IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL Case no. 2200179/2022
BETWEEN:

RACHEL MEADE Claimant

- and -

(1) WESTMINSTER CITY COUNCIL
(2) SOCIAL WORK ENGLAND Respondents

CLAIMANT'S CLOSING SUBMISSIONS

"One has to belong to the intelligentsia to believe things
like that: no ordinary man could be such a fool."

- George Orwell, "Notes on Nationalism" (1945)

Introduction

1. The Claimant is a social worker of 20 years standing, with an unblemished regulatory and employment record. She believes facts which until a very few years ago almost no-one would have thought capable of being seriously doubted: that sex in humans is binary, immutable, and sometimes has material consequences. That belief is now commonly referred to as "gender-critical", and is widely disparaged by those on the other side of the raging public debate on sex and gender. As Knowles J said in *Miller v College of Policing* [2020] HRLR 10, ¶¶250-251:

> I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as "transphobic" or as displaying "hatred" when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views…

2. Although the expression "gender-critical" for the mainstream belief in the reality and materiality of sex is now fairly widely understood, there is no comparably well-established term for the opposite belief. That in itself is a startling measure of the sudden dominance the latter has gained in much of society; it is as if an insistence that the Earth was flat had rapidly gained such an ascendancy that those who still clung to an old-fashioned belief in its roundness were now routinely referred to as "round-Earthers", those who believed it flat now simply being treated by the language as occupying a default territory so unremarkable that it did not merit a name.

3. "The terms gender identity theory" or "gender theory" are used in these submissions for the claim that a person's inner sense of his or her gender identity is more real, and more material, than his or her literal sex.

4. There is no need for the Tribunal to state a preference for either of these beliefs, and it will no doubt avoid doing so. But it is asked to note that gender critical belief is, at the least, very far indeed from being a niche position. As Choudhury J noted in *Forstater* at ¶115:

> Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society. Ms Russell sought to persuade us that the decision in Corbett is outdated and should not be followed, particularly in light of the GRA under which a person who obtains a GRC does "become for all purposes" the acquired gender. We cannot see any real basis on which this appeal tribunal could disregard Corbett especially given that the House of LordsÕ comments in Chief Constable of West Yorkshire v A were made having regard to the Gender Recognition Bill: see para 42 of Chief Constable of West Yorkshire v A. Society has, of course, moved on considerably since 1971, and, as stated in the Equal Treatment Bench Book, "awareness, knowledge and acceptance of transgender people has greatly increased over the last decade". However, the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament, not a court or tribunal considering whether a belief is protected under section 10 of the EqA, to declare otherwise.

5. The Claimant's gender-critical belief is a protected belief for the purposes of s.10 of the Equality Act 2010: see *Forstater v CGD* [2022] ICR 1.

The facts and the evidence

6. Between 2018 and 2020, the Claimant shared or "liked" a number of Facebook posts touching on the current bitter controversies about sex and gender. Her Facebook page was private, shared with about 40 contacts ("friends"), and did not mention her professional status as a social worker.

7. One of the Claimant's Facebook friends in 2020 at the time was Aedan Wolton (AW). AW is a natal woman who asserts a masculine identity. In these submissions, since nothing turns on his sex, AW will be referred to as "he" in deference to what is understood to be his preference in the matter of pronouns. The Claimant had known AW since he had been a student on a social work student placement with WCC, and she considered him a friend in the ordinary social sense of the word.

8. In 2020, AW made a collection of some 70 or so screenshots of the Claimant's Facebook posts, and made a complaint about the Claimant to Social Work England on 15 June 2020, asserting that a number of her Facebook posts were "transphobic" in nature, or evinced "discriminatory views". The posts in question were expressions or manifestations of mainstream "gender critical" views of a kind widely discussed online and in the broadcast and print media. Many of the posts were impeccably measured; a few were satirical or mocking. None was abusive, incited hatred or violence or defamed any individual. One was - as was suggested to Graham Noyce, SWE Case Examiner - an almost comically reasonable demand that there should be consultation of women before changes to the law affecting women's rights were enacted.

