to give it such weight as we considered appropriate, when considering the claims of the other seven claimants.

Terms of address

9. There was a high degree of public interest in these proceedings, such are the sensitivities and divisive arguments surrounding questions of gender identity and biological sex in wider society in general. The use of language in this arena can in its own right be seen as controversial. At the outset of the hearing, the legal representatives asked to address the Tribunal on the use of pronouns. They wished to ensure that the Tribunal demonstrated no appearance of bias by the use of any given pronoun when referring to Rose Henderson, a trans woman, whose use of the female changing rooms, is central to the disputes in the case. Having listened to their representations, we established that the Tribunal would refer to Rose by first name and would use the neutral pronoun of 'they'. Mr Cheetham confirmed that, although Rose went by 'she', Rose was content to be referred to as 'they' during the proceedings This approach was in accordance with the Equal Treatment Bench book. We considered that such language, particularly with Rose's prior understanding and agreement was appropriate to address the notion of apparent bias. It was agreed that the Tribunal would not require any party or witness to use any particular pronoun against their wishes, again in keeping with the Equal Treatment Bench book.

10. We wish to record our gratitude to both counsel not just for the quality of their representation and submissions but for the way in which they approached what is on any analysis a contentious subject matter. There were occasional disagreements, for example, as to whether certain lines of cross-examination should be permitted. Both counsel approached the questioning of witnesses with sensitivity. Largely through their skill and cooperation, the evidence was fully heard and tested and the proceedings never became heated.

The function of an employment tribunal

11. We begin by providing a brief summary of our function as an employment tribunal. We do so because we are alive to the public interest and division of views that exists in wider society regarding the access by biological male trans women to so-called 'female spaces'. Many will have views on this and in holding to their views, they will do so irrespective of the legal implications of any given set of facts. That is understandable. People tend not to think in terms of whether any given set of facts is captured by any particular statutory provision. They will form their views, often instantly, based on instinct, or on their own sense of whether something is right or wrong without recourse to any statute. They may describe something as being 'morally' right or 'morally' wrong because it does or does not 'feel' right. The role of an Employment Tribunal, however, is not to form a view on instinct or feeling, or to pronounce on whether a given state of affairs is morally 'right' or 'wrong'. We are conscious that this is a lengthy judgment and that most are unlikely to be interested in anything other than the 'headline outcome'. No doubt they will draw their own conclusions as to whether that outcome is 'morally' right or wrong. Many will read beyond the headline outcome, however. Therefore, we consider it important to first set the scene for those who may be unfamiliar with the work of employment tribunals and their function.

12. Our remit is to adjudicate on complaints in respect of which jurisdiction has been conferred on us by Parliament. We do not have general oversight of employer/worker relations. We are not a public inquiry. We are not here to pass judgment on social mores or preferences. We hear and determine statutory complaints and we do so, or at least we endeavour to do so, judicially. By that, we mean:

    12.1. We hear and read evidence.

    12.2. Doing the best we can on the evidence we have received, we then make findings of fact

    12.3. We then seek to apply the law to those findings of fact.

    12.4. We arrive at a reasoned decision based on the application of the law to the findings of fact.

13. We make clear to any reader that we are expressing no wider commentary or views beyond having to adjudicate on the cases before us. We are concerned only with the evidence, the applicable law and how we apply that law to the set of facts in these proceedings.

14. In doing so, we respectfully adopt the terminology of the Supreme Court as set out in paragraphs 6 and 7 of its judgment in **For Women Scotland Ltd v Scottish Ministers** [2025] I.C.R. 899:

> **"A person who is a biological man, i.e. who was at birth of the male sex, but who has the protected characteristic of gender reassignment is described as a 'trans woman'. Similarly, a person who is a biological woman, i.e. who was at birth of the female sex, but who has the protected characteristic of gender reassignment is described as a 'trans man'."**

15. We now turn to our first essential task, which is to set out our findings of fact. One or other or sometimes even both parties are invariably dissatisfied with a tribunal or court's findings of fact but that is the nature of litigation. Witnesses often give evidence, convinced of the truth of what they are saying. They often profess to recall with clarity the events or words as they describe them. Two witnesses may give wholly irreconcilable versions of the same event. This poses great difficulty for a tribunal of fact. It is no easy task. Judges and panel members possess no special powers that enables them to detect whether someone is lying, if indeed they are lying. The task of fact finding requires an assessment of the 'reliability' and/or the 'credibility' of a witness's evidence. Often a close examination of the written contemporaneous documentation assists a tribunal in assessing the reliability of a witness's oral evidence. Where we have expressed views on the reliability or the credibility of a witness's evidence, or on part of the evidence, we have done so out of necessity and only for the purposes of determining disputed factual issues. Nothing we say is intended to be – nor should it be taken as - any wider view by us of the reliability or credibility of anyone who gave evidence in this case beyond the matter under consideration. Sometimes, we set out the respective competing positions or we identify the evidential source of contentious evidence before going on to make our findings so that the parties understand the basis for our findings. We would add that in this case all witnesses on both sides gave their evidence with restraint and courtesy.

Findings of fact

The Respondent

16. The respondent Trust provides acute and community health services to a population of approximately 650,000 people across County Durham and Darlington. It has a Board of Directors ('**the Board**') consisting of a Chairman, Chief Executive Officer ('**CEO**'), Executive and Non-Executive directors. There is, in addition, a Council of Governors ('**CoG'**) the role of which is to hold the Board to account. The Trust employs some 8,500 staff about 80% of which are female. It Operates across a number of sites one of which is Darlington Memorial Hospital (**DMH**). Others are University Hospital of North Durham (**UHND**), Bishop Auckland General Hospital (**BGH**), as well as Community Hospital sites spread across the region.

17. Structurally, the organisation consists of several Clinical Care Groups as well as Corporate Directorates. Each Care Group has a management triumvirate, made up of a Care Group Director (a senior Medic), an Associate Director of Nursing (a

senior Nurse) and an Associate Director of Operations (a senior Operational Manager). They are responsible for the day-to-day management, governance and running of their services. One of the corporate directorates is Workforce & Organisation Development ('**Workforce Development**'). The current Director of Workforce Development is Andrew Thacker. He reports to the Chief Executive Officer ('**CEO**'). Before Mr Thacker took up this role, the position was held by Morven Smith. There was a period when Mr Thacker and Ms Smith were 'job-sharing' this role, during the run up to Ms Smith's retirement. Mr Thacker has three direct reports: Andrew Moore, Alison Nicholson and Tracy Atkinson, each of whom is a 'Head of Workforce Development', each with their own portfolios.

18. Andrew Moore, 'Head of Workforce Experience' has a portfolio that includes culture and engagement and inclusion. He directly manages a team of three, one of whom is Jillian Bailey, 'Workforce Experience Manager'. Mr Moore shares an office at DMH with Tracy Atkinson, the 'Head of Workforce and Organisation Development – Operations'. Ms Atkinson has a portfolio within which she leads three functions. She is 'Head of Human Resources' ('**HR**'), 'Head of Resourcing' and 'Head of Occupational Health & Wellbeing'. As Head of HR, she has overall responsibility for the HR team. That team consists of, among others, Alison Laidler, an HR Manager and Lesley Smedley, an HR Advisor who reports to Ms Laidler.

19. The events relevant to these proceedings took place at DMH. All of the Claimants are based at DMH and work in the Day Surgery Unit.

Ward 14 and the Day Surgery Unit ('**DSU**')

20. Ward 14 is situated on the first floor of DMH. It is managed by a Band 7 Ward Manager who was, from **August 2022,** Claire Gregory. Approximately 45 staff work there, split between two sections: elective orthopaedic (consisting of 14 staff) and day surgery (consisting of 31 staff). All of the claimants in these proceedings are band 5 staff nurses, with the exception of Carly Hoy, who is a band 3 Healthcare Assistant. For ease of reference, we shall refer to them compendiously as the 'DSU nurses'. Throughout the proceedings, the terms 'ward 14' and 'DSU' were used synonymously by everyone. For present purposes they are one and the same. The DSU is where patients who require planned, or elective, surgery are admitted prior to and after surgery in theatre.

21. In terms of line management structure, between Ms Gregory and the DSU nurses sat two Band 6 nurses, Sister Nicola Harrison and Sister Sarah Naylor. They reported to Ms Gregory. A previous Band 6 nurse, Sister Ali Quinn, also reported to Ms Gregory. She retired in **December 2023**. Ms Gregory reports to the Matron for Elective and General Surgery, Trauma and Orthopaedic Surgery. From **September 2023** that was Sandra Watson. She reports to the Associate Director of Nursing, Helen Coppock.

Theatres

22. At DMH, the Theatres nursing staff are managed by Band 7 Theatre Managers. The two B7 Theatre Managers relevant to these proceedings are Tracy Wainwright and Jody Robinson. Ms Wainwright and Ms Robinson also report to a Matron, also (potentially confusingly), called Watson. That is Matron Linda Watson. As is the case with Sandra Watson, Linda Watson reports to Helen Coppock, the Associate Director of Nursing.

23. Aside from the Theatre Managers, the 'theatres team' consists of Band 6 nurses, Band 5 staff nurses, Operating Department Practitioners ('**ODP**s') and Health Care Assistants ('**HCAs**'). Between them, Ms Wainwright and Ms Robinson are managerially responsible for approximately 137 staff. In addition to those who report to Ms Wainwright and Ms Robinson, the theatres department consists of professional medical practitioners, agency staff and students. As regards the latter, the Trust provides placement opportunities for undergraduates to enable them to undertake degrees or other qualifications relevant to a healthcare or hospital setting.

Interaction between DSU and Theatres

24. Theatre patients are admitted for surgery from a number of sources. The majority are admitted from the DSU. The usual pre-operative procedure is that the patient is admitted to the DSU and is taken to the Surgical Elective Admissions Lounge ('**SEAL**') where they are changed into theatre attire. The patient is then taken to theatre for surgery. After surgery the patient is recovered by an anaesthetic practitioner and is then transferred back to the care of the DSU staff before being discharged from the hospital.

The Claimants

Bethany Hutchison ('BH')

25. **BH** has worked for the Trust at DMH since 2018. She works a regular shift from 7am to 4:30pm on Monday, Wednesday and Thursday.

Karen Danson ('KD')

26. **KD** has worked for the Trust since 2019. Since some time in 2021 (after Covid) she worked the following shifts:

- 10am – 8pm x 1
- 7am – 5pm x 2
- 7am – 4.30pm x 1

Joanne Bradbury ('JB')

27. **JB** is a Band 5 nurse. She has been employed by the Respondent for some 30 years.

Mary Annice Grundy ('AG')

28. **AG** has been employed by the Trust since **summer 2021**. During the material time she worked 4 shifts a week (but not on Tuesday):

    7am – 3pm x 3
    7am – 8pm x 1

Lisa Lockey ('LL')

29. **LL** started at DMH at the end of 2020 during Covid. She works two shifts as follows:

    7am – 7.30pm x 1
    7am – 2.15pm x 1

30. Up until the end of **August 2022 LL** worked one of those shifts at BAH. From **September 2022**, both shifts were worked at DMH.

Carly Hoy ('CH')

31. **CH** has worked at DMH since **July 2021**. From **01 November 2022** up to **14 July 2025** she has worked the following shifts:

    09.30am – 8pm x 2
    09.30am – 6pm x 1

32. Every other week her third shift finished at 6pm. The shift start times later changed to 10 am on **30 January 2023**.

Tracy Hooper ('TH')

33. **TH** started working at DMH in 2002.

Jane Peveller ('JP')

34. **JP** has been employed by the Trust since **March 1997**. Up until the outbreak of Covid in **March 2020** she worked at BAH. She then moved to DMH where she was based initially in the surgical ward before moving to DSU in about **October 2020**. She works two days a week totalling 15 hours.

Rose Henderson

35. Rose Henderson is employed full time by the Trust as an **ODP** and is also based at **DMH**. Rose works in surgery, as part of the theatres team. The role of ODP involves, from time to time, transporting patients to the Intensive Treatment Unit ('**ITU**'), to the DSU, to SEAL (pre-surgery) or to the Recovery unit on DSU (post-

surgery). In addition to preparing theatres and assisting with operational procedures, an ODP also acts as a link between the surgical team and other parts of the hospital.

The changing facilities when Rose first started using them and when the Claimants became aware of this

36. The female changing rooms relevant to these proceedings are situated on the first floor at DMH. They are located next to the male changing rooms. Any reference to 'the changing room' is to the female changing room unless stated otherwise. The changing room is used by some 300 females. The use of the changing room by Rose Henderson is at the heart of these proceedings. It was, on first reading, a curious feature of this case that the Claimants and others raise concerns about that only from the summer of **2023** when Rose had been using the changing room since **2019**. To make some sense of why that might be, we need to set out a brief timeline.

37. Sometime in **2019**, the Respondent's practice placement educator informed the Theatres Managers, including Tracey Wainwright and Jody Robinson, that a student called Rose Henderson was to start at the hospital, that Rose was transitioning and that Rose would be using the female changing room. This information had been given to the practice placement educator by Teesside University, where Rose was undertaking a degree in Operating Department Practice ('**ODP**'). This is part practical, part study and it is a requirement of the course that students spend a significant proportion of time in the operating theatres. The expected pattern is for a student to spend about a month at university followed by about 2 or 3 months at hospital. Given Rose commenced the degree in **September 2019**, it is more likely than not that they started attending DMH, and using the female changing room, from about **November 2019**.

38. No-one, whether from Theatres management or HR, had any discussion with Rose about the appropriateness of using the female changing facilities, either during Rose's time as a student or at any time after Rose became an employee of the Trust. From the outset and throughout, it was simply accepted by management that Rose would use the changing room of Rose's choice as Rose was transgender.

39. Based on the expected pattern of study/work Rose would have been physically present at DMH for about a month or so in late 2019, up to what would be the students' normal Christmas break, in mid-December. There was then, most likely a month or so in classroom taking matters to **February/March 2020**. The first COVID national lockdown then followed in **March 2020.** Although this did not affect NHS workers in the same way as others, it did affect students. During 'the COVID period' as it was referred to (the duration of which was not stated in evidence), Rose spent little time at DMH. The focus during this period was on the academic side of the course. We do not know when Rose returned to DMH after **March 2020** other than that it was a considerable period of time, or 'after COVID'. It is likely that there was some sporadic periods of attendance at the hospital during **2021** as

COVID restrictions eased. It is also a factor that university courses run from semester to semester. There was, we infer from this, a break from approximately **May/June 2021** to about **September 2021**. We find that the anticipated regular pattern of about 1 month classroom/2 months' hospital started to resume from about **April 2022**, followed by a summer break (at the end of the semester) and resumed again in **September 2022**. Further, during COVID, DSU staff did not use the female changing room at all for a period of approximately 14 months. They used a room on ward 14. Rose then qualified on **10 October 2022** and commenced employment with the Respondent that month.

Rose's shift times as an employee

40. Rose's shift times were as follows:

    40.1. 8am – 6pm (typical pattern)
    40.2. 1pm – 8pm (late shift)
    40.3. 8pm – 8am (night shift)

41. As can be seen from the shift times, none of the Claimants had the same **start times** as Rose Henderson. That was also the case for witnesses called on their behalf, with the exception of Sharon Trevarrow [**B3/648**] who worked Monday to Thursday 8am – 2pm.

42. Given the above history, the different start and finish times and the differing experiences of individuals (for example, Bethany Hutchison's absence for much of 2021 and 2022 due to maternity leave and other pregnancy related absences) we were able to understand better why it was that, during the period from **September 2019** to approximately the **summer of 2023**, many staff outside theatres (including those in DSU) were unaware that a trans woman was using the female changing room. It was not, in the end, that surprising to us. Of the Claimants, Bethany Hutchison was the first to learn that Rose was working in Theatres. This was in about **January 2023**. However, she was unaware at that time that Rose was using the female changing rooms. It was not until about the summer of 2023 that by and large those in the DSU came to learn that a trans woman (who they later came to know as Rose) was using the changing room and this adequately explains why they did not raise concerns earlier.

43. As regards the female changing room at DMH, Rose Henderson was the only trans woman to access it. We heard evidence that there were other trans women employees of the Trust, (for example, see paragraph 41 of Sandra Watson's witness statement). However, we were not told how many staff. They did not use the DMH female changing room and there was no suggestion or evidence that they accessed or used any other female changing room. We infer from this that either they were not uniform wearers or, if so, that they had alternative arrangements for changing elsewhere.

Trust Policies

44. Central to the complaints in these proceedings are two workforce policies operated by the Trust: the 'Uniform Appearance and Dress Code Policy ('**Uniform policy**') and the 'Transitioning in the Workplace Policy' ('**TIW policy'**). Given the centrality of the TIW Policy to the issues, we refer to this in more detail below. Before doing so, however, we must briefly set out how the Trust's policies are developed, approved and reviewed.

45. The Trust has responsibility for producing its own workforce policies. To aid this exercise, it has created a 'Policy For Policies' ('**PFP**'). This sets out its requirements for, among other things, the development and approval of Trust workforce policies. Any team that is tasked with developing or reviewing a particular policy must refer to the **PFP.** That team draws on support and guidance from NHS England, NHS Confederation, NHS Employers and other sources where relevant according to the relevant policy that is being developed. The PFP (section 5.3) uses the terminology '*Document Author*' to describe the subject expert that prepares/drafts the policy and '*Document Owner*' the latter being identified as senior managers, generally at Associate Director or Executive Director level, to describe the most senior person who has responsibility for the policy.

46. The team responsible for producing and updating workforce policies sits within **Workforce Developmen**t.

Uniform Policy

47. Although we were not provided with a copy of the Uniform policy, it was common ground that, as regards uniformed staff, it requires employees to attend work in their non-work clothes and to change into uniforms when they arrive at work and to change out of their uniforms before leaving their place of work, including for the purposes of any breaks (see paragraph 8 of the Amended Grounds of Resistance '**AGOR**'). The underlying rationale behind this is, we infer, the infection risk that wearing a uniform outside of the hospital would present. Staff are expected to go straight to a changing room to change into their uniform before going to the ward. They could not just change in any room, again we infer for reasons related to infection risk, but also for reasons of modesty. Only one facility had, in any event been provided for them in which to change.

Transitioning in the Workplace Policy

48. The Trust first looked at developing a TIW policy back in **2016.** However, nothing got as far as the review or approval stages of policy creation. Version number 1.0 of the TIW policy was eventually approved by the Trust's Board of Directors on **19 February 2019**. Version 2 was approved on **22 November 2021** We are not aware of any material difference between versions 1 and 2 and no-one in these proceedings suggested that there was any. All references to the TIW policy, therefore, are to version 2.0, unless otherwise stated and we infer that the relevant parts were the same in all material respects.

49. Mr Moore's team is the lead team for the TIW policy. It is also responsible for providing training on Equality, Diversity and Inclusion ('**EDI**'). Contrary to the evidence of Mr Moore, the Trust expects someone to have '*ownership'* of a policy (as can be seen from section 5.3 of the PFP). We find that the 'owner' of the TIW Policy was Mr Thacker (and before him Morven Smith) they being the relevant directors of the department within which the policy sits. Ownership in this sense means, as far we can see, the person who has ultimate responsibility for the policy. That is distinct from the 'author' of the policy, who is usually the person designated as the 'subject expert' on the area covered by the policy.

50. The TIW policy was prepared by a Workforce Experience Officer, Pat Winter, since retired. She is referred to on the Policy Control Sheet [**B2/79**] as the 'author'. Mr Moore had been her line manager.

51. The normal process involved in the creation of a Trust policy is as follows: the author researches various pieces of legislation and guidance, prepares policy drafts and then submits their work through a process of review, via the Senior Leadership Team ('**SLT**') to the Trust's Policy Review Group, the latter being a discussion forum consisting of managers and local union representatives. The draft policy is then taken to the Joint Consultative and Negotiating Committee (**'JCNC'**) as an agenda item for approval. The JCNC is jointly chaired by the Director of Workforce and OD and the Staff Side Chair. Once approved by the JCNC it is then submitted to the Operational Performance Assurance Committee ('**OPAC')** for ratification. Finally, it is sent to the Board of Directors for final Board approval prior to publication and implementation.

52. The Trust does not consult with individual members of staff on the creation or development or review of workplace policies (including the TIW policy). That is not unusual and in an organisation of 8,500 staff, it would be wholly unrealistic to expect it to do so. Consultation is – and insofar as concerns the TIW policy was - undertaken with the Respondent's recognised trade unions on the JCNC. In developing the TIW policy, Mr Moore's team also consulted with 'staff network groups.' These groups were created some years ago by the Workforce Experience team. The groups are: LGBTQ+ Staff Network Group; Disability and Long-Term Conditions Staff Network Group; Unity and Ethnic Diversity Staff Network Group and Faith Staff Network Group. The network groups receive drafts of the policies and are asked to provide feedback as part of the equality impact assessment of the policy.

53. The TIW Policy Control Sheet stipulates an 'expiration date' of **30 November 2024**. The normal practice of the Trust is that a policy is reviewed every three years, unless something – for example a change or development in the law - prompts an earlier review. Therefore, there is a normal cycle of review or, as it was referred to during these proceedings, a 'business as usual' review. The author starts the normal review process some 6 months ahead of the policy expiration date. The TIW policy was at the beginning of its business as usual review from about **April**

or May 2024. This work was undertaken by Jillian Bailey, by now the Workforce Experience Manager who had taken over that responsibility from Ms Winter. Ms Bailey's role also included EDI. She is the Trust's subject expert and her name would appear as 'author' on version 3.0 of the TIW policy. Ms Bailey had been involved in the initial work of researching a transitioning in the workplace policy back in 2016. However, the TIW policy relevant to these proceedings was one that she 'inherited'.

The TIW policy

54. The policy begins with an '**Introduction'** as follows:

> "*County Durham and Darlington NSH Foundation Trust ('CDDFT') does not discriminate in any way because of sex, sexual orientation, gender reassignment, gender identity, or gender expression. This policy is designed to create a safe and productive workplace environment for all employees which supports transgender and non-binary employees.*
>
> *The word transgender describes a person whose gender identity, gender expression or behaviour does not conform to the sex they were assigned at birth.*
>
> *Some people will undergo a process of aligning their life and physical identity to match their gender identity, and this is called transitioning. This policy identifies the support offered to staff who are transitioning; and sets out the expectations of behaviour for other members of staff in relation to transitioning and gender identity.*
>
> *Transitioning is a unique process for each individual and may include any number of changes to a person's life. There is no 'right' or 'wrong' way to transition. For some this involves medical intervention, such as hormone therapy and surgeries, but not all Trans people want or are able to have this… Transitioning could also involve dressing differently, changing official documents, telling friends and family that you are transitioning, or several other changes. The start of or intent to transition will be different for everyone. It's about the individual.*"

55. Under the heading '**Purpose and Definition'**, the TIW policy says:

> "*For many people their personal sense of being feminine or masculine – their gender identity – matches their birth sex and they do not have any questions over their gender identity. However, some people's gender identities do not match the gender they were assigned at birth. There is a wide range of ways that people can express gender identity and people should be free to express this in the way they are most comfortable with without facing discrimination.*

> *… Many people falsely believe that to transition a person must undergo a medical intervention, such as hormone treatment or surgery, or gain a Gender Recognition Certificate ('**GRC**'). It should not be assumed that the goal of every individual's transition is to change their physiology or legal gender. If a Trans person chooses not to undergo any medical intervention or gain official documentation, they are still entitled to dignity and respect for their chosen gender identity*."

56. Under '**Duties'** it states: "It is the responsibility of all staff and those working on behalf of the Trust to comply with this policy."

57. In section 5, under the heading '**Main Content of Policy'** [**B2/84**] is a sub-heading called 'Process.' This states:

> "*The Trust's recognition of a transgender person's identity begins the moment a person informs us they are Trans or intends to transition*."

58. Responsibility for monitoring compliance with the policy is that of the Workforce Experience Team, HR and Occupational Health.

59. Section 8 states that the policy should be used in conjunction with a list of other policies and procedures (14 in all) including the 'Dignity at Work Policy' and the 'Resolution Procedure'. This latter procedure is the Trust's grievance procedure by another name [**page B3/29-47**]. The Resolution Procedure envisages two stages: an informal stage, where staff are expected to raise concerns informally with their line manager and a formal stage, which they can progressed to if the informal stage has been exhausted.

60. Section 9 of the TIW Policy contains seven appendices:

    60.1. Appendix 1 consists of a flow chart outlining the transition process. This is designed for managing existing members of staff who are considering or have decided to transition (as opposed to staff who join the Trust having already transitioned or are in the process of transitioning).

    60.2. Appendix 2 is a guide for managers and employees. We set out the relevant part of Appendix 2 below.

    60.3. Appendix 3 consists of 'Support Plan Template'. This is stated as being a 'useful starting point to develop a plan'. It sets out questions and points to consider, such as whether others need to know about the Trans person's plans such as 'colleagues/friends and people you work with/external partners' and if so, who will tell them and why. On its face, it clearly envisages the trans employee's manager having a sensitive discussion with them and preparing a plan of communication of some sort, or at the very least, considering what if anything should be communicated

to anyone. It is geared towards managing issues for an existing employee whose outward appearance is to change.

60.4. Appendix 4 consists of 'Frequently Asked Questions' or FAQs. One such FAQ is:

Q – Will I be able to use the facilities-toilets and changing rooms which match my gender identity?

A – Yes, you may also use accessible toilets if you prefer.

60.5. Appendix 5 is headed "Supporting Transgender Colleagues". It guides employees in a way that is intended to treat transgender colleagues with dignity and respect. It contains a glossary of suggested terminology for people to avoid and suggests correct substitute terminology.

60.6. Appendix 6 is headed 'Equality Analysis/Impact Assessment. We set out the relevant parts below.

60.7. Appendix 7 is a template 'Document Approval Request form'. This is to be completed when creating or reviewing the policy.

Relevant parts of Appendix 2

61. One of the things that should be discussed between manager and transitioning employee is:

> *"Agreeing the point at which the individual will commence using gender neutral/single sex facilities in their affirmed gender, for example toilets and changing areas.* ***This should occur from the time that the employee wishes this to start*** *as some staff members may prefer to continue to use the same facilities as they used to in the early stages of transition.* ***They are legally allowed to use any toilet facility they prefer and the choice should be theirs***."
>
> (**emphasis added**) **[page B2/91]**

62. Under the heading 'Use of Gender Specific Facilities' the policy states:

> *"An area of consideration can be the use of gender specific toilets and washroom/shower facilities.*
>
> *CDDFT support a transgender employee's* ***right to use the toilets and facilities appropriate to their gender from the point at which the individual declares that they are living their life fully in that gender****. In some cases, the individual may wish to use a single-occupancy toilet during their transition, but they must not be pressurised to do so, and*

this should not be a long-term solution. A transgender person should not be expected to use an accessible toilet unless they prefer to do so.

***We will agree with the employee when they wish to start using the facilities appropriate to their acquired gender and how this should be communicated to colleagues**. Any concerns raised by others will be dealt with promptly and sensitively and harassment of the individual will not be tolerated.*

***If others do not wish to share the gender specific facilities, they should use alternative facilities**.*"

(**emphasis added) [page B2/92]**

Relevant parts of Appendix 6

63. It is the responsibility of Workforce Development to carry out an equality analysis and impact assessment of the TIW policy. This exercise consists of answering a number of questions under 5 steps. We set out some of those questions and answers by reference to the various steps:

63.1. **Under step 1**: '*what are you hoping to achieve?*' ANS: '*To provide an overview of Trans inclusion and the gender transitioning process which includes guidance for managers*'.

63.2. **Under step 2:** '*Who have you consulted with*?' ANS: '*JCNC, HR Policy Review Group, EDI Strategic Group, CDDFT Staff Network Groups'*.

63.3. **Under step 3:** '*What is the impact?*'
ANS: '*Ethnicity or Race No differential impact known'*
ANS: '*Sex/Gender No differential impact known – a high percentage of CDDFT workforce identifies as female therefore managers need to be supportive of female to male transitions particularly in historically female dominated professions. Some males that wish to transition to female may be attracted to historically female dominated professions'*
ANS: 'Age No differential impact known – people may choose to transition at any age'.
ANS: '*Disability No differential impact known – Transgender people have a higher likelihood of experiencing mental ill health than the general population and are more likely to attempt suicide. Therefore adopting this framework and providing a supportive environment and structure will help to minimise negative impact on mental wellbeing'*.
ANS: '*Religion or belief No differential impact known'*
ANS: '*Sexual orientation. No differential impact known'*
ANS: '*Marriage and Civil Partnership 'No differential impact known'*
ANS: '*Pregnancy and Maternity No differential impact known'*
ANS: '*Gender Reassignment Outlines support required for a staff member who are proposing to undergo, are currently undergoing or*

have undergone a process (or part of a process) of gender reassignment. It provides a clear process for managers to follow to support their staff and to ensure that they operate within legal requirements'.
ANS: '*Other socially excluded groups or communities No differential impact known*'

63.4. **Under step 4**: '*Are any groups affected in a different way to others as a result of the policy*? ANS: '*None'*

63.5. **Under step 5**: '*How are you going to monitor this policy*?' ANS: '*The Trust will monitor the application of this framework via the available data annually as part of the EDHR Annual Report and the Equality Deliver Scheme 2 report*'.

64. Jillian Bailey led the review of version 2, leading to the drafting and subsequent ratification by **OPAC** of a version 3.0 on **24 March 2025**. That review of version 2.0 came as part of the normal cycle or 'business as usual' review.

Summer 2023 and the concerns regarding the use of the female changing room by Rose Henderson

65. In **2023** some nurses raised concerns with Sister Ali Quinn regarding the use, by a trans woman, of the changing room at DMH. Bethany Hutchison was one such nurse. We shall set out below the sequence of events as we find them to be. Mrs Hutchison expressed to Sister Quinn that she and others were concerned that a trans employee was changing in the female changing room and that this was a risk to the privacy and safety of female nurses. This was, as Mrs Hutchison described it in oral evidence, '*an informal discussion about a serious matter*'. Mrs Hutchison raised the concern on her own behalf and that of Annice Grundy, who had shared her own concerns with Mrs Hutchison. Lisa Lockey also raised the same concern with Sister Quinn in about **September 2023** (not November as stated in the pleadings or list of issues). Lisa Lockey informed Sister Quinn that she did not feel comfortable with a trans woman using the changing room and that she did not think it was right. Sister Quinn told Mrs Lockey that others had also expressed concerns and that the matter was being discussed with management. Tracy Hooper also spoke informally to Sister Quinn at some stage. When that was is unclear; however, we find it most likely to be in August or September. Miss Hooper expressed the same concern as Bethany Hutchison, that a trans woman was using the female changing room and that this presented a risk, or a perceived risk, to safety of the female nurses. She had initially been uneasy about raising any concern as she was concerned she may be seen as bigoted or transphobic and did so only after hearing from other colleagues regarding their views of Rose's use of the changing room and of the life experiences of some of those nurses (see paragraphs 9 and 10 of Mrs Hooper's witness statement). None of the concerns was reduced to writing by them or by management. Whatever words were used, the substance of the concern was about the presence in a female only changing room of a biological

male/trans woman and the risk that this posed to the female staff and Sister Quinn understood this concern, as is evident from her subsequent feedback, which we shall come to in due course.

66. Doing our best to trace through the sequence of concerns we are able to make the following findings of fact on the timings and who was involved with or aware of these concerns between **July and October 2023**.

67. As it happened, Mrs Hutchison (nor any of those mentioned in paragraph 65 above) was not the first to raise this concern. The first concern raised came from staff in Theatres. This is clear from the first documented email we have seen regarding this subject, namely the email of Thursday **13 July 2023** from Lesley Smedley of HR to Linda Watson, Matron of Theatres and other managers in theatres [**B2/269**]. Also copied into this email was Alison Laidler, Ms Smedley's line manager. We infer that it was the same concern that later came to be raised by those in DSU, namely Rose's use of the changing room and the perceived risk that this presented to female nurses. The email subject heading is '*Wednesday's Sensitive Conversation'.* We find that to be a reference to a conversation that took place the previous day between the recipients of the email. Tracy Atkinson had been updated about that sensitive conversation by Ms Smedley by **13 July 2023**. Ms Atkinson agreed that Jillian Bailey should have a sensitive discussion and '*maybe look at awareness to the wider team*' [**B2/274**]. Ms Smedley advised Theatre Managers to '*bear with us as we make the arrangements*'. The reference to *'we'* is to HR. Therefore, as of **mid-July 2023**, management in Theatres and HR personnel (Ms Atkinson, Ms Laidler, Ms Smedley at the very least) were aware that at least one employee from Theatres had raised a concern regarding the use of the female changing room by a trans woman and that this concern was the perceived risk that this presented to female nurses.

68. However, nothing happened in the month between **13 July** and **17 August 2023** regarding that concern. On **17 August 2023**, Linda Watson emailed Ms Smedley (and the same other recipients) as follows:

'*not sure if we did get any further with this*' **[B2/268]**.

69. By this time another '*team'*, had voiced its concerns, as is apparent from Linda Watson's comment:

'*I have been approached from a different team that uses the female changing room*'.

70. We find this to be a reference to Sister Quinn's 'approach', following Bethany Hutchison raising her concern. Sister Quinn had taken Mrs Hutchison's concern (and that of the others who raised it by that date) to Linda Watson who then made HR aware that this was now not just a matter of a concern from Theatres but also from DSU. This was reinforced by Linda Watson's subsequent email of **22**

September 2023 (paragraph 76 below) where she expressly refers to an escalation by members of both the Theatres and DSU teams [**B2/263**].

71. Responding to Linda Watson's email of **17 August 2023**, Lesley Smedley agreed that the matter needed to be addressed. She explained that she had emailed Tracy Atkinson but that Ms Atkinson was not back from leave until the following week [**B2/268**]. Another month passed without anything being done to address the concerns raised by members of staff in Theatres or DSU. In the meantime, by now about a month or so after she had first raised her concerns, Mrs Hutchison asked Sister Quinn whether anything was going to happen about the matter. Sister Quinn told Mrs Hutchison that she had taken the concerns to senior members of the surgical team, which Ms Hutchison was given to understand consisted of some Band 6 Sisters and a Matron.

72. On **21 September 2023** Lesley Smedley emailed Linda Watson, Jody Robinson and Tracy Wainwright, asking:

    '*has this been sorted? I have flagged with Tracy A but not sure if anything has been done'*. [**B2/266-267**].

73. We find that to be a surprising email from Ms Smedley in the circumstances, especially in light of her own email of **13 July 2023,** where she had asked the Theatres managers to '*bear with us as we make the arrangements'* and her further email of **17 August** where she agreed that the matter needed to be addressed. The natural inference to be drawn is that Ms Smedley had expected someone else, other than her, to have '*sorted*' the matter. She had made more senior people aware of the concerns that had been passed to her by Theatres managers. The expectation was that someone in HR was to do something about the concerns, as she had expressly told the theatres managers to leave it with them. It is plain however that nothing had been done by HR in the ten weeks since concerns were raised at the **12 July 2023** Wednesday meeting regarding the 'sensitive conversation', other than to suggest that something be done to look at the 'awareness' of staff (paragraph 67 above). That also meant that nothing had been done by operational managers in either Theatres or DSU.

74. On **22 September 2023**, at 10.31, Tracy Wainwright responded to Ms Smedley's question as follows:

    "No this has not been addressed. It was mentioned that it was an education talk but certain staff have their views and these will not change with education/awareness. Staff struggle as this member of staff is not transitioning and a lot of our international staff struggle with her in the female changing room." [**B2/266**]

75. Up until that point in time, the only HR person Ms Wainwright had been in communication with regarding Rose's use of the changing room had been Lesley Smedley. From this, we infer that Ms Smedley spoke to Ms Wainwright soon after

she (Ms Smedley) had raised the matter with Tracy Atkinson on **13 July 2023**. Ms Smedley reported to Ms Wainwright that someone from HR would speak to managers about holding an education and awareness talk with the teams. The clear implication of this was precisely that identified by Ms Wainwright, namely that the intention within HR senior management was for someone from HR to 'educate' staff by making them aware of the rights of trans employees.