9. The complainant's language was intemperate. He described "Standing for Women"as a "known hate group"; he treated a petition against allowing the charity Mermaids to train schools and other public sector organisations as self-evidently pernicious; he referred to "a public outcry concerning the views of JK Rowling".

10. A triage decision-making team at SWE referred the case for investigation of possible impairment of the Claimant's fitness to practice on grounds of misconduct on 4 November 2020. The team concluded that the concerns raised were serious, and that there were reasonable grounds to investigate.

11. The "regulatory concerns" were formulated by the triage decision-making group as follows:

> The social worker has posted and/or shared posts on Facebook that **are discriminatory in nature.**
>
> The social worker has signed petitions by organisations that appeared to pursue a **discriminatory goal**.
>
> The social worker has donated money to people and/or organisations who appear to hold and/or have publicised **discriminatory views**. [243]
>
> **[emphasis supplied]**

12. The matter was passed to an investigator, Jack Aitken, who contacted the Claimant to notify her of the complaint on 9 November 2020 [250]. The Claimant promptly informed her manager, Jackie Gilroy and discussed the complaint with her.

13. The Claimant provided her response to the complaint on 23 November 2020 [367]. Her tone was contrite. Her evidence was that she was shocked, frightened of losing her job, and also inclined to accept that if her regulator thought she had done wrong, she must have done wrong. This was at a time after an employment tribunal had ruled that Maya Forstater's gender-critical belief was not capable of being protected under the Equality Act because it was "not worthy of respect in a democratic society", and before the Employment Appeal Tribunal's judgment of 10 June 2021 to the contrary effect. The Claimant's manager, Jackie Gilroy, provided a testimonial speaking in glowing terms of her practice as a social worker, including in particular her ability to "empathise and reach out to marginalised groups to ensure their rights are not eroded or ignored".

14. Mr Aitken sent his completed investigation report to the Claimant on 23 March 2021 [442]. In his report, the element of the regulatory concerns consisting in factual assertions was framed in identical words to those used by the triage decision-making group. Again, the concerns referred to posts that were "discriminatory in nature", petitions which "pursued a discriminatory goal" and donations to organisations which appeared to hold "discriminatory views".

15. In June 2021, SWE appointed two Case Examiners, one a social worker and one a lay person, whose task was to consider whether there was a reasonable prospect of a finding of impairment of the Claimant's fitness to practice, and if they considered there was, either to refer the matter for adjudication, or, with the consent of the registrant, to impose a sanction short of removal from the register. Graham Noyce, who gave evidence, was the professional Case Examiner, and Heather Martin, who provided a witness statement but was not in the event able to attend the hearing, was the lay Case Examiner. The Tribunal heard that it was normal practice for one of the two CEs to take the lead in drafting their decision, and that on this occasion that role fell to Heather Martin.

16. On 10 June 2021, Ms Martin sent Mr Noyce a draft decision [497] with the covering note

> still struggling with public impairment as this was in mind a significant departure...if this was racism or sexism we would be saying defo public impairment given the extended period of time... the number of posts and the content
>
> let me know your thoughts

17. Two draft decisions have been disclosed by SWE. The first gives in a box marked "Final outcome" on its "Decision summary" page the words "No impairment - no further action warning (unpublished)". The second [499] gives the proposed outcome "Accepted disposal proposed - 1 year warning order". The latter version bears some annotations by Mr Noyce: on page 9 [507], he writes "Needs changing to yes?"where Ms Martin has marked the answer "no" to the key question "Is there a realistic prospect of the adjudicators finding the social worker's fitness to practice is impaired?" On page 18 [516] he offers "You put all of this info below into the 'no impairment' template, which I've now deleted. I've now comped and pasted all of it into the AD [accepted disposal] section".