76. HR had not, however, made any arrangements. Therefore, Linda Watson emailed as follows:

"*It would be helpful to have HR input as we don't wish to put any of the team at detriment, and this has been escalated by both members of the theatre team and the DSU team*." [**B2/272**]

77. Up until that last email, the recipients/senders of emails on the subject had been the same since the **13 July 2023**. Although Tracy Atkinson had been kept informed by Lesley Smedley, she was not directly involved in the email correspondence. On **25 September 2023** Matron Linda Watson included her in the conversation directly:

"*Can I ask for some availability for a meeting please as this becoming [sic] a wider issue and the teams would like some steer from HR. I see that Lesley and Alison have out of office messages so I will copy Tracy Atkinson in as well*." [**B2/272**]

78. We infer from this that Matron Linda Watson saw the matter as being urgent and wider than simply Theatres. We also find that the theatre managers were seeking answers from HR. Ms Atkinson then joined in the conversation directly on **25 September 2023** at 19:47 in response to Linda Watson's email. Ms Atkinson added Jillian Bailey to the list of recipients. She said:

'*I suggested that we speak with Jillian – did this happen?*
Jillian are you able to meet with the Theatre team please, I am happy to assist if needed.' [**B2/271**]

79. This is a reference to Jillian Bailey, the 'subject expert' who had been identified by Ms Atkinson in **July 2023** to give the 'education talk'. Jillian Bailey then joined the email conversation on Tuesday **26 September 2023** [**B2/271**].

80. On **28 September 2023** Ms Bailey met with the Theatres Managers, Tracy Wainwright, Jody Robinson and Linda Watson via Microsoft teams. There is a difference of account between Tracy Wainwright and Jillian Bailey as to what was said at that meeting. In paragraph 27 of Ms Bailiey's witness statement she states: '*they explained to me that Rose had recently stopped taking hormone therapy and had made it quite public with some people that she had decided to have a baby with her partner, that Rose was sounding and looking more masculine as a result of having stopped taking the hormones and that this had led to some staff complaining that they felt uncomfortable*'. Ms Wainwright said that she did not say

these things to Ms Bailey as statements of fact. Rather, she was, she said, describing what she understood others to have been saying about Rose.

81. It is, we find a bit of both. As regards the reference to cessation of hormone treatment and plans to have a baby, we find that Ms Wainwright was indeed reporting what others had been saying. These 'rumours' as they were described had been drawn to her attention but by whom she did not say. This was also the case with regards to comments about Rose not transitioning. Although her email of **22 September 2023** [**B2/257**] reads as if she is giving her own personal observations on that subject, we find that was no more than a poorly expressed email, as she alludes to in paragraph 12 of her witness statement. Ms Wainwright was not asserting that Rose was not transitioning. She was trying to express what she understood others had been saying from information that had come to her attention, which she regarded as 'general chatter', 'rumblings', 'rumours' and 'intelligence'. We find that Ms Wainwright almost certainly knew who it was, within Theatres, who had expressed concerns about Rose planning to have a baby with their female partner and that Rose had stopped taking hormones. However, she had never personally spoken to Rose about these things. Therefore, she could not say for sure if that was the case.

82. Despite these things having been drawn to her attention through what she described as 'intelligence', Ms Wainwright did not consider it appropriate to have any conversation with Rose about the concerns for a number of reasons: firstly, because of the clear terms of the TIW policy; secondly, because Rose had worked in Ms Wainwright's team and had used the changing room for years and Ms Wainwright did not consider Rose to be a threat to anyone; thirdly, because, we find, Ms Wainwright and Ms Robinson were dismissive of the concerns based on their knowledge of Rose; and fourthly, because she believed that Rose had the right to use the changing room and that even to have the conversation may amount to discrimination against Rose.

83. Ms Bailey gave evidence in a considered, measured and reflective way. However, we were satisfied that she had partly got the 'wrong end of the stick' in what she has set out in paragraph 27 of her witness statement. Although it was mentioned by Ms Wainwright and Ms Robinson at that meeting that Rose had stopped taking hormones and had made it public that they were trying for a baby, neither Ms Wainwright nor Ms Robinson were stating these things from any personal knowledge of their own because neither of them had spoken to Rose about these personal issues. Neither had Rose volunteered this information to them personally.

84. However, as regards the references in paragraph 27 of Ms Bailey's witness statement to Rose's physical appearance, we find that the description given to her was indeed that of Ms Wainwright's and Ms Robinson's own personal observations of Rose. They explained to Ms Bailey that Rose had recently appeared and sounded more masculine. It is more likely than not that Ms Wainwright mentioned this during the discussion about the 'rumours' regarding cessation of hormone treatment – i.e. Ms Wainwright and Ms Robinson, we infer, explained to Ms Bailey

that if those rumours were true this might explain Rose's recent appearance, which they described to Ms Bailey as Rose sometimes attending work with visible stubble, referring to one occasion where Rose had not shaved for several days without hiding with make-up. Ms Wainwright also explained to Ms Bailey that there were international/overseas staff who were using the changing rooms. All three managers felt and expressed to Ms Bailey that these nurses may have concerns about Rose's use of the changing room. Ms Wainwright had personal knowledge of the discomfort felt by 'international nurses' whilst using the changing room. She had personally noticed that international staff '*go into the shower cubicles because they don't like to get changed with anybody*'. From this noted reticence to changing in front of other biological women, we are satisfied that Ms Wainwright deduced that women from a '*non-western country/culture'* (as 'international nurses' were described to us) would have even greater concerns about changing in the same space as a biological male. It is more likely than not and we so find that Ms Wainwright noticed this reticence of 'international nurses' more so when Rose was present in the changing room.

85. Despite her own observations regarding international nurses and despite being aware indirectly of the concerns of other staff, Ms Wainwright never asked to speak to any of the nurses in Theatres (or in DSU for that matter), whether the international nurses or anyone else, about their concerns. In keeping with the TIW policy, Ms Wainwright believed that anyone who was uncomfortable with the arrangement could change somewhere else. That could only realistically mean changing in the toilet or in a shower cubicle.

86. Ms Bailey was not told at this meeting of **28 September 2023** that staff in **DSU** had raised concerns, as opposed to staff in Theatres. Therefore, she did not meet with any manager from DSU. She met only the Theatres Managers and she subsequently emailed only the Theatres team. However, as already set out above, Linda Watson had mentioned in the string of emails which had been forwarded to Ms Bailey by Ms Atkinson prior to that meeting, that concerns had also been raised by the DSU team. Ms Bailey had not taken that in and proceeded wrongly on the basis that the concerns were within the Theatres team only. Although Ms Bailey ought to have known this from the emails, someone, either Theatres managers or Ms Smedley or Ms Atkinson, could have but did not make it clear.

87. No one from HR, considered it necessary or important to speak to the staff who raised the concerns directly at the time, as opposed to speaking only to the theatres managers. Neither Ms Smedley nor Ms Laidler, nor Ms Atkinson had asked who has raised the concerns. They were content to proceed simply on the basis that unnamed nurses had raised concerns without attempting to get any understanding of why they might object to Rose's use of the changing room. We are of course aware of the distinction between the functions of HR and operational management. However, sometimes a concern cannot be addressed locally by operational management in a specific part of the organisation and must be addressed at the relevant directorate level, which in this case was HR, or more properly Workforce and Organisational Development. This was just such a concern because it was

about the appropriateness of a specific part of the Trust wide TIW policy. That much was obvious. It was also why Theatres Managers had turned to HR for answers. They knew what the policy said on giving Rose Henderson the choice and that Rose had exercised that choice.

88. No-one from HR, including Ms Bailey, visited the changing room. This meant that Ms Bailey was giving advice to Theatres managers based only on a description of that room given to her by them. This inevitably increases the risk of misunderstanding. One such misunderstanding that arose is evident from paragraph 32 of Ms Bailey's witness statement. Ms Bailey understood the changing room to contain cubicles for changing – as opposed to shower or toilet cubicles which might be utilised for changing if necessary. That was not the case. There were, in fact, no changing cubicles in the changing room. Although there were two shower cubicles (with curtains) and three toilet cubicles (with lockable doors), these were not changing cubicles. The normal practice and expectation – and by nature of the layout of the room – was that staff would get changed into and out of their uniform in the open, in front of each other. As already observed, not all nurses were comfortable with changing in the open, even in front of other women and some resorted to changing in the ladies' toilet. They did so in order to preserve their own propriety or modesty.

89. At the meeting of **28 September 2023**, Ms Bailey advised the Theatres Managers to talk to Rose about the fact that some of Rose's colleagues had concerns, of the sort that had been drawn to Ms Wainwright's attention. Ms Bailey did not think it right that concerns had been raised of which Rose was unaware. She thought and advised that the best solution was to try to work with Rose on any solution. She raised the possibility that Rose might be asked if they were willing to change elsewhere. However, this suggestion was met with resistance by the theatres managers. None of the three managers present would countenance this. They were insistent that they should not make Rose aware of the concerns or address them directly with Rose at all. As Linda Watson later described it, they were unhappy with the advice [**B3/968**]. They expressed the view that Rose should be supported and must not be treated differently. They felt that if Rose was asked to change elsewhere this would be wrong and discriminatory.

90. Ms Wainwright was comfortable with Rose using the changing room. She personally had no concern. She believed that those who wished Rose to use alternative facilities were inflexible in their views. She was, we find, right about that. However, she was equally inflexible in her view that Rose must not be asked even to consider changing elsewhere. As we have set out above, she had understood that HR were going to arrange for an 'education talk' for staff. She understood this to be a talk to raise awareness on the rights of trans people and the need for transwomen to be able to share the changing room with female nurses – something which aligned with Ms Wainwright's view. She and the other Theatres managers believed that such a talk would not change the views of those staff who objected to Rose using the changing room. Therefore, they were strongly of the view that there should be no dialogue with Rose about the matter and that those who

objected to Rose's presence in the changing room should change elsewhere. It will be seen, in due course, that Ms Wainwright's view that others should be asked to use alternative facilities over Rose's choice to use the changing room, was shared throughout HR up to the highest level. Rose's choice was prioritised over the objections of others.

91. Having met with resistance about speaking to Rose, Ms Bailey changed her advice to Theatres managers after the meeting. She gave the matter further thought and emailed the Theatres managers at 11:25am that same day (**28 September 2023**). We set that email out in full (**emphasis added**):

"I have had a think about this since we spoke and reflected on it from an objective stand point. Essentially when weighing up the risks in this situation ***on one hand we have risking upsetting Rose which potentially could be illegal discrimination whereas the other staff that have complained the risk is for them feeling uncomfortable****. Therefore, on this basis* ***I would recommend going back to the people that have complained and explaining that as an organisation we understand they may feel uncomfortable with the situation however we respect Rose's right to identify as female and her choice to use the facilities that match her gender****. You may wish to point out what other options are open to them to use such as the cubicles if they feel they want to have more privacy.*

I think in other areas that I have been aware of in this organisation this has not been an issue as the individual transitioning has been much more conscious of their own privacy when getting changed and the request has come from them to put in place other provisions, which has made this a lot more straight forward.

As agreed, ***I have contacted a few other people I know if they have come across a similar issue as you are having, where the individual that has transitioned is quite happy in a communal area themselves and will let you know if I hear of any other suggestions but I suspect they will adopt an equally cautions approach of keeping on the right side of the law rather than trying to satisfy the complaining staff***."

[**B2/275-276**]

92. Matron Linda Watson replied, thanking Ms Bailey for her support. In her email to Ms Bailey of **28 September 2023**, she said:

"*I recognise that there are concerns regarding discrimination and protected characteristics from a legal point of view and support a cautious approach from that perspective. I can and will have a conversation with staff who have raised concerns if they are identified to me, alongside the Theatre Managers, however I also acknowledge that all staff have a right to raise concerns and I have an obligation to support both the individual and the staff who may feel uncomfortable – the 'complaining staff' – as they will also feel they have a right to have their privacy and*

dignity respected. I can suggest alternatives such as using cubicles or another area of the changing room where appropriate.

It is a minefield as we discussed, and we acknowledge that this is difficult for all involved, but as a Matron I have to ensure that all staff feel listened to and that I act on their concerns. As a team we recognise that these challenges will become more prevalent, and will be more accepted, unfortunately as we can see, we are not in that position at the moment. I would very much appreciate if you do find that other organisations have any further suggestions regarding this matter that you pass these on for consideration." [**B2/275**]

93. We do not know whether the identity of those 'complaining staff' within theatres was ever given to Linda Watson and if so, what if any discussions she had with the Theatres' staff following this email. Nothing of that sort has been documented anywhere. We do know that Matron Watson did not speak to any of the complaining members of staff from DSU. Sister Quinn informed Mrs Hutchison that management had taken on board the points she and others had raised regarding safety and risk but they had to accept the situation because of the inclusiveness of the NHS. Ms Bailey had not advised anyone in DSU directly and Sister Quinn had not been present at the 28 September meeting nor copied into the email. We infer that it was Linda Watson who fed back to Ali Quinn the advice from Ms Bailey and that the gist of the feedback as set out in paragraph 9 of Ms Hutchison's witness statement is accurate. It is more likely than not that this feedback from Sister Ali Quinn was given not in August but shortly after the advice of Jillian Bailey contained in the email of **28 September 2023.** Mrs Hutchison has simply got her timings slightly wrong in paragraph 9 of her witness statement.

94. Therefore, as of the end of **September 2023**, the response to the concerns raised by Bethany Hutchison and others was in essence that they had to accept the fact that a trans woman was using the female changing room because of NHS inclusiveness. This feedback was given without anyone in a Band 7 management role or anyone in HR asking to speak to the individuals or without any review of the potential impact of the TIW policy on female nurses. Upon giving the feedback Sister Quinn did not inform Mrs Hutchison or anyone else that they could raise the matter more formally if they were not satisfied with this.

October 2023 to April 2024

95. The feedback from Sister Quinn to Bethany Hutchison was the last word on the matter from management up to **April 2024**. As articulated above, the Trust's Resolution Procedure makes provision for an employee to take a concern further, if it has not been informally resolved to their satisfaction. By raising their concerns with Sister Quinn, they (Mrs Hutchison, Mrs Lockey, Mrs Hooper and Mrs Grundy) were in substance – albeit unwittingly – doing what was required under stage one of the Trust's Resolution Procedure, albeit they had not completed any of the usual forms the Resolution Procedure provides for when raising a concern. However, none of those mentioned above had been involved in raising a grievance before.

They had not consulted the Trust's Resolution Procedure and were not aware of its terms. As already set out, Sister Quinn did not explain to anyone that they could take the matter further under the Trust Resolution Procedure or any other procedure.

96. However, the concerns remained. Not unnaturally, DSU staff spoke and shared their views and concerns with each other. It was not until **October** or **November** 2023 for example, that Mrs Hutchison came to learn from Lisa Lockey that she too had raised the same issue with Sister Quinn and that Mrs Lockey told her that the issue had been raised with management. They came to learn that others had the same concerns. Mrs Hutchison had also been discussing the situation at home with her husband and her father. Eventually, with their support and encouragement, she came to the view that she and others should make a formal written complaint.

97. It was in **February 2024** when the concerns regarding Rose's use of the changing room first came to the attention of the claimants' line manager, Claire Gregory. It is surprising that it took this long for her to learn of this and it is, we find, explained by the fact that Ms Gregory is not permanently present on the ward and that (unlike the Theatres managers) she did not use the changing room. Further, Ms Gregory had never met or seen Rose and Sister Quinn had for whatever reason never made her aware of the concerns and we note that she had retired by **December 2023**. In any event, on hearing of the concern, Ms Gregory immediately considered it to be an issue for HR. Unbeknown to her, HR had, as we have seen, been made aware of concerns from some Theatres staff back in July 2023 and from some DSU staff in August 2023, albeit no individual names had ever been given to them.

98. Ms Gregory contacted Lesley Smedley of HR and told her that some DSU nurses were concerned about a biological male, trans woman changing in the female changing room. Ms Smedley advised Ms Gregory to find out what the concerns were, to take notes and then come back to HR. Ms Gregory had spoken to Ms Smedley by **19 February 2024** [see **page 290 witness bundle**, time stamp 02:57]. As we have seen, Ms Smedley had, of course, been aware of the concerns that had been raised back in the **summer/Autumn 2023** from both theatres and DSU. Therefore, this cannot have come as any surprise to her, even if she had thought – wrongly – that the concerns might have gone away.

99. Ms Gregory met with the nurses in DSU on **19 February 2024**. The purpose of the meeting was to enable her to discuss the concerns with the DSU staff and to document them in an email to Ms Smedley. The meeting was covertly recorded by Mrs Hutchison. Whether she was right or wrong to do so, Mrs Hutchison wanted to have an accurate record of what the concerns were. She was by this time intent on taking legal advice from the Christian Legal Centre, something that had been suggested to her by her family and she wanted a recording for her own purposes. She did not tell anyone else she was recording the discussion. We were invited to listen to the recording and we did so carefully more than once. A transcript was prepared and attached as an exhibit to Mrs Hutchison's statement and was at

pages 287 – 305 of the witness bundle. The transcript is by and large a faithful reproduction of the recording. Ten speakers are identified by name as speaking and others whose names were not given are identified as 'speaker' or 'multiple'.

100. The speakers, including some of the claimants in this case, spoke of their concerns about having to undress down to their underwear in the presence of Rose, who is described as being male and masculine in appearance. Lisa Lockey refers to taking her top off and that she saw Rose looking at her. One speaker described a busy room full of '*bums and boobs*' and feeling uncomfortable because of Rose being there and seeing them. Some speak of Rose telling people about trying to get their girlfriend pregnant. In an effort to capture the concerns in a way that could be sent to Lesley Smedley, Claire Gregory said:

"*We have to be saying that we are females, we have got a voice, we have got the right as well to be able to get changed safely, confidently and comfortably*" [**page 298**, Claire Gregory, time 13:00].

101. Mrs Hutchison added that they should also be saying that the Trust has an obligation to protect their dignity and safety. Mrs Hutchison added:

"The discussion is as well, *where do we draw the line? Is it that people who are cosmetically changed are all right. Because actually I would feel more comfortable if somebody was cosmetically … and chemically*" [**page 298**, Bethany Hutchison, time 13:55].

102. This latter comment by Mrs Hutchison (which from a listening of the recording we find received a chorus of agreement by many present) reflects what we find to be the main concern for the DSU nurses, that a biological male, one believed to be in a sexually functional relationship with a female partner was permitted to change clothes alongside them in a female only changing room. It was this perception of 'maleness' of Rose and the concern that Rose was permitted to be in a room with them whilst in partial undress that was at the heart of their concerns and that made them feel unsafe.

103. Ms Gregory had mentioned to her direct manager, Sandra Watson that she was meeting with the nurses and why. Sandra Watson asked to be copied in on Ms Gregory's email to Lesley Smedley. On **19 February 2023**, at 16:57, Ms Gregory emailed Ms Smedley [**B2/277-278**]. We set out the key parts of that email below:

"Good afternoon Leslie

I write in relation to several upset members of my team within Day Surgery at DMH. They have informed me that there is a member of staff within theatres who refers to themselves as being female but is physically a male and living a male life.

I have had a debrief meeting this morning with my team and they have made me aware of some of their concerns. ….. This current situation poses a huge risk to our female employees and they are feeling undermined that their Trust are not looking after their interests or that of our LGBT community. We feel that the Trust should provide suitable changing facilities for those who are going through transition and it is not that we female colleagues need educating on the topic.

The Trust do state that they protect their staff and provide them with safe comfortable changing facilities. This is not occurring as some of my staff are actually afraid to get changed in the female changing room as they are made to feel uncomfortable. The Trust also state that they will adhere to religious and cultural beliefs. One of my nurses today has explained how she was late off her shift as she wouldn't get changed while this member of staff was in the female change.

None of my team are against this once the gender transition is complete but at present the team are feeling very deflated and unsupported. We are aware that the world is evolving and our societies are changing no one disputes this …"

104. Ms Gregory emailed Ms Smedley again on **22 February 2024.** She attached a link to a website, '*Fair play for women'* [**B2/283**]. (the same email was reproduced at **B3/88**). She added:

"… staff are upset that they have not been made aware of the likelihood of this happening in the female change and feel the staff member is being let down by not having suitable changing facilities."

105. The reference to the '*staff member*' is a reference to Rose Henderson.

106. Ms Smedley forwarded Ms Gregory's emails to her line manager Alison Laidler. She, in turn, emailed Sue Williams (HR Compliance Officer) and Gordon Brockbank on **22 February 2024**, referring to a discussion that was to take place later that afternoon. Ms Laidler noted that 'Lesley' (Smedley) had spoken with the transitioning member of staff's manager and there '*may be some exaggeration going on'* [**B2/282**]. The reference to '*some exaggeration going on'* is a reference to the content of the email from Ms Gregory (summarised in paragraph 103 above). However, no one from HR or theatres spoke to or fed back to Ms Gregory regarding any suspicion of exaggeration nor had anyone investigated anything before expressing that view.

107. On the same day, **22 February 2024 [B2/289-290**], Lesley Smedley emailed Jillian Bailey, Tracy Atkinson, Alison Laidler and Andrew Moore. The subject header was '*re: Jillian Bailey/Tracy Wainwright meeting toda*y'. Ms Smedley also attached the email from Jillian Bailey dated **28 September 2023** containing the advice Ms Bailey had given to Theatres back then [**B2/290-291**].

108. Ms Smedley said in her email of **22 February**:

"I have attached one of the emails I have received. I think there is some exaggeration on them stating rose is parading about in their underwear".

109. It was Tracy Wainwright who first used this phrase '*parading about'* when discussing with Ms Smedley her understanding of the concerns raised by Ms Gregory on behalf of DSU nurses. From what Ms Smedley had described, she interpreted the allegation to be that Rose had been parading about in the changing room in underwear. On **15 January 2025**, Sue Williams emailed Ms Wainwright as follows: '*during the interview with Lesley Smedley she informed us that you had reported that Rose was parading around in her boxers – can you confirm where you got this from/who told you this*?" [**B3/908**]. This prompted a response from Ms Wainwright who responded: "*I certainly did not say this. I get changed near to Rose and she does not parade in her boxer shorts*." [**B3/907**]. The reference to '*parading'* therefore emerged from the discussion between Ms Smedley and Ms Wainwright. By the time it reached Ms Newton, it had been incorrectly described as being an assertion, rather than a denial, by Ms Wainwright.

110. The key point is that Ms Smedley's view that the concerns were possibly being exaggerated was based solely on Tracy Wainwright's response and was expressed without going any further to establish any facts.

111. Ms Smedley asked Ms Bailey whether she had any suggestions. Ms Bailey replied on **27 February 2024** [**B3/90-91**] giving advice and embedding links to various sites including:

- the 'Fair Play for Women website' (this came from the link sent by Ms Gregory as per paragraph 104 above)
- the Equalities and Human Rights Commission ('**EHRC'**) non-statutory guidance of April 2022
- an article from Personnel Today
- a document from the NHS Confederation called 'Leading for all supporting trans non-binary healthcare staff September 2023'

112. Ms Bailey advised that a thoughtful approach to finding a balanced resolution was needed; that ideally, a long-term solution should involve the creation of gender-neutral, fully enclosed cubicle changing facilities for universal use across all changing areas. She suggested some interim measures to be considered:

- Open dialogue with parties to discuss appropriate and acceptable solutions.
- Access practical enhancements to privacy within the existing changing facilities, such as installing additional partitions or cubicles.
- Explore alternative changing arrangements without compromising the rights of any individual, including flexible schedules, staggered start/finish times, or alternative facilities where feasible.

113. The Fair Play for Women link contained an article headed 'Advice to service providers about female-only changing rooms'. It was not advice to employers. However, we were taken to it in evidence as it was an article read by Ms Bailey [see the **Legislation and Guidance Bundle, pages 81-104**]. Among other things, the article stated:

"*This guidance highlights the relevant sections in UK law to help service providers who offer changing room facilities to their customers. There is little in the way of established case law for business to rely on, so instead this guide sets out the legal framework with reference to the approved legal text of the Equality Act 2010. … We also highlight where relevant any guidance published by the EHRC in the form of statutory code. Statutory code is not an authoritative statement of the law; only the tribunals and the courts can provide such authority.*

What does female only mean?
Under UK law there are 2 sexes: male and female. 'Female-only' means restricting the service to members of the female sex only and excluding members of the male sex. Your legal sex class is what's written on your birth certificate."

114. The article went on to make a number of observations about why it is not unlawful to discriminate against biological male trans women by excluding them from a female-only changing room. It referred to there being provision in the Equality Act 2010 within Schedule 3, Part 7 of that Act which provides that a person does not contravene section 29 of Part 3 of the Act (which deals with services and public functions) by providing a service only to persons of one sex if certain conditions (those contained in paragraph 27 of schedule 3, para 7) are satisfied and where the limited provision is a proportionate means of achieving a legitimate aim.

115. The article also addressed any concerns some might have about potential discrimination against those with the protected characteristic of gender reassignment. It referred to Part 7, section 28 of the Act (it really means paragraph 28 of Part 7 of Schedule 3) which it stated sets out a lawful exception to gender reassignment discrimination provided the conditions in 'section' 28(2) apply and is a proportionate means of achieving a legitimate aim.

116. The article set out what is meant by 'objective justification' relating this to the use of female-only changing rooms. It did so by reference to the EHRC code. It gave examples of what it referred to as good reasons (or legitimate aims) why some women might want and need female-only changing rooms. The article concluded that:

- "*Female-only changing rooms are lawful and achieves the legitimate aim of providing the safety and privacy that women want and need when they are in a state of undress.*

- *Special exceptions exist in the Equality Act to allow service providers to lawfully exclude people born male from female-only spaces.*

- *All males can be lawfully excluded, even members of the male sex who self-identify as women and even males who have legally transitioned to female (meaning those in possession of a GRC)*

- *To minimise the impact on transgender customers you can provide a mixed-sex changing area in addition to your female-only changing area.*

- *By not providing a female-only changing area may be at risk of litigation*."

117. Ms Bailey read this article before replying to Lesley Smedley on **27 February 2024** [**B3/90-91**]. She advised that:

118. "*while the article presents a perspective emphasising the importance of same-sex provisions under the Equality Act, asserting that same-sex excludes trans women based on their legal biological sex, it is crucial to acknowledge the contrasting wording that transgender individuals have the right not to face discrimination based on their gender reassignment under the same Act and should be given access to gender appropriate facilities. The Act recognises both rights, creating a nuanced legal landscape*" [**B3/90**].

119. Ms Bailey confirmed in her oral evidence to the Tribunal that her belief that the Equality Act meant that a transgender employee should be given access to gender appropriate facilities was based on no particular provision of the Equality Act. She had in mind only the general prohibition of discrimination against a person because of gender reassignment. She believed this to be confirmed by other guidance that differed to that provided by '*Fair play for women'*, which she described in her email to Ms Smedley as a '*gender critical website'*. That is a correct description, we find. However, this does not diminish what is said in the article. We find that Ms Bailey did not accord significance to the Fair play for women article <u>because</u> it was a gender critical site. This highlights something that was evident to this tribunal (and it surfaced when Professor Pheonix came to give evidence) namely that when someone expresses a view either way on the use by trans women of what might be seen as traditional 'female spaces', they come to be viewed as either being '<u>against</u> trans rights' or '<u>for</u> trans rights'. This chimes with the evidence of Mrs Hooper, who felt constrained in expressing her concerns for fear of being seen as 'transphobic'. A deeper analysis of the issue was overlooked by the reduction of the article as being from a gender critical website.

120. Ms Bailey also obtained from South Tyneside and Sunderland NHS Foundation Trust a copy of its policy '*Transitioning at work and gender diversity policy*' [**B2/212-237**] where she noted that much of it was similar to the Respondent's TIW policy. In the South Tyneside policy, at section 10.11 it stated:

"*Trans colleagues are entitled to use the facilities of their affirmed gender identity. Gender-neutral changing spaces should be provided where possible. In the absence of gender neutral changing spaces, Trans and Non-Binary staff members may use the facilities they feel most comfortable using*."

121. Ms Bailey spoke to someone at the South Tyneside Trust who told her that its policy had been through their solicitors who confirmed that it was in line with current legislation and guidance. At the time Ms Bailey was not aware of the content of the Workplace (Health, Safety and Welfare) Regulations 1992. She became aware of these at some point in time. It is more likely than not that this was after proceedings in this case had commenced. She was not alone. Mr Thacker did not become aware of them until **March 2025.** When he read them, he understood two things: firstly, that they provided for single sex changing facilities for men and women and secondly that they were binding on the Trust as an employer's obligations in the workplace. The Trust's TIW policy had been drafted and reviewed in ignorance of these Regulations.

Ward meeting 05 March 2024

122. During a ward meeting on **05 March 2024**, staff asked Ms Gregory whether there had been any response to their concerns regarding the use of the changing room by Rose. Ms Gregory had received no update. She emailed Ms Smedley again after that meeting **[B2/287].** Ms Gregory asked whether staff could attend a meeting so that they may constructively put their points across and be advised by HR directly rather than through her (Ms Gregory). Ms Smedley replied that day to say they were escalating it and would get back to her. However, Ms Gregory received no further update in **March**. This was reminiscent of the delay experienced by Linda Watson back in **July 2023** when Ms Smedley had asked managers to bear with them.

123. A number of nurses, including the claimants, had by now come to believe that the lack of response from management or HR demonstrated a lack of any sense of urgency on the Trust's behalf. They felt that this reflected a lack of concern for them and that they were not being listened to or taken seriously. Among them was Mrs Hutchison. As stated above, she had been discussing the matter at home for some time. On her father's suggestion, she and some of the other nurses approached Christian Concern/ Christian Legal Centre for advice and support. They could have approached their trade union but they chose not to. They believed that, in Christian Concern, they would find a willing supporter with legal support. Mrs Hutchison approached them for advice some time between **19 February 2024** and **20 March 2024**.

Letter of complaint dated 27 March 2024 (sent on 04 April 2024)

124. Having consulted with Christian Concern, a letter dated **27 March 2024** was drafted by a solicitor, Mr Stroilov, who went on to represent the Claimants in this litigation. The letter is at page **B3/79-82**. It was signed by 26 nurses, making up

just over half the nurses in the DSU. It refers, among other things, that Rose had '*made no secret*' of trying to have a baby with Rose's female partner. Most, if not all of the Claimants were questioned by Mr Cheetham about this. He put to them that this was mere rumour and that they had no direct knowledge of this. The Claimants accepted that they had no direct knowledge and that it was something that had spread across the department. They believed that the source came from nurses in theatres who knew Rose and to whom Rose had spoken about it. They believed it to be true. Rightly or wrongly, it emphasised to them Rose's 'masculinity' and represented to them that the person sharing the changing room was a sexually active, functioning biological male. They took it as '*common knowledge'*.

125. Counsel asked for a ruling as to whether Mr Fetto should be permitted to question Rose on whether there was truth to these rumours, hitherto expressed as 'common knowledge'. Mr Cheetham considered that any questioning would be unnecessarily intrusive. Mr Fetto, submitted that there was at least implied criticism of the Claimants for raising it without having direct knowledge and that it was, in any event, relevant to the question of impact on the harassment case, that it would form part of the analysis as to whether it was reasonable for Rose's use of the changing room to have the effect contended for by the Claimants. We gave Mr Fetto permission with the caveat that we expected him to approach the matter sensitively. Mr Fetto did just that. His questions were limited only to whether Rose had told people about the matter and he did so in a delicate and proper manner. Rose confirmed that they had indeed talked to colleagues in Theatres about their intention to start a family later in life. The original source of the information was, therefore, Rose. That information then travelled through Theatres and onto DSU.

126. The letter dated **27 March 2024** was not in fact sent until **04 April 2024 [B2/323].** The letter was sometimes referred to in the proceedings as 'the **04 April 2024** letter'. They are one and the same. Ms Atkinson, Mr Moore and Mr Thacker confirmed in their evidence that, upon reading the letter they understood it to consist of two related concerns: firstly, the very use of the female changing room by Rose Henderson, a biological male, trans woman and secondly, the alleged behaviour of Rose in the course of using the changing room. Mr Moore understood the concerns of the nurses around the policy itself. Although he and Ms Atkinson later said that it was only on **20 May 2024** that they first understood there to be behavioural concerns as well, in oral evidence to the Tribunal they acknowledged that the letter also contained allegations about personal behaviour, in addition to a concern about the use of the room.

127. Believing that there was a good number of women who shared the concerns, Mrs Hutchison set about trying to obtain signatures to the letter before sending it to the Director of Workforce Development. We accept her evidence as to how she went about this as set out in paragraphs 20 and 21 of her witness statement.

128. One of those she spoke to was a nurse in Theatres, Leanne Davies ('**LD'**). She was known to Mrs Hutchison outside work. **LD** told Mrs Hutchison that, although she shared her views regarding Rose's use of the changing room, she

was reluctant to add her signature to the letter as she worked in the same team as Rose. We get a good insight into what happened following Mrs Hutchison's approach to **LD** from the Facebook messages between them [**B2/299-309]**. On **28 March 2024**, **LD** made four other nurses in Theatres aware that there was a letter to sign regarding Rose's use of the changing room [**B2/299**]. As **LD** put it, '*the news spread like wildfire'* around Theatres.

129. It is of note that **LD** works in Theatres and is a colleague of Rose's. She expressed concern for Rose's welfare and her respect for Rose as a person and a colleague. She found the letter to be too personal as it mentioned Rose and it referred to conduct which she had not witnessed. At the same time, she made clear her feelings that she was against '*people with a penis using female changing facilities*', that she sees Rose '*making no effort at all*'. **LD** said that they had learned to accept Rose as she is but that '*some do feel it is an awkward situation especially in view of the fact that she is still living out her full potential as a man and management should re- evaluate this new developmen*t'. She did not wish Rose to feel bullied but did not feel it '*right that the rest of us feel gagged*'. **LD** added that Rose had '*stopped transitioning for now and is trying to father a child*', that she is '*living like a man*' and '*looks like a man*'.

130. It is highly unlikely that these views and emotions were confined to **LD.** It is much more likely that they were shared by others in Theatres also. We have set out our findings above in respect Ms Wainwright's understanding of the feelings of 'international nurses'. The concerns expressed privately by **LD** to Mrs Hutchison in the Facebook exchange are more likely than not the same sort of concerns referred to by Ms Wainwright as 'rumblings' or 'rumours' and which she did not wish to or consider it appropriate to address with Rose or with her other staff. The exchange highlights the difficulty that staff would and, we infer, did have, in voicing concerns. Firstly, there was the fact that Rose was a colleague and there was concern that by raising objection to Rose using the changing room, this would be upsetting for Rose. Secondly, we infer from what we have already set out that staff were aware of management's support of Rose using the changing room and that staff were expected to accept this arrangement. This is, we find, what LD is referring to in saying '*the rest of us feel gagge*d'. These things, operating together, would and did militate against people raising their concerns. It partly explains why concerns trickled through. Further, those who eventually formally raised concerns in writing were from a different unit, the DSU. They were not close colleagues of Rose. Although still uneasy about raising concerns, that was one less pressure for them.

131. Mrs Hutchison expressed understanding for **LD**'s position and did not put any pressure her. She said she hoped for a good outcome both for those nurses who felt bullied by Rose's presence in the changing room and for Rose.

132. The '*spreading wildfire'* referred to by **LD** resulted in the existence of a letter coming to the attention of management in theatres – it not been seen by them at this point, however. Jody Robinson emailed Tracy Atkinson, Linda Watson, Rhys Maybrey (another Theatres Manager) and Tracy Wainwright on **28 March 2024**

[**B2/318-319**]. The subject line was *'transgender concerns'*. We set the email out in full:

"*I have been made aware by 2 theatre staff about a DSU nurse (Beth) who has been asking them if they want to sign a letter/petition to complain about one of staff members who is male to female transgender getting changed in the female changing room.*

Apparently Beth and some of her colleagues feel so strongly about this that they have enlisted a solicitor and the letter has been penned by them.

I have spoken to sister Naylor (DSU) about this and she was aware. I have raised the concern that it is upsetting to our staff to be asked to be involved, as Rose is our friend and colleague.

Sister Naylor will address this with Beth and kindly ask her to please consider the feelings of both the theatre staff and Rose herself, who I am sure will at some point hear of this.

The feelings in our department is overall supportive and inclusivity for our team however they choose to be identified.

I have not personally seen the letter, but I expect it will be sent to HR to deal with in the near future.

Tracy Wainwright and I have had a meeting a few months ago with a HR representative, as we were aware of similar feeling from DSU staff. The meeting was to gain some advice as to how the Trust would suggest we deal with these issues. As Managers we did not find it helpful, as the suggestion were that we address the issue with Rose, rather than those that raised the concerns. We did not feel that this was appropriate or in keeping with our Trust's inclusivity policy.

I feel that this requires senior HR and legal input as soon as possible as it has clearly been escalated outside of the Trust.

This is an extremely sensitive issue and it saddens me to think that a nurse would feel so strongly about the situation that she has attempted to enrol colleagues against a fellow health professional.

We will be more than happy to support any discussions and talk with those who have concerns."

133. The advice referred to by Jody Robinson which they did not '*find helpful'* was the initial advice given by Jillian Bailey on **28 September 2023** which we have set out above. It is clear from the email that Ms Robinson was aware of the complaints from DSU back in **2023**. Yet neither she nor Ms Wainwright had acted on that advice by speaking with any of the complaining staff. Ms Robinson's suggestion

that they would be happy *to support any discussions and talk with those who have concerns*, was, we infer, no more than a statement that they would be prepared to talk to staff to emphasise to them that Rose was a valued member of the Theatres team, was no threat to anyone and was entitled to change in the changing room that corresponded to Rose's affirmed gender.

134. Ms Robinson felt that the matter required senior HR and legal input due to its escalation. From all the evidence we have seen, it is obvious to us that operational managers did not know how to resolve this situation at a local level. They believed that any resolution was beyond their capacity. They needed others, particularly senior HR and legal professionals to provide the solution for them, whatever that might be. That was also the view of Matron Sandra Watson when she came to learn of the matter (see paragraph 15 of her witness statement). This was never going to be a case of HR simply giving advice to local management on a process to follow, leaving it for them to arrive at a management decision based on the views of nurses in the DSU. It was obvious that the matter required a solution that was beyond the clinical or operational professionals.

135. Tracy Atkinson responded to Ms Robinson's email on **02 April 2024 (B2/318**]. She said it might be helpful to have a discussion. She acknowledged that they (Theatres Managers) had previously met with Jillian Bailey but that further discussions and support were clearly needed. Ms Atkinson copied in Andrew Moore to provide additional support. She asked who was the best person to meet to discuss further. That same day, Tracy Wainwright emailed the same recipients plus some others:

"Just to keep you in loop, one of our theatre staff has informed rose that DSU have a petition to have her removed from the female changing room. Rose is very upset and I am sure there is very shortly going to be some fall out from this." [**B2/317**]

136. Although Rose had been informed, Rose had not seen the letter and had been told nothing other than staff were trying to have a petition signed to remove them from the changing room.

137. The following day, **04 April 2024,** Claire Gregory emailed the letter of complaint to the then Director of Workforce Development and OD, Morven Smith. It contained 26 signatories [**B3/79-82]**. The letter was headed: **'*Re Single sex changing facilities at Darlington Memorial Hospital*'**. The letter expressed the concern as being the use of the women's changing facilities by Rose Henderson, who identifies as female but who is biologically male and who has talked about trying to inseminate their female partner. They said that they did not consider it appropriate to have a sexually active biological male sharing their changing facilities. The letter continued as follows:

"We recognise that the Trust has a duty to staff who identify as transgender, but that right is not absolute. We are asking the Trust to take note of the NHS policy, 'Leading for all: supporting trans and non-binary healthcare staff', which says:

'*It is also important for employers to be* ***aware that concerns may be raised by some employees about sharing bathroom and shower facilities with trans or non-binary employees****. Employers must be conscious of their obligations under the Equality Act 2010 in respect of all protected characteristics and appreciate that there may be a conflict between these protected characteristics on occasions in the workplace. These conflicts should be resolved in a way that doesn't show preference for one protected characteristic over another and seeks to ensure that trans and non-binary staff are not caused distress in accessing facilities which align with their gender identify. In assessing the provision of bathroom and shower facilities,* ***all protected characteristics should be considered*** *and we recommend the involvement of staff groups and networks for input. [****Emphasis added'****]*

138. Ms Smith replied to Ms Gregory that same day [**B2/328**] to say that she would pass the letter to the relevant parties to consider the position and respond accordingly. The complaint was quickly circulated among a number of senior executives in the Trust. Claire Gregory forwarded it to Sandra Watson. She in turn forwarded it to Helen Coppock, Associate Director of Nursing, who forwarded it to Felicity White, Associate Director of Operations Surgery Care Group and Noel Scanlon, Executive Director of Nursing. Felicity White (who was unaware of any policy around changing areas) forwarded it to Lorraine Nelson, Executive Director of Operations, who in turn sent it on to Sue Jacques, the Chief Executive [**B2/336-339**]. In this string of emails, the letter of complaint was referred to as a 'petition'. [**B2/337**]. Tracy Atkinson was made aware of the letter and received a copy on **04 April 2024 [B2/323**].

139. Alison Laidler, at the request of Tracy Atkinson, emailed Carol Birch, Associate Director of Facilities. She asked if there was any work looking at changing rooms and, if not, who might be the best person to join a group to do so [**B2/351**]. Ms Birch replied that there was no such work ongoing. She later nominated someone from estates as a contact. Andrew Thacker provided a high-level informal update for the Board on **05 April 2024**. He advised the Board that the letter of concern would be handled under the Trust's Resolution Procedure, in the same way as would be any other concern.

Meeting of 15 April 2024

140. Tracy Atkinson arranged a meeting with relevant managers. She was content for whichever manager was considered appropriate to attend this meeting. She was to be absent on leave from **08 April**, returning to work on **15 April 2024**. A meeting was diarised for **15 April**. Ms Atkinson met with Lauren Faye, Linda Watson, Jody Robinson, Tracy Wainwright and Claire Gregory. Ms Atkinson joined the meeting by video. Ms Gregory was initially unaware of the meeting and was asked to join it only about 5 minutes before it started, even though the letter of complaint had been sent by her and not by anyone in Theatres. Ms Gregory felt

'ambushed', by which she meant that she had been caught off guard by having to attend a meeting at a moment's notice.

141. There is a dispute between Ms Atkinson and Ms Gregory as to what was said at this meeting. It centres around what, if anything, was said about the need for '*education*' of the DSU nurses. Ms Gregory's account is that Ms Atkinson said she wished to set up a meeting with the staff, to get a better understanding of their concerns so that she could understand what was safe for them and that the staff needed to be educated to broaden their views and that they should be more inclusive. Ms Gregory, not expecting to have been at the meeting, made the most basic of notes at the time. Her note reads: '*Tracy Atkinson. Education. Broaden views. Inclusive. Compromise*' [**B2/346**].

142. Ms Atkinson maintained that at no point during the meeting did she use the term 'educated' and that she did not say that the complaining staff had to broaden their minds. Her recollection is that she said '*we*' needed to consider the situation in its widest context and noted the need to ensure inclusivity for all – by which, she maintains she meant all parties. She further maintained that she said at the meeting that there needed to be greater awareness on the Resolution Policy.

143. We have considered both accounts carefully. There was a number of possibilities, including: one or other of them is right about what was said; both are wrong, or there is a bit of both, with one or other getting the wrong end of the stick, so to speak. Memories are notoriously troublesome. In the end, we preferred and accepted Ms Gregory's recollection of what was said and find Ms Atkinson's account to lack credibility and reliability. We are satisfied firstly that Ms Atkinson did talk about 'education' and 'training' of the nurses at that meeting. It was possible but, we concluded unlikely that Ms Gregory had chosen her own word to describe what was being said by Ms Atkinson about a need for greater awareness of the resolution policy. It is more likely that she wrote the key words that that were actually used. We noted that this was not the first time 'education' had been referred to in the context of Rose's use of the changing room. It had been referred to before, back in **September 2023** (see paragraph 74 above). Additionally, Ms Atkinson at the later meeting of **20 May 2024** (see below at paragraph 151) did not maintain that she had <u>said nothing</u> about 'education' at the meeting of **15 April**. Rather, she tried to explain that, in doing so it was '*not about you as individuals needing education, it's around the concern around how we deal with resolutions in the organisation*' [see **witness statement bundle, page 314**, transcript of meeting timed at 10.43]. Therefore, Ms Atkinson, in **May 2024**, sought to explain the reference to 'education' as a reference to what she referred to as the 'petition' – i.e. the letter of complaint dated **27 March 2024**, which she believed to be an improper way of raising a concern. We further noted that when Linda Watson was interviewed about 15 April meeting by Susan Newton on **26 November 2024** she was asked "*was Claire Gregory told her staff needed to broaden their mind-set and be educated on the matter in this meeting?*" Ms Watson is noted to have replied: "*we did talk about people's awareness of equality, diversity and inclusivity. Training*

was mentioned, but not that a particular team needed it, but more about what the Trust could offer." [**B3/961**]

144. This evidence as a whole, led us to find that Ms Atkinson did – as Ms Gregory maintains – refer to 'education' and 'training.' This was for, but not limited to, DSU staff. Having found this, we then had to consider and make a finding on what sort of education and training Ms Atkinson was referring to. We considered but rejected what Ms Atkinson said in the last sentence of paragraph 33 of her witness statement, namely that she was referring to training and education on the Trust Resolution policy and how this supports staff raising concerns commencing at 'local level'. Why do we reject this? Firstly, Ms Atkinson was aware that informal concerns had been raised at a local level over six months before regarding the use of the changing room by Rose. She had then suggested an education talk on equality and diversity. Secondly, we struggled to understand what possible 'training' Ms Atkinson might have had in mind on the resolution procedure. She did not explain in evidence what this might consist of.

145. There was no 'education' or 'training' that we could envisage on the 'process' of raising a complaint beyond simply directing staff to the relevant procedure and forms. The non-legal members of the tribunal had never experienced a situation whereby a group of workers had been 'trained' or 'educated' on how to present a grievance. On the other hand, they have had significant experience of workers being trained and educated on diversity and equality, precisely what Linda Watson had alluded to during her interview with Susan Newton. It is very easy to envisage an organisation providing such training, and indeed it is not uncommon in our experience, especially in the public sector. Further, we find that Ms Atkinson did say at the meeting on 15 April 2024 that staff had to broaden their mindset. This could only be in the context of educating them on the rights of trans employees in the workplace. This accorded with Ms Atkinson's view (and that of other senior HR figures) that Rose had a legal right to change in the changing room that corresponded to Rose's affirmed gender.

146. Therefore, we find that Ms Atkinson referred to arranging training and education, that this was clearly a reference to diversity and inclusivity with a view to broadening the mindsets of those who had raised concerns, especially with regards to transgender colleagues. This was entirely consistent with the Trust's philosophy and with the TIW policy. It was in keeping with what had been fed back to Mrs Hutchison via Sister Quinn in **September 2023**, feedback that originated from HR. Ms Gregory, who made headline notes, then fed back accurately to the nurses in DSU that the Trust was in support of Rose and that the 26 signatories had to be educated, broaden their mindset and be inclusive. This further feedback served only to reinforce the view held by the nurses in DSU that they were not being listened to and that their concerns would go nowhere.

147. Lest it be thought that we are in some way critical of the suggestion that employees be provided with equality and diversity training or of the suggestion that staff should seek to broaden their outlook on the treatment of transgender

colleagues or of all colleagues from all walks of life, we are not. All good employers will understandably hope and expect that all of their workers are treated with dignity, courtesy and respect. In and of itself, it is a noble aspiration that staff should 'broaden their mindset'. But this issue of 'education' and 'broadening mindsets' takes on a particular significance on the facts of and in the context of these cases. One can have a broad mindset on the rights of transgender people whilst at the same time raise legitimate concerns about the effect of having to share a space whilst being exposed in one's underwear in the presence of someone of the opposite biological sex. Given the circumstances in which it was suggested, the intention to 'educate' with a view to broadening mindsets served to highlight to the DSU nurses in particular that they were not being taken seriously, reinforcing the feeling that they were seen as transphobic or bigoted. If nothing else, it demonstrated a prioritisation of one group over another.

Second letter (30 April 2024)

148. On **01 May 2024**, Ms Gregory emailed a second letter to Morven Smith bearing the date **30 April 2024** [**B3/83-84**]. The letter was drafted by Mrs Hutchison and was based on what Ms Gregory had fed back to her and the others. Ms Gregory did not draft it but she did not disagree with the content. It stated:

" …. *We have been informed via Claire Gregory that on 15 April the Head of HR, Tracey Atkinson, told Ms Gregory at an impromptu meeting at the hospital as follows:*

- *The trust are in complete support of Rose.*
- *The staff that signed the letter need to be educated and attend training*
- *The staff need to broaden their mindset*
- *The staff need to be more inclusive*
- *The staff need to compromise*

It was further stated by Tracy Atkinson at the meeting that:

- *Bethany Hutchison 'needs training on how to raise a complaint and that she must attend a meeting with various senior members of staff and be a spokesperson on behalf of those who signed the letter'. We note that this is despite the fact that Mrs Hutchison was not the person we had nominated to represent us in our complaint."*

The above has done nothing whatever to allay our concerns.

Yours sincerely,

Claire Gregory and the signatories of the original letter."

149. In an email dated **08 May 2024**, Ms Atkinson asked Ms Gregory to confirm '*what does good look like in terms of a resolution – what are the staff seeking as a remedy, can you please clarify this in order for us to consider in advance of the*

meeting.' [**B3/114-115**]. That was a reference to a meeting that had been arranged for **20 May 2024**.

150. Ms Gregory replied on **09 May 2024**. In that reply, it is again clear that the complainants wished to have separate changing facilities. Ms Gregory wrote:

"… *on the back of these responses the team have expressed they just want a safe place for everyone including Rose, they do not want to be in a situation where it could be 'our word against theirs. I have every hope that this can be resolved amicably and professionally*." **[B3/113]**

Meeting of 20 May 2024

151. On **20 May 2024**, Ms Atkinson and Mr Moore met with Ms Gregory and approximately 25 nurses from DSU. This meeting also was covertly recorded, this time by Lisa Lockey. We have been provided with a transcript of the meeting [**witness statement bundle, exhibit BH1, pages 286-336**]. We have also listened to the recording as we were asked to by the parties. The Respondent invited us to conclude that this was at times a hostile meeting. However, that is not apparent from the audio recording. Contrary to Ms Atkinson's evidence in paragraph 55 of her witness statement, she was not spoken over or interrupted multiple times. We have no doubt that this is Ms Atkinson's genuine perception both now and at the time but it is certainly not the finding of this Tribunal.

152. It is not unnatural in our experience – especially in a large group setting – for a listener to interject during a lengthy dialogue by a speaker, whether to disagree with a point the speaker is making or because the listener senses an opportunity to respond to something that the speaker has just said before the moment is lost. All that the audio recording demonstrated to us was a dynamic conversation where, on occasion a person said something at such an opportune moment. Even then there was only one occasion we could detect when Mrs Hutchison might be said to have 'butted in' when Ms Atkinson was speaking. That was when Ms Atkinson referred to the letter of complaint as a 'petition'. We have no doubt that Ms Atkinson perceived that this to be a hostile interruption but that is not how we would describe the interjection. From Mrs Hutchison's perspective, and that of the other signatories, she perceived the description of the letter as a 'petition' to be derogatory. Her interjection was no more than a point of clarification. We would add, we do not regard Ms Atkinson's use of the word 'petition' as hostile or derogatory. All of this serves only too easily to demonstrate how, in human interactions, we are adept at feeling hostility even in circumstances where objective observers detect no intended or actual hostility.

153. It goes without saying that we were not present to witness any 'body language' and we are only too aware how much part of human interaction is in body language. We have no doubt that Ms Atkinson sensed some personal hostility towards her from certain people in the room and especially from Mrs Hutchison at this point. However, that is unsurprising given the feedback that had been given to

the nurses by Claire Gregory following the meeting of **15 April 2024**. From the perspective of the nurses going into that meeting, they were going to be speaking with senior HR figures who believed they needed to be educated. Ms Atkinson went into that meeting aware of the content of the **30 April** letter and she knew that she would most likely have to defend herself. Both Mrs Hutchison and Ms Atkinson therefore had, to a significant extent, a 'defensive' mindset from the outset. Set against that background, the meeting had potential to be challenging and tense for Ms Atkinson and we have no doubt she perceived it as hostile.

The letter of 27 March: a 'letter' or a 'petition' and does it matter?

154. The description of the letter as a 'petition' forms part of the complaints in this case – rather than it simply being described as part of the wider factual matrix. Therefore, we have to address it.

155. Ms Atkinson explained that she and Mr Moore were there to help navigate the way through and that the first stage of doing so was informal resolution [**witness bundle, page 310**, time stamp 01:17]. Ms Atkinson explained that there is a particular way in which the Trust, as an organisation, deals with 'resolutions' (the Trust's term for grievances) and that a 'petition' was not appropriate [**page 314**]. Some of the nurses perceived that the word 'petition' was used pejoratively or disapprovingly by Ms Atkinson. Certainly, Mrs Hutchison did - as we have outlined above. Ms Atkinson explained that she was merely referring to the letter as a petition because that is how it had been described to her. That is indeed how Jody Robinson had referred to it in her email to Ms Atkinson of **28 March 2024** [**B2/310-311**]. Ms Atkinson had simply adopted that language. Whether she was right or wrong to adopt Ms Robinson's language, we do not find that Ms Atkinson meant anything by the use of the word. It was used interchangeably with 'letter.'

156. On an objective analysis, it matters not whether the letter of complaint was referred to as a letter or petition. Whether a letter containing 26 signatures is a 'letter of complaint' or a 'petition of complaint' is not the point – although much was made of it in the case. The key point is that, however, described, Ms Atkinson and other senior HR officers did not believe that the correct way to go about raising a concern about another employee was to circulate a document at work with a view to procuring signatures. Ms Atkinson told the group that the normal way of raising a concern was to do it locally through the matron or ward manager. She explained that, by doing this, they would not necessarily need HR intervention because it would be dealt with locally with the management team. That was, she explained, stage one resolution, which she said had not been done here [**witness bundle, page 315**, time stamp 11:41].

157. The claimants who were present at this meeting felt that they were being talked down to and not being taken seriously by Ms Atkinson or Mr Moore. We can understand why they felt this way, having listened carefully to the recording. Ms Atkinson refers to '*case law'* being '*clear'*. She refers to '*navigating their way through what the ask is'*; to the '*art of the possible'* and '*what good looks like'*. The

language had a very 'corporate' weight that was felt by the nurses and which they regarded as unconvincing and patronising. This was especially the case when told that they were at the first informal stage of their complaint. Mrs Hutchison pointed out that the matter had in fact been raised with sisters on the ward and that it had, as far as they knew, already gone to HR. Mrs Hutchison was of course right about this. That first informal stage (as was accepted in evidence by Mr Thacker, Ms Atkinson, Mr Moore and Ms Bailey) had in fact been undertaken (albeit unwittingly by the complainants at the time and without completion of forms) by some of those who were signatories to the letter back in **August 2023** including Mrs Hutchison. Not only that, but HR were fully aware of this at the time.

The art of the possible

158. During the meeting Ms Atkinson said "*I guess what I'm hearing is your ask is for separate changing facilities*". We pause to note here that it is obvious – and always had been obvious – to Ms Atkinson and others who received the letter what it was that the signatories were seeking. This was the exclusion of Rose, a trans woman, from the changing room while at the same time expecting that Rose be treated with dignity and respect. This was plainly stated in the letter of **27 March 2024** and was also clear from Ms Gregory's earlier email of **19 February 2024.**

159. Ms Atkinson added said one of the things they were considering was around the wider impact of estate and what is the '*art of the possible'*, that they would have a look at the changing facilities so they can 'visualise' that [**witness statement bundle page 321**, time stamp 21:19]. Ms Atkinson said that she could go and have a look at the facilities.

160. As alluded to already, Ms Atkinson referred to the existence of 'case law' and to discrimination a few times during this meeting. She also referred to the need to respect everybody's dignity at work, irrespective of protected characteristics, that they would have a conversation with everyone to say '*we are going to have to have a bit of flexibility here and you know we are going to have to compromise'* [**page 333**, time stamp 40:57], that if there was an easy middle ground they would have found it by now. She referred to there being 'case law' where an organisation was "*slammed for asking someone to do something different because of their protected characteristic and that would include go and get changed over there"*.

161. By referring to discrimination, Ms Atkinson had in mind only discrimination against Rose. At no point did she, or anyone else in management or HR seriously consider that the policy of permitting a trans woman to use the female changing rooms might constitute some form of discrimination against female employees.

162. Mr Moore also referred to '*the case law*', emphasising that it was a delicate situation, that they wanted those in the room to be comfortable, wanted Rose to be comfortable and needed to protect the organisation as well. He said there had been a recent case where the organisation had accommodated the transgender person in a suitable way but where some individuals were not happy with that decision. He

mentioned that "*those individuals were open to direct sort of legal challenge, so we don't want that to happen either … we need to get this balance right and work through it together*" [**page 327-328**, time stamp 32:11]. We find that Mr Moore also was of the view that the only question of discrimination here was against Rose and added that people in another case who objected to suitable accommodation for a transgender person found themselves open to direct legal challenge, the implication being that this could happen to the nurses at DMH.

163. Towards the end of the meeting Ms Atkinson said: "*If you are happy for us to go away and think about alternative solutions, the estate, what's the art of the possible, what we can do to try and resolve it in what I'm calling an amicable way. So that we've got a sensible way forward*" [**witness statement bundle, page 327**, time stamp 30:15]. Ms Atkinson said that they were going to try and see Rose that week and have a conversation with Rose and the theatres management team; that she needed to look at the changing facilities. Mr Moore added that he had contacted the estates department and that maybe they could come and advise him and Ms Atkinson because '*when you come to buildings and infrastructure, it is always a challenge*'. Therefore, the meeting was left on the basis that Ms Atkinson and Mr Moore were to speak to Rose and do a bit of homework on the infrastructure and the estate. Ms Atkinson added that if the nurses thought of anything else that would be helpful they were open to solutions. It was, she said a "*joint problem*, *so let's have a joint solution"*" and that they should "*leave it with* us".

164. Nothing that was said at this meeting was enough to reassure the Claimants. They were all of the view that management had not acknowledged or explained the delay since concerns were first raised. They were right about this. Management had not taken their concerns seriously between July 2023 and this point. As far as they were concerned, Ms Atkinson was simply promising to have discussions within management but not to address the core issue from their perspective. They were also, we find, correct in their belief. Management was not going to address the core issue (the use of the female changing room by a biological male trans woman was not going to be addressed). Mrs Hutchison, in particular, was sceptical about these suggested 'management discussions', especially in light of the feedback they had received from Claire Gregory following the 15 April meeting. She and others had found Ms Atkinson's explanation about what she meant by education to be unconvincing.

165. Shortly afterwards, most of the signatories to the letter of complaint had a discussion about what had been said at the meeting. They shared the same view which was that HR would not do anything, that they were intent only on preventing a legal action against the Trust. As regards that last point, we find that a major concern of the senior managers was in fact to protect the Trust against possible litigation from Rose and perceived reputational harm. Ms Atkinson, Mr Moore and others, including Ms Bailey and Mr Thacker were also motivated by their belief in the correctness of the TIW policy and their understanding of the legal rights of Rose. They did not expect the Claimants to go as far as they did. They were 'blindsided' by what came next

Events immediately following the meeting of 20 May 2024

166. On **21 May 2024**, Alison Laidler sought, as a starting point, to arrange a visit to the changing room at DMH within the next couple of weeks for Tracy Atkinson, Ms Laidler and Anne Richardson (now Edwards) [**B2/354**]. However, that visit never happened because of the events later that week.

167. On **23 May 2024**, Claire Gregory told Matron Sandra Watson that a group of staff who were concerned about the changing room were on a Teams meeting talking to their solicitor about going to the media. Sandra Watson informed Noel Scanlon, Executive Director of Nursing of this. There was then a flurry of activity at a senior level. Mr Scanlon called Mr Thacker. He, in turn, spoke to Tracy Atkinson after which he updated Mr Scanlon by email [**B2/388**]. Mr Thacker explained to Mr Scanlon that this was a complex issue, for which there was existing case law and one which has seen lawsuits being raised against individuals. He explained that there had been a meeting that week (i.e. the meeting on 20 May) at which "*they*" (meaning Ms Atkinson and Mr Moore) "*reached agreement from all on further work which will be undertaken in relation to trying to seek a resolution to this which is in line with our local policies and avoiding the involvement of legal representatives*". Mr Thacker went on to say:

"It is unfortunate that the way in which this has been brought to our attention has been done in such a way that is creating animosity between colleagues in Day surgery - a petition against the individual along with poor behaviours and discriminative/offensive language from some individuals involved is not the correct way to handle this situation and has the potential to cause more damage in terms of the Trust's reputation than the interpretation of a policy which is designed to encourage the Trust to be inclusive.

Workforce & OD along with Estates and other colleagues are working with Day Surgery to try and identify a workable solution that is consistent with the case law mentioned earlier – a separate 'transgender' changing room or demanding that an individual uses other inappropriate accommodation to get changed is neither feasible or reasonable. We know that our facilities and the ability to find a perfect (for all) solution to this is limited.

I have asked that Tracy and Andrew keep both me and Morven appraised of this on a regular basis but I am reasonably assured, at this point, that this is being managed appropriately and with the best interests of all involved in mind."

168. Mr Scanlon replied [**B2/379**]:

"*Just to confirm Sandra tells me Tracey and Andrew do know that the female staff have gone to lawyers and are in conference as I write.*

This strikes me as entirely self-inflicted politically correct nonsense which will end up in the tabloids. If the individual is not respectful of his/her/their female colleagues

then I think we do need to take management action as opposed to asking the majority of the female staff to make alternative changing arrangements which I believe is the advice Tracey and Andrea (sic) have given based upon our current policies."

169. Mr Thacker's response was in substance that any solution had to align with the TIW policy and that the solution senior HR had in mind was to find somewhere for the nurses who had complained to change elsewhere. However, Mr Thacker was aware that there were no alternative facilities. Even the stark numerical reality was not enough for management to consider speaking to Rose to ask whether Rose might be willing to change elsewhere pending a resolution of the matter. Some 300 workers used the female changing room, of which there was a single biological male/trans woman. Bearing in mind there were 26 signatories, the Respondent could not rule out that more were reluctant to share the changing room with Rose. We refer back to our findings above regarding the natural reticence that staff may have to raising any concerns of this nature. That is why management had to 'engage' with Estates, to see what they could do to provide something for potentially a significant number of staff, as opposed to engaging with estates to see if they could provide something for a single member of staff in the meantime. Requesting Rose to change elsewhere, even having the conversation, was never on the cards. It was in the eyes of Mr Thacker, Mr Moore and Ms Atkinson neither reasonable nor feasible.

170. That afternoon the Trust's Head of Communications, Gillian Curry called and then emailed Mr Thacker, Morven Smith, Tracy Atkinson and Andrew Moore to explain that she had received an email from the Mail on Sunday about an article that was to be published that weekend and asking for comment from the Trust by 1pm on **Saturday 25 May 2024**. Mr Thacker spoke again with Gillian Curry on Friday and was told that the paper wanted to run the story by Sunday because the nurses had stated that they intended to bring a legal claim against the Trust the following week. Ms Curry liaised with the journalist urging them not to publish details that could identify individual employees. Mr Thacker made other senior figures aware of what was happening so that they would be able to provide any support that might be needed.

171. Tracy Atkinson updated the Theatres that same day (Friday). Managers were concerned for Rose's welfare given the news that a story was going to appear in the Mail on Sunday over the weekend. Therefore, on Friday **24 May 2024,** Rhys Maybrey and Jody Robinson spoke to Rose. They explained to Rose that there had been a meeting on 20 May but that staff from Day surgery had now gone to the press and that the Mail on Sunday was going to print. Rhys Maybrey updated Tracy Atkinson about this that day [**B2/381**]. He said "*as per your offer Rose would like to meet on Wednesday* [**29 May 2024**] *at a time convenient to yourself. Jody will be available to attend with Rose as support*."

172. On **24 May 2024**, Mr Moore had a conversation with Ms Bailey. He explained that he had been looking at the TIW policy with Tracy Atkinson as she (Ms Bailey) was in the process of reviewing it. He referred to some of the language which seemed to him to be 'dated'. They wondered together whether the staff who had complained were possibly thinking that Rose supposedly trying for a child meant that they were not permanently living life in their affirmed gender as detailed in the policy. Ms Bailey followed this up with an email containing advice which she asked to be passed on to Ms Atkinson [**B2/383-384**]. In her email, Ms Bailey inserted a number of links, including:

- NHS Guidance from the NHS Confederation (noting in particular pages 63 and 69)
- ECHR guidance (noting that this had been withdrawn on 08 April 2024)

173. Ms Bailey said:

"*The issue of challenge being is Rose spending her life as a woman and I am sure it could be argued either way but for all intents and purposes she is dressing and telling us that she is living her life as a woman so we can only go from that and the staff who say she is being sexually active as a man don't have any proof of that*."

174. Mr Moore forwarded the advice to Ms Atkinson and Mr Thacker. Mr Moore's take on this was that "*the way it has been approached is in line with what is available to guide us but summarised below by Jillian*". In an answer to a question by Mr Fetto, Mr Moore confirmed that what he meant by this was that the policy was right but that some of the language needed to be refreshed. Mr Thacker also found the advice to be very helpful. Having seen the reference to the policy '*not being absolutely current*' he asked that: '*we please prioritise this for review*' [**B2/385**].

175. The reference to the policy not being '*absolutely current'* was to that part of the TIW policy which stated:

'the *right to use the toilets and facilities appropriate to their gender from the point at which the individual declares that they are living their life fully in that gender.'*

176. When asked by the Tribunal what he understood the phrase '*living their life fully in that gender*' to mean, Mr Moore did not know. He considered that any refreshing of the language would involve potentially changing that language or removing it.

177. Although the policy referred to use of toilets and changing facilities appropriate to the stated gender being made available from the point at which a trans person declares that they are living their life fully in that gender (whatever that means in practice) at no point did Rose make such a declaration. Nor had anyone ever considered asking Rose to make such a declaration. As set out earlier, there had been no discussion with Rose at any point in time regarding use of the

female changing room. By Rose saying they were transgender that was sufficient for the Trust to permit Rose to access the changing room. The Trust's recognition of a transgender person's identity begins the moment a person informs it they are Trans or that they intend to transition. Recognition of transgender status is one thing but access to a female changing room, on paper, at least, is another. The TIW policy, on paper, suggests a higher threshold before that same transgender person may use the facilities that accords with their affirmed gender. This apparently higher threshold requires a declaration that they are living their life fully in that gender, a phrase whose meaning Mr Moore did not understand. In practice, there was no expectation that any such declaration be made or recorded or checked (if such a thing was even possible). In the end, it was clear to us that – in practice, within the Trust - simply stating that one has transitioned (i.e. is transgender) or that one is transitioning or intends to transition was regarded, for all intents and purposes, as the same as a declaration that a person was living their life fully in that gender. This provided that person, under the policy to an unfettered choice to use the changing room of their choice.

178. Returning to Ms Bailiey's email to Mr Moore of 24 May 2024 [**B2/383-384**], the links provided by her included a link to explanatory note 43 to section 7 of the Equality Act 2010 (which gives the definition of gender reassignment). She also referred to a first instance employment tribunal case called **Taylor v Jaguar Landrover**. This suggested to her that the language needed updating. However, there was no suggestion by her or anyone else that the substance of the policy that permitted trans women to access the female only changing room (or the mirror position for transmen to access the male changing room) should be reconsidered. If anything, the reference to South Tyneside's policy (which Ms Bailey found to be very similar to the Respondent's TIW policy) confirmed to senior HR officers that there was no need to review the substance of the TIW policy, only the wording, in order to bring it up to date. We have no doubt that it is for these reasons that when an external consultant (Susan Newton) came to be appointed to carry out an investigation into the letter of **27 March 2024**, a review of the correctness – and effect – of the policy on female nurses was never on the table.

Legal action

179. Eight nurses – the claimants in these proceedings - decided that they would take legal action in the Employment Tribunal. In consultation with their backers Christian Concern, they also decided to approach the media. They commenced ACAS early conciliation on **24 May 2024**. An EC Certificate was issued on **28 May 2024** and an ET1 (Claim Form) was presented to the Tribunal on that day.

Media coverage

180. The case was first reported in the Mail on Sunday on **26 May 2024**. It was picked up by other national newspapers. The Trust was named in these initial reports but not Rose. The coverage by the Sun (and we infer the Mail on Sunday) referred to a trans nurse appearing to take a keen interest in female staff, walking

around the room in boxer shorts, that the trans colleague had told the nurses that they had stopped taking hormone treatment as they were trying for a baby with a female partner. It also referred to an encounter in the changing room – that is a reference to what we now know to be the events as described by Karen Danson in her witness statement but without referring to her name [**Media bundle pages 3-4**]. Although not published at the time, the Claimants gave Rose's name to the Mail. Subsequent press coverage then referred to Rose by first name only [see Daily Mail coverage, **Media bundle pages 5-9**]. A photo of Tracey Hooper, Annice Grundy, Lisa Lockey and Bethany Hutchison dressed in nurses' uniforms was published for the purpose of posing for a photo for the article. Those uniforms were not their own uniforms but were provided by the Daily Mail.

181. As the days and weeks went by, some of the Claimants were interviewed on television, for example Mrs Hutchison and Mrs Lockey. There continued to be increasing press coverage over time via all media outlets including on social media. Much of what was reported referred to allegations of conduct or improper behaviour of a Trust employee. The Claimants had begun to take on the role of campaigners. They now saw themselves as fighting a wider battle, on behalf of women in general for the maintenance of 'safe spaces'. Following a preliminary hearing in the Employment Tribunal in **January 2025**, Rose's surname was eventually published by the media and photographs of Rose started to appear in the press.

The temporary solution: alternative changing facilities

182. As we have set out, the TIW policy provides that "*If others do not wish to share the gender specific facilities, they should use alternative facilities"* even though no available alternative facilities existed. In practice, therefore, those women who had to change in and out of uniform at work only had available to them the female changing room. This was known to management, which was why Ms Atkinson spoke of the '*art of the possible'*.

183. It was clear to Sandra Watson that there was nowhere big enough or suitable for long term use by a group of nurses (in the region of 26, being the number of signatories, and potentially many more). In **June 2024**, she received a call from Katherine Burn, Director of Quality and Deputy Director of Nursing, asking if she knew anywhere that might be suitable. Ms Watson thought that this was what HR were to be looking at. Nevertheless, she suggested that they could perhaps use Claire Gregory's former office as a locker room. There were also two other larger rooms, each of which had one single lockable changing cubicle and a separate accessible lockable toilet inside. However, she noted that both rooms were currently being used, one as a meeting room and the other as a staff room. Management then set about using Ms Gregory's room as a locker room and one of the meeting rooms as a changing room, as a temporary measure. A digilock was installed on Ms Gregory's former office and a sign was placed on it saying '*locker room'*. Another sign was put on the door of the meeting room saying '*individual changing room'*.