18. SWE's initial disclosure contained only the final version of the CEs' decision dated 8 July 2021. The Claimant sought disclosure of any earlier drafts and communications between the two only after witness statements had been exchanged in November 2022. Neither Mr Noyce nor Ms Martin had seen fit to mention the fact that Ms Martin's original proposed decision had been "no reasonable prospect".

19. Mr Noyce denied when asked about this that Ms Martin's initial draft had proposed a conclusion that there was no reasonable prospect of a finding of impairment, but he had persuaded her to change this. It is submitted that his answers in this respect were unsatisfactory, and the documents speak for themselves.

20. SWE wrote to the Claimant on 28 June 2021to offer her a one-year warning order as an accepted disposal, and she agreed. The final decision [537] dated 8 July 2021, enclosed with SWE's letter to the Claimant of 9 July [561], was due to come into effect and be published on the SWE website on 9 August 2021 after a 28 day period during which the Claimant could apply for review.

21. After SWE's letter of 28 June, the hearing bundle is silent (apart from some internal communication at SWE about the potential for media/social media interest in the decision once published) until 22 July.

22. On 22 July, Aleks Gruska, who had by now replaced Jackie Gilroy as the Claimant's manager, sent Donna Barry SWE's letter confirming that the Claimant's case had been closed without a hearing with a warning applied to her registration, and attaching the decision and the investigation report [576]. Later the same day, at 16.06, Donna Barry, Ms Gruska's manager, sent the investigation report on to Senel Arkut, WCC's Director of Health Partnerships, with a covering email [575] indicating that the Claimant's immediate managers had no concerns about her practice. It is submitted that the clear drift of that email is "this matter has been dealt with: the social worker's conduct has always been impeccable, and no further action is needed".

23. Evidently more senior managers disagreed. Senel Arkut forwarded the email at 16.07, without comment, to Bernie Flaherty and Ann Ffrench. The Claimant was summoned to a Teams meeting that afternoon and suspended on gross misconduct charges; the suspension letter, which had been read out to her at the meeting, was sent to her after the meeting at 17.44. The Claimant's second line manager, Donna Barry, was suspended on the same day, as confirmed in a letter of 23 July 2021 [581].

24. There is an oddity in the story at this point. Donna Barry insisted in her evidence that she had volunteered the information about the regulatory outcome to Ms Arkut on 22 July. It would seem harsh to suspend Ms Barry on a charge of gross misconduct for making the judgment that this was not a matter that needed to be escalated to higher management even if she had not subsequently volunteered the information to Ms Arkut. But if it is correct that she made that judgment initially, and then spontaneously saw the error of her ways (as the Council might characterise it) on 22 July and raised the matter with Ms Arkut, to suspend her for her slowness in doing so appears incomprehensibly savage.

25. It is submitted that this is implausible. The interpretation that Ms Arkut heard of the sanction from some other source and phoned Ms Barry is a much better fit both with Ms Barry's email, and with the fact of Ms Barry's suspension.

26. The Council has been strikingly evasive and inconsistent about the manner in which this information came to Ms Arkut's attention. The question is touched on in the following places:

[830] HF Disciplinary investigation report 5 November:

> 1.5 This followed SWE's investigation findings being reported to then Bi-Borough Director of Health Partnerships, Ms Senel Arkut.

[1313] 28 June 2022, RM disciplinary hearing

> 22nd July 2021 Council suspended Ms Meade and disciplinary investigation commenced. Senior managers had not been made aware of the SWE referral prior to this.

Helen Farrell's witness statement, ¶5

> The investigation was triggered by a notification by Social Work England's (SWE) that they had issued the Claimant with a warning order in connection with her conduct.

[193] Claimant's disclosure request of 28 April 2023, seeking:

> 1. The notification by SWE to WCC that they had issued the Claimant with a warning order in connection with her conduct referred to at paragraph 5 of Helen Farrell's statement.
>
> 2. If different, the document by which it came to Senel Arkut's attention that there were serious allegations against the Claimant, referred to at the second paragraph of her letter of 22 July 2021 suspending the Claimant.