184. On **30 June 2024** Ms Gregory sent a group WhatsApp message to the DSU staff:

"*Hi, as of tomorrow we are going to have a locker room on the ward (minus the lockers for now but they are on order, promise).*
This room will be my old office there is a digital lock on it … If anyone would like to get changed in private, there is an individual changing area in the meeting room but belongings are not to be kept in there.
These changes have been enforced by the deputy director of nursing and the ADN." [**B2/515**]

185. Ms Gregory confirmed that the new rooms were for the use of those who choose not to change in the main changing room. Tracey Hooper asked:

"Just a couple of questions…
Why do we have to move and not Rose? Surely its easier and more practical move 1 person and not a full ward of staff.
If everyone on the ward wants to use your office how will this be accommodated as we all won't fit in there and having to wait to get in will cause a delay to starting work.
Will we be giving up our personal locker and have to share with someone else due to lack of space?" [**B2/516**]

186. Ms Gregory replied that she had been told it was a temporary measure.

187. Although unknown to the nurses at the time, on **28 June 2024**, Colin Evans, Fire Safety Officer, notified management that if a room was to be used as a changing/locker room it had to be afforded the correct fire safety measures [**B2/500**]. By **August 2024** it was recognised that Claire Gregory's old room (now the locker room) was not compliant with fire regulations (given the storage of staff property) and that the cost to render it so would be £9,200 [**B2/861**]. In **September 2024**, Helen Coppock had emailed Sandra Watson about this [**B2/865**] asking whether there were any suitable changing facilities on Ward 11 that might be shared. This question was asked because Ms Coppock wished to avoid having to incur £9,200 if there was something else available. However, there was nothing on ward 11 that could be used, as confirmed by Sandra Watson. The fire compliant work was not something that Ms Watson could authorise. It was for others to do this, not her. She had already identified a room that might be usable. No-one else, either from estates or HR, had identified anything at all. The necessary work referred to by Mr Evans was never carried out and throughout the time Ms Gregory's room was used as a locker room, it was not fire safety compliant.

188. We were particularly impressed by Sandra Watson as a witness. She had a good grasp of the issues. She recognised immediately that at the heart of the matter was the TIW policy and that the Trust needed to look at the policy on a wider basis. It was clear to her that this was something that went beyond local managers. She also seemed to command the respect of her nurses. However, she was fairly

new to her role at the time and had been advised not to involve herself in these matters by Helen Coppock, that she was to remain impartial because a 'process' was being followed. Reflecting on events during her evidence she expressed the view that, with hindsight, she should have met with the complainants. She understood why staff felt unheard and unsupported by the Trust, and she included herself in the description of those who had been seen to have generated this feeling. In the Tribunal's view it is unfortunate that she was advised to stay out of things because her input is likely to have been well-received and helpful.

Posters placed on the female changing room

189. On **01 July 2024**, the day on which the temporary facilities were made available, staff arriving for work in the morning saw that a poster had been pinned to the external door of the changing room. It said *'Inclusive Changing Space*'. The poster contained the letters 'NHS' against the colours of the rainbow above which was printed '*do not remove this sign'*. There were also five A4 pages from the NMC Code pinned to a wall inside the changing room highlighting in various colours passages from the Code [**B2/2112**]. Karen Danson was the first to see this. Someone (most likely Mrs Danson) posted a photo of the sign on the door onto the group WhatsApp Group at 06.41 that morning. Tracy Hooper also saw them and felt that it was a dig at them. So too did Carly Hoy. It was, she believed, a deliberate attempt to add insult to injury and she was, in her words, 'fuming'. She considered that someone had done this to wind them up and provoke them. Bethany Hutchison also saw the posters and reported the matter to Claire Gregory.

190. Ms Gregory then told Sandra Watson. By the time Sandra Watson got there, the poster on the external door had been removed. However, she did see the pages from the NMC Code on the wall inside the changing room. Tracy Wainwright did not see the poster on the changing room door when she arrived for work but she too saw the NMC Code pages. We find that the poster on the external door had been removed almost right away, very shortly if not immediately after Karen Danson took her photo. We are unable to say by whom.

191. Sandra Watson felt this to be a passive aggressive act from Theatres staff to DSU. She spoke to Helen Coppock. Ms Coppock advised Ms Watson not to do anything and to leave the NMC pages where they were. However, upon speaking to Katherine Burn, Deputy Director of Nursing very shortly after this, Ms Burn agreed that the pages should be taken down. Ms Watson did this right away. None of the Claimants was aware that Helen Coppock had spoken to Sandra Watson at the time. Ms Watson only told Bethany Hutchison about this over a year after the event (see paragraph 68 Mrs Hutchison witness statement).

192. No-one has been able to say who put these posters up. The best evidence is that it was a person or persons from the Theatres night staff. That is what Tracy Wainwright believed. Given that the posters only appeared overnight and having regard to the evidence of Ms Wainwright, we infer that to be the case. They were placed there in a misguided attempt to show support for Rose. However, this was

perceived by the Claimants as provocative. Rose Henderson was made aware of what happened. Rose did not believe that it helped the situation.

Concerns regarding the media coverage

193. On **15 July 2024**, Mr Thacker wrote to four of the Claimants: Mrs Hutchison, Mrs Lockey, Miss Hooper and Ms Bradbury. He understood those to be the four who had appeared in the photograph in the Daily Mail dressed in uniform. Ms Bradbury, however, was not in that photograph. Mrs Grundy was. The letters were in identical terms. They said:

"*We are aware of your recent engagement with the UK media in respect of the ongoing legal action you are pursuing against the Trust. Whilst we acknowledge your right to exercise your freedom of speech and in no way would want to prevent you from raising concerns about issues at the Trust, it is not appropriate to make serious allegations against other colleagues in the media.*

We write to remind you that the Trust's Resolution Procedure is the appropriate mechanism for resolving concerns about other employees or problems at work in a way that is fair and maintains confidentiality for all those involved.

We are cognisant of the human impact and other vulnerable parties in this dispute and therefore ask that you refrain from making any further allegations against Trust colleagues on any media platforms, particularly whilst the internal processes are ongoing.

We remind you of your duties as employees to act in accordance with the Trust values, especially in relation to such sensitive and highly personal matters for those involved, but also so as not to undermine the confidence and trust of patients receiving or due to receive care from the organisation.

Any behaviour, including that outside of work, that is considered inappropriate or disrespectful and/or which is directed towards another employee will not be tolerated and will be investigated appropriately under the Disciplinary Policy." [**B3/392-393**]

194. Mrs Grundy (correcting paragraph 22 of her statement) did not receive this letter. Rather she was shown a copy of it by one of the recipients. On **18 July 2024**, Andrew Storch solicitors (on behalf of the Claimants) wrote to the Respondent's representatives, Capstick solicitors, regarding Mr Thacker's correspondence. The Claimants' solicitors said, among other things:

"*Given the ongoing litigation between our respective clients in which both parties are represented by solicitors, it is inappropriate and oppressive for your client to write to our clients directly about those matters. Please advise your client to ensure that any correspondence or discussions related to the ongoing litigation may only take place via the parties' respective solicitors*." [**B/171-172**]

Complaint from Rose Henderson

195. On **16 July 2024**, Rose Henderson submitted a complaint of bullying and harassment against '*all named individuals that a letter was sent to the Trust regarding the incident'*. [**B3/987**]. It was prepared with the assistance of a trade union representative and went on to say '*August 2023 a letter was sent to Trust around my protected characteristics which then escalated to interviews with both tv and press involvement. I believe this amounts to direct discrimination and harassment that has created an intimidating, hostile, degrading humiliating and offensive environment due to my protected characteristics*.'

196. Rose, who had never been shown the letter of complaint from the DSU nurses, believed it had been taken around DSU and Theatres by nurses, in order to drum up support to have Rose excluded from the changing room. To date, all that Rose had to go on was that there had been a 'petition' as it had been described and that some in DSU had gone to the press, putting Rose's name in the public arena. Rose was concerned about the impact of local and national press coverage. This felt personal and upsetting. It never occurred to Rose that there was a risk of others being genuinely distressed, embarrassed or frightened by the fact that they were using the changing room given they had been using it for some years. Sue Williams acknowledged Rose's complaint by letter on **19 July 2024**. She said that the matter would be investigated in accordance with the Trust Resolution Procedure [**B3/991**].

197. On **06 August 2024** Ms Williams wrote to Mrs Hutchison and others regarding Rose Henderson's grievance **[B2/627]**. Ms Williams reminded Mrs Hutchison of the need for confidentiality and that she should not discuss the complaint or her evidence with any other member of staff. It ended by stating that should the investigation conclude that inappropriate behaviour has taken place, action 'may' be taken in accordance with the Trust disciplinary procedure. At the time, Mrs Hutchison was absent on sick leave – she had been absent from **17 July 2024** and remained absent until **22 September 2024**. The role of being seen to be the 'leader' of the group and the wider situation generally had been taking its toll on her. That same day, Kirsten Coutts – a nurse on ward 11 who was a signatory to the 27 March letter – was personally handed a copy of Rose's complaint by Helen Coppock. Coming from such a senior manager, this unnerved Ms Coutts.

198. Rose's complaint has been held in abeyance and is still outstanding.

The complaints about Rose Henderson's behaviour in the changing room

199. We must at this point set out our findings on the allegations regarding Rose Henderson's behaviour as set out in paragraph 3 (a) (ii) to (vi) and paragraph 3(b) of the list of issues. We do so by reference to the relevant paragraph numbers in that list of issues [**B1/117-118**]. We find it convenient to address them in this way

even though it means going out of chronological sequence to the events already described.

Paragraph 3(a) (ii) and (iii) Spending longer than is necessary in the changing room, on many occasions wearing men's fitted boxer shorts, but on some occasions fully dressed; walking around the changing room on many occasions undressed to boxer shorts but on some occasions fully dressed.

200. We heard from Lisa Lockey and Carly Hoy on these allegations. Lisa Lockey gave evidence about a single occasion one day in **January 2024**. By this date, Mrs Lockey was, as she put it, aware that a 'man was using the changing room' which gave her a feeling of discomfort. Because of this, she tended to keep herself to herself. On this occasion the changing room was very busy. Mrs Lockey saw that Rose was in the changing room but did not see Rose in a state of partial undress. She noticed that Rose was talking with people she assumed were colleagues. Mrs Lockey asserted that Rose, who did not know Mrs Lockey, gave her a long hard look as if to say: '*you have gone to the toilet to change because of me*'. We are unable to accept this as a reliable account of what Rose Henderson did for a number of reasons. Firstly, there is the passage of time and the effect this has on memory as one replays events time and again, especially as each recounting fits with a developing narrative. Secondly, this was a fleeting experience. Thirdly, Rose's very presence in the changing room was a matter of contention for Mrs Lockey before this day. She was already uneasy at the presence of a biological male creating the risk that she would regard any look or casual glance or any comment as something improper.

201. We accept that Rose made eye contact with Mrs Lockey. We find that she read something into this. What she reads will be highly subjective and influenced by her discomfort. Fourthly, Rose's locker was at the other end of the changing room from the toilets. For Mrs Lockey to be right would meant that Rose – who had been talking to colleagues at the time – would have to have noticed her in a busy room, seen her go to the toilet to change, notice her again when she emerged from the toilet and then purposely give her a long hard look. Mrs Lockey has not satisfied us on the civil standard of proof either that Rose Henderson gave her a long, hard look or that Rose stayed around for too long in the changing room, however long 'too long' is supposed to be. We must make clear that under no circumstances do we regard Mrs Lockey as having lied to us or that she tried to mislead us. We are satisfied that her perceptions are and were real and genuine. We accept that upon seeing Rose, she was sufficiently distressed at the prospect of exposing herself in front of Rose and went to change in the toilet. We accept that on going back to her locker she made eye contact with Rose and that she perceived Rose to be purposely looking at her. At this stage, however, we are required to make findings of fact as to what Rose Henderson did based on the allegations that have been made. We shall say more about these perceptions of Rose's behaviour in our conclusions.

202. We found Carly Hoy's evidence to be equally unreliable in some respects. We repeat what we say above regarding the first three points in the case of Mrs Lockey. They apply equally to Carly Hoy. Mr Cheetham pressed Ms Hoy on the pattern of behaviour she describes in her witness statement. In paragraph 7 of her statement she describes seeing Rose walking around wearing nothing except very tight black boxer shorts with holes all over them. At the same time, however, she said she did not pay close attention to Rose and as soon as she saw Rose, she would turn away. These 'many occasions' reduced to about once a month, then to perhaps less than that and then changed to an uncertain every couple of weeks. We were hesitant to accept this assessment given Ms Hoy's understandable uncertainty on the matter. She was doing her best but was palpably uncertain and unclear. Ms Hoy eventually landed on a recollection of having seen Rose 'more than a few times' but was unable to say how many. Even then, she accepted that it was not the case that Rose was just walking around the changing room wearing nothing but tight boxer shorts on every occasion.

203. On the subject of Rose allegedly strolling up and down, Ms Hoy said initially that every time she was in the room she saw Rose do this. She then qualified this by saying that every time she would go to the changing room she would have her face buried in her phone until she got to her locker. When Mr Cheetham asked how it was that she was able to notice so many things about Rose when her face was buried in her phone, Ms Hoy said that she noticed these things when she put her phone down as she stood by her locker. Regarding the length of time spent in the changing room, Ms Hoy said that she spent less than two minutes when getting changed to go home, irrespective of whether Rose was there or not. She never did, and would not, get changed in front of Rose. This was because she was distressed at the thought of being exposed in Rose's presence. On occasion she changed in the toilet and on occasion she would see that Rose was present, leave the room and wait in the corridor for Rose to leave before returning to change. On one occasion she made eye contact with Rose which Ms Hoy described as Rose staring at her. She thought at the time that Rose had been waiting for her to change. Ms Hoy agreed with Mr Cheetham that her main concern was the 'maleness', the physicality of Rose. Mr Cheetham stressed that he was not accusing Ms Hoy of lying but that because she saw Rose as masculine, walking and looking about in the room, she perceived this as threatening to her. Ms Hoy agreed.

204. We accept and find that Rose Henderson would on occasion walk from one part of the room to another. That is not unnatural given that Rose was using the room to change in and out of scrubs and this would be what any other user of the room might have to do from time to time. On occasion Rose would go from their locker back in the direction of the entrance, to retrieve fresh scrubs from another part of the changing room. On occasion Rose most likely did so wearing only boxers and a top. However, we do not find that Rose did this at any point in nothing but boxer shorts. We found it is more likely than not that on one occasion, Ms Hoy saw Rose in just boxers. However, we find that was in the course of Rose standing

by their locker when getting changed and not walking up and down in boxers without reason. Further, we find that this sight of Rose in nothing but boxers was a fleeting glance on Ms Hoy's part. Insofar as there is any implication of Rose lingering or deliberately changing in a particular way or strolling up and down the changing room for no good reason, we reject this. We make no such finding. However, as with Mrs Lockey, we are not of the view that Mrs Hoy was trying to mislead or lie to the Tribunal. Where a tribunal of fact rejects an account it is not always because a person is considered to be dishonest – and we have noted that Mr Cheetham did not suggest this. Most accounts that are rejected in litigation, in our experience at least, are rejected for different reasons. We have no doubt that Ms Hoy saw Rose walking from one part of the room to another dressed in boxers and a top. We have no doubt that, at times eye contact was made and have no doubt that Ms Hoy saw Rose on an occasion in nothing but boxers. Ms Hoy's perception and recollection of events is (as in the case of the others) affected by her genuine discomfort and distress in having to share what she believed should be a female space with a biological male and by the replaying of events in her mind over time. Whilst accepting her honesty, we are unable to conclude that Rose in fact behaved as perceived.

Paragraph 3(a) (iv) initiating conversations with female colleagues, including those with whom Rose Henderson is not acquainted while they are changing in the changing room.

Paragraph 3(a) (vi) RH … approached the Second Claimant from behind …. and asked 'are you not getting changed yet' … three times within less than five minutes

205. We take these together because they are related allegations. The evidential source for the first was said to come from the evidence of Karen Danson as well as the hearsay evidence of Vivienne Robinson, an account of which was given by Bethany Hutchison in paragraph 99 of her witness statement. The evidential source of the second allegation is from Karen Danson alone. Leaving aside the obviously contentious issue of the presence of Rose in the changing room, looking at this first allegation (3(a) (iv)) as it is framed, there can be (and is) no sensible complaint about Rose Henderson initiating conversations with colleagues with whom Rose is acquainted. This specific complaint is about Rose Henderson initiating conversation with those with whom Rose is not acquainted.

206. We did not hear from Vivienne Robinson, nor did anyone notify Ms Newton of her experiences at any time prior to the close of Ms Newton's investigation. Mr Cheetham did not cross examine on complaints that were not before the Tribunal and did not question Mrs Hutchison on this. For his part, Mr Fetto merely asked Rose if they knew the person referred to in paragraph 99 of Mrs Hutchison's statement. He did not challenge Rose's denial of ever having spoken to any pregnant woman in the changing room to the best of Rose's knowledge. In those circumstances, we give no weight to that account and make no findings in respect of anything that is alleged to have been said to Vivienne Robinson.

207. Turning then to the matter in paragraph 3(a)(vi), we did hear from Karen Danson about a single occasion when she encountered Rose in the changing room. Bar this single occasion there was no reliable evidence of Rose initiating conversation with any colleague with whom Rose was not acquainted, let alone a pattern or 'practice' of doing so, as pleaded in paragraph 10 of the Particulars of Claim. As regards the Karen Danson incident, Mrs Danson says that she was asked three times by Rose Henderson 'are you not getting changed yet?' Rose flatly denied that this exchange ever took place.

208. We noted that when interviewed by Susan Newton on **18 November 2024** (over a year after the event), that Rose was asked whether, in **September 2023** they had asked Karen Danson why she wasn't getting changed. Rose said:

"*I don't know who Karen Danson is and can't put a name to the face. I typically only speak to close colleagues that I work with in Theatres*" [**B3/1015**].

209. In paragraph 28 of Rose's witness statement they put forward the possibility that Mrs Danson might have been in the changing room on an occasion, as Rose recalls it, when Rose sarcastically asked a friend if she was nearly changed yet. The implication is that Mrs Danson might have overheard Rose ask this of their friend. There were aspects of Rose Henderson's evidence on this which we did not find altogether reliable. Although Rose only put this forward as a 'possibility' we could not equate the scene described by Rose in paragraph 28 of the witness statement with that described by Mrs Danson. There was also the flat denial by Rose that the scene described by Ms Danson happened. Leaving aside the perception of Mrs Danson and leaving aside the impact on her of Rose changing in the female changing room, there is nothing intrinsically wrong with one user of changing facilities asking another user of those facilities 'are you not getting changed yet', or even in repeating the question. We could better understand a response by Rose that they may well have asked Mrs Danson that question but that they were simply unable to remember. However, although initially troubled by Rose's flat denial of the allegation, in the end we regarded it as a symptom of this divisive litigation. Rose's first statement to Susan Newton is one that we could more readily understand. The essence of that statement was that Rose Henderson, when asked whether they had ever asked Karen Danson if she was not getting changed, simply did not know who Karen Danson was and that Rose typically only spoke to known colleagues. We consider the reality to be that at the time Rose was of the view that they may well have asked such a question but had no idea who Karen Danson was. That initial position has, in the course of this litigation, hardened into a flat denial.

210. Having weighed up the recollections and accounts by both witnesses and considering the written and oral evidence, we were in a position to set out our findings of fact on this issue in paragraphs 211 to 213 below.

211. Mrs Danson first saw Rose Henderson fleetingly at work around **August 2023**. She did not know then that Rose was a trans woman. There was little about Rose's appearance on that occasion that suggested this to her. On one occasion around the end of **September 2023**, at the end of her 10am to 8pm shift, Mrs Danson went to the changing room to get changed before leaving the hospital to go home. On entering, she saw Rose at the other end of the room standing by a locker wearing scrubs on top and boxers on bottom. As soon as she saw Rose she 'clocked' immediately that there was what appeared to be a man in the changing room. Mrs Danson was alarmed by this. She immediately felt uncomfortable. Mrs Danson walked to her own locker which was round the corner, to the left of Rose's locker. We were told that the room was about the size of the tribunal hearing room. We estimate that it would have taken about 10 seconds for Mrs Danson to get to her locker. She was not aware of anyone else in the changing room at the time. Rose was stood facing Rose's own locker. When Mrs Danson reached her locker and stood facing it, her view of Rose (to her left) was of Rose's back.

212. When at her locker, she started to rummage in her bag for her keys. Rose, at this time, was in her peripheral vision. Mrs Danson saw Rose glance over a shoulder and ask her '*are you not getting changed?*' On hearing this, Mrs Danson's feeling of alarm was heightened further. It was a masculine voice. The question and the situation as she saw it, of being alone in close proximity to a man in partial undress, immediately triggered disturbing memories for her. She answered 'no'. Thoughts were rushing through her head, wondering why this 'man' was standing there, asking her this question. She found her keys and opened her locker but did not remove her belongings. Instead, she sat on the bench opposite her locker (marked as an orange rectangle on **page 307).**

213. Rose asked again 'are you not getting changed yet'. Mrs Danson, still in a state of distress, said 'no'. She texted her husband to say that she was finished work and would see him soon. She opened up a game on her phone. She did not look up. Whether Mrs Danson's memory is reliable enough to warrant a finding that Rose asked the question a third time is not of significance. We say that because given Mrs Danson's earlier personal experiences, after she heard Rose speak for the first time a 'fight or flight' reaction was triggered in her. She reacted by sitting down and texting her husband buying time, waiting for Rose to leave. In those circumstances we have doubts about the reliability of the question being asked a third time. A third repeated question seems to us unlikely, given it had been asked twice already and answered. As we have previously mentioned, memories are fallible enough without factoring in the impact of recalling events when in a fight or flight state. Shortly after Mrs Danson sat on the bench, Rose left the room. The whole encounter lasted no more than a few minutes. One might wonder why, when Rose asked Mrs Danson the first time if she was not getting changed, she did not simply leave the room. However, it is not for us or anyone else to expect such a rational response when someone is in a fight or flight state. The simple fact is that Mrs Danson reacted as she did. Without doubt, she found the experience very distressing.

214. Indeed, the effect of this encounter on Mrs Danson which is described by her in paragraphs 13 to 15 of her witness statement is not challenged. Mrs Danson took some sick leave within days of this experience, from **28 September 2023**. She remained absent from work for a week. On her return, on about **05 October 2023**, she spoke to Sharon Trevarrow. The effect on her was real and consequential.

215. Ms Trevarrow was the 'wellbeing representative' for DSU. This role involved her having one wellbeing meeting with colleagues each year. We shall call this the 'annual wellbeing meeting'. In addition, Ms Trevarrow would also have other wellbeing discussions at any other time if requested by an employee. We shall call these 'ad hoc' wellbeing meetings. On about **05 October 2023** Ms Trevarrow had one such ad hoc meeting with Karen Danson during which they discussed Mrs Danson's experience in the changing room. Not all ad hoc meetings were documented, and we find that Ms Trevarrow made no written record of that particular discussion. However, we are in no doubt that it took place and that Mrs Danson and Ms Trevarrow discussed the effect on Mrs Danson of encountering Rose in the female changing room.

216. Rose Henderson knew nothing of Karen Danson's personal life experiences. We reject any suggestion, implicit or otherwise, that Rose asked this question for some sinister reason. Rose Henderson did not see themselves as a threat to any colleague and was simply getting changed when someone else arrived in the changing room, went to their locker yet did not start to get changed. It may be that Rose lacked insight generally into the effect of their presence in that environment on some colleagues. This lack of insight is partly explained, we infer, from Rose's inherent belief that the right place for Rose to change was the female changing room; from the fact that Rose had been using the changing room for some time without complaint – or without being aware of any complaints – and from the fact that Rose was doing no more than exercising the choice provided under the TIW policy.

Paragraph 3(a) (v): staring at female colleagues, in particular at their breast area, as they are getting changed

217. The evidential source for this allegation was said to come from Lisa Lockey, Carly Hoy and Tracy Hooper. In addition, the Claimants relied on hearsay evidence contained in paragraphs 95-96 of Bethany Hutchison's witness statements regarding things that Leanne Dennis said at the meeting of **20 May 2024 [witness statement bundle, page 318**] and Sharon Trevarrow's comments to Susan Newton during her investigation [**B3/651-652**]. We have already referred to Leanne Dennis above. She was a theatres nurse, a colleague of Rose's. Although there is no dispute about what Leanne Dennis said (we have listened to the recording) she speaks of a 'feeling'. We were not inclined to rely on this as reliably establishing a fact in the absence of hearing directly from Ms Dennis. However, the experience of Mrs Danson and the fact that Ms Dennis speaks of her own recent issues of domestic abuse and that she had this feeling and perception highlights the very

real impact on some women who find themselves alongside biological male/trans women in what they would expect to be a female only space. These feelings of being watched or gazed upon was a feature of the evidence and extended to Mrs Trevarrow, who said that she believed she saw Rose looking at people up and down. The feelings were real and cannot be dismissed on the basis that Rose did not in fact 'gaze upon' or 'stare' at women, or that Rose did not 'linger' for longer than necessary, for example. The perception or belief of those that felt these things was very real.

218. We have already addressed Lisa Lockey's evidence on this issue (paragraph 200 - 201). We did not accept that Rose, in fact, gave her a long, direct look albeit we have no difficulty in finding that there was eye contact between her and Rose. Eye contact is a perfectly natural aspect of human interaction. It would be odd if people were expected not to make eye contact with each other and for us to find that there was none. We repeat our findings regarding Mrs Lockey already being uncomfortable with the presence of Rose in the changing room. In such circumstances, any eye contact is likely to be exaggerated in her mind and we find that is the case here. We have also addressed Carly Hoy's evidence on this matter (paragraph 202 above).

219. As regards Tracey Hooper, she never saw Rose looking or staring at anyone. She merely refers to one unnamed international nurse and makes a broad allegation without any details. We did not consider this to be sufficiently reliable evidence to enable us to reach a finding of fact that Rose Henderson stared at women. That left the evidence of Ms Trevarrow, which we have alluded to in paragraph 217 above. However, taking her evidence with the evidence of others, we were not persuaded that, on the balance of probabilities, Rose had in fact been in the habit of staring at people. The fact that Rose is permitted to be in the changing room means that inevitably Rose will look around and see others in a state of partial undress. At what point, we asked ourselves, does merely looking about a room or making eye contact become unacceptable 'staring' or 'looking someone up and down' improperly? These things are extremely difficult to measure. The interpretation of a look or eye contact is incredibly subjective and the context here is that those who say Rose stared at women were already uncomfortable with Rose's presence in the changing room. In such a context, eye contact that lasts only for seconds may be regarded as 'staring'.

220. Although we did not consider the evidence before us to be sufficiently reliable to find as a fact that Rose stared at anyone, the different life experiences of women compared to men in general, and in some cases the particular experiences of some individuals helps us understand and give context to why those who were deeply concerned by Rose's presence in the changing room believed they were being looked upon or watched. We say more about this when we come to the evidence of Professor Pheonix. Although we find that Rose did not stare improperly or look people up and down improperly, that is not to detract from the genuinely held view of the Claimants or others such as Mrs Trevarrow that they believed Rose had on occasion done so.

221. Each of the Claimants described the effect on them of either using the changing room whilst Rose was using it and/or living with the apprehension that they may find themselves doing so at a time when Rose was changing. We find that there was a minimum level of distress caused by – at the very least - the apprehension that they may be exposed in their underwear to a biological male whilst changing in and out of their uniform and that they may be observed and looked upon by Rose when in a state of partial undress. Some felt that they had been watched and that Rose was spending longer than necessary in the changing room (Mrs Lockey, Mrs Hoy). The other Claimants who had not perceived these things personally, believed their colleagues had been stared at and that Rose lingered in the changing room and they feared that they may be subject to the same experiences. We have set out Karen Danson's experience, of which the Claimants had been made aware. Others shared their beliefs that Rose had stared at them or others, Leanne Davis and Sharon Trevarrow being two. The Claimants had been told of these things and all of it fed into their levels of apprehension and distress. In addition, they believed Rose to be a sexually active biological male, who had stopped taking hormones, had a female partner, and had made no secret of this or of plans to have a baby. There was a basis in fact for this belief. Rose had told colleagues about plans to have a baby, and Rose was not in fact taking hormones at the time. It was not a case of Rose having stopped. Rose only started taking hormones in about **October 2024** [**see B/1014**]. These things heightened the apprehensions and feelings of insecurity of the Claimants by having to share a communal changing room with what they perceived to be a sexually active biological male. The matter was well put in an email from Deborah Taylor on **07 August 2024**: "*Rosalie has made it known that they are not undergoing any transition, continues to have male anatomy and is trying for a child with their girlfriend. Takes no female hormones and dresses as a man when coming to work. This context has heightened the discomfort among female staff using the changing room*." [**B3/613**] That was precisely how the Claimants saw it.

222. That we found that Rose, personally, did not behave improperly whilst using the changing room, in no way diminishes these very real and genuine perceptions of the Claimants, all of whom were fearful of the risks at the very least, to their dignity, bodily integrity and privacy.

223. We now move on to other allegations about Rose's conduct outside the changing room, as set out in paragraph 3(b) of the list of issues. There are four incidents, said to amount to harassment related to a protected characteristic. We set out our findings in relation to these in paragraphs 224 to 235 below.

Incident 1: paragraph 3(b) (i) It was alleged that on 08 July 2024, Rose Henderson walked unaccompanied on to the Surgical Elective Admissions League ('SEAL') and asked a member of staff for a paediatric consent form, which would not be available there because only adults are admitted to SEAL

224. The evidential source of this allegation was said to be paragraph 10 of Jane Peveller's witness statement as well as hearsay accounts contained in the statements of Bethany Hutchison (paragraph 75(a)) and Karen Danson (paragraph 31). However, their evidence simply amounts to repeating what Jane Peveller told them. Apart from **08 July 2024**, Mrs Peveller had only ever seen Rose Henderson twice in all the time that she worked at DMH. The first occasion was in either **October 2020** or **March 2021** (she could not be sure which) but in any event it was when Rose was a student. Mrs Peveller had been working on the DSU when a student came to the ward to collect a patient. Mrs Peveller noted that that the student introduced themselves to the patient as Rose. Mrs Peveller realised that Rose must be transgender. She thought nothing more of it.

225. The second time Mrs Peveller saw Rose was over three years later, after the **27 March 2024** letter of complaint had been sent on **04 April 2024**. This was also the one and only time Mrs Peveller had seen Rose in the changing room. Mrs Peveller's locker is about a metre away from Rose's. She knew before this that the locker belonged to Rose although she had never seen Rose in the changing room before. It was approximately 3.15pm. Mrs Peveller was about to remove her scrubs/trousers when Rose came into the changing room. Mrs Peveller stopped what she was doing and looked away as she felt uncomfortable. Rose got changed and left the room. Mrs Peveller did not look at Rose getting changed and did not see Rose in partial undress. She does not suggest that Rose acted in any way improperly whilst in the changing room. She did, however, experience anxiety, as she put it, at the thought of a man being close to her as she was about to remove her trousers.

226. The third and last time Mrs Peveller saw Rose was on **08 July 2024**. On that occasion, Rose went to the DSU to ask if anyone had a form 2 consent form as they did not have one to hand in theatres. Consent forms come in a large pad or booklet. This pad contains 4 different types (numbered 1 to 4), one of which (number 2) is a paediatric consent form. The consent form was urgently needed by a surgeon and the coordinator at theatres could not find one. Therefore, Rose went to recovery see if they had one. On arriving there, Rose spoke to a nurse in SEAL. That nurse was Jane Peveller. Rose asked Mrs Peveller whether she had a consent form number 2. Mrs Peveller was unsure what that was but looked to see if she could find one. She could find only consent forms 1, 3 and 4. She asked Rose what form 2 was. When Rose explained that it was a paediatric consent form, Mrs Peveller said that they did not have those forms on that ward. Pausing there, when asked by Mr Cheetham about how this action could amount to harassment, Mrs Peveller replied that '*it was not harassment of me*'. She went on to explain that at that time she was '*still anonymous'*, meaning by this was that she was sure that Rose did not know that she was one of the those who objected to Rose using the changing room. Again, Mrs Peveller does not suggest that Rose was aggressive or even impolite, or that Rose's body language was in any way improper. Mrs Peveller did not feel intimidated or anxious. At most, she thought it odd that Rose would not know they did not have a form 2. She merely 'wondered' whether Rose had come to harass others.

227. Mr Fetto invited us to conclude that there was an inconsistency in Rose's evidence regarding this matter. The inconsistency was said to be that in paragraph 32 Rose said '*I therefore went to Ward 14/DSU and I did find one there*' whereas in oral evidence, said '*I was accompanied by the nurse'* – i.e. Mrs Peveller. We do not find that to be an inconsistency. It is a matter of language. By saying '*I therefore went to ward 14/DSU'* this does not exclude the possibility that the nurse from SEAL also went to DSU. It may be but is not necessarily inconsistent. We considered the point but accepted Rose's' evidence that someone on the ward produced a child consent form from the stationery cupboard.

228. DSU may well deal with adults only but in theatres they operate on adults and children. It may be that SEAL and DSU is an adults' ward but that does not mean that Rose Henderson would have known that they do not hold child consent forms somewhere on that ward. Theatre paperwork is kept in a stationery cupboard on the DSU (paragraph 22 of Jody Robinson witness statement and paragraph 40 of Tracy Wainwright witness statement). As the nurses in DSU deal with adults, naturally they will never have cause to use a child consent form. But it does not follow from any of this that nowhere in DSU will there be, within the general collection of forms, a paediatric consent form. The paediatrics department is on the floor above theatres. DSU is closer and the form was required urgently. We find that Rose Henderson went to DSU because it was closer and the theatres stationery cupboard is located there. We are satisfied that Rose Henderson did not go there for any purpose other than to obtain a paediatric consent form and not for any other sinister purpose and did not behave improperly in any respect.

Incident 2: paragraph 3(b) (ii) It was alleged that on 10 July 2024, Rose Henderson, accompanied by another member of theatre staff walked on to ward 14 ostensibly to collect trolleys. That is not part of Rose Henderson's usual work as a theatre ODP and does not require two members of staff. Upon seeing the first claimant [Bethany Hutchison], Rose Henderson displayed amusement.

229. Bethany Hutchison is the evidential source of this allegation. We find that Mrs Huthchison (and indeed others) was on a heightened state of alert regarding Rose Henderson, certainly by **08/10 July 2024**. By this stage, matters regarding their concerns had been dragging on for getting on a year; the Claimants had been to the media; they had issued proceedings; they had been provided with inadequate changing facilities as an alternative to using the main changing room and there had been the issue with the posters. In addition, by **10 July 2024**, Mrs Hutchison was convinced that someone from the Trust had been intercepting mail meant for her. We find that this heightened state resulted in her misinterpreting the most innocent of acts on the part of Rose Henderson. Even seeing Rose Henderson in 'their' ward was now interpreted as being a hostile act. The mindset had shifted to a 'them and us' (DSU v Theatres) attitude, as theatres were seen as generally supportive of Rose Henderson and the claimants were suspicious of any interaction with the Trust or with Rose Henderson.

230. Against this background, we turn to set out our findings as to what happened on **10 July 2024**. The facts are simple. Rose Henderson went to DSU with a close colleague from theatres, Sheila Archer (an HCA) to see if they could find two trolleys for use in theatres. Being colleagues, it is highly likely (and we so find) that they chatted as they did so. As they came on to DSU Bethany Hutchison saw them together. It seemed to Mrs Hutchison that '*Rose and others seemed to be amused at something*' (paragraph 74 of Mrs Hutchison's statement). As Rose and Sheila are close colleagues, we find that at some point they most likely did smile and were amused at whatever it was that they were talking about. That is perfectly normal behaviour. Bethany Hutchison and Rose Henderson saw and looked at each other. Rose recognised Mrs Hutchison from her appearances in the media. Mrs Hutchison was at the time in her normal clothes. From this, we infer that it was around 4.30pm at the end of Mrs Hutchison's shift, when she was about to leave to go home. By then, Mrs Hutchison had heard reports from Lucy Wilson and Jill Ogden about allegedly aggressive and intimidating behaviour by Rose earlier that day (see paragraph 75b of Mrs Hutchison's witness statement). As they looked at each other, Rose Henderson perceived a 'smirk' on Mrs Hutchison's face. We do not consider that an apt description (but recognise the subjectivity of these things). Given the circumstances, however, we find that Mrs Hutchison gave Rose what we find to be a 'defiant' look as she believed (albeit wrongly) that Rose was there to intimidate her and others. We must make it clear that we are satisfied and find that Rose Henderson visited DSU for a proper reason and not for any purpose such as that alleged in these proceedings, namely to intimidate or harass any of the claimants or other complainants.

231. Incidentally, we make no finding that Mrs Hutchison's post (or that of anyone else was intercepted). We were referred to a photograph of an envelope. The envelope in question **[B2/2114]** contained a card from Women's Rights Network. The photograph of the envelope does not reveal any name or any other identifying features. The address gave only Mrs Hutchison's name and not the ward or service she worked in. It is entirely unsurprising that a hospital post room, handling hundreds of pieces of mail a day, will open an envelope in order to see if there are more identifying features in the document inside. That, we infer, is precisely what happened here. To the extent that Mrs Hutchison said in evidence that 'we' (that is, her and her fellow claimants) gradually began to suspect that our mail was being intercepted, this belief was based solely on the flow of mail ending as abruptly as it began. This tells us little evidentially and is more likely than not the result of the ebb and flow of public interest. We are satisfied that the inference wrongly drawn by Mrs Hutchison regarding Rose's presence on the DSU is explained by her frame of mind at the time.

Incident 3: paragraph 3(b) (iii) It was alleged that also on 10 July 2024, as Lucy Wilson, a signatory to the 27 March 2024 letter (but not a claimant) and another nurse, Jill Ogden, passed Rose Henderson in the corridor, Rose 'intentionally eyeballed them' and walked towards them aggressively swinging keys.

232. The evidential source of this allegation is Bethany Hutchison (paragraph 75b witness statement) and Karen Danson (paragraph 31 witness statement). We have already referred to this above. Mrs Hutchison repeats what she was told by Lucy Wilson and Jill Ogden. We did not hear evidence from either of those individuals. As in the case of Vivienne Robinson, given the context, heightened states of alert and the absence of the individuals who are said to have witnessed this we give no weight to what is said regarding 'intentionally eyeballing' or walking towards them 'aggressively'. We accept the evidence in paragraph 37 of Rose Henderson's witness statement. Rose does not carry keys at work but does carry a pair of scissors. Rose has a habit of swinging these around the index finger. It is akin to a nervous habit and is something Rose does regularly and absent-mindedly. It is more likely than not that this is what was seen by Lucy Wilson and Jill Ogden and, based on the state of heightened alert we have described, this innocent habit is likely to have been misinterpreted as an aggressive act. For the avoidance of any doubt, we do not find that Rose Henderson eyeballed anyone intentionally as alleged and do not find that Rose walked towards anyone aggressively or with intent, swinging keys or scissors.

Incident 4: paragraph 3(b) (iv) It was alleged that in early October 2024, Rose Henderson walked into DSU, to the top of the ward, turned round, walked back and left the ward, with no apparent reason to visit the unit.

233. The evidential source for this allegation is said to be Carly Hoy (paragraph 28 of her witness evidence and her oral evidence) and Tracy Hooper (paragraphs 34-36) as well as some hearsay evidence contained in paragraph 31 of Karen Danson's evidence. The allegation suggests a single occasion. However, in Mrs Hoy's evidence she said that this happened every couple of weeks. She then said that was a guess. We regarded her evidence on this as inherently inconsistent and unreliable. Furthermore, Carly Hoy does not suggest that Rose gave her a dirty look or that Rose did or said anything to anyone on any of these occasions. The complaint is simply that Rose was there without any '*apparent'* reason. Tracey Hooper also apparently saw Rose on an occasion, describing Rose in what we find to be deliberately exaggerated language for the purposes of these proceedings as '*taking large strides in the manner of a man'*. She then describes Rose as giving her an '*evil look*', again something we consider to be exaggerated language. It is clear to us from the written and oral evidence of Carly Hoy and Tracey Hooper that they too were on heightened alert. The way Mrs Hooper described coming out of the bay (a room) to watch Rose walk all the way down the corridor and back suggested to us that she was not intimidated by Rose's presence but was curious and on the 'look out' to see what Rose was up to. As she described it in her witness evidence, '*there he was, bold as brass*'. When asked by Mr Cheetham whether Mrs Hooper was sufficiently open-minded to accept that there may be a good reason for Rose Henderson being there, if Rose gave a reason, Mrs Hooper said that she was not.

234. Contrary to the allegation in paragraph 3(b)(iv) we are satisfied that and find that Rose Henderson did have an 'apparent' reason to be on DSU. What the 'actual' reason for Rose being on the ward on this unspecified day in October is impossible for Rose Henderson to say. In a busy working environment where there are good apparent reasons for a worker to be in a particular locality it is expecting a great deal of that person to say many months after the event what the actual reason was on unspecified dates. All that Rose Henderson can say is that they may well have been in DSU on any given day or days between July and October 2024 and may have been seen by Mrs Hoy and Mrs Hooper, and no doubt others. There is good apparent reason for an ODP to go to DSU, for a trolley or for paperwork for example. It may be that Rose made the odd wasted journey but there is nothing unusual or sinister in that. We have considered the point made by Mrs Hoy that she had not seen Rose on the ward before July, yet here she was, suddenly seeing Rose a few times in the space of a few weeks. One could say the same about Mrs Hoy's experience of seeing Rose in the changing rooms. Over two years had passed between Mrs Hoy starting with the Trust and first seeing Rose in the changing rooms. We find that, once noticed, and especially once the complaint went in, Rose was, so to speak, on the 'radar' of the signatories to the letter. They were on alert, such that any 'sighting' of Rose took on a new meaning for them. This was no longer a case of simply sharing a changing room with 'a' trans woman at work but of encountering 'the' trans woman who was in the eyes of the signatories to the letter, being given priority by the Trust over them and who was now at the very heart of an increasingly difficult dispute and one that was becoming high profile.

235. To the extent that it is suggested that Rose Henderson's purpose in coming on to DSU on the occasions witnessed by Carly Hoy and Tracey Hooper, as described in their evidence, was to intimidate or harass them or anyone associated with their complaint we reject this.

The Trust's Resolution Procedure

236. As set out above, on **05 April 2024** Mr Thacker had updated the Board at a high-level that the concerns raised in the letter of 27 March would be addressed under the Trust's Resolution Procedure. Following the 20 May meeting, Morven Smith determined that the Trust would initiate an investigation under stage 2 of its Resolution Policy – the 'formal stage'. She wrote to Claire Gregory [**B2/410-411**] attaching a 'Resolution Procedure Form' [**B2/412-414**]. She asked that the parties who wish to formally raise their concerns complete the template and sign to agree to its content and submit to Helen Coppock. She said that this would then provide the basis of the concerns to be considered and allow an appropriate investigating officer to be appointed and proceed with the investigation in line with the Trust's processes. She explained that Ms Gregory and/or those raising their concerns were entitled to be represented by a trade union/staff association representative or work colleague not acting in a legal capacity. On **06 June 2024**, Mrs Hutchison told Ms Gregory that no-one was going to complete the resolution paperwork as their

solicitors had advised them not to. Ms Gregory updated Helen Coppock of this [**B2/424**].

237. Mr Thacker corresponded with Ms Gregory on **09 July 2024**, believing her to be the 'Lead Complainant' and noting that she had confirmed that she and/or members of her team do not intend to participate in the resolution process [**B3/131**]. Ms Gregory replied on **11 July 2024** to say that she was not the Lead Complainant and had been passing on letters on behalf of her staff.

238. An external HR Consultant, Susan Newton, was commissioned to undertake the stage 2 investigation. On **17 July 2024**, Mr Thacker sent a briefing note to Ms Newton [**B3/77-78]**. She was requested to '*act as Investigating Officer in respect of concerns raised as outlined in appendix 1 and 2 of this document*'. Those appendices contained the two letters of **27 March** and **30 April 2024**.

239. On **20 and 22 July 2024**, having understood by now that Ms Gregory was not the Lead Complainant, Mr Thacker wrote to the Claimants and the other signatories to the 27 March letter. An example of the letter is at page **B3/395-396**. He referred to the two letters of **27 March 2024** and **30 April 202**4. Mr Thacker explained that the Trust had commissioned an external investigating officer who would undertake a full investigation into the facts and would produce a written report with outcomes and findings. The letter asked for confirmation of an agreed nominated spokesperson as the concern was put forward as a collective concern. Mr Thacker explained that the Trust would then arrange an initial meeting with the nominated spokesperson as per section 5.2.1 of the Resolution Procedure.

240. Section 5.2 of the Resolution Procedure deals with the formal stage [**B3/36**]. It states among other things:

> *"Employees have the right to be accompanied by a trade union representative or work colleague employed by CDDFT (not acting in a legal capacity) at any meetings taking place under the Stage 2 Formal Resolution process if they so wish."*

241. The policy then provides for an initial meeting and further meetings as necessary culminating with an outcome meeting. It states the range of outcomes available which are: 'upheld, not upheld or partially upheld'. The policy allows for an appeals process. It then repeats the position regarding representation, excluding those who are acting in a legal capacity, with the possible exception of making a reasonable adjustment if necessary for any disabled employee.

242. On **25 July 2024**, the Claimants' solicitors wrote to the Trust's solicitors. Among other things they said:

"*Whist we acknowledge that the Employment Relations Act 1999, the ACAS Code of Practice and your client's policy do not guarantee a right for an employee to be legally represented in a procedure of this nature, it is within your client's discretion*

to permit that, and our client's request is reasonable in the circumstances. Indeed it would not be reasonable for your client to require our clients to attend meetings which are very likely to affect our clients' position in ongoing litigation without permitting them to be accompanied by their solicitors." [**B1/173-174**]

243. On **25 July 202**4, the Trust's solicitors replied informing the Claimants' solicitors that the request was denied. In doing so, they stated:

"*Our client's policy on conducting Resolution meetings explicitly notes legal representatives are not permitted to attend. The purpose of this internal process (which is not a legal process) is to give complainants an opportunity to explain their concerns so that our client can undertake the necessary investigation. It is not to discuss the ongoing litigation or to hold without prejudice discussions. If your client requires support at these meetings they are permitted to attend with a trade union representative or a family member or friend, including fellow employee, should they require pastoral support. It is not appropriate for a legal representative to attend and represent employees at these internal meetings*.

…

We also note your assertions it is inappropriate to contact your client directly. Our client reserves their right to contact their employees about an internal work investigation procedure which has arisen as a result of their complaints. As noted, this is a distinct process to the ongoing litigation." [**B1/175-176**]

244. Sue Williams was appointed as support Ms Newton. Ms Williams contacted 46 individuals identified by Ms Newton to make arrangements for interviewing them. This included the Claimants. One of those contacted on **04 September 2024** was Kirsten Coutts. On **09 September 2024**, Sue Williams wrote to Ms Hutchison [**B3/401-402**] in the same terms as the letter to Ms Coutts. Ms Hutchison was notified that an interview had been arranged with her on **16 September 2024**. The letter informed her that she was entitled to be represented at the meeting by a trade union/staff association representative or work colleague employed by CDDFT who was not acting in a legal capacity. The letter went on to say:

"*I must reiterate that any information issued to you and/or members of the team involved in the process, and which you and/or members of the team have access to during this process, must be kept strictly confidential and must not be disclosed to any persons not directly or indirectly involved in the resolution process.*

In addition you and/or members of the team should not discuss your complaint or your evidence with any other member of staff and specifically those who may be called to give evidence."

245. Ms Hutchison (and others who were similarly written to) agreed to participate in an interview only if permitted to be accompanied by a solicitor. The Trust did not agree to legal representation and stuck to its policy of trade union and/or work

colleague attendance. It was subsequently agreed that the Claimants would send written statements instead of attending an interview, which they did on **13 and 17 October 2024**. Those statements were reviewed by Ms Newton and Ms Williams.

246. On **05 February 2025**, Ms Newton asked for and was provided with a copy of the TIW policy. At Ms Newton's suggestion, Ms Williams wrote to Ali Quinn on **18 March 2025** with some questions. However, Ms Quinn never responded. Ms Williams then telephoned her on **26 March 2025** on which occasion Ms Quinn said she did not want to be involved in the investigation. She never answered the questions that were sent to her.

247. Delays to the investigation were caused by personal circumstances of Ms Williams and some were also caused by the fact that Ms Newton was an external consultant running her own business and dealing with other matters. There were also delays caused by the time taken for individual witnesses to respond to queries. In the meantime, some people withdrew their complaints. It was implied by Mr Fetto, if not expressly put to Ms Williams, that by construing some emails as amounting to withdrawals from the complaint, that she was acting improperly, with a view to pushing down the number of complainants. To the extent that there was any suggestion of improper conduct on the part of Ms Williams we reject this. We find that she acted properly in the role she was given and – whatever the views others hold of her involvement – she carried out her role to the best of her abilities in challenging circumstances. A lot of time was spent on the resolution process during evidence. At one point the judicial member of the panel asked whether it was suggested that Ms Williams' purpose was to violate anyone's dignity or create the proscribed environment. Mr Fetto suggested that this was indeed her purpose, albeit noting that none of the Claimants had, in fact, suggested this in their evidence. So that there is no doubt about it, we are entirely satisfied that Ms Williams had no such purpose.

248. Ms Williams emailed Ms Newton on **02 December 2024** to say she had made a start on the investigation report asking her to make a start on the findings section [**B2/1051**]. Work on this continued through **December 2024** and right up to **March 2025 [B2/1579]**.

249. The Trust has a process whereby reports produced by external consultants are submitted to an experienced Trust employee for quality assurance purposes. A finalised draft report was, eventually, prepared by Susan Newton in late **March 2025**. Anna Telfer, Deputy Director of Nursing was asked to undertake a quality assurance check of Ms Newton's report – essentially, a critical analysis. Ms Telfer is very experienced. She produced a witness statement for these proceedings, the content of which was agreed by the parties. Her statement and her own report does not make comfortable reading for Ms Newton. Ms Telfer concluded that the draft report was unsatisfactory and left more questions than answers on some of the allegations. She could not genuinely say with confidence that the report reached the right conclusions. She was not thereby saying it reached the wrong conclusions but that the conclusions that were drawn were not sufficiently well explained by

reference to the evidence gathered. She was also critical of the lack of clarity of the terms of reference given to Ms Newton. Ms Telfer sent her report to Ms Williams on **16 April 2025** [**B2/1765-1766 and 1734-1746**]. We share the views expressed by Ms Telfer in her witness statement.

250. Ms Williams met with Ms Newton on **29 April 2025** to finalise the report and sent it to Andrew Thacker and Tracy Atkinson. The Claimants did not want to attend a meeting to discuss the outcome and asked for it to be sent in writing. The outcome was provided to the signatories on **08 and 09 May 2025** [**B2/1864-1875**].

The outcome of the Resolution Procedure

251. We do not propose to go through the report in any detail. We shall confine our findings to 'concern 1' which was stated to be: "*The use of the women's changing facilities at the hospital by a fellow member of staff, Rose Henderson, who is biologically male*." Ms Newton's conclusion was as follows:

"*The investigation has upheld this concern and established that the Trust has allowed an employee who was assigned male gender at birth, Rose Henderson ('RH') to use the female changing facilities since joining in September 2019*." [**B2/1867**]

252. The report then set out some extracts from the policy. As regards concern 1, Ms Newton upheld the complaint and stated:

"It is concluded that the Trust decision to permit RH to use the Changing Room was in keeping with the Trust Transitioning in the Workplace Policy v2.1, specifically Appendix 2 (page 23 of the Transitioning in the Workplace Policy) because RH has confirmed she is transitioning." [**B2/1868**].

253. It is difficult to understand the conclusion that this part of the complaint was 'upheld' in the context of everything that we know in this case. It was patently obvious that the signatories were complaining about two things:

(1) that the Trust permitted a biological male/trans woman employee (Rose Henderson) to use the female changing room on the basis that Rose had confirmed they were transgender, that this was unacceptable to the complainants and that Rose should be provided with alternative facilities.

(2) that there were aspects of Rose's behaviour while using the changing room that were unacceptable to them.

254. On any objective reading it is not a conclusion on the first part of the complaint to say that the Trust's permission for Rose to use the changing room was in keeping with the TIW policy. It is simply stating what the complaint is without addressing its substance or recommending any steps. It was accepted by Mr Thacker in evidence that the second part of the complaint could in principle have

been investigated without the need for any investigation on the first part because the first part was inherently a matter of policy. However, as Mr Thacker confirmed, the review of the policy was out of scope of the investigation. Because a review of the policy was out of scope of the Resolution Procedure this meant that the central complaint (number (1) above) could never be addressed, let alone resolved. We fail to see how this could not have been known to Mr Thacker and others at the time. That is because the Trust has an established practice of creating and reviewing their policies as we have set out above and there was no sense of urgency or desire on the part of senior management to review the TIW policy outside the normal cycle of policy review diarised by Ms Bailey. It may be that Ms Newton felt she could do nothing with 'concern 1' other than to state the obvious, i.e. that Rose's permitted use of the changing room was in keeping with the TIW policy. After all, she was not able to review the policy or to recommend that Rose be excluded from the room, absent any finding of improper behaviour on Rose's part. Absent changing the language of the TIW policy to bring it more up to date, as we have set out above, the position that Sister Ali Quinn fed back to Mrs Hutchison back in **September 2023** remained the position of senior HR management throughout this period. That was that Rose had a right to use the changing room; that to exclude Rose would amount to discrimination against Rose on grounds of gender reassignment; that anyone who was uncomfortable with this arrangement would have to use alternative changing facilities. Regarding the resolution procedure investigation, the only outcome that could have resulted in Rose being required to use alternative facilities would have been findings of improper behaviour by Rose whilst using the changing room.

The business as usual review and version 3.0

255. The review to the TIW Policy that Ms Bailey had been working on resulted in the ratification by the Board, on **24 March 2025**, of version 3.0 of the TIW Policy [**SB/203-230**]. The paragraph under 'Process' in version 2.0 [**B2/84**] paragraph 57 above) remained as it was in version 3.0 [**SB/210**]. The passage under the heading 'Use of Gender Specific Facilities' in appendix 2 of version 2.0 was removed and replaced with alternative wording. The sentence '*if others do not wish to share the gender specific facilities, they should use alternative facilities*' was removed. It was replaced by the following, modified, sentence:

"*Where there is objection from other staff about trans or non-binary staff using single sex changing, showering or toilet facilities due to their religion or belief, careful consideration of balancing the rights under the Equality Act 2010 of both sides must be taken into account by the manager that does not favour one side or the other*." [**SB/212**]

Supreme Court judgment in the case of For Women Scotland Ltd v The Scottish Ministers

256. Version 3.0 of the TIW policy remained 'live' only for a matter of weeks. It was withdrawn after the Supreme Court handed down its judgment on **16 April**

2025, in the case of For Women Scotland. Mr Thacker emailed Ms Bailey on **28 April 2025** suggesting that it be removed until they obtain further national guidance to update the policy. The policy was removed that day. On **29 May 2025** the Trust was visited by David Purdue, Regional Chief Nurse for NHS England North-East and Yorkshire. He met with Sandra Watson and Bethany Hutchison. He said that following the Supreme Court decision, the Health Secretary had asked him to visit the hospital and discuss the changing room situation. He said that the situation had taken much longer to resolve than it should have and that it was unnecessary to wait for any further national guidance on the matter in order to resolve it. In **July 2025**, alternative changing room facilities were found for Rose to use and those women who had been using the hitherto temporary facilities, including the Claimants, returned to using the female only changing room which is not now being used by Rose.

Findings related to the evidence of Professor Phoenix

257. Professor Jo Phoenix was the final witness in these proceedings. She is a Professor of Criminology in the School of Law at the University of Reading. She holds a degree in Sociology, a Master's degree in Gender and Social Policy from the University of Bristol and a PhD in Sociology from the University of Bath. She has over 35 years of experience in researching matters of gender and justice. She is a sociologist with a specialism focusing on the role of sex in crime and justice. Her expertise is grounded in empirical social science and feminist theory. For the purposes of these proceedings, she prepared a 28-page report alongside a 79-page document (appendix 3) consisting of extracts from literature to which she refers in her report. Her instructions were to give expert opinion evidence on two questions:

(a) Are women generally more sensitive than men to being compelled to undress in front of a person of the opposite biological sex?

(b) Are women more likely than men to suffer fear, distress and/or humiliation if compelled to undress in front of a person of the opposite biological sex?

258. Professor Pheonix holds what are known as 'gender critical beliefs.' This was explained to us as a belief that sex is biological and immutable. She is an adviser to the organisation 'Sex Matters' and she endorses the principles of that organisation. She makes no secret of this. The content of her report was not challenged by the Respondent.

259. Feminist social science is a body of work that is empirical in nature, meaning that those who practise in this area seek to draw conclusions based on verifiable observation or experience, rather than by pure theory or logic. There is also a body of feminist social literature that is essentially theoretical. Both tend to be loosely referred to together as 'feminist social theory'. However, there is a distinction between empirically drawn conclusions and theoretical assertions. As described by Professor Pheonix in answers to questions by the Tribunal, the former (feminist

social science) is about seeking to explain 'here and now' patterns in society, whereas the latter (the purely theoretical side) is philosophically 'normative', i.e., it tends to assert what society 'should be' like. Both can be valuably read together, whilst recognising these distinctions.

260. There is no body of research or set of social scientific studies of which Professor Pheonix is aware that directly addresses either of the two questions asked in this case, and on which she was asked to provide an opinion. Nor are there any studies that look at the impact of women generally sharing facilities with biological males who identify as women. The reference in paragraph 20(g)(xiv) of Professor Pheonix's report to *'extensive discussion'* in the US and Canada about alleged threats to women's privacy rights in female locker rooms posed by the presence of transgender individuals is not a reference to any empirical research but to political and popular discussion.

261. Just as there are no studies that directly address the effect on women of having to share communal changing facilities with men, there are no studies that have looked at the impact or effect on men of having to share communal changing facilities with women. The reference, in paragraph 20(g) (xvi) of Professor Pheonix's report to '*qualitative accounts'* illustrating that men's discomfort with undressing in front of women is '*generally muted*', is explained in footnote 2 of her report. What she refers to there was the only account of women's experiences in a male locker room that she could find in her research. What little evidence there is, however, suggests a general absence of or relatively little discomfort on the part of men.

262. The research and studies that do exist and from which Professor Pheonix has drawn inferences in answering the questions in this case, are referred to in her report. From that research, she is of the opinion that the answer to both questions in paragraph 257 (a) and (b) above is 'yes'. She arrives at those answers inferentially. In doing so, she has interpreted the pleaded phrase '*compelled to undress'* in the way set out in her letter of instruction, namely, that the phrase *'compelled to undress' in front of a person of the opposite biological sex*' should be read as: '*required to change clothes in a communal changing room shared with a member of the opposite sex*'.

263. Professor Pheonix is plainly right to interpret the phrase in that way. We shall say more about that in our conclusions. We say here that it would make a nonsense of the facts and of the legitimate arguments in this case to suggest that the pleaded phrase '*compelled to undress in front of a member of the opposite sex*' must bear a narrow literal interpretation, of people being 'compelled' (in the sense of 'forced') to change their clothes whilst they quite literally stood 'in front of' a person of the opposite sex. The Respondent understood perfectly well from the factual matrix and from the case being advanced that this perhaps inelegant or sloppy drafting meant '*required to change clothes in a communal changing room shared with a member of the opposite sex*'. The 'compulsion' lies in the factual reality: a Uniform policy mandated (or compelled) to change into and out of clothes at work. The TIW

policy required (or compelled) anyone who was not comfortable with changing in the presence of a member of the opposite biological sex to use alternative facilities. There were no alternative facilities. To argue against Professor Phoeonix's interpretation would be fanciful.

264. We accept that the inferential conclusion arrived at by Professor Pheonix is drawn from nearly four decades of robust criminological evidence (paragraph 22a of the report) and especially two empirically well established and interconnected points:

(1) The asymmetry of risk of sexual and physical violence from men that women still face compared with men – which is grounded in the prevalence of sexual violence and harassment and

(2) The ways in which this asymmetry or risk means that women's everyday lives are shaped by harassment, intimidation and the constant management of fear.

265. We accept what Professor Pheonix sets out in paragraph 20 of her report that:

(a) it is an enduring feature of culture that different modesty norms apply to men and women, that men and women internalise these modesty norms differently and that breaches of modesty norms have profoundly different effects on men and women.

(b) Individual responses to breaches of modesty norms are not (we would add 'necessarily') a result of personal insecurities. Reactions are (we would add 'generally') a product of the societies into which individuals are born.

(c) Undressing is never just a neutral act; it is imbued with cultural meaning and a sense of personal, symbolic and reputational stakes.

(d) Women are far more likely than men to be uncomfortable undressing in front of people outside their immediate intimate circles of family and friendship groups

266. We accept that, as a general rule, considerably more women than men feel or would likely feel personal insecurity, distress and fear if required to change clothes in a communal changing room shared with a member of the opposite sex. This reflected many of the accounts given by the Claimants in this case. We accept that this is rooted in the different cultural and societal experiences of women compared to men. Further, we accept that women will feel things differently at different stages of life as their relationship with their bodies (comparative to men) changes with age. There will be moments of acute awareness and sensitivity on the part of women that do not apply to men, for example during menstruation, during pregnancy or during menopause. During these periods, women may and very many do experience physical reactions, such as bleeding, incontinence,

sweating or heightened emotions, which inevitably has an effect on their sense of self. They are inherently private matters and can affect women's perceptions of self and dignity. The relationship between a woman and her body is very different to the relationship between a man and his body.

267. It is, we find, a legitimate inference to draw from the empirical based research relied on and from the different relationship that women bear to their bodies than men, that women generally, compared to men generally, have or would have a greater sensitivity of having to undress (thereby exposing parts of their bodies or underwear) in the presence of members of the opposite sex. This phenomenon can be explained by what is referred to as the 'objectification theory'. This is a theory developed in the late 1990s by feminist psychologists Barbar Fredrickson and Tomi-Anne Roberts. This theory takes up most of Professor Pheonix's appendix 3. We have read that appendix in full. It is sufficient to highlight only a few passages to understand it and to further understand that part of the research on which Professor Pheonix partly based her opinion.

"*This article offers objectification theory* ***as a framework for understanding the experiential consequences of being female in a culture that sexually objectives the female body****. Objectification theory posits that* ***girls and women are typically acculturated to internalise an observer's perspective as a primary view of their physical selves. This perspective on self can lead to habitual body monitoring****, which, in turn, can increase women's opportunities for shame and anxiety … This theoretical framework places female bodies in a sociocultural context with the aim of illuminating the lived experiences and mental health risks of girls and women who encounter sexual objectification. … Certainly* ***not all women experience and respond to sexual objectification in the same way. Unique combinations of ethnicity, class, sexuality, age and other physical and personal attributes undoubtedly create unique sets of experiences across women, as well as experiences shared by particular subgroups. Yet amid the heterogeneity evident among women, we propose that having a reproductively mature female body may create a shared social experience, a vulnerability to sexual objectification, which in turn may create a shared set of psychological experiences****. Objectification theory (a) provides a framework for understanding this array of psychological experiences that appear to be uniquely female…"* [**extracts from appendix 3, pages 1 - 9 of Professor Pheonix's repor**t] ***[emphasis added***]

268. This theory does not appear out of nowhere. As described by Professor Pheonix, it offers a framework for understanding the empirical observation and experiences described in her report. It also accords with the Tribunal's own understanding of why women, more so than men, are more sensitively attuned to their bodies and to greater feelings of vulnerability when exposed. The highlighted passages above and the theory in general terms do not stand out to us as surprising statements.

269. Professor Pheonix draws heavily on the objectification theory and on her own empirical research. She sets out in her report the range of ways in which objectification is manifest in the day-to-day life of women, resulting in many being in a chronic state of self-surveillance and that generally, women and girls tend to internalise an observer's gaze much more profoundly than men and that this leads to self-objectification, body monitoring and a heightened sensibility vis-à-vis modesty practices and their potential breach. It is not just feminist theory that confirms this observation but wider early sociological theories on informal social sanctions for breaches of modesty norms applying more heavily to women than men (paragraph 20(g)(vi) of the report). This struck a particular chord with the Tribunal in light of our analysis of the evidence of Rose's behaviour in the changing room. Whilst we had found that Rose had not, in fact, looked women up and down, or stared at their breasts, or had lingered in the changing room, we found that the Claimants, and others, genuinely perceived this to be the case. This chimes with the state of self-surveillance that Professor Pheonix speaks of and with the 'array of psychological experiences' that Fredrickson and Roberts allude to. The research and the theory provide a rational explanation for these perceptions.

270. We accept – as does the Respondent – that women are more likely to have experienced sex-based harassment and sex-based violence than men. It will come as no surprise to anyone that this is so. The risk posed to women generally by this state of affairs causes a reaction in many women and leads them to adjust their own behaviour according to the circumstances. Women do not have to experience sex-based harassment or violence personally. The experiences of some women can and does have an impact on others. Depending on the circumstances, a woman might experience fear and distrust in the presence of a man even though, objectively, as a matter of fact, the man is an entirely innocent actor. We take an example that we can all recognise, of a woman walking alone on a street at night, whereupon she notices an approaching male. She crosses the road to avoid the man, holding her keys in her hands in the event she needs to defend herself or she phones someone or pretends to do so. The approaching male is a perfectly decent and innocent person with no intention to harm anyone and is oblivious to the woman on the street. He would feel offended at the thought that someone might regard him as potentially harmful. But it is not the individual's character that dictates the reaction in the woman. It is not the man himself but the fact that he is a man. The difficulty for the woman in this example is that she is unable to police the character or the intent or motivations of the approaching male. She is fearful of the risk presented in the knowledge of women's experiences in life generally. Her reaction does not depend on personal experience, although of course it may be explained by this. The Tribunal is able to draw on its own experiences of life in recognising these fearful, defensive, precautionary traits in women in certain circumstances. They are not irrational reactions. On the contrary, they are entirely rational, based on the lived experiences of other women generally. Many women will feel anxious and may take extra precautions in what men might regard as normal situations.

271. Just as the innocent male on the quiet street may say that he has done nothing to generate the fear of the approaching female and that he is offended at the thought of her crossing the road or preparing to defend herself, Rose Henderson may feel offended by the reactions of the Claimants to their presence in the changing room. But the reactions are real in both scenarios.

272. In the circumstances that prevailed in this case (where employees were required to change their clothes in a communal changing room shared with a member of the opposite biological sex), we accept that a greater proportion of women would experience reactions of fear, distress or humiliation. These reactions, when compelled (in the sense used by Professor Pheonix) to be in a state of undress in front of men or to observe men in a state of undress are, in the case of those who experience them, not irrational or disproportionate responses. We accept that these reactions/responses are not simply historic and that they prevail and that they are likely to prevail whether the biological male identifies as a woman or not. On the facts of this case, it is only the fact that the biological male identifies as a woman that enables them to gain access to the changing room in the first place, thus generating the fear and reactions of the sort discussed by Professor Pheonix. There is no reason to suppose that the mere fact that Rose has the protected characteristic of transgender status means that those reactions dissipate or evaporate and, on the facts of this case, they clearly did not.

273. Therefore, by inference from the primary observations made and set out in her report, we find that:

(a) Women are generally more sensitive than men when required to change clothes in a communal changing room shared with a member of the opposite sex.

(b) Women are more likely than men to suffer fear, distress and/or humiliation if required to change clothes in a communal changing room shared with a member of the opposite sex.

Did the Respondent apply any provision, criteria or practice?

274. We must now set out our findings in relation to an aspect of the indirect sex discrimination claim, namely whether the Respondent applied any 'provision, criteria or practice' ('**PCP'**) as set out in paragraph 7 of the list of issues. For an understanding of what amounts to a '**PCP'** see paragraph 291 below under the relevant legal principles section of this judgment. Three PCPs were identified by the Claimants as having been applied to them by the Respondent and which they say were discriminatory in relation to sex. We refer to them as **PCPs 1 to 3**.

274.1. Giving staff access to single-sex changing rooms based on self-declared 'gender identity' and/or regardless of sex and/or regardless of gender reassignment [**PCP 1**]

274.2. Lack of consultation with the users of single-sex changing rooms before allowing access to a member of the opposite sex based on their self-declared 'gender identity' [**PCP 2**]

274.3. Prioritising the right of transgender employees to access changing facilities based on their self-declared 'gender identity' over other employees' right not to have to change in front of a member of the opposite sex [**PCP 3**]

PCP 1

275. It is not in dispute that the Respondent gave staff access to single-sex changing rooms based on self-declared gender identity. We have already set out in our findings how, on paper, there appeared to be a higher threshold before a trans person could access the changing room of their confirmed gender than there was for recognising transgender status. The TIW policy refers to the Trust recognising a transgender person's identity the moment the person informs the Trust that they are Trans or intend to transition. The policy also states that the point at which the individual is able to use single sex facilities of their affirmed gender (such as changing areas) should be from the time the employee wishes and that they are legally allowed to use any toilet facility they prefer and the choice should be theirs. It provides that the Trust supports a transgender employee's right to use the facilities appropriate to their gender from the point at which the individual declares that they are living their life fully in that gender. However, we found that the Respondent paid no heed to this part of the policy that appeared to require a 'declaration' in practice. It appeared to be meaningless as even Mr Moore, Head of Workforce Experience could not define it and did not understand what it meant in practice. Ms Bailey accepted it was not defined and could say no more than that the phrase 'living their life fully in that gender' may mean different things to different people. We found that in reality access was permitted to the changing room that corresponded to the affirmed gender upon the Trust recognising a person as transgender. That recognition, and therefore, permission to access the changing room, was based on self-declared gender identity. As the Trust had been informed that Rose was transgender, without more, Rose was permitted to use the female changing room.

276. The Trust accepts that it permitted access on the basis of self-declared gender identity. However, it takes issue with the phrase 'irrespective of gender reassignment'. We do not think that this phrase matters on the facts of this case. That is because no-one at the Trust ever stopped to consider whether there was a difference between 'gender identity' and the protected characteristic of gender reassignment. It is clear to us that Rose has the protected characteristic of gender reassignment. Permission to access the changing room depended on no more than recognition of a person's transgender status. Although there may be a difference between 'gender identity' and 'gender reassignment' on the facts of this case, they were treated as one and the same. Although it also adds little to the analysis, we find that insofar as it is argued that the permission was given 'irrespective of sex', that must be right. Once the Trust recognised transgender status (upon being

informed that the person identifies as a particular gender) and/or has the protected characteristic of gender reassignment, the TIW policy permitted them to choose which changing room they wished to use irrespective of their biological sex. What mattered was the gender they identified with. However, the words 'and/or regardless of sex and/or regardless of gender reassignment' adds little. The Respondent accepts that it gave staff access to single-sex changing rooms based on self-declared gender identity.