[203] The Council's response to that:

> 1. SWE did not notify WCC directly, the Claimant notified Aleks Gruska and the matter was then escalated. Please see email in the bundle.
>
> 2. As above.

The Respondent's Counsel, cross-examining the Claimant,

> SWE notified your employer of the outcome? I notified my employer, I don't know if SWE did. [line 382 of the Claimant's notes]

27. On 6 August 2021 [602], the Claimant made inquiries of SWE about whether she could appeal the accepted disposal. On 9 August, SWE told the Claimant that there was no route for appealing an accepted disposal, and published the sanction on its website.

28. On 17 August 2021 [692], Graham Linehan, who was mentioned in the decision, wrote to SWE complaining that the published decision defamed him, and on 25 August 2021, SWE reissued the decision. The mention of Mr Linehan was removed, but the decision was otherwise unchanged.

29. On 6 September 2021, the Claimant applied for review of the CEs' decision. SWE agreed to review the decision 29 September 2021 [767].

30. On 4 October 2021, the Claimant attended a disciplinary investigation interview with Helen Farrel [800]. Ms Farrell produced an investigation report dated 5 November [829], and on 26 November 2021 [908], the Claimant was told that the case would go to a disciplinary hearing. She remained suspended despite her protests.

31. On 14 January 2022, the Claimant's solicitors sent the Council a letter before claim threatening proceedings for an injunction against the continued suspension [1013]. The Council's reply of 20 January 2022 justified the continuing suspension by reference to the seriousness of the allegations, the need to preserve confidentiality, and the need to minimise her contact with a vulnerable client base, and the need to minimise her contact with members of staff who were likely to be interviewed as part of the investigation.

32. It is submitted that none of those explanations stands up to scrutiny. There had never been the slightest evidence that vulnerable clients might be at risk from the Claimant. As Ms Farrell confirms in her witness statement, since the alleged misconduct took place away from work, she had no need to interview any witnesses. As to the seriousness of the allegations, taking that at its very highest, bearing in mind that SWE had not seen fit to suspend the Claimant from practice or attach any conditions to her practice, and she had practised for a year without incident since the complaint had first been raised, it is incomprehensible that the Council took the view that it was essential to suspend her.

33. On 28 January 2022 [1081], SWE published a revised CE decision referring the Claimant's case to a public Fitness to Practice hearing.

34. On 2 February 2022, Donna Barr was given a written warning for her failure to escalate the regulatory proceedings against the Claimant sooner than she did.

35. On 3 February, having had sight of the full dossier of screenshots that had been provided to SWE by Aedan Wolton, Helen Farrell completed an addendum to her disciplinary investigation report [1106]. In this document the Council gives its first sign of any awareness that the judgment of the Employment Appeal Tribunal in *Forstater* might have some bearing on the case, and Ms Farrell acknowledges that "gender-critical" beliefs are protected under the Equality Act. Oddly, she includes a paragraph explaining her

personal disagreement with the Claimant's gender-critical views. She singles out four posts which, in her view, "cross the line" by being "transphobic and discriminatory". Those are a petition to stop Mermaids training the police, schools and other public services [299]; the "deadnaming" cartoon in which Voldemort says that he identifies as the hero of the story [305]; the Scouts cartoon [341]; and a TV clip of an interview on Good Morning Britain with Stephanie Davies-Arrai of Transgender Trend.

36. Jackie Gilroy was given a written warning for her failure to escalate the regulatory matter to more senior managers on 26 March 2022 [1128].

37. The Council conducted a disciplinary hearing on 28 June 2022, with Hazel Best presiding. Ms Best's decision of 8 July 2022 [1421] found gross misconduct proved, and issued a final written warning to remain live for two years, and her suspension was lifted. Donna Barry emailed the team [1439] announcing her return and expressing the hope that all members would do their best to support her to settle back into her role.

38. SWE's extensive statement of case for the planned Fitness to Practice hearing was sent to the Claimant on 6 July 2022 [1374].