PCP 2

277. It is not in dispute that the individual users of the changing rooms were not personally consulted before allowing Rose access to the female changing room. Nor was it in dispute that individual users of the changing rooms were not personally consulted before ratifying the TIW policy. The consultation that pre-dated the ratification of the policy, as we have set out, was collective in nature. The Respondent's position appeared to be that it would and could never be expected to consult individual users of the changing room as this would be an unrealistic and impossible task. We agree with that, insofar as it refers to individual consultation on the development and ratification of the policy. However, PCP 2 is not about consulting on the policy. It is about consulting users of the particular changing room before permitting Rose access to that room under the policy. This too would be a difficult matter on which to consult with individual users of the changing room. We bear in mind that an organisation such as this will have a continuing flow in and out of users: new starters, students etc. It would be unduly onerous to have to consult with every new starter or batch of new starters. That would place an unrealistic burden on the Trust. The TIW policy envisages some form of dialogue with colleagues, of informing them, with the prior consent of the trans employee [see **B2/93** under the heading 'informing colleagues']. However, what that 'consultation' might be would invariably depend on the individual circumstances. It would also require the consent of the individual trans employee. Although on the facts, the Respondent applied PCP 2, it does not seem to add much to the issues in the indirect sex discrimination claim. That is because, in any claim of indirect sex discrimination, there must be a causal link between the group and individual disadvantage and the PCP. Whilst we were satisfied that is the case with PCP 1 and PCP 3, we are not so satisfied that it is the case with PCP 2.

PCP 3

278. This PCP was very much in dispute. It is contentious. Here, it is alleged that the Trust prioritised the rights of transgender employees to access changing facilities based on their self-declared gender identity over other employees' right not to have to change in front of a member of the opposite sex. We are satisfied from our earlier findings that the Respondent did in fact prioritise the perceived rights of transgender employees to access changing facilities of their choice over the right of other employees to access a single sex changing facility based on biological sex. This is clear from the wording of the policy, the way in which it was implemented and the attitudes and mindset of those who developed, reviewed,

approved and owned the policy. The policy provided that those who objected should use alternative facilities, yet it had no available alternative facilities for them. Those nurses who raised legitimate concerns were told that they had to accept the fact that the NHS was inclusive. The attitude of senior Workforce Development managers was that staff needed to be educated and to improve their awareness of trans rights. This prioritisation was plain to see and was baked into the TIW policy. We find that PCP 3 is better expressed as the Trust having '*prioritised the perceived rights of transgender employees to use changing facilities based on their self-declared gender identity over the rights of other employees to have use of a single sex facility'*.

Submissions

279. Both counsel prepared written opening arguments or notes as well as written closing submissions. These written submissions were then supplemented by oral submissions on **11 November 2025**. We were provided with a bundle of authorities running to 1,132 pages.

280. We mean no discourtesy to counsel by not setting out their respective submissions. This would only lengthen what is already a lengthy judgment. We touch on some of the submissions in setting out our conclusions. We listened to and read all submissions carefully and reviewed them during our deliberations.

Relevant law

Harassment related to a protected characteristic

281. Section 26 of the Equality Act 2010 provides that:

> (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.
>
> (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.

282. Section 26 is a pragmatic provision that seeks to balance competing factors so that employees receive reasonable protection, having specific regard to their perception of the conduct, but without expecting an unrealistic standard of workplace conduct from their colleagues. Employees can be expected to demonstrate a degree of robustness, as was emphasised by the decisions of the Court of Appeal in **Grant v HM Land Registry & Anor** [2011] I.C.R. 1390 and **Richmond Pharmacology v Dhaliwal** [2009] I.C.R. 724.

283. There are a number of components in a complaint of harassment. They have been helpfully set out in a number of authorities, the most recent being the judgment of HHJ James Tayler in **Carozzi v University of Hertfordshire** [2025] IRLR 179. The first component is that 'A' must have engaged in **unwanted conduct**. That conduct must be **related to a relevant protected characteristic**. The conduct must have the **purpose or the effect** of violating the dignity of 'B', or creating an intimidating hostile, degrading, humiliating or offensive environment for 'B'.

There must be conduct, and that conduct must be unwanted

284. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant. It does not mean that express objection must be made to the conduct before it can be deemed to be unwanted.

The unwanted conduct must be 'related to' a protected characteristic

285. The term "related to" has a relatively broad meaning and is designed to cover all forms of conduct that, properly viewed, has a relationship to the protected characteristic. There must, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question. If the unwanted conduct relates to a protected characteristic, it will only amount to harassment within section 26 if the purpose of the 'perpetrator' ('A') is to violate 'B's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for B or if that is the effect of the conduct. If it is asserted that a failure properly to investigate a grievance that alleges discrimination, or to take such a complaint seriously constitutes harassment, it is not sufficient that the grievance or complaint was related to the protected characteristic; the failure properly to investigate the grievance, which constitutes the conduct, must be related to the protected characteristic: **Worcestershire Health and Care NHS Trust v Allen** [2024] EAT 40.

The purpose of the conduct

286. Whether the purpose of 'A' is to violate B's dignity or to create the proscribed environment requires consideration of A's mental processes. This may involve the drawing of inferences from the surrounding facts and circumstances. If A is found

to have the unlawful purpose, it is irrelevant that it might not have had the proscribed effect.

The effect of the conduct

287. The statutory provision allows for the possibility that 'A' deliberately violates the dignity of 'B' (or deliberately creates the proscribed environment) or that 'A' does so without that intention, but the conduct has the effect of violating 'B's' dignity (or creating the proscribed environment). Where the conduct has the effect but not the purpose of violating dignity etc, the Employment Tribunal is required to consider:

"both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b)": **Pemberton v Inwood** [2018] ICR 1291, CA, per Underhill LJ

288. There is little case law on what is meant by violating dignity. What authority there is suggests that not every adverse conduct will amount to a violation of a person's dignity. Trivial or transitory events or acts are unlikely to constitute a violation of a person's dignity. Whether conduct is sufficiently serious to warrant a conclusion that certain conduct has the effect of violating a person's dignity is a question of fact in each case for the employment tribunal. A claimant must actually have felt or perceived that their dignity has been violated or that the proscribed environment has been created for them and that requires the claimant to have been aware of the conduct. Tribunals must not cheapen the significance of the words of section 26. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: **Land Registry v Grant** [2011] I.C.R. 1390, per Elias LJ @ para 47. It is important not to distort the language of the section to avoid bringing discrimination law into disrepute. In hearing the evidence and finding facts, a tribunal should not make judgments as to the discriminatory significance, if any, of individual incidents. If ad hoc assessments 'discrimination or no' are made, the result is a fragmented and discursive judgment; more importantly there is the potential for ignoring the impact of the totality of successive incidents, individually trivial.: **Driskel v Peninsula business Services Ltd** [2000] IRLR 151 @ para 12.

Indirect discrimination

289. Section 19 of the Equality Act 2010 provides:

(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 reassignment
…. Sex

290. The law on indirect discrimination has been the subject of a number of valuable pronouncements by the Supreme Court, in particular by Baroness Hale: **R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JSF and ors** [2010] 2 A.C. 728; **Homer v Chief Constable of West Yorkshire Police** [2012] I.C.R. 704; **Essop v The Home Office** [2017] I.C.R. 640.

What is a provision, criterion or practice ('PCP')?

291. The phrase PCP should be construed widely to include any formal or informal policy, rule, practice, arrangement, criteria, condition, prerequisite, qualification or provision (EHRC Employment Code, paragraph 4.5). The function of the PCP is to identify what it is about the employer's management of the employee or its operation that causes the particular disadvantage. The PCP must, therefore, be capable of being applied to others (**Ishola v Transport for London** [2020] I.C.R. 1204, CA.

292. The PCP must actually be applied to 'B'. 'A' must also apply it to others with whom B does not share the protected characteristic, or the Tribunal must be able to conclude that A would apply the PCP to such persons. Further, application of the PCP must put persons with whom B shares the characteristic at a particular disadvantage compared to persons who do not share B's characteristic. In addition, the PCP must also put B at that disadvantage. The phrase '*particular disadvantage*' is apt to cover any disadvantage. It is not limited to a disadvantage that is 'serious, obvious and particularly significant. All that the phrase does is to clarify that it was persons with the relevant protected characteristic who were disadvantaged. The word 'particular' is almost redundant as the effect of the provision would be the same without it: see **McNeil v Revenue and Customs Commissioner**s [2019] IRLR 915 and Harvey on Industrial Relations and Employment Law, Division L (3) (e) para 310].

293. It is for a claimant in every case to establish that a PCP puts or would put those who share the same characteristic at the disadvantage claimed. Under the predecessor provisions in the Sex Discrimination Act 1975 and the Race Relations Act 1976, the law was framed in such a way that this required an analysis of the proportions of women and men who could comply with a PCP and to then compare whether the proportion of women who could comply was considerably smaller than the proportion of men who could comply. Invariably, this resulted in statistical evidence becoming a typical feature of indirect discrimination cases as well as arguments regarding the correct 'pools' for the purposes of this statistical comparison.

294. However, section 19 Equality Act 2010 is not a reproduction of those predecessor provisions. While statistical evidence, in the right case, may be helpful in establishing group disadvantage, section 19 does not require statistical proof that more of those in the protected group suffer the disadvantage than those outside it. It must be recognised that statistical evidence may not exist. Other evidence may be used to establish the necessary effect, such as expert evidence [see Harvey on Industrial Relations, Division L, part 3(3)(e) [310]]. In **Homer v Chief Constable of West Yorkshire Police** [2012] I.C.R. 704, Baroness Hale said at paragraph 14:

"*Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But … the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse …. It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages*."

295. A claimant must establish a causative link between the PCP and the disadvantage suffered by the group and the individual. However, a claimant is not required to establish a causal link between the disadvantage suffered and the protected characteristic. Therefore, a claimant is not required to establish the reason why a group of a particular protected characteristic suffers the disadvantage. It is enough that it does: **Essop v Home Office** [2017] I.C.R. 640, SC.

Comparison by reference to circumstances

296. Section 23 of the Equality Act provides as follows:

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

297. When applying section 23 to a claim of indirect discrimination under section 19, the comparison must be with those who (apart from the relevant protected characteristic) are in circumstances that are the same or not materially different: **Pendleton v Derbyshire County Council** [2016] IRLR 580 [EAT]. Insofar as it is necessary to identify a 'pool' of people for the purposes of comparison, this should consist of all the workers affected by the PCP in question, so as to test the discrimination complained of by considering those who were subject to it. In that way, a comparison can be made of the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it [see Harvey on Industrial Relations, Division L, Part 3 (ii) paragraph 312.01]

Objective justification

298. If a claimant establishes the things in section 19(2)(a) to (c), the burden then falls on the employer to show that the PCP was a proportionate means of achieving a legitimate aim. This is sometimes referred to as a requirement to establish objective justification.

299. The EHRC Employment Code states that for an aim to be 'legitimate' it must be 'legal, must not be discriminatory in itself and it must represent a real, objective consideration [para 4.28 of the Code]. It must correspond to a real need on the part of the employer. Aside from this, there would appear to be endless potential 'legitimate aims'.

300. The employer must then show that the PCP was an appropriate means of achieving the aim. A PCP will not be proportionate if it is not appropriate to the aim in question and if it is not reasonably necessary to achieve the relevant aim. The principle of proportionality requires the tribunal to take into account the reasonable needs of the employer's business and to make its own assessment as to whether the discriminatory measure is reasonably necessary. The tribunal must undertake a balancing exercise assessing not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic considering the qualitative and quantitative effects of the PCP. Of relevance to this exercise will be whether a lesser form of the measure would serve the same aim.

301. Where a Convention right is engaged, the concept of justification must be read compatibly with that right, pursuant to s.3 Human Rights Act 1998. A PCP which violates a complainant's Convention rights will only be justifiable as far as the relevant Convention article so permits.

Victimisation

302. Section 27 of the Equality Act 2010 provides as follows:

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

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

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

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act..

303. It is enough that a reasonable worker would take the view that the relevant treatment amounts to a detriment: **Shamoon v CC RUC** [2003] I.C.R. 337.

Gender Reassignment

304. Those with the protected characteristic of gender reassignment have protections under the Equality Act 2010.

305. Section 7 of the Act defines gender reassignment as:

(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.

306. The characteristic that is protected is gender reassignment and not gender identity. The term 'transgender' is used to refer to those persons whose gender identity does not correspond to their sex at birth and who identify with another gender.

Time limits

307. Section 123 of the Equality Act 2010 provides:

(1) …. 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.

(2) ….

(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.

308. There is a difference between a continuing act and an act with continuing consequences. Where an employer operates a discriminatory policy or practice, that practice may amount to an act extending over a period of time. However, tribunals should avoid taking a literal approach as to whether a state of affairs can be described as a 'regime' or 'policy' or 'practice.' Whether there is conduct over a period of time depends on the facts of any given case. It is best to avoid hard and fast rules when considering those facts and applying the statutory provision to them. Tribunals should look at the substance of the complaints and then determine whether the complaints, in substance, can be regarded as part of one continuing act by the employer: **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548 @ para 17.

The Workplace (Health, Safety and Welfare) Regulations 1992 ('the 1992 Regulations')

309. Regulation 24 of the 1992 Regulations provides that:

(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 cannot, 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.

310. In **Post Office v Footit** [1999] WL 15565585, the High Court considered whether the employer's provision of a unisex locker room and separate toilet rooms for each sex but no separate ladies' changing room complied with regulation 24. The unisex locker room was shared by some 90 men and 9 women. Staff could and did change in the unisex locker room. However, if any female employee wished to remove more than a topcoat or jacket, she could only do so in the general area of the ladies' toilet room. Ognall J held that the employer was in breach of regulation 24 and that it was insufficient that women could confine themselves within the ladies' toilet room when wishing to change their clothing.

Article 8: European Convention on Human Rights (private and family life)

311. This provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

312. Article 8 protects, among other things, personal autonomy, identity, and dignity, and physical and psychological integrity. It is a qualified, not an absolute right, meaning that a public authority may lawfully interfere with it. For any interference to be lawful it must be:

312.1. Be in pursuit of a legitimate aim,

312.2. Be in accordance with the law,

312.3. Be necessary in a democratic society.

313. The legitimate aims are identified in article 8(2). Whether the interference is 'necessary in a democratic society' requires it to be proportionate to a social pressing need.

Discussion and conclusions

Victimisation

314. We begin by setting out our conclusions on the claims of victimisation.

Did the Claimants do a protected act?

315. The Claimants relied on three protected acts in this case. The Respondent accepted that two of them were protected acts within the meaning of section 27 Equality Act, namely the sending of the letter of **27 March 2024** (on **04 April 2024**) and the commencement of these proceedings. The sticking point was whether, in going to the media, the Claimants had done a further protected act.

316. Although disputed by the Respondent, we find that those Claimants who gave media interviews or spoke to the press about the TIW policy and the use of the female changing room by a trans woman did a protected act by giving information in connection with proceedings under the Equality Act and by making an allegation that the Trust had infringed the Equality Act. On the evidence before

us, we find that the Claimants who did this are Bethany Hutchison, Annice Grundy, Lisa Lockey and Tracey Hooper. It is clear to any reasonably informed reader that what those nurses were complaining of in the course of speaking to the media was an infringement of the Equality Act 2010. Taking the Daily Mail report as an example [**Media bundle, page 5**] it refers to harassment, victimisation and indirect discrimination. Unlike the position with 'protected disclosures' under the Employment Rights Act 1996, section 27 EqA does not require that any of the things in section 27(2)(b) to (d) are said to or 'done to' the employer.

317. Mrs Hoy, Mrs Danson and Mrs Peveller on the other hand, did not give any media interviews or speak to the press about their experiences – at least not by August 2024 (the date of the last alleged detriment). Whether some within the Trust believed that they had gone to or that they might go to the press is academic because – as can be seen from the following paragraphs – we concluded that the things complained of in these proceedings as identified in paragraph 12 of the list of issues [**B1/121**] (the ''detriments') were not done because any or all of them had gone to the media or because anyone from the Trust believed that any or all of them had or may do. Nor, we are satisfied, were the things done because of the first or second protected acts relied on. Therefore, to the extent that the Claimants, or some of them did protected acts, it is academic.

Detriments: list of issues

Paragraph 12(a)

318. The first detriment complained of is Ms Atkinson's comments on **15 April 2024** about the signatories of the letter. We refer back to our findings on what was said at this meeting in paragraph 140 - 146. We are satisfied that Ms Atkinson was not motivated consciously or unconsciously by the fact that the Claimants had made an allegation that the Trust had contravened the Equality Act or because, by sending the letter, they had done something in connection with the Equality Act. Ms Atkinson said what she said because she believed that those who were uncomfortable with sharing a space with a trans woman colleague needed to broaden their outlook and understand the rights of transpeople and because of her belief in the TIW policy. We refer to our findings back in **summer 2023** where Jillian Bailey, which we infer was on Ms Atkinson's direction, had been proposed as a person to give a similar education talk to staff. This was before any of the protected acts relied on. The letter of **27 March 2024** was the context of the discussion and triggered the meeting of **15 April 2024**, but Ms Atkinson's motivation was not the fact that signatories had written to the Trust in that letter.

Paragraph 12(b)

319. We did not find that Ms Atkinson criticised the letter at the meeting on **20 May 2024**. We refer to our findings in paragraphs 151-153 above. The Claimants were not subjected to the detriment as pleaded.

Paragraph 12(c)

320. Nobody knows for sure who displayed the poster and the pages from NMC code of conduct only that it was someone from theatres. The poster on the entrance door had been removed even before Sandra Watson approached Helen Coppock. Although Helen Coppock said privately to Sandra Watson that the NMC Code should not be removed, it was in fact removed and the Claimants were unaware of what Helen Coppock had said. Action was, therefore, taken quickly and that action was sanctioned by the Director of Nursing.

321. We conclude that a reasonable worker would, in those circumstances, not consider this to be a detriment in and of itself (as it was alleged to be). It was a show of support for Rose Henderson from colleagues in theatres. It is a relevant feature of our findings of fact that the Claimants had by this date made public their own views on whether a trans colleague should be allowed to share the female only changing room. They had appeared in the media and they were fully aware that there were different views on the matter and fully aware that most of the theatres team appeared to be supportive of Rose's 'right' to use the female changing room. There was no reliable evidence that the poster/NMC code had been placed there by anyone in authority. They were aware that there were clear dividing lines between those who support trans woman in female spaces such as a changing room and those who do not. In these circumstances, in our judgement a reasonable worker would not regard what was a reactionary and momentary display of support by unidentified colleagues of Rose as amounting to a detriment at work. A reasonable worker would have recognised it for what it was: a display of support for one side of the argument. At its highest, a reasonable worker would have been angered or provoked by a display of disagreement in this fashion but would temper that by recognising their own actions in publicising their own views to the world at large. Further, we conclude that the most likely explanation for the display was a misguided show of support for Rose as opposed to the fact that some of the Claimants had spoken in the media about infringement of the Equality Act. We note our finding that the press first reported in late May and the poster was displayed on **01 July 2024**.

Paragraph 12(d)

322. We made no finding that Rose Henderson made unnecessary visits to DSU and no adverse findings regarding Rose's behaviour in the terms set out in paragraph 3(b). The Claimants were not thereby subjected to detriment as alleged.

Paragraph 12(e) and (g)

323. We shall take these together. We refer to our findings regarding Mr Thacker's letter of **15 July 2024** [**B2/392**] in paragraph 193 above and in particular to that part of the letter that states:

"Any behaviour, including that outside of work, that is considered inappropriate or disrespectful and/or which is directed towards another employee will not be tolerated and will be investigated appropriately under the Disciplinary Policy"

324. We conclude firstly that no part of the letter amounted to a threat to discipline anyone because the Claimants had done a protected act within the meaning of section 27 Equality Act. It was sent as a reminder to the Claimants of the need not to direct any inappropriate remarks at individual colleagues in things that they said publicly. The non-legal members, in particular, were of the view that the fact that a letter was sent in these terms was unsurprising. We regard the letter as perfectly reasonable in the context of what was going on at the time. We are satisfied that it was not motivated by the Claimants' protected act or acts. That was not the motivation of Mr Thacker. It was sent out of a concern for other colleagues.

325. Further, we do not agree that the letter subjected the Claimants to any detriment. The letter angered the Claimants that is true, but that is insufficient to amount to a detriment for the purposes of section of the 27 Equality Act. Most of what the Trust did or said in this arena angered the Claimants by this stage. We do not agree on an objective and contextual analysis that the content of the letter itself can reasonably be described as threatening. The terms of the letter were reasonable and a reasonable worker, understanding the context, would regard the letter as such. It does no more than encourage appropriate and respectful behaviour towards colleagues. Any reasonable worker would and ought to appreciate that disrespectful and inappropriate behaviour towards colleagues could well lead to a disciplinary investigation. We remind ourselves of the facts. The Claimants made the decision to go to the press in conjunction with their legal advisers. By going to the press, given the division of opinions on either side of the arguments on the sanctity of women's spaces, it was highly likely – absent a privacy order from the Tribunal – that Rose Henderson's identity would eventually be published. This likelihood must have been known to the Claimants at the time given the sophisticated representation they had and have had throughout and given that the Claimants had given Rose's name to the press. It is not the norm for employees with an internal work dispute to go to the media. The decision to go to the press was, in our judgement, a 'strategic' decision to highlight their case to the world and to put pressure on a management that they believed to have dragged their heels on this issue for far too long. It was the start of a campaign. The DSU nurses were then thrust into the limelight, becoming known as 'the Darlington Nurses'. That was, no doubt, difficult for the Claimants at the time but they have steadily become more accustomed to the glare of publicity and have clearly taken on the mantle of campaigners. We do not state this as a criticism in any way. The Claimants are entitled to campaign on the wider issue. However, we infer that part of the 'strategy' in going to the press was to gain some protection from any perceived action that might come their way. That this is so, was amply illustrated by something Mrs Hutchison said in evidence when she was asked questions by Mr Cheetham about the last paragraph of Mr Thacker's letter of **15 July 2024**. When asked whether she or any other Claimant had been disciplined. Ms Hutchison replied '*they would not dare discipline now*'. We conclude that Mrs

Hutchison was also of that view point after the story started to hit the press. The Claimants felt protected by the publicity. They have reacted indignantly and unreasonably in our judgement to a reasonably worded letter from Mr Thacker but were not subjected to any detriment by him in that regard.

326. This complaint also takes in the letters of **August 2024** from Sue Williams, an example being the one to Bethany Hutchison at **page B2/627** (see findings of fact in paragraph 197 above). The letters concerned Rose Henderson's grievance. It was accepted by all the Claimants that, whether they agreed with Rose or not, Rose had a right (as did they) to pursue a grievance if Rose felt bullied or undermined in some way and that the Trust would have to investigate that complaint. This letter was, we conclude, sent solely as a consequence of Rose's complaint. We are confident that Ms Williams, in sending this letter in August was not motivated by the fact that the Claimants had done protected acts either by sending the letter of 04 April, or by going to the press or by commencing proceedings. She was motivated only by the fact that Rose Henderson had initiated a grievance and by the need to forewarn the Claimants of the 'possibility' of an outcome. The reaction of the Claimants to this letter is, again, in our judgement driven by a sense of indignation but they were not subjected to any detriment by Ms Williams.

327. In our judgement the terms of the letter were reasonable. It is good practice for an employer to warn the recipient of a complaint that, should an investigation conclude that inappropriate action has taken place, that action 'may be' taken under the employer's disciplinary procedure. That is all that this letter did as well as stress the need for confidentiality. No reasonable worker would regard the proper forewarning of a possible outcome as a detriment.

328. In light of our conclusions, the complaints of victimisation are not well-founded and are dismissed.

Harassment related to sex and/or gender reassignment regarding the changing room

329. As far as the issues relating to the changing room are concerned, the Claimants advanced their complaints of harassment on three fronts:

(1) firstly, that the use of the female changing room by Rose Henderson constituted an act of harassment related to sex and/or gender reassignment by Rose for which the Trust is liable under sections 109 and 40 Equality Act 2010 (paragraph 3(a)(i) list of issues); and

(2) secondly, that by requiring the Claimants to share the changing room with Rose Henderson, this constituted an act of harassment related to sex and/or gender reassignment by the Trust for which the Trust is directly liable under section 40 of the Equality Act [paragraph 4(a) list of issues]

(3) thirdly, that Rose Henderson's behaviour in the course of using of the changing room constituted an act or acts of harassment by Rose for which the Trust was liable under sections 109 and 40 [paragraph 3(a)(ii) to (vi) list of issues].

330. In our judgement, having regard to our findings of fact, Rose Henderson did not engage in conduct that can be described as harassment related to sex or harassment related to gender reassignment within the meaning of section 26 Equality Act 2010. This includes the conduct of changing in the changing room without more (that is paragraph 3(a)(i) of the list of issues identified in the above paragraph). We must state at this juncture that we draw a distinction between Rose's conduct in using the changing room and the Trust's conduct in permitting Rose use of the changing room (that is paragraph 4(a) of the issues). As will be explained, we consider the latter to amount to harassment related to sex and/or gender reassignment within the meaning of section 26. We are confident in drawing that distinction that it does justice to the case. Had we not been able to distinguish between Rose's use of the room on the one hand and the Trust's permission for Rose to use it on the other hand, we would have had no option other than to conclude that Rose's use of the changing room also amounted to harassment by Rose personally, for which the Trust is liable. But section 26 is drafted in such a way that it enables us to do justice to the facts of this case. We shall attempt to explain our reasoning when we get there. Before we do so, we will first set out our conclusions on the other issues identified in paragraph 3(a) all of which concern Rose's conduct whilst using the changing room and then move on to the incidents described in paragraph 3(b) of the list of issues.

The incidents in paragraph 3(a)(ii) to (vi)

331. Bar the one allegation regarding Rose's encounter with Karen Danson, the Claimants have failed to establish the factual basis of the things complained of in paragraphs 3(a) (ii) to (vi) of the list of issues. However, we will address the Claimants' perceptions on those matters when we come to consider the effect on the Claimants of Rose's use of the changing room (under paragraph 3(a)(i) and paragraph 4(a) of the issues).

332. Tribunals must approach a complaint of harassment in a structured way. We must ask whether the alleged 'perpetrator' engaged in the conduct complained of, whether that conduct was 'unwanted', whether the conduct had the proscribed purpose and if not whether it had the proscribed effect or effects in section 26 of the Equality Act. In relation to the matters in paragraph 3(a) (ii), (iii), (iv) (v) we asked:

332.1. Did Rose engage in unwanted conduct as alleged? The answer to that from our findings of fact is 'no'. Therefore, we need say no more about those as Rose did not in fact engage in the unwanted conduct alleged.

333. Turning to the single incident with Karen Danson (list of issues 3(a)(vi)):

333.1. Did Rose engage in the conduct as alleged? The answer to that is 'yes'. We found that Rose asked Mrs Danson on most likely two occasions whether she was not getting changed.

Unwanted conduct

333.2. Was the conduct 'unwanted'? The answer to that question is also 'yes'. We had to determine this from the viewpoint of Mrs Danson. We had regard to the fact that Mrs Danson had not expressed to Rose personally or to any manager that she objected to Rose's presence in the changing room. However, we would not expect Mrs Danson to have to object personally to Rose using the changing room. In any event, Mrs Danson had very limited experience of seeing Rose and it had not previously registered with her that Rose had been using the female changing room until the incident in question. On this occasion, she registered that a biological male was using the changing room as she walked towards her locker. Rose's presence, for her was unwanted, as indeed was the question asked of her by Rose.

Was the conduct related to sex or gender reassignment?

334. That took us to the next question:

334.1. Was Rose's conduct in asking that question related to sex or was it related to gender reassignment? The answer to that, in our judgement, is 'no'.

335. We must, therefore, explain this conclusion. What is under the spotlight at this stage of the analysis is the conduct of the individual and the relationship of that conduct with the protected characteristic in question. It is not the reaction of Mrs Danson to that conduct. Mrs Danson's reaction to the question does not determine whether the conduct was related to a protected characteristic. When asked by the Tribunal how this was related to a protected characteristic, Mr Fetto replied that it was simply because Rose was present in the female changing room. This was, he submitted, sufficient to render the repeated asking of the question as being 'related to sex'. We agree the 'related to' criterion does not require there to be a strong link between the conduct and the characteristic. However, there must be some sufficient connection or association between the conduct and the protected characteristic. That is not necessarily established by the context – or location - in which the conduct was engaged. Mr Fetto referred us to paragraph 49 of his opening note where he submitted that all instances of pleaded unwanted conduct were 'related to' the Claimants' sex and/or to Rose's sex and/or Rose's actual or perceived gender reassignment. At its highest, it can be seen from paragraph 50(b) of Mr Fetto's opening note (repeated by him in oral submissions) that Rose's behaviour in the changing room is related to sex and/or gender reassignment simply because of the place where it occurred.

336. We do not accept that submission. The question 'are you not getting changed yet' in and of itself is innocent when uttered (even more than once). It is the sort of question that is not out of place in a changing room where the purpose of being there is to get changed and where the evidence almost universally is that people do not hang around and that they get changed quickly. The question takes on a different connotation in Mrs Danson's case because of her life experiences. Having regard to the facts on an objective basis, Mrs Danson was not, in fact, getting changed quickly (albeit for understandable reasons not appreciated by Rose). We made no finding that Rose Henderson meant these words to be intimidating or upsetting in some way. It was of no surprise to us that Rose Henderson was unable to remember Mrs Danson or even asking the question. Although we were initially somewhat surprised that Rose had 'denied' the allegation (as opposed to saying 'cannot remember'), we ultimately regarded that 'denial' to be the natural reaction of someone accused of making a comment which they now understand to have had a significant impact on a person with a history of sexual abuse. Rose's denial was not an unnatural response to an allegation of this sort, involving as it does a fleeting encounter in a room used by many hundreds of people by a person who was unknown to Rose.

337. It is also relevant that Rose Henderson was in the changing room with the express permission of the employer, in accordance with a policy that gave Rose the choice of where to change and where the policy rightly encourages the reception and inclusion of trans employees in the workplace. As far as Rose was concerned, they were in the right room, had been for years with permission of the Trust and causing no harm to anyone. Up to this point nobody had said to Rose that their presence in the room was objectionable to colleagues. As we have seen, managers steadfastly refused to have any such conversation with Rose. However, ordinary behaviour by Rose Henderson in the course of using the changing room was genuinely perceived as harassing because Rose's very presence was perceived as harassing and in the case of Mrs Danson, this was aggravated by her personal history. But our task is to analyse the particular conduct of the individual and to decide whether <u>that</u> <u>conduct</u> had a sufficient connection to sex or gender reassignment. The simple fact of Rose's presence in the female changing room is, in our judgement insufficient to warrant a conclusion that by asking the question more than once related to either characteristic or perceived characteristic. There was no suggestion that if a biological woman had asked it of another biological woman that this would have amounted to conduct related to sex because it was asked in a changing room. That a trans woman asked the question in a female changing room is insufficient in our judgement to characterise it as being conduct related to either of the protected characteristics relied on.

The paragraph 3(b) incidents

338. We now turn to the allegations of harassment set out in paragraph 3b of the list of issues which concern complaints about Rose Henderson's behaviour outside

the changing room. We remind ourselves of our findings of fact on these issues as set out at paragraphs 224 - 235 above. In summary, we found that:

338.1. Rose did go to SEAL on **08 July 2024** and ask for a paediatric consent form and spoke to Jane Peveller.

338.2. Rose went to DSU with Sheila Archer on **10 July 2024** to collect trolleys and was seen by Bethany Hutchison

338.3. Rose was in the habit of swinging scissors and this (not the swinging of keys) was seen by Lucy Wilson and Jill Ogden who reported this to Bethany Hutchison

338.4. In early **October 2024**, Rose walked along the DSU corridor and back again. Rose was seen by Carly Hoy and Tracey Hooper. Rose had an apparent good reason to be on DSU.

339. Taking a structured approach, the answer to the first question: 'did Rose Henderson engage' in the conduct complained of is 'yes'.

Unwanted conduct

340. The next question we had to consider was whether this conduct was 'unwanted'. Even recognising the breadth of the phrase 'unwanted conduct' as set out in paragraph 284 above, it may seem odd that anyone working in a hospital could regard these things either alone, or taken together, as 'unwanted conduct'. How, we asked could nurse 'A' who works in one area of a hospital floor regard the mere presence of nurse 'B', who works in another part as 'unwanted conduct' for the purposes of the harassment provisions? In normal circumstances, this would be seen as a trivial complaint. However, we recognise that these were not normal circumstances.

341. We found that by **July 2024**, the Claimants and other signatories to the letter were in a heightened sense of alert. We were left with the strong impression (for it can be no more than that) that any 'sighting' of Rose Henderson in the DSU was regarded as suspicious and unwelcome. The mere presence of Rose raised suspicions. People talked (as evidenced by Lucy Wilson and Jill Ogden going to speak to Bethany Hutchison), views hardened and inferences were drawn. The Claimants concluded that Rose's purpose on visiting DSU on each of these occasions was to intimidate them. They sought to persuade us that Rose had no apparent reason to be on DSU. We found otherwise. In our judgement, based on our findings, it would be wrong to categorise this conduct as 'unwanted' for the purposes of section 26 Equality Act 2010. Rose was simply going from one place to another for the purposes of their employment.

Was the conduct related to sex or gender reassignment?

342. In any event (lest we be wrong about that) there must be something in the conduct of Rose that is related to the protected characteristic of sex or gender reassignment. Whilst the intention of Rose is not a determinative factor in assessing this, it may form part of the overall objective assessment which we must undertake. We found that Rose had an apparent good reason to be on DSU on these occasions. We noted that the alleged lack of apparent reason was at the very centre of the allegation in that the visits were alleged to be 'unnecessary', which formed the basis of them being described as both 'unwanted' and 'related to' sex/gender reassignment. We had not found them to be unnecessary. We had rejected the allegations of eyeballing and aggression whilst swinging keys. There was no evidence that Rose said anything untoward to anyone. There was simply the context of what had gone before. That, in our judgement was insufficient to establish a sufficient connection between the conduct and the protected characteristics.

343. We cautioned ourselves against making an assessment of harassment on an item-by-item basis, so to speak. We looked at the totality of our findings regarding Rose's behaviour in the changing room and outside the changing room in arriving at these conclusions. We also cautioned ourselves against treating the seven claimants as 'one.' They are not one. Each Claimant's total interaction with Rose was different, albeit we recognised that, to an extent, these were 'shared' experiences in that the Claimants spoke to each other and the experience of one shaped the understanding and concerns of others. Each of the Claimants identified the number of occasions they had seen Rose in their witness statements.

343.1. Bethany Hutchison (paragraphs 5, 73 and 74 of her witness statement).

343.2. Karen Danson (paragraphs 1 and 3 of her witness statement)

343.3. Annice Grundy (paragraphs 4, 7 of her witness statement)

343.4. Lisa Lockey (paragraphs 7, 22 of her witness statement)

343.5. Carly Hoy (paragraphs 7, 28 of her witness statement)

343.6. Tracey Hooper (paragraphs 4, 34 of her witness statement)

343.7. Jane Peveller (paragraphs 5, 10 of her witness statement)

344. We made findings in respect of the interactions of each of the Claimants with Rose. Having done so and considered the totality of evidence and facts as we found them, we concluded that the conduct complained regarding Rose's presence on the DSU and in speaking to Mrs Danson, did not constitute conduct that was related to either of the protected characteristics relied on.

345. Having disposed of what might be called the 'behavioural' allegations, we come back to the question of Rose's use of the changing room and whether this amounts to harassment within the meaning of section 26 in the case of Rose and in the case of the Trust.

Paragraph 3(a)(i) of the list of issues

346. As stated in paragraph 330 above, we distinguish between Rose and the Trust when it comes to the 'use' of the changing rooms. When considering section 26 Equality Act in this case, we have had to consider the conduct of different actors and the effect on others of the conduct of those actors. That is what section 26 directs us to do by reference to 'a person (A)'. In the analysis of the complaint under paragraph 3(a)(i) of the list of issues, 'A' is Rose. In the analysis of the complaint under paragraph 4(a) of the list of issues, 'A' is the Trust (or senior managers of the Trust). The act of the Trust that falls for analysis is the implementation of the TIW policy and the permission given to Rose under it to use the changing room. We address the case against Rose personally before turning to the case against the Trust.

Did Rose Henderson personally harass the Claimants by using the female changing room?

Was there unwanted conduct by Rose?

347. It is an obvious and accepted fact that Rose Henderson used the female changing rooms. It is also an obvious and accepted fact that Rose chose to use the female changing room. It is also a fact that, at least from **27 March 2024**, Rose continued to use the female changing room in the knowledge that a significant number of nurses had expressed their objection to Rose doing so. That Rose engaged in this 'conduct' is clear.

348. From the perspective of the Claimants, Rose Henderson's conduct in using the female changing room was unwelcome and unwanted. That is the case both before and after Rose became aware of the objection of others following the **27 March 2024** letter. We do not consider that the failure to notify Rose of the objections means that Rose's conduct was not unwanted. Although Rose had not personally been made aware that the Claimants (or others) objected to their use of the changing room until late March/early **April 2024** we have seen how concerns had been raised informally as far back as **August 2023** (albeit Rose was unaware of this). We were satisfied that Rose's use of the female changing room, from the point at which the Claimants became aware of it, amounted to unwanted conduct for the purposes of section 26.

Was Rose's unwanted conduct in using the changing room related to sex and/or to gender reassignment?

349. This is an inescapable conclusion. The answer is 'yes' in respect of both the protected characteristics. Sex and gender reassignment are at the very heart and centre of Rose's choice to use the female changing room. To argue that there was no sufficient connection or association with sex and/or gender reassignment between Rose's use of the changing room would be absurd (and we note that Mr Cheetham did not advance any such argument).

Rose's purpose

350. The next question was whether Rose's purpose in using the changing room was to violate the dignity of the Claimants or anyone else or for the purpose of creating the proscribed environment in section 26(1)(b). We were satisfied that this was not Rose's purpose. Rose was simply doing what the Trust permitted Rose to do, to act as, and to be treated as a trans woman which for all intents and purposes meant regarding Rose as a woman. Nothing that Rose did manifested itself in such a way as to demonstrate to us any purpose or intent to violate anyone's dignity or create a hostile etc, environment for Rose's colleagues.

351. Whether Rose ought to have had more insight into the effect on female colleagues of having to change to their underwear in the presence of a biological male is another matter. That is especially so from the point at which Rose became aware of objections. We fully understand the respective viewpoints in the wider debate in this arena. We understand that Rose feels strongly that Rose's rightful place was to change in the female changing room. It is possible to hold to that belief while at the same time recognise the effect of this on some colleagues. Certainly, we would say that there appeared to be a lack of insight in this regard on Rose's behalf. This is what we infer Mr Scanlon to have been referring to in substance where he referred to the individual not being *respectful of his/her/their female colleagues* (see paragraph 168) albeit he expressed matters rather differently and more directly. It is likely that the lack of insight is wrapped up in Rose's unwavering belief that their presence in the female changing room is no threat to anyone and that they are simply asserting their affirmed gender by going about the ordinary routine of getting changed in an environment which feels natural for Rose and which has the authority and permission of the Trust. None of this translates into a 'purpose' on Rose's part, however.

What was the effect of the conduct?

352. Having concluded that Rose's unwanted conduct was not for the proscribed purpose under section 26 of the Act, we turned to consider whether it had the proscribed effect on the Claimants. We have already observed how we considered the perceptions of the Claimants to be genuine and real. Under section 26(4) we must and do take account of those perceptions. Each of them genuinely perceived their dignity to have been violated by Rose using the changing room, where Rose could see them in partial undress and where they could see Rose in partial undress, resulting in them being fearful to change or having to wait until Rose finished, or to go the toilet to avoid being seen by Rose. This was not dependent

on actual experiences (such as that of Mrs Danson) but also of the apprehension of this (as experienced by Mrs Hutchison). The perception of violation of their dignity was heightened by what they had heard of Rose not taking hormones and the common knowledge that Rose was planning at some point to have a baby with their female partner. Not only did they perceive this situation to violate their dignity, they perceived that it created a hostile and humiliating environment for them, especially taking this alongside the fact that they had taken their concerns to management but were not taken seriously. Indeed, we were satisfied that for each and every one of them, their dignity was violated by Rose using the female changing room and for them, this created a hostile and humiliating and degrading environment.

353. Although we conclude that Rose's unwanted conduct in changing in the female changing room related to sex and gender reassignment and that this violated the dignity of the Claimants, nevertheless we conclude that this does not constitute harassment by Rose personally within the meaning of section 26. Our essential reasoning on this must be explained. Section 26(4) is the key part of the provision. It states that:

"*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*."

What are the other circumstances of the case?

354. We must take account of the other circumstances of the case. By reference to our findings of fact, the relevant circumstances include:

354.1. Rose was using the changing room in accordance with Trust policy. That policy had been drafted and was in place before Rose arrived at the Trust. All that Rose did was to exercise a choice given to them in accordance with the terms of that policy.

354.2. Rose had been using the changing room for some considerable time before becoming aware that a 'petition' had been signed asking for Rose to be removed. Rose had not been shown the letter of concern and was not made aware of the effect Rose's presence was having on those who had raised concerns. No one in management had ever sat down with Rose and spoken about the concerns of others or why it was that they felt as they did.

354.3. There was no improper behaviour by Rose personally whilst in the changing room – although there were genuine perceptions of this.

354.4. The real accountability for Rose being in the female changing room is that of the Trust. The Trust – as a separate actor – has liability in its own

right to the Claimants in respect of its conduct in permitting Rose to exercise the choice that amounted to harassment of the Claimants.

Was it reasonable for the conduct to have the proscribed effect?

355. In our judgment, it was not reasonable for Rose's conduct in using the room to have the proscribed effect because the primary responsibility for the situation rested with the Trust. It was the Trust, through senior managers, that held all the decision-making powers in this case. They were in control of the situation. Although Rose chose to use the female changing room, that was simply because it accorded with Rose's identified gender and this was affirming to Rose. However, Rose's presence in the changing room was a direct consequence of that part of the Trust's TIW policy that afforded use of the female changing room to any biological male who declared that they identified as female. The situation could have been reviewed by the Trust but was not. This litigation would never have arisen had the Trust provided for single sex changing rooms and provided suitable, dignified premises for Rose, all the while recognising and respecting Rose as a trans woman. Given that the Claimants' complaints can be comprehensively addressed by focusing on the conduct of the Trust itself, it is not reasonable, in our judgement, and having regard to all of the above circumstances, to conclude that as regards Rose personally, that the conduct of using the female changing room be regarded as having the proscribed effect. Although factually inextricably linked, there is a distinction between Rose's conduct in using the changing room and the Trust's conduct in permitting Rose use of it. To the extent that we have found this to be unwanted conduct related to sex and gender reassignment and that it violated the dignity of the Claimants, it is the Trust that is responsible and accountable for this state of affairs, not Rose.

356. We do not consider there to be a logical contradiction in a conclusion that the Trust harassed the claimants by permitting Rose to use the changing room but that, by exercising the choice to use it, Rose did not. The two conclusions are easily reconcilable. Nor is it simply a theoretical distinction without meaning. In our judgement, the distinction does justice to the facts. In the meeting of **20 May 2024** there is reference by the DSU nurses to Rose not being protected against accusations and that a benefit of separate facilities would protect Rose from accusations – ironically of the sort that were made in this case [**witness statement bundle, page 319, 328**].

Paragraph 4 of the list of issues – allegations of harassment against the Trust

Paragraph 4(b)(i)

357. We agree with what Mr Cheetham says in paragraph 81 of his written submissions. This is the key issue in the harassment case. We also agree, as he says in paragraph 82, that it is about the application of the TIW policy which permits a biological male who is transgender to use the female changing room. We do not accept what Mr Cheetham says in paragraph 83(i) of his submissions. The

question is whether the conduct of the Trust in having and/or implementing that policy infringed section 26 of the Equality Act 2010. The 'lawfulness' of the TIW policy may have a bearing on the analysis to be undertaken when looking at section 26(4) of the Act (or when we get there, to objective justification in the indirect sex discrimination claim). However, we do not agree with his proposition that "*to be unlawful it would have had to be contrary to the Equality Act as defined at the material time*" – i.e. prior to the Supreme Court's decision in **For Women Scotland Ltd**. We agree with Mr Fetto that the law at the relevant time was the same as the law is now. The Supreme Court declared the law as it is and has been since the Equality Act case into force. As above, we approach the question in a structured way.

Was there unwanted conduct by the Trust?

358. By permitting Rose Henderson to use the female changing room pursuant to a policy which gave Rose an unfettered right to choose to do so, the Trust in effect required the Claimants to share the changing room with Rose. It is no answer to this complaint (as it is obviously understood) to say that the Claimants did not have to share the changing room with Rose because they could have changed elsewhere or they could have changed in a toilet or behind a shower curtain. Indeed, that is part of the conduct complained of. The Claimants had no option but to share the changing room with Rose (or any other biological male who identified as male and wished to share the room) because there were no alternative facilities for the Claimants to use. The Respondent must confront the reality of the situation which is that it engaged in the conduct complained of. Insofar as it is necessary to identify an 'actor' we identify the senior management of the Trust as engaging in this conduct, namely Mr Thacker and Ms Moore before him as being the directors responsible for the 'ownership' of the policy and the Board in that they ratified the policy. We would also include Ms Atkinson as engaging in the conduct of requiring the Claimants to share the changing room with Rose.

359. Was this conduct 'unwanted'? From the perspective of the Claimants the conduct of the Trust in permitting Rose, a biological male, to use the female changing room, which in the absence of suitable alternative facilities, meant in substance that they were required to share the changing room with a biological male was unwelcome and unwanted. The Trust had, we found prioritised the perceived rights of transgender staff over the rights of others such as the Claimants. The Trust had drafted and implemented a policy that effectively said to any woman who objected to sharing the changing room with a trans woman, that they would have to use alternative facilities knowing that there were no alternative facilities. Therefore, in practice, the policy gave female workers (and male workers for that matter) no real or effective choice in the matter of where they get changed. We do not accept Mr Cheetham's submission that the TIW policy could not in itself be regarded as 'conduct'. During submissions the Tribunal raised as an example the hypothetical case of a white shop owner who had a policy that forbade staff from serving black customers. The question was asked of Mr Cheetham, might an employee working in that environment not legitimately argue that the mere

existence of the policy constituted 'unwanted conduct' by the employer related to race which had the proscribed effect even if the employee never had to act on the policy by refusing to serve a black customer? Mr Cheetham conceded that this would be a legitimate argument and that the existence of such a policy would easily be regarded as 'conduct'. We recognise of course that in this extreme example such a policy would obviously be unlawful. But the point is it is the existence of the policy – lawful or not – that amounts to the 'conduct' even if no employee ever has to give effect to the policy by turning a black customer away.

360. By analogy, we consider that the existence of a policy which permits a biological male who identifies as a woman to use the female changing rooms may properly be characterised as 'conduct' in itself. In any event, the ratification of the policy is in our judgment 'conduct' and certainly the implementation of it, by permitting Rose, a biological male, to access the changing room in pursuance of it is undoubtedly 'conduct' – and that is essentially what this case is about, as Mr Cheetham himself observed. We considered Mr Cheetham's submission to be unduly limiting on the meaning of 'conduct'. The reality is that the Claimants were effectively required to share the changing room with Rose in pursuance of a ratified policy in circumstances where no alternative facilities were available to them. This amounted to 'unwanted conduct'.

Did the unwanted conduct relate to the protected characteristics of sex and/or gender reassignment?

361. We have already answered this when considering Rose's personal conduct in using the changing room. It is an inescapable conclusion that the Trust's unwanted conduct related to both characteristics. The TIW policy is entirely about gender reassignment. It necessarily follows that that by permitting a trans woman to share a female only changing room with female colleagues in accordance with that policy is directly and inextricably associated with gender reassignment and sex. Those characteristics are both at its very heart.

Was the purpose of the Trust in permitting Rose to share the changing room/ requiring the Claimants to share it with Rose (or any other trans woman) to violate the dignity of the Claimants or to create the proscribed environment?

362. We are satisfied that this was not its purpose. Its purpose was to create an environment that gave transgender employees comfort and reassurance that they would be accepted and supported in the workplace. We observe this is an admirable and noble purpose. All good employers will look to ensure that all its staff are treated with respect. We are only too aware that transgender people are vulnerable to exclusion, abuse, mistreatment, lack of respect and misunderstanding in society. Nothing we say in this judgment should detract from that or be seen as diminishing the values that the Trust espouses in supporting its transgender staff.

What was the effect of the conduct?

363. We were however satisfied that despite the admirable purpose of seeking to include transpeople in the workplace and make them feel included, the implementation of the part of the TIW policy that effectively required the Claimants to share with Rose had the effect of violating the dignity of the Claimants and of creating for them a hostile, humiliating and degrading environment.

Perceptions of the Claimants

As previously stated, in deciding whether conduct has the effect referred to in section 26(1)(b) we must have regard to the perceptions of the Claimants. In the case of each of the Claimants, we were satisfied as a matter of fact that their dignity was violated and that for them, the Trust's conduct created a hostile and intimidating environment. Our conclusion in this respect was not affected by the differing levels of exposure to Rose in the changing room that each Claimant experienced. We need not go through the separate effects on each Claimant. That is because for each of them we accepted that there was a minimum level of distress caused by – at the very least - the distressful apprehension that they may be exposed in their underwear to a biological male whilst changing in and out of their uniform and that they may be observed and looked upon by Rose when in a state of partial undress. We have found that certain of the Claimants felt that they had been watched or stared at and we have set out the experiences of Mrs Danson. We have also made findings as to what others had told the Claimants all of which feeds into their levels of apprehension and distress. We also found that they believed Rose to be a sexually active biological male with a female partner and who had made no secret of this. In fact, Rose had merely spoken to a couple of close colleagues about the intention to have a baby with their female partner sometime in the future. This had come to the attention of the nurses in DSU and it heightened their apprehensions and feelings of insecurity by having to share a communal changing room with a sexually active biological male. These things undoubtedly had an effect on the Claimants and the other signatories of the 27 March letter and quite probably more who had not signed the letter.

364. From the point they became aware that Rose was using the same changing room, the Claimants lived with this apprehension every working day. It is not an answer to Bethany Hutchison's complaint, for example, to say that she had little experience of actually using the changing room at the same time as Rose. The impact on her, and of the other Claimants, was significant. That impact was on their personal dignity and privacy. For women to be required to change into and out of uniform in a communal setting probably exposes them to dents in their personal dignity, even when it is in the presence of other biological women; but it would, in our judgement fall short of 'violating' their dignity. It is something they are likely to get used to because of the absence of a perceived threat in a single-sex space. To require them, however, to then share that space with a biological male who identifies as a woman more than dented the inherent sense of worth and personal dignity of the Claimants. We can safely conclude from the facts that it violated their dignity not just by the presence of Rose in the space but because in permitting

Rose to be there the Trust failed to respect their personal bodily privacy and sense of dignity. For each of the Claimants, this caused them distress. The degree of that distress varied from one to the other depending on their actual, separate experiences and their own resilience, with the high-water mark being the case of Karen Danson.

365. We have noted how we made no findings of fact that Rose spent longer than necessary in the changing room, or that Rose stared at anyone's breasts or that Rose was in the habit of walking up and down in boxer shorts. However, we were equally satisfied that those who gave evidence about these things – and those who gave their observations to Susan Newton during the Resolution Procedure investigation - were not lying to the Tribunal about what they considered to be Rose's behaviour. It is a symptom of the fact that a biological male was in such close proximity with women who were or who might be in states of partial undress that has led, in our judgement, to various people holding these perceptions that Rose was staring or taking longer than normal. Where people were already anxious and concerned about Rose's presence, as was the case of those who gave evidence on these things, any eye contact, or question (as in Karen Danson's case) is likely to be interpreted adversely. All the Claimants described Rose as being rather masculine in appearance and being clearly biologically male when seen wearing boxer shorts and bearing stubble. These were not simply flippant observations. Their view of the physicality of Rose heightened the feelings of insecurity and feelings of being stared at. When those who witnessed Rose in the changing room then understood Rose to be sexually active and trying for a baby with a female partner, this served only to further heighten their anxieties and apprehension resulting in, for them, a violation of their dignity and modesty and the creation of an environment that felt hostile or intimidating. We were conscious of the observations of Elias LJ in **Land Registry v Grant** that the words of section 26 were chosen carefully and their meaning must not be cheapened (paragraph 288 above). However, on the facts of this case, as we found them to be, we were satisfied that the words used in section 26 were apt to describe the effects on the Claimants.

366. We are conscious in saying this that Rose Henderson too has a sense of inner worth and personal dignity and that this must be respected as in the case of others. We are acutely aware that this decision may make for difficult reading for Rose. However, the focus of the case was necessarily on the effect of the TIW policy and the Trust's conduct towards the Claimants and the effect of that conduct on them. The only consolation we can add is that we found no improper behaviour on the part of Rose personally.

The other circumstances of the case

367. We now go on to consider the other circumstances of the case and whether, in the case of the Trust's conduct, it is reasonable for that conduct to have the effect in section 26(1)(b)

368. The other relevant circumstances of the case include:

368.1. The Claimants' attempts to raise concerns effectively went nowhere. Initially they were told they simply had to accept the situation because of the inclusivity of the NHS.

368.2. The Claimants were told, via feedback from their line manager that they needed to be educated and broaden their mindset.

368.3. The TIW policy had the admirable purpose of seeking to include transgender staff.

368.4. That part of the TIW policy that permitted trans staff to use the changing room of choice gave priority over the rights of women to have a single sex changing area.

368.5. The policy suggested that anyone who objected to use the changing room with a trans member of staff should use alternative facilities but provided no such facilities for them.

368.6. Those who drafted the contentious part of the policy and those who ratified it, implemented it, reviewed it and continued it, did so with no intent to violate anyone's dignity or to create a hostile or intimidating etc environment but in the belief that the policy was right.

369. Mr Cheetham submitted that the allegation of harassment arises from the application of a 'lawful policy' (paragraph 83(ii) of his written submissions) and that, in paragraph 85(iv) the lawfulness of the policy applied across the Trust (and which reflected the policy in other Trusts) formed part of the circumstances to be considered. It is clearly not the whole of the TIW policy that is in dispute in these cases. No one takes issue, or at least no one could reasonably or properly take issue with those parts of the TIW policy that deals with matters other than access to single sex changing facilities. Therefore, when we refer to 'the policy', we are for these purposes referring to the contested part of the TIW policy.

370. We were unclear what was meant by the submission that the policy was 'lawful' and deeper consideration of the argument led us to conclude that the policy of permitting biological males who identify as women to use a female changing room was not 'lawful'. In arriving at this conclusion, we asked ourselves what law or laws would render it 'lawful. We started with the Workplace (Health, Safety and Welfare) Regulations 1992 ('**the 1992 Regulations**').

371. We accepted Mr Fettos' submissions regarding the effect of these regulations. Regulation 21(2)(h) requires in respect of washing facilities that 'separate facilities are provided for men and women, except where and so far as they are provided in a room the door of which is capable of being secured from

inside and the facilities in each such room are intended to be used by only one person at a time'. The changing room contained shower cubicles behind curtains, not lockable doors. Once biological males are permitted use of those facilities, then it cannot be said (in respect of that group) that separate facilities are provided for men and women.

372. More relevant to the facts of this case, regulation 24(2) of the 1992 Regulations provides that where changing facilities are needed because workers wear 'special clothing' and cannot for reasons of health or property be expected to change in another room, '***the facilities shall not be suitable unless they include separate facilities for, or separate use of facilities by, men and women where necessary or reasons of propriety and the facilities are easily accessible, of sufficient capacity and provided with seating'***.

373. Mr Cheetham, in oral submissions, accepted that, for the purposes of those Regulations, 'sex' 'may' have to be interpreted in the same way as under the Equality Act in accordance with the Supreme Court judgment in **For Women Scotland**. The Supreme Court did not consider that particular piece of legislation in its judgment, although it examined the wider health and safety legislation framework. We are satisfied that, in keeping with the need for a coherent and workable structure, to enable those who have to regulate their conduct and comply with statutory duties, the meaning given to 'men' and 'woman' in those Regulations must logically be the same as under the Equality Act 2010. We agree with paragraph 32 of Mr Fetto's written closing submissions. Mr Cheetham did not strenuously resist a coherent interpretation of the 1992 Regulations. However, he submitted that even if that were the case, the way in which the TIW policy provided for a trans woman to use the biological female changing facilities as a matter of choice did not render the policy unlawful, because the Tribunal must look at the circumstances as they existed at the time; and those circumstances must include a consideration of the suite of guidance from organisations such as the EHRC and the NHS and how those in the Trust understood the various definitions. We agree that the perceptions of those who drafted and reviewed the TIW policy are relevant circumstances in assessing the effect and we took those into account. However, here we are considering the submission that the TIW policy was in and of itself 'lawful'. In our judgement it cannot be said to be 'lawful'. As soon as the Trust permitted Rose to use the female changing room in pursuance of its TIW policy, it was in breach of these Regulations and was acting unlawfully. We agree with paragraph 32(a) of Mr Fetto's closing submissions. Therefore, we conclude that from the moment it permitted Rose to use the female changing room, the Trust was in breach of the 1992 Regulations.

374. What then of the Equality Act 2010? We considered whether there was any provision in that Act that might render the policy of permitting Rose to access the female changing rooms 'lawful'. There is nothing in the Act that we could see (or that we were taken to) that confers on a transgender employee the right to use the changing facilities that accords with their declared or affirmed gender. The Equality Act 2010 protects those with the protected characteristic of gender reassignment

from discrimination, harassment and victimisation, in the same way that it provides such protection to those of other protected characteristics. However, that does not translate into a positive 'right' on the part of a trans woman to use the female changing room (or for that matter of a trans man to use the male changing room).

375. Although we are concerned with Part 5 of the Equality Act 2010, the Act does in fact address the subject of separate spaces for the sexes in Part 3. This was something that Ms Bailey was aware of by at the latest **February 2024**, albeit this had little if any impact on her thinking or analysis when reviewing the policy (see paragraphs 113 – 118 above). We are of no doubt that senior people in HR and managers in theatres were of the view that Rose and other transpeople had a right to use the facilities of their choosing, irrespective of the views or rights of others. That came across very clearly in the evidence and is reflected in our findings of fact. Having considered the Equality Act we can see nothing there that would render 'lawful' a policy that gave biological males the choice to use a female changing room, effectively overriding the objection of female colleagues.

Convention Rights

376. If there was nothing in the Equality Act 2010 that conferred a right such as to render the policy lawful, we considered whether there were Convention rights that might do so. Mr Cheetham submitted that we did not need to trouble ourselves with the EHRC Convention on Human Rights in this case as the answer could be found in domestic law. That may be so but counsel had agreed in the list of issues [**B1/116**] that certain Convention rights <u>of the Claimants</u> were engaged in this case and that we should take into account any violation of the Claimants' Convention rights by the Respondent when considering their claims under the Equality Act. Those rights were article 8 and article 10. Mr Fetto ultimately acknowledged that article 6 was not engaged (recognising the force of paragraph 42 of Mr Cheetham's written submissions).

377. However, there was no agreement between counsel as to whether Rose's Convention rights <u>would have been</u> infringed had the Trust required Rose to use alternative facilities for the purposes of getting changed. In his oral submissions, while maintaining that the answer to these claims lay entirely in domestic law, Mr Cheetham submitted that we may have to consider whether such a request or instruction would have constituted an infringement of article 8 in Rose's case. Although more directly relevant to the justification defence to the indirect discrimination claim, in light of Mr Cheetham's submission that the TIW policy was 'lawful', we also considered this point in relation to the harassment complaint.

378. We considered the following hypothetical scenarios: suppose the Respondent's managers had approached Rose to speak about the issues (as Ms Bailey had first suggested to Theatres Managers) and that Rose had reluctantly agreed to change elsewhere, or management had insisted against Rose's wishes to exclude Rose from the female changing room. Whether that would have

infringed Rose's Article 8 rights or not would depend on whether Rose was provided with dignified, adequate changing facilities.

379. Would it be unlawful (in the sense of infringing Rose's article 8 rights) to exclude Rose from the female changing room and provide Rose with suitable changing facilities? This really amounts to an argument that preventing a biological male trans woman from sharing the communal, open changing room with female colleagues amounts to unlawful interference. We do not accept that it does. Even if providing Rose with suitable alternative facilities would have amounted to an interference with Article 8, we can see a very strong case for arguing that this would have been a legitimate interference under Article 8(2). It would be in accordance with the law (the 1992 Workplace Regulations) and would not be in breach of any provision of the Equality Act 2010. Whether it would be necessary in a democratic society would require a balancing of the interests of Rose against the interests of the Trust and its other employees in pursuing a legitimate aim (respecting the dignity and privacy and health of others, which would include their mental health and wellbeing). Relevant to that would be the availability of suitable adequate facilities for Rose balanced against the availability of alternative suitable facilities for a significantly larger number of nurses who felt uncomfortable about sharing the changing room. If Rose had been told to change in the male changing room that may be a different matter but that was not the case and has never been envisaged. We say more about Convention rights under the section 19 indirect discrimination claim.

380. Having considered the relevant legislation we have not been able to identify any part of any statute or any authority that would, without more, lead us to conclude that the relevant part of the TIW policy was 'lawful' as submitted by Mr Cheetham. We shall have to address this again when considering the notion of 'competing rights' under the indirect discrimination claim.

381. Therefore, whilst we considered the admirable purpose of the TIW policy in general as being a relevant circumstance for the purposes of section 26(4)(b), we did not agree that it was a relevant circumstance that the TIW policy was lawful (i.e. the contentious part of the policy) because, in our judgement, it could not be said to be lawful given the 1992 Regulations.

382. Finally, we had to consider whether it was reasonable for the Trust's conduct in requiring the Claimants effectively to share the changing room with a biological male to have the effect in section 26(1)(b). We are satisfied that it is reasonable for the conduct to have the effect. There was nothing irrational about the perceived and actual effect on the Claimants of being required to share the changing room with Rose. We accept Mr Fetto's submission that the Claimants' distress corresponded with societal norms evidenced by Professor Pheonix's evidence. We repeat what we said earlier, that we see no logical contradiction in concluding that the Trust's conduct in permitting Rose to use the female changing room / requiring the Claimants' to share the room with Rose amounts to harassment related to sex and gender reassignment whereas from Rose's personal perspective, the use of

the changing room by Rose does not amount to such harassment. On the contrary, in our judgement, the distinction does justice to the substance of the complaint of harassment in these cases upon considering and applying section 26(4) of the Equality Act in the cases of both the Trust and Rose. We also repeat that, had we not been able to draw such a distinction we would have been bound to hold that Rose's conduct in using the changing room amounted to harassment by Rose for which the Trust would be liable by application of section 109 Equality Act.

Paragraph 4(b) to (h) of the issues

383. We turn now to the other complaints of harassment against the Trust in paragraph 4 (b) to (h) of the list of issues.

384. We can easily dispose of the matters in paragraphs 4(b)(v), (d), (e), (f), (g) and (h). We found that Ms Atkinson did not criticise the letter at the meeting on **20 May 2024** (issue 4(b)(v)). We made no finding that Mr Thacker criticised the Claimants' engagement with the media or that he threatened a disciplinary investigation for engaging with the media (issue 4(d)). We found that Mr Thacker wrote to the claimants rather than directly to solicitors and refused to permit the solicitors to attend grievance interviews (issue 4(e) and (f)). Quite how these two complaints came to be included in these proceedings is something only the Claimants' lawyers can answer. We were struck how Jane Peveller was bemused when asked by Mr Cheetham why she said these things amounted to harassment. She was clearly unaware that someone had suggested that, by not permitting her solicitor to attend a grievance interview, that this was alleged to constitute 'unwanted conduct related to sex/gender reassignment'. Quite frankly, these complaints in paragraph 4(e) and (f) should never have been advanced and were a waste of the Tribunal's time and resources. They are most likely a product of over-zealous 'lawyering'. In any event, the 'conduct' complained of in no way related to the protected characteristics. As regards the issues in paragraphs 4 (g) and (h) we found that Ms Williams did not threaten disciplinary action and did not impose an unreasonable requirement of confidentiality and to the extent that there was a requirement for confidentiality, it was reasonable and not related to sex or gender reassignment but to their understanding and practice of conducting investigations. The Claimants have failed to establish the factual basis of those complaints.

385. That leaves the complaint about declining to address the Claimants' concerns about the use of the changing room by Rose (**issue 4(b)(i), (ii**) **and (iii)** and the provision of an inadequate alternative temporary changing room (**issue 4(b)(vi)** and the displaying of the posters (**issue 4(c)).**

Paragraph 4(b)(i), (ii) and (iii): whether the Trust failed to address the concerns raised via Sister Ali Quinn and/or in the letter of 27 March 2024, sent on 04 April 2024

Did the Trust engage in unwanted conduct?

386. Our conclusion is that the Trust did not take the complaints in **August/September 2023** seriously and failed to address them (although paragraph 4(b)(ii) refers to 'November', we found that this was in fact **September 2023**). By this, we are referring to the concerns raised with Sister Ali Quinn (paragraph 4(b)(i) and (ii) of the issues). Nor did it take seriously or address the later concern raised in the letter of **27 March 2024/04 April 2024** (paragraph 4(b)(iii) of the issues). As regards the initial concern, had they been taken seriously, we would have expected someone to have invited Bethany Hutchison and/or Lisa Lockey and/or Tracey Hooper and others who had raised concerns with Sister Quinn to a meeting to discuss the concerns, to document them, to feedback at an arranged informal meeting and to explain that if dissatisfied, they could take the concerns further. Nothing of that nature happened. Sister Quinn simply fed back informally that anyone who was uncomfortable with the position, had to accept it because of the inclusivity of the NHS. Those who had raised the initial concerns with Sister Quinn either directly or indirectly through others were Bethany Hutchison, Annice Grundy, Lisa Lockey and Tracey Hooper.

387. After the **27 March 2024** letter had been sent on **04 April 2024**, we found that Ms Atkinson and Mr Moore responded to this by arranging a meeting and got in touch with estates to discuss finding somewhere for the complaining nurses to change. The Trust decided not to address the central concern regarding the use of the female changing room by a trans woman, as they could have done by prompting a review of the impact of the arrangement on users of the changing facilities. It decided to go down the resolution procedure route. However, the central complaint, namely the use of the female changing rooms by a trans woman was not taken seriously by senior HR management. Neither Ms Atkinson or Mr Moore or any other senior HR officer who understood the complaint, including Mr Thacker, Ms Bailey and Ms Smedley was ever going to do anything other than adhere to the TIW policy of allowing Rose to use the female changing room and to require the Claimants to change elsewhere. Ms Atkinson, who was leading the conversation in **May 2024**, and who had previously been involved back in **September 2023** with Lesley Smedley was of the view that the Claimants needed to broaden their mindset.

388. Once the Trust embarked on the Resolution Procedure investigation, the outcome was going to be either that Rose Henderson had behaved improperly or not. That was never going to be concluded quickly, was only going to look at allegations of improper behaviour and not the policy itself, which was the underlying concern. In our judgement that whole investigation (which was no doubt stressful for all concerned) could easily have been avoided by addressing the central concern first and reviewing the policy. If the investigation concluded no improper behaviour, nothing would change.

389. There was nothing to prevent the Trust from separating the 'conduct' issues contained in the letter of **27 March 2024** from the policy issue – i.e. 'use of' the room by Rose or any other trans woman. That part did not require any investigation other than speaking to the Claimants to understand their point of view, speaking to

Rose to understand Rose's point of view and having another look at the policy and its effect on what was a significant number of nurses. However, this was never in the contemplation of the Trust. The most that was to happen was the 'business as normal' review which at most would look at changing some of the language to bring it up to date. By failing to take seriously the central concern about Rose using the changing room and conveying the message to the Claimants that they should broaden their mindset, the Trust failed to address the underlying concern raised in the letter.

Issue 4(b)(vi): **The alternative premises**

390. The Trust then provided an inadequate alternative temporary changing facility for the signatories to the letter which included the Claimants (paragraph 4(b)(vi) of the issues). This was symptomatic of and a manifestation of the failure to take the Claimants' central concern seriously and of the prioritisation of the perceived rights of Rose over those of the Claimants. We refer to our finding that Ms Atkinson told Ms Gregory on **15 April 2024** that the signatories to the letter, which included the Claimants, needed to be educated to broaden their mindset (paragraph 4(b)(iv) of the issues).

Issue 4(c): The posters

391. As regards the posters we refer to our findings in paragraph 189-192 above. We found that this was provocative but that it was a short-lived event, the posters having been removed by those in authority. Although the person or persons who displayed the posters were not identified, they were employees or workers of the Trust. It was certainly unwelcome or unwanted conduct on the part of those Claimants who saw them.

392. Therefore, we conclude that the Trust engaged in the conduct complained of in paragraph 4(b)(i), (ii) (iii) and (vi) and (c) and that this was unwelcome or unwanted from the point of view of the Claimants.

Was this unwanted conduct related to sex and/or gender reassignment?

393. We have no doubt that it was. The views expressed by Ms Atkinson on **15 April 2024** were seeped in notions of sex and gender reassignment and the perceptions as to the primacy of one group's rights (those with the characteristic of gender reassignment) over that of another (women). The failure to take the concerns seriously was similarly driven by the attitudes towards gender reassignment and biological sex. The provision of the temporary facilities was similarly inextricably woven into the belief that transgender rights in this arena took priority over those of biological women who objected and was consistent with the baked in priority within the TIW policy on the use of changing rooms. It was undoubtedly unwanted conduct that had a sufficient association with both characteristics. The conduct of placing the posters was also inextricably related to gender reassignment.

Was the purpose to violate the dignity of the Claimants or create the proscribed environment?

394. As to purpose, we are satisfied that this was not the purpose of the managers who engaged in this conduct. We repeat what we have said above regarding the purpose of the TIW policy. At all times, we are satisfied that senior managers acted as they did or failed to act because they believed in the policy and that the claimants had to accept that policy. As regards the posters, we inferred that they were placed there in a misguided attempt to show support for Rose. The purpose was not to violate anyone's dignity but almost certainly to support Rose's expression of their own dignity.

Did the effect of the unwanted conduct have the proscribed effect?

395. As above, the first consideration must be the perception of the Claimants. As to this, each of the Claimants genuinely felt that they were not being taken seriously, that they were being in essence fobbed off by senior management and that they were seen as trouble-makers. The cumulative effect of this conduct for them created a hostile environment. However, as regards the posters and NMC code, not everyone saw these. This was a minor moment in the scheme of things that, in our judgement, did nothing more than irritate those who saw them and others who heard about them. The posters aside, we are satisfied that the Claimants perceived the environment created by management's failures to take their concerns seriously and in declining to address them, to be hostile and intimidating. We also infer that the failures we have identified and the conveying of the message that people had to accept the arrangement of Rose using the changing room most likely dissuaded a number of workers from voicing their objections to the arrangement.

Was it reasonable for the conduct to have that effect?

396. Having regard to the perceptions and the circumstances in paragraphs 354 and 368, we are satisfied that it was. It is incumbent on an employer to take concerns of its workforce seriously and to respond to them diligently. There was no sign of that in relation to the central concern of the requirement to share the female changing room with a biological male employee. The Claimants were easily able to perceive that they were not taken seriously and that the view of senior management was they required to be educated. Any reasonable employee will rightly consider that to create a hostile environment for them and we conclude that it was reasonable for the conduct set out above to have that effect on these Claimants

Conclusion on harassment related to sex and/or gender reassignment

397. In light of the above, we uphold the complaint of harassment related to gender reassignment and/or sex against the Trust in respect of the matters identified in the following paragraphs of the list of issues:

397.1. Paragraph 4(a),
397.2. Paragraph 4(b) (i) (ii) (iii) (iv) (vi)

398. The conduct in paragraph 4(a) in and of itself amounted to unwanted conduct which had the effect of violating the dignity of the Claimants and creating a hostile working environment for them. The conduct in paragraph 4(b) together and considered along with that in paragraph 4(a) amounted to a pattern of unwanted conduct which had the effect of creating a hostile working environment for the Claimants.