39. The Claimant appealed the final written warning on 19 July [1489]. She attended a return to work meeting with Donna Barry and Hillary Harris on 25 July 2022 [1497], and resumed work after almost exactly a year's suspension.

40. The Fitness to Practice hearing was scheduled for 17-21 October [1570], with the original complainant, Aedan Wolton, due to give evidence. The Claimant sent SWE a statement of case for the hearing on 16 September. The Claimant's Three weeks later, SWE applied to discontinue the proceedings on the ground of new evidence. The new evidence relied on in the discontinuance application was the full content of the posts that the Claimant had shared, and a number of additional testimonials as to the Claimant's good character and impeccable professional practice, and the additional detail that her private Facebook page (already known to have been private) had at the relevant time only been shared with about 40 people.

41. It is submitted that the "new evidence" referred to by SWE in its discontinuance application was a transparent pretext. The full content of the posts was something that SWE had only to research, and indeed its own statement of case of 6 July 2022 is furnished with a considerable wealth of detail gleaned from its own researches. The additional testimonials only amplified what Jackie Gilroy, the person best-placed to comment on the Claimant's practice, had already said (and Ms Gilroy's own email in support at the time of Mr Aitken's investigation had offered further testimonials if required; that offer had not been taken up. The detail about the number of Facebook friends the Claimant had at the time of the posts was trivial.

42. It is submitted that the far more likely true explanation for SWE's last-minute retreat was the information contained in the Claimant's statement of case putting it beyond doubt that Mr Wolton was not merely a highly committed and active trans rights activist, but also a trans rights activist with an intemperate and at times abusive social media persona. That, no doubt taken together with a belated realisation that *Forstater* meant that they could not treat the Claimant's beliefs as reprehensible in themselves and would have to find something disgraceful in the manner in which they were expressed, persuaded SWE to seek a face-saving exit from the proceedings. The Fitness to Practice proceedings were discontinued at SWE's request on 17 October 2022.

43. The Council's disciplinary appeal hearing followed hard on the heels of discontinuance, on 8 November 2022. Pedro Wrobel in his decision on the appeal [1779] swerved the grounds of appeal raised by the Claimant, and focused instead on whether her gender critical beliefs impacted on her professional judgment and her practice as a social worker and potentially deterred vulnerable service users from accessing the service.

44. Mr Wrobel's reasoning is to be found in four short paragraphs on the second page of his letter. It appears to rely on the discontinuance of the Fitness to Practice proceedings, the lack of evidence of any concerns about the Claimant's practice, the fact that the posts in question were only shared on a private Facebook group, and the fact that the Claimant had not posted anything similar for two years.

45. Two years after first being notified of the regulatory concern, the Claimant was once again a social worker and a Council employee with an unblemished regulatory and disciplinary record.

The issues

46. The issues have been narrowed. The statutory appeal issue was conceded by SWE in November 2022. On 15 November 2022 [85], the Claimant's solicitors addressed the question of protected belief:

47. Please concede by return that the Claimant's gender critical beliefs are protected under the Equality Act 2010 ("EqA"). Your clients have no reasonable prospect of success in contending that they are not (or may not be; we note that neither of you has forward a positive case). Putting our client to proof on this point amounts to unreasonable conduct which threatens to extend very substantially the witness and documentary evidence that needs to be put before the tribunal.

48. Both Respondents declined at that time, but both conceded that question on 3 July 2023. (A consequence of that is that the sections of the otherwise agreed list of issues highlighted yellow as not agreed may be ignored.)

49. As to limitation, on 28 November 2022 [99] (in a letter making an open offer to settle the case) the Claimant's solicitors specifically invited both Respondents to withdraw their limitation defences:

> But as we understand it, both Respondents are still pursuing their limitation defence, which is also misconceived: it is hard to imagine a clearer case of a continuing act or state of affairs than these interlinked regulatory and disciplinary proceedings both set in motion by the same single complaint.

50. Both Respondents declined to concede limitation at that stage. Both conceded limitation through their Counsel this week.