399. As regards the complaints against Rose Henderson personally in paragraphs 3 (a) and (b) those complaints are not upheld and are dismissed.

Indirect sex discrimination (paragraphs 7 – 10 of the list of issues)

400. We now turn to the complaint of indirect sex discrimination.

401. Whilst all three PCPs were applied by the Respondent, in our judgement, this case is really about the causative effect of PCP1 and PCP3. We do not consider that PCP 2 put the Claimants to the disadvantage pleaded, either in its own right or taken alongside the other PCPs.

402. The relevant PCPs are:

402.1. The Trust gave staff access to single-sex changing rooms on self-declared gender identity (PCP 1) and

402.2. The Trust prioritised the perceived rights of transgender employees to use changing facilities based on their self-declared gender identity over the rights of other employees to have use of a single sex facility (PCP 3).

403. As we have already stated, we considered that PCP 3 is better expressed in this way. This slight alteration more accurately reflects the facts of the case without affecting the substance of the arguments or doing any injustice to either party's case or to the respective arguments advanced.

404. As with the harassment claims, we must take a structured approach when considering a section 19 complaint. This involves asking four questions:

404.1. Did the Respondent apply to each claimant a 'PCP' which it applied or would have applied to men in circumstances which are not materially

different to those of the claimant? The Claimants must establish this on the evidence.

404.2. If so, does the PCP put – or would it put – women at a particular disadvantage when compared to men in such circumstances? The Claimants must establish this on the evidence.

404.3. If so, did the PCP put - or would it put – the claimant at that disadvantage? Each Claimant must establish this on the evidence

404.4. If so, can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim? The Respondent must establish this on the evidence.

405. We start this analysis with the application of the PCPs.

Did the Respondent apply the PCPs and if so to whom?

406. The Claimants and those male workers of the Trust who used the male changing room were in materially similar circumstances to those of the Claimants: they were required to wear a uniform at work pursuant to the Uniform Appearance and Dress Code Policy; they were required to attend in their non-work clothes; to change into uniform when they arrive at work and to change out of uniform before leaving their place of work. Changing rooms had been made available for male and female workers for this purpose.

407. As regards the Claimants, we found that the Respondent gave access to single-sex changing rooms by Rose (a biological male trans woman) based on self-declared gender identity and that as regards the male users of the male changing room, it would have permitted any biological female trans man access to the male changing room, in accordance with its TIW policy (that is PCP 1). We also found that the Trust prioritised the perceived rights of Rose, a biological male trans woman, to use changing facilities based on their self-declared gender identity over the rights of the Claimants to have use of a single sex facility (again, in accordance with the TIW policy) and that as regards male users of the male changing room, it prioritised or would have prioritised the perceived rights of a biological female trans man over the rights of male employees, in accordance with the TIW policy (that is PCP 3). Therefore, the answer to the first question is ‘yes’, the Respondent applied to each claimant ‘PCPs’ which it applied or would have applied to men in circumstances which are not materially different to those of the Claimants.

Whether the PCPs put – or would put – women at a disadvantage when compared to men (‘group disadvantage’)

408. In this case:

(a) There was a 'female changing room' at DMH which may, by application of the TIW Policy, be used by females and biological males who identify as females.

(b) There was a 'male changing room' at DMH which may, by application of the TIW Policy, be used by males and biological females who identify as males.

(c) The Claimants cannot point to an actual or hypothetical male comparator who had been (or would be) treated more favourably by application of the TIW Policy. That is because a biological female who declared that they identified as male would, in accordance with the TIW policy, be permitted use of the male changing room; and any male employee who was uncomfortable with this arrangement would be required to use alternative changing facilities, none of which were available.

409. Thus, there is equality of treatment between men and women in those materially similar circumstances. However, as Lady Hale explained **R v Governing Body of JFS** [2010] IRLR 136 (@ paragraphs 56-67), the objective of the law against indirect discrimination is not to achieve formal equality of treatment. Indirect discrimination law looks beyond that formal state of equality towards substantive equality of results. Something that appears to the observer to be neutral on its fact, that applies equally to both sexes, may have a disproportionately adverse impact or effect on those of a particular group (or in the language of the Act, of a particular 'protected characteristic'). This is often referred to as 'group disadvantage'.

410. It was alleged that the application of these PCPs put women to a particular disadvantage in that, by comparison with men, they are or would be more likely to be caused to experience fear, distress and/or humiliation by having to change in front of a member of the opposite sex. We are, at this stage, assessing matters at the group level. We are not dealing with actual disadvantage to the Claimants – that analysis comes at the individual level.

411. Lady Hale stated in paragraph 35 of **Essop v The Home Office** [2017] I.C.R. 640**:**

"*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. Thus, in the typical case of a height requirement, women are statistically more likely to fail to meet it, but only some will fail and others will pass*."

412. In this case, issues of modesty and dignity are at the heart of the likely disadvantage to women. Although accepting that more women than men are likely to have experienced sex-based harassment and/or sex-based violence, the Respondent did not admit that generally women are more sensitive than men to being compelled to undress in front of a person of the opposite biological sex, and

therefore more likely to suffer fear, distress and/or humiliation by being so compelled. We do not accept what Mr Cheetham says in paragraph 124 of his written closing submissions that because there were plenty of women who did not object to getting undressed in front of a biological male that the group disadvantage is not established. It is a typical feature of indirect discrimination that some members of the disadvantaged group will not actually suffer the disadvantage. Indeed, that is the case here as can be seen from our findings of fact that not all of the female workers who used the changing room were uncomfortable with Rose's use of it and that the Theatre Managers and other colleagues were supportive of Rose accessing the female changing room. But not every member of the group needs be put at the disadvantage by the PCP.

413. Mr Cheetham submitted that the question of whether the Claimants had established group disadvantage could be left to the judgement and assessment of the Tribunal alone and that Professor Pheonix's evidence took the question of group disadvantage nowhere (see paragraphs 125 of his closing submissions). We do not agree that Professor Phoenix's evidence added nothing to the analysis of group disadvantage, either because of the absence of studies analogous to the circumstances of this case or because of Professor Pheonix's gender critical beliefs. On the contrary, it was valuable evidence. The empirical research she attests to cannot simply be ignored or reduced to nothing. Nor can it be explained away by virtue of her gender critical beliefs. It is the research that gives weight to her opinion. There is nothing to say that someone who did not hold to gender critical beliefs would have come up with different research from which a different conclusion might be inferred. The content of the report itself was unchallenged by Mr Cheetham and the Respondent had been invited but declined to instruct a joint expert or even its own expert.

414. The Respondent conceded that '*statistically'* women are more likely than men to have experienced sex-based harassment and/or violence (see paragraph 123 of Mr Cheetham's closing submissions). That was so despite no statistics having been produced. In substance, the Respondent accepted that we could 'take as read', so to speak that more women than men are likely to have suffered such experiences. Why, we considered, can we not 'take as read' that more women than men are or would be likely to suffer fear, distress and/or humiliation when compelled to undress in front of a member of the opposite sex. We recognise that one could, if necessary, probably gather existing statistical data on the exposure of men and women to sex-based harassment and violence which would reveal the different experiences between the sexes. This might explain the Respondent's readiness to concede the point. On the other hand, there is little prospect of gathering existing statistical evidence on the questions put to Professor Pheonix. As far as she (and the Respondent) is aware, no such data exists. However, the fact that more women than men experience sex-based harassment or violence is, in our judgement, an important factor when considering the answer to the two questions put to Professor Pheonix. The preponderance of sex-based assault and sex-based violence against women, on top of other societal and cultural pressures

on women that do not apply to men in the same way or to the same extent (as outlined by Professor Pheonix: for example, breaches of modesty norms) partly explain why generally women are or would be more sensitive than men at being required to undress to their underwear in the presence of a member of the opposite biological sex. We are able to infer that women are or would be generally more sensitive than men to being compelled to undress in front of a person of the opposite biological sex. Furthermore, if women are more likely to have experienced sex-based harassment and/or violence and are more sensitive to undressing in front of a member of the opposite sex, it is not much of a leap to infer that they are more likely to suffer fear, distress and/or humiliation by the application of the PCPs in this case. There is, to us an obvious link and at the very least, it is a legitimate and proper inference to draw.

415. We note the total absence of any evidence from the Respondent to counter the evidence presented. That is not to say that the Respondent carries any burden of proof in this respect. It is simply to note that it offered nothing other than a 'non-admission'. We note our finding that the 'equality impact assessment' section of the TIW stated in relation to impact on sex: *Sex/Gender No differential impact known* (see paragraph 63.3 above). However, that was not, in our judgement, anything other than a bland observation on the policy as a whole, which does not begin to assess the 'impact' of a biological male accessing a female changing room. it was merely paying lip service to the requirement for an impact assessment. We also found that the Trust did not carry out any review or monitoring of the impact of Rose using the changing room on its female workforce at any time. Even though policy drafters must have been aware of the potential that sexually abused women would be required to change to their underwear in a room with a biological male, they carried out no risk assessment. Therefore, the Trust was not well placed to counter the evidence of Professor Pheonix by any evidence of its own gathered either at the equality impact assessment stage of drafting the TIW policy or at any time thereafter as a result of any monitoring. In any event, we are required to assess whether women generally are disadvantaged by the PCPs in comparison with men generally. We are not required to assess whether all women were disadvantaged

416. Therefore, we conclude that breaches of modesty norms and violations of dignity have greater consequence for females than males such that women would be more likely to experience feelings of distress, fear or humiliation by being required to share a communal changing room with a member of the opposite sex which involves exposure of their bodies (see paragraph 21a of Professor Pheonix's opinion). We note Baroness Hale's observation in **Homer** that section 19 was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages. We cannot ignore the evidence before us, even noting Mr Cheetham's submission that this can be left to our judgement and assessment alone. We would rather not leave such an important matter purely to our judgement. We are confident in our conclusion that women in general are more likely to be associated with feelings of distress, fear

and/or humiliation in the circumstances under consideration in this case, than men. That conclusion is based on the evidence which accords with our own judgement.

417. We agree with Mr Fetto's submission that the single-sex changing facility was a private and intimate space, in which women undressed to their underwear and that the actual or potential presence of a biological male in that context particularly adversely impacts women by causing them fear, distress and/or humiliation because they are statistically more likely than men to have experienced sex-based harassment and/or violence and because women are generally more sensitive than men to being required or expected to undress in the presence of a person of the opposite biological sex. We agree that the likelihood that more women than men will suffer fear, distress and/or humiliation in these circumstances, to a large extent follows from the Respondent's admission regards sex-based harassment, but that it is also heavily supported by sociological observation and research, as described by Prof Phoenix in her report. We accepted her opinion that the reactions of fear, distress or humiliation is not a phenomenon that is isolated or idiosyncratic to the Claimants or to those based at DMH but is a result of a set of patterned and predictable responses within specific cultural and structural contexts.

418. Neither counsel made any submissions as to whether it was necessary to identify any 'pool' for the purposes of testing whether the PCPs were discriminatory. We take from this that they considered this to be unnecessary. Insofar as it is necessary to do so, the 'pool' of people must be the pool of workers affected by the PCPs in question (see 'relevant law' under paragraph 297 above). That pool is either those workers at DMH (as that is where Rose and the Claimants and others affected by the PCPs worked) or all workers across the Trust to whom the Uniform policy applied – as they too would be affected by the contentious part of the TIW policy and PCP 3. We consider the proper pool to be the pool of workers to whom the PCPs were applied at DMH and who used the female and male changing rooms which were situated next to each other on the plan at **B2/2083** of the bundle. We also considered, if wrong about that, the position Trust wide.

419. We have no statistical evidence on the 'proportion' of women within the Trust who were put to the identified disadvantage or on the 'proportion' of men who are or would also be put to the same disadvantage. It would be unrealistic to expect such evidence for a number of reasons. We have already set out in our findings that there was a reticence on the part of women to speak out about their objections to sharing the female changing room with a biological male trans woman and no biological woman, trans man used the male changing room. However, we do have some numerical information. Approximately 300 women used the changing room at DMH. We do not know the numbers of those who used the male changing room which was situated next to it. Nor do we know the numbers of those who used the male or female changing facilities in other parts of the Trust and to whom the PCPs were also applied. We do, however, know that 80% of the Trust's staff are female and, we found that more than 80% of nurses are female – all of whom are required to wear uniforms. Therefore, by far more women than men are affected by the

Uniform policy and what we found to be the adverse effects of the TIW policy on privacy, modesty and dignity. We know that on the facts of the case, only the female changing room at DMH was accessed by a biological male who identified as female. There was no evidence of any male changing room being accessed by a biological female who identified as male.

420. By comparison with men, a significant number of women using the changing room under consideration in this case were, therefore, adversely affected by the PCPs. We know that at least 26 objected to the use of it by Rose for the reasons we have set out. However, it is highly likely that more in DSU felt the same as them but were unwilling to put their name to the letter of complaint. It is also highly likely that there were female staff in Theatres who felt as Leanne Davis did. The 26 signatories alone correspond to about 8.6% of those who used the changing room in case. In truth, the real percentage is likely to have been significantly greater. There was no evidence of any man in the pool of those to whom the PCPs were applied being adversely affected by the PCPs and we inferred from Professor Pheonix's evidence that, had a trans man accessed the male changing room, that men would be unlikely to react in the same way as women in comparable circumstances. From all of the above, we can extrapolate that throughout the Trust the numbers of those women comparable to men who would likely be similarly adversely affected would be similar.

421. We are satisfied, therefore, that the answer to the third question is yes, the PCPs put women at a particular disadvantage when compared to men and that the Claimants have established 'group disadvantage.' It was PCP 1 in conjunction with PCP 3 that put women to that disadvantage. The disadvantage as identified in paragraph 27 of the Particulars of Claim can be accurately expressed as follows:

"*PCP 1 in conjunction with PCP 3 puts women at a particular disadvantage when compared with men, the disadvantage being that women are more likely than men to experience feelings or apprehensions of, fear, distress and/or humiliation by, in effect, being required to change to change to their underwear in front of a member of the opposite sex*."

Did the PCPs put - or would they put - each claimant at that disadvantage?

422. This is the stage where we must consider individual disadvantage – the third question. Any claimant who brings a claim of indirect sex discrimination must herself be put at the same disadvantage by the PCP(s). We were satisfied that each of the Claimants did experience feelings and apprehensions of fear, distress and humiliation by PCP 1 in and of itself but also in conjunction with PCP 3. We repeat our findings on the effect on the claimants (see in particular paragraphs 220 to 222 above). We accept Mr Fetto's submission that this corresponds with the group disadvantage in that it concerns the Claimants' fear, distress/anxiety and compromised modesty and dignity by reason of actual and apprehended sharing of the female-only changing room with Rose.

423. Therefore, the Claimants have established factually what they need to establish for the purposes of section 19(2), that the PCPs applied by the Trust were discriminatory in relation to sex.

424. We must now consider the fourth question, whether the Respondent has established that the PCPs were a proportionate means of achieving a legitimate aim.

What are the legitimate aims?

425. These were said to be as follows:

425.1. The aim of sensitively balancing the competing rights of its employees in the workplace.

425.2. The aim of respecting the gender identity of all its employees.

425.3. The aim of adhering to relevant legislation and guidance/advice in relation to provision of single-sex facilities

426. We have no difficulty in accepting that these are indeed legitimate aims. We would observe that the first and third aims are expressed very broadly. However, that does not render them less than legitimate. It does mean that careful thought is required as to what they mean in the context of this case.

Proportionality

427. Whether legitimate or not, the Respondent must satisfy us on evidence that the PCPs were a proportionate means of achieving the aim or aims.

Competing rights

428. We accept that 'one protected characteristic does not outweigh another' as submitted by Mr Cheetham in paragraph 130 of his written submissions. We accept that Rose had the protected characteristic of gender reassignment. However, on the facts of this case, we do not consider there to have been any rights of those employees with the protected characteristic of gender reassignment that 'competed' with those who have the protected characteristic of sex. Those with each of those protected characteristics have the protections (or rights) afforded to them under Part V of the Equality Act 2010 in the same way as those of other protected characteristics. There is no 'competition' in that respect. If anything, the rights are in harmony with each other: the right not to be subjected to harassment related to a protected characteristic; the right not to be discriminated against on grounds of a protected characteristic the right not to be victimised etc. There may be some cases where an employer has to adopt a measure or 'PCP' in order to

achieve a balancing of competing rights in the workplace, but this was not such a case.

429. However, there was, as we have found, a 'perception' on the part of managers and senior HR officers as to the 'rights' of transgender employees versus the rights of female employees in the sense that Rose, as a trans woman, was believed to have a legal right to use the female changing room and the female users of that room were (in substance) believed to have no legal right to object to Rose's use of it – as demonstrated by the TIW policy stipulating that they should use alternative facilities, by the views of senior HR that they needed to stay on the 'right side of the law' and which manifested in the temporary provision of inadequate ad hoc facilities for those who were uncomfortable with the arrangement. However, the belief of HR officers and managers does not equate to the existence of 'competing rights' in law or in fact.

430. We accept paragraphs 29 and 30 of Mr Fetto's closing submissions and conclude that there was and is no right in law for a transgender person with or without the protected characteristic of gender reassignment to use a single-sex changing room corresponding with their affirmed gender. On the contrary, regulation 24 of the 1992 Regulations requires there to be separate changing rooms for use by biological men and women. In the case of **For Women Scotland Ltd**, the Supreme Court held that the words 'sex', 'woman' and 'man' in sections 11 and 212(1) of the Equality Act 2010 meant (and were always intended to mean) biological sex, biological woman and biological man. They did not include the sex that a person acquired pursuant to the issue of a gender recognition certificate, or a fortiori, to a transgender person not in possession of such a certificate.

431. The reference to 'men' and 'women' in the 1992 Regulations must, in our judgement, be interpreted harmoniously and consistent with 'sex' and 'men' and 'women' under the Equality Act. This was not seriously contested by Mr Cheetham, who conceded that this 'may' be the case. Parliament cannot, in 1992, prior to legislating for transgender recognition, have intended those words to bear any meaning other than biological sex. Nothing in the Equality Act or in other legislation since 1992 changes that. Therefore, where, as in this case, the Claimants and Rose had to wear special clothing for the purposes of work (a nurses uniform) and where, as we found, the Claimants could not, for reasons of health (infection risk) or propriety (modesty), be expected to change in another room, the Trust was under a statutory obligation to provide suitable and sufficient facilities for them – and for Rose. By virtue of regulation 24, those facilities cannot be suitable unless they are separate for men and women for reasons of propriety (see the case of Footit referred to in the relevant law section above). As we have already stated, propriety, modesty, privacy and dignity are at the heart of these complaints.

432. There is nothing in the Equality Act that stands to override the 1992 Regulations and affords Rose or any other trans woman a 'right' to access the female changing room. The prohibition against gender reassignment discrimination under the Equality Act does not equate to a 'right' to access that space, such that

it gives rise to competing rights with women who have rights under the 1992 regulations to be provided with suitable single-sex facilities in the relevant circumstances.

Was there a sensitive balancing of 'perceived' rights?

433. PCP 1 was said by the Respondent to amount to a proportionate means of 'sensitively balancing' competing rights. Although there were no competing rights, the attempt to balance any perceived competing rights was not carried out sensitively, or at all. We refer to our findings regarding the information that was provided to Ms Bailey by Ms Gregory regarding Part 3 of the Equality Act and access to single sex spaces in respect of service providers and how the advice in the article Fair play for women was dismissed as emanating from a gender critical website.

434. Some 80% of the Trust's workforce are female and, as we found, probably more than 80% of its nursing staff are female and therefore, uniform wearers. The number of transgender women who 'might' seek to use the female changing room was extremely small. We heard of another transgender employee who used alternative facilities although no details were provided. Therefore, out of 300 users of the changing room in issue in this case, one was a biological male. There was no attempt by the Trust to strike any kind of balance. No one spoke to Rose to seek Rose's views, to ask if Rose was willing to use alternative facilities. The temporary solution (which ran for about a year) was cobbled together. It was a manifestation of the policy requiring those who were uncomfortable to change elsewhere. In the scramble to find the signatories to the 27 March letter somewhere else to change, the Trust could only come up with inadequate and unsuitable facilities. On any analysis, a 'sensitive' balancing would have required having a sensitive discussion with Rose. It would have been more reasonable to ask – or insist – that Rose use temporary facilities. However, this was not countenanced. This was in keeping with the fact that the TIW policy itself (i.e. the contentious part) was not in itself a sensitive balancing of rights, perceived or actual. It was, as we found, a prioritisation of the perceived rights of transgender staff over the actual rights (under the 1992 Regulations) of biologically female staff.

435. It is difficult for the Trust to argue that PCP 1 was a proportionate means of achieving any or all of the three aims, when it has been in breach of the 1992 Regulations and where, contrary to its denials, we have found that it applied PCP 3, the prioritisation of perceived transgender rights over the rights of others. In those circumstances, we conclude that they have failed to show that the measures taken to achieve any of the aims were appropriate. This includes the aim of respecting the gender identity of all its employees which we address below.

The aim of respecting the gender identity of all its employees

436. As we have said, this is unquestioningly a legitimate aim. It is right and proper that Rose Henderson's (and any other transgender employee's) gender identity be respected. However, the measure taken in this case to achieve the aim

of respecting Rose's identity was not appropriate – because it was a breach of the 1992 Regulations. Furthermore, absent any consideration of the 1992 Regulations, it could not be appropriate given our conclusion that by permitting Rose use of the female changing room, this amounted to harassment related to sex, in contravention of section 26 Equality Act 2010.

437. We remind ourselves that the PCP (in this case PCP 1) must correspond to a real need on the part of the Trust; it must be appropriate with a view to achieving the objectives pursued and it must be reasonably necessary to that end. We have seen the discriminatory effect of the PCP, in that it puts women – and the Claimants – to the disadvantage set out above and amounted to harassment of them, in contravention of section 26 of the Equality Act 2010. In balancing the discriminatory effect of the PCP against the reasonable needs of the Trust to respect the gender identity of its employees, it is relevant to consider whether a lesser measure was also available to the Trust. A lesser measure clearly was available. This was to provide Rose, the only transgender employee using the female changing room with alternative, suitable and dignified facilities in which to comply with the Trust's Uniform policy. In our judgement, this would have respected Rose's gender identity and would have respected the biological sex of the Claimants. It would achieve equal respect for both characteristics. It is a fallacy that in order rightfully to respect Rose's rights Rose must be given access to the female changing room.

438. There was little in Mr Cheetham's written or oral submissions regarding proportionality beyond simply restating the three legitimate aims. Although submitting that we could dispose of the issues in this case without recourse to anyone's Convention rights, Mr Cheetham nevertheless submitted that, in using the female changing room, Rose was exercising their own article 8 right to respect for private life. We have already addressed article 8 in Rose's case by considering what the position would be had Rose (who had been using the room since 2019) been required to leave the female changing room and change in alternative facilities. We return to it here as the argument is slightly nuanced, it being asserted as a matter of principle that, by using the female changing room, Rose was simply exercising their article 8 rights.

Rose's Convention rights

439. The difficulty we had with the argument that Rose was 'exercising their own article 8 rights' was that Rose although transgender, is a biological male and chose to use a changing room in which they would be exposed (as we have seen) down to their underwear in the presence of others who would also be exposed to their underwear. At no point did Rose ask if there was anywhere private in which to change. We infer from this that Rose was generally unconcerned about being exposed to their underwear in front of biological females. We could not see how the exercise of this choice engaged Rose's article 8 rights at all. It may have been otherwise if Rose had been compelled (in the sense used in the Claimants' cases) to use the male changing room and to dress and undress in front of biological males. However, that was not the case. Had that happened, we should easily

conclude that Rose's article 8 right had been engaged and that there would be a compelling case that it had been unlawfully infringed.

440. Mr Cheetham's submission amounts, in substance, to an argument that Rose had and has a right to use the female changing room if Rose so wishes and that if the Trust had instead provided Rose with separate, dignified alternatives and limited access to the female changing room to biological females, that this would have infringed Rose's right to private life. We reject this. It is no more than saying because Rose is transgender Rose has a right to use whichever changing room Rose chooses. As we have already set out in our conclusions above, that is not the case. Had the Trust provided Rose with suitable alternative facilities from the outset and kept the biological sexes apart, it would necessarily have been acting in compliance with the 1992 Regulations, as it would have been had it excluded Rose at any point after Rose started using them. By permitting Rose access to the female changing room, it was in fact in breach of those regulations.

441. Further, excluding Rose from the female only changing room would not have amounted to an act of direct discrimination on grounds of gender reassignment. The exclusion would not be on grounds of gender reassignment. If anything, it might be said to be on grounds of sex. However, Rose would be treated no less favourably than a woman who would also be similarly excluded from the male changing room.

442. Therefore, had the Trust excluded Rose (and provided suitable alternative facilities) and had this engaged Rose's article 8 rights, there is a compelling case that this would have amounted to a lawful interference of that right by a public authority. Such interference would be in accordance with the law (the 1992 Regulations at the very least) and would be a proportionate measure in the protection of health of the Claimants, for the protection of their rights under the 1992 Regulations preserving propriety and modesty for all concerned and for the protection of their rights under the Equality Act not to be subjected to harassment related to sex.

The Claimants' Convention rights

443. We do consider the Claimants' article 8 rights to be engaged in this case. They were provided with no effective choice of where to change their clothes. By introducing a biological male into the female changing room – the only space made available to them, this infringed on their rights to privacy and bodily autonomy. The Trust, as a public body interfered with that right. That interference may only be lawful interference if it is prescribed by domestic law. In the circumstances of this case, the Trust was in breach of domestic law, under regulation 24 of the 1992 Regulations. There was no pressing social need for Rose to be accommodated in the female changing room. Given the respective numbers of transgender staff and biological female staff, Rose could reasonably and feasibly have been provided with alternative facilities, unlike the Claimants and others who had expressed their discomfort.

444. We agree with Mr Fetto that the Trust cannot satisfy the test of proportionality when it was acting unlawfully in contravention of the 1992 Regulations and when it unlawfully interfered with the Claimants' article 8 convention rights.

445. Therefore, the answer to the fourth and final question is no, the Respondent has not shown the PCPs to be a proportionate means of achieving a legitimate aim. The complaint of indirect sex discrimination is, therefore, well-founded and is upheld.

446. There is one final matter we must deal with which, on our findings, is limited to the provision of the temporary changing facilities.

Time points

447. An application to amend the Claim Form to include the complaints in paragraph 23 of the Amended Particulars of Claim was made on **14 October 2024** and granted by Judge Legard at a preliminary hearing on **18 November 2024**. In granting permission, Judge Legard left to this Tribunal to consider whether any 'jurisdictional' issues might arise regarding time limits, particularly whether any conduct might be found to be 'conduct extending over time'. The permitted amendments consisted of the inclusion of allegations regarding conduct of the Trust after presentation of the ET1 under paragraphs 19A to 19J with associated amendments in paragraph 22A, 22B and 23. Paragraph 19B concerned the provision of the temporary changing facilities. Of the amended particulars, that was the only part which we found to amount to harassment related to sex and gender reassignment.

448. Taken together with the Trust's permission for Rose to access the female changing room under the TIW policy (which continued up to and as at the date of presentation of the ET1 and beyond) and the failures to take seriously/address the concerns of the Claimants (which continued up to and as at the date of presentation of the ET1 and beyond) we are satisfied that the provision of inadequate temporary changing rooms on **01 July 2024** was part of a pattern of conduct, which constitutes 'conduct extending over time' within the meaning of section 123 of the Equality Act. The conduct is inextricably linked to the policy and to the situation created by the Trust. It was the manifestation of that part of the TIW policy that required the Claimants to change in alternative facilities. The solution of provision of alternative facilities was dictated by the state of affairs produced by the Trust. Having regard to the substance of the complaints as we must (see the case of **Lyfar**, paragraph 308 above), we are satisfied that the Trust was responsible for an ongoing state of affairs in which the Claimants were subjected to unwanted conduct related to sex and which had the proscribed effect.

Remedy hearing

449. In light of our conclusions, the Claimants are entitled to a remedy. We would encourage the parties to resolve any question of remedies without the need for a further hearing. The legal representatives must write to the Tribunal by no later than 35 days of the date on which this judgment is sent to say whether there is a need for such a hearing and if so with suggested agreed directions. The Claimants' solicitors must also update the tribunal no the case of Joanne Bradbury, which remains stayed pending further order.

Employment Judge Sweeney

Date: 14 January 2026

APPENDIX

LIST OF ISSUES (LIABILITY ONLY)

Convention Rights

1. It is agreed between the parties that:
    a. The Respondent is a public authority within s. 6 of the Human Rights Act 1998;
    b. The Tribunal has no jurisdiction to hear a freestanding claim for a breach of the Claimants' Convention Rights; but
    c. In considering the Claimants' claims under the Equality Act 2010, the Tribunal will take into account any violation of the Claimants' Convention rights by the Respondent.
2. The Claimant rely on the alleged violations of their Convention Rights under:
    a. Article 8 ECHR (PoC para 22);
    b. Article 6(1) ECHR (PoC para 22A);
    c. Article 10 ECHR (PoC para 22B).

    The Respondent denies all alleged violations.

    Below, issues affected by Convention Rights are *italicized*.

Harassment

3. Whether RH subjected the Claimants to the following unwanted conduct:
    a. Conduct in the Changing Room:
        i. using the Changing Room;
        ii. spending longer time in the Changing Room than is necessary to change clothes, on many occasions only wearing men's fitted boxer shorts, but on some occasions fully dressed;

iii. *walking around the Changing Room, on many occasions undressed to their boxer shorts, but on some occasions fully dressed;*

iv. *initiating conversations with female colleagues, including those with whom they are not acquainted, while they are changing in the Changing Room;*

v. *staring at female colleagues, in particular at their breast area. as they are getting changed.*

vi. *The alleged incident in or around September 2023: RH, wearing only a scrub top and fitted boxer shorts with holes in them, approached the Second Claimant (with whom they were not acquainted) from behind. The Second Claimant had been in the Changing Room alone, and was trying to find something in her locker. RH asked the Second Claimant "are you not getting changed yet?". After she replied "no", RH repeated the same question to her at least twice more, within less than five minutes.*

b. Frequent unnecessary visits to the Day Surgery Unit since July 2024. The Claimants make the following specific allegations:

i. On 8 July 2024 RH walked unaccompanied on to the Surgical Elective Admissions Lounge (SEAL) and asked a member of staff for a paediatric consent form (which would not be available there because only adults are admitted to the unit).

ii. On 10 July 2024 RH, accompanied by another member of theatre staff walked on to ward 14 ostensibly to collect trolleys. That is not part of RH's usual work as a theatre ODP and does not require two members of staff. Upon seeing the First Claimant, RH displayed amusement.

iii. On 10 July 2024 one of the nurses who co-signed the Letter, Lucy Wilson, went with a colleague to collect a patient from recovery. As they passed RH in the corridor, RH intentionally eyeballed them and walked towards them aggressively swinging keys.

iv. In early October 2024 RH walked into Day Surgery Unit, walked to the top of the ward, turned round, walked back and left the ward. RH had no apparent reason to visit the Unit at all.

It is agreed that the Respondent is liable for RH's conduct under s. 109(1) of the Equality Act 2010.

4. Whether the Respondent subjected the Claimants to the following unwanted conduct:

(a) Requiring the Claimants to share the Changing Room with RH (PoC paras 2 and 9);

(b) Declining to address the Claimants' concerns about RH's access to the Changing Room, including:

i. Failure to address the concerns raised via Sister Ali Quinn in or around August 2023 (PoC para 16(a));

ii. Failure to address the concerns raised by the Fifth Claimant in or around November 2023 (PoC para 16(b));

iii. Failure to address the concerns raised in the letter of 4 April 2024 (PoC para 17);

iv. Ms Atkinson telling Ms Gregory on 15 April 2024 that the Respondent supports RH and that the signatories of the Letter need to "broaden their mindset", "be more inclusive", "be educated", and to be given training (PoC para 18);

v. Ms Atkison criticizing the Letter at the meeting with the Claimants and others on 20 May 2024 (PoC para 19).

vi. Providing an inadequate alternative 'temporary changing room' in or around June-July 2024 (PoC para 19B).

(c) Displaying posters inside and outside the Changing Room in early July 2024 (PoC para 19C);

(d) Mr Thacker's letter on or around 15 July 2024, containing criticisms of Claimants' engagement with the media coverage of these legal proceedings and threatening a disciplinary investigation (PoC para 19E);

(e) Persisting in writing to the Claimants directly, rather than via their solicitors, about this litigation and/or its subject matter in July-August 2024 (PoC paras 19G-19J);

(f) refusing to permit the Claimants to be accompanied by their solicitors to interviews as part of the Respondent's investigation of the matters subject to ongoing litigation (PoC paras 19H-19I);

(g) Threats of disciplinary action in Ms Williams's letters to Claimants in August 2024 (PoC para 19J);

(h) Ms Williams's letters seeking to impose an unreasonable requirement of 'confidentiality' and to prohibit discussions between the Claimants and/or discussions with other members of staff (PoC para 19J);

5. Whether the conduct set out in paras 3-4, individually and/or cumulatively, was:
    a. related to the Claimants' sex; and/or
    b. related to RH's sex and/or perceived sex; and/or
    c. related to RH's actual or perceived gender reassignment; and/or
    d. unwanted conduct of a sexual nature.
6. Whether the conduct set out in paras 3-4, individually and/or cumulatively had
    a. the purpose and/or
    b. the effect of
        i. violating Claimants' dignity and/or
        ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for any of the Claimants.

Indirect discrimination

7. *Whether the Respondent applied the following provisions, criteria or practices (PCPs):*
    a. Giving staff access to single-sex changing rooms based on self-declared 'gender identity' and/or regardless of sex and/or regardless of gender reassignment;

b. *Lack of consultation with the users of single-sex changing rooms before allowing access to a member of the opposite sex based on their self-declared 'gender identity';*

c. *Prioritising the right of transgender employees to access changing facilities based on their self-declared 'gender identity' over other employees' right not to have to change in front of a member of the opposite sex.*

8. Group disadvantage:

    a. It is agreed that women are statistically more likely to have experienced sex-based harassment and/or violence

    b. It is disputed whether women are generally more sensitive than men to being compelled to undress in front of a person of the opposite biological sex, and therefore more likely to suffer fear, distress and/or humiliation caused by the application of the PCPs.

9. Individual disadvantage: whether any or each of the Claimants was put to the disadvantage(s) identified in Issues 8(a) and/or 8(b) above.

10. Whether the PCPs were proportionate means of achieving the following legitimate aims or any of them:

    a. Sensitively balancing the competing rights of its employees in the workplace;

    b. Respecting the gender identity of all its employees;

    c. Adhering to relevant legislation and guidance / advice in relation to provision of single-sex facilities.

Victimisation

11. The Claimants rely on the following protected acts:

    a. The Letter of 4 April 2024 (agreed to be a protected act);

    b. Commencing the Tribunal proceedings (agreed to be a protected act);

c. Giving media interviews and/or otherwise engaging and/or sharing information with the media about this litigation and/or its subject matter. The Respondent denies this was a protected act.

12. Whether the Respondent subjected the Claimants to the following detriments because the Claimants had done those protected acts and/or any of them:

a. Ms Atkinson's comments about the signatories of the Letter on 15 April 2024, to the effect that they needed to "broaden their mindset", "be more inclusive", "be educated", and to be given training (PoC para 18);

b. Ms Atkinson's criticisms of the Letter at the meeting on 20 May 2024 (PoC para 19).

c. The posters displayed inside and outside the Changing Room in early July 2024 (PoC para 19C);

d. RH's unnecessary visits to the Day Surgery Unit since July 2024 and his alleged behaviour (Issue 3(b) above);

e. Mr Thacker's letters around 15 July 2024, containing criticisms and threats of disciplinary action;

f. ;

g. Ms Williams's letters of August 2024, including threats of disciplinary action.