51. As to the facts, the agreed list of issues deals separately with 16 alleged detriments or acts of harassment by R1, and 10 by R2. In the case of R1, each of the alleged detriments is one incident that forms part of a single disciplinary process beginning with R1's suspension of the Claimant on 22 July 2021 and ending with its letter dated 15 November 2022 withdrawing the final written warning but continuing the restraint (which continues to date) on the Claimant's freedom of expression. In the case of R2, each of the alleged detriments is one incident that forms part of a single regulatory process beginning with notification of the complaint to her in November 2020 and ending with the discontinuance decision of 17 October 2022. The Claimant does not pursue items (f) or (g) from the list of factual complaints against SWE at ¶9 of the list of issues.

52. Although the list of issues asks the question in each case whether the Claimant was in fact subjected to the treatment in question, that is presumably not a live issue in the case of any of the incidents (the majority) which are irrefutably documented. In the case of only 5 of these detriments (all relating to claims against R1) is there any possible doubt about what happened:

2(e), where it may be in issue whether the disciplinary interview was hostile in tone;
2(f), where it may be in issue whether the tone and content of the investigation report was hostile;
2(i)(fourth bullet), where it may be in issue whether the letter maintained a restraint on the Claimant's freedom of expression
2(o), where it may be in issue whether the return to work meetings continued a restraint on the Claimant's freedom of expression;
2(p), where it may be in issue whether the letter implied continuing disapproval of the Claimant's conduct and/or continued a restraint on her freedom of expression.

53. In the case of all the remaining detriments alleged against R1 or R2, there is no room for doubt about what happened, because what is alleged is a documented part of one or other respondent's process.

54. The question whether the treatment was unwanted by the Claimant is another one that has been included in the list of issues, but as to which there is no sensible room for doubt. No employee wants to face any element of a disciplinary process, and no regulated professional wants to face any element of a regulatory process.

55. The central questions will be, for harassment, whether the conduct related to a protected belief; and whether, if so, it had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The central question for direct discrimination will be whether the Claimant was treated less favourably than a person not having her protected belief (or not being perceived to have it).

56. The remainder of these submissions will take issues 2(e), 2(f), 2(i) (fourth bullet), 2(o) and 2(p) first; and then deal more compendiously with the questions relevant to direct discrimination and harassment.

The factual issues

2(e) Was the disciplinary interview hostile in tone?

57. The tribunal is asked to consider the notes of the hearing together with the additional light cast on Ms Farrell's attitude to the Claimant's protected belief in her 2 February 2022 Addendum.

2(i) Did the Council's letter of 20 January 2022 maintain a restraint on the Claimant's freedom of expression?

58. The letter [1040] speaks for itself. The Tribunal is asked to conclude that - as well as doing explicitly the other things mentioned at paragraph 2(i) of the list of issues - it had the effect of maintaining and reinforcing the ongoing unlawful restraint on the Claimant's freedom of expression. The reason for that restraint was her gender-critical belief.

2(o), Did the return to work meetings continue a restraint on the Claimant's freedom of expression?

59. As was acknowledged to Donna Barry and Hillary Harris in cross-examination, given the actions of more senior managers in finding the Claimant guilty of gross misconduct because of the manner in which she had posted previously and imposing a final written warning on her, they personally had little freedom of action how to manage the

Claimant's return to work. But with whatever motives, they did encourage the Claimant not to discuss her views in the workplace, and that will inevitably have continued the unlawful restraint on her freedom of expression. Again, the reason for that restraint was her gender-critical belief.

2(p) Did the appeal outcome letter imply continuing disapproval of the Claimant's conduct and/or continue a restraint on her freedom of expression?

60. It is submitted that the answer to this question is clear from a fair reading of the letter [1779], and in particular the penultimate paragraph [1780]. It was striking that even in his oral evidence to the Tribunal, Pedro Wrobel did not feel able to confirm that the Claimant had done nothing wrong, less still that she would have been entitled to post the material she posted to her private Facebook page publicly if she so wished.

Direct discrimination

61. It has not been suggested that the Claimant's posts lacked the necessary close and direct nexus to her underlying protected belief to be properly understood as manifestations of that belief. Self-evidently, those manifestations of her belief were the reason for the entirety of both the regulatory and the disciplinary processes. To escape findings of direct discrimination in relation to those processes, the respondents would need to persuade the tribunal that the manner of the Claimant's expression of her belief was so objectionable, at least in some cases, that it would justify limitations on her freedom of belief and expression under articles 9(2) and 10(2): see *Higgs v Farmer's School* [2023] EAT 89 at paragraphs 45-58 and 82 in particular.

62. That, however, will not in itself get either respondent home. They will also have to persuade the tribunal not merely that they *could* lawfully have acted on grounds of the Claimant's objectionable manifestation of her belief; but also that it was in fact the Claimant's manner of expression and not the content of the beliefs that was their reason for acting as they did. In light of their many written formulations of the charge against her focusing not on the manner of expression but the content of her belief, it is submitted they should fail to do so.

63. These are facts from which the tribunal could decide, in the absence of any other explanation, that each respondent directly discriminated against the Claimant on grounds of her protected belief sufficient to shift the burden to the respondents under s.136 EqA to show that they did not do so. It is submitted that both respondents' belated and ill-explained attempts at reformulation do not come near to the standard of cogent evidence required to discharge that burden.

64. In truth, the explanations for their actions given by the Respondents have shifted over time in a manner that suggests a gradually dawning - if to this day incomplete - realisation of the implications of the judgment of the Employment Appeal Tribunal in *Forstater*.

65. Aedan Wolton's complaint was originally made, and the charges to be investigated formulated by R2's triage decision-making group, at a time after an employment tribunal had ruled that Maya Forstater's gender-critical belief was not worthy of respect in a democratic society and before that decision had been reversed on appeal. Both Wolton's complaint and the regulatory charges as framed by R2 (and thereafter adopted by R1) reflect an unambiguous characterisation of the views which the Claimant had expressed as in themselves "discriminatory" and therefore culpable.

66. Given that a tribunal had ruled that Ms Forstater's gender-critical belief was so inherently incompatible with the rights of others that it was "not worthy of respect in a democratic society", there was some basis for its belief that it could lawfully sanction her for manifesting that belief; there is even some excuse, in the sense that at the time it was a comprehensible position for it to take, even if not in the sense that it is to any extent legally exculpatory. But to whatever extent it might have excused R2's conduct before 10 June 2021, that excuse is seriously undermined by its failure to recognise and (to the best of its ability, much damage already having been done) to remedy its error after that date.

67. The totality of the evidence shows, it is submitted, that by June 2021, both respondents had allowed themselves to be so completely overtaken by a zeal for "trans inclusion" in the strong and intolerant form preached by Stonewall *et al* that they had become institutionally incapable of accepting or even fully comprehending the implications of

Forstater. The Tribunal may think that the evidence of many of their witnesses demonstrates (It should be noted that - contrary to the hyperbolic claims of many activists that their gender-critical adversaries wish to drive them from public life, exclude them from sport, deprive them of the use of toilets, etc - neither the Claimant nor any of those whose posts and articles she shared argue against "trans inclusion" in a conventionally liberal sense. The gender-critical position is, in brief, that there are circumstances in which sex matters; that in those circumstances, it is literal sex that matters, not gender identity; and that no-one should be punished for speaking in plain language about about sex or distinguishing it from gender identity.)

68. By the time R1's disciplinary process commenced on in July 2021, the Employment Appeal Tribunal had handed down its judgment (on 10 June 2021) that gender-critical views were capable of being protected beliefs for the purposes of the Equality Act. Nevertheless, there is little sign that managers had any awareness of the case when they suspended not only the Claimant, but also two of her managers, on charges of gross misconduct arising out of her expression of those views. Neither is there any hint of any awareness of the implications of *Forstater* in the initial investigation report from Helen Farrell, who says "It is of concern that despite a period of reflection Ms Meade does not accept that her posts were discriminatory, inflammatory or that they could cause offense [sic]".

69. When she wrote her addendum to her investigation report dated 3 February 2022, Ms Farrell evidently had either read or been briefed on the EAT judgment in *Forstater*. In that addendum, she seeks to draw a distinction between legitimate expressions of the Claimant's gender-critical views, and four specific posts which she characterises as "transphobic and discriminatory".

70. By the time of the disciplinary hearing on 28 June 2022, Ms Farrell appears to have arrived at an understanding of *Forstater* that led her to believe that those with gender-critical views were entitled to hold them, but not to manifest them. She said "There is a difference between holding and manifesting a belief" and "I think sharing posts is *expressing your beliefs* and shows a lack of insight" [emphasis supplied].

71. In her witness statement for this tribunal, Ms Farrell's understanding of *Forstater* seems to have developed further. Now (at paragraph 24) she says that she understood *Forstater* to mean that "a belief that sex could not be changed" was what was protected under the Equality Act, and an employee should not be sanctioned for having that belief. She says that what she considered was whether the Claimant's posts went beyond expressions of that factual belief and could be considered offensive and discriminatory. She refers to two posts which she says "could cause offence and could be interpreted that the Claimant held transphobic views". That may reflect a hope on the part of the Council, since abandoned, of limiting the reach of *Forstater* to only the most plain vanilla statements of belief in the reality and materiality of sex, leaving any vigorous argument founded on that belief beyond the pale.

72. R2's rationalisation of its decision-making seems to have had the same starting and finishing points as that of R1, although omitting the intermediate condemnation of "manifestation" of a gender critical belief. The original framing of the regulatory charge refers, as noted above, to posts that were "discriminatory in nature", petitions that "appeared to pursue a discriminatory goal" and donations to organisations that "appear to hold and/or have publicised discriminatory views".

73. But by the time the statement of case for the FtP hearing was written, the concern seems to be with the potential of posts to cause offence, eg:

> [T]he posts consistently argue for, amongst other things, the exclusion of transwomen from single-sex services and spaces; the rejection of self-identification under the GRA; and the limitation, reduction or prohibition on medical treatment (such as puberty blockers) for gender dysphoria in children.
>
> It is foreseeable that public confidence in the profession, including the expectation that a trans or gender non-conforming person will be treated in a non-judgmental, supportive way that respects their gender identity, could be undermined by the Social Worker's sharing of posts which make strenuous arguments for what remains a controversial position.

74. The same emphasis on the potential for her posts to cause offence or disquiet in the public is to be found in R2's witness evidence, e.g. in Heather Martin's statement at paragraph 8:

> It was not the Claimant's belief or that she had expressed a view online, but that some of the social media posts could, in our view, cause offence and undermine public confidence in the profession.

75. The difficulty for the Respondents is that both formulated the original charges against the claimant in terms which unambiguously took exception not merely (or even primarily) to the manner in which the Claimant expressed her beliefs, but to the beliefs themselves; and both repeatedly referred in writing to her beliefs as "discriminatory" or "transphobic". Their subsequent reformulations to focus on capacity to cause offence are, it is submitted, a transparent attempt to steer round the obstacle presented by *Forstater* to their desired outcome of punishing the Claimant for expressing a belief of which they disapprove.

76. But even if the Tribunal were minded to accept that reformulation at face value, it is submitted that it should not avail either respondent. Employees and regulated professionals are entitled to hold gender-critical beliefs. It is not enough for employers and regulators to tolerate those beliefs, reluctantly, provided they are treated as shameful, or mentioned in the most bland terms possible. They are part of the very diversity that employers and regulators should both be willing to value and celebrate as contributing to culture of open debate in the workplace and the profession. The Claimant's evidence at ¶45-51 of her second statement is clear that there is a troubling silence in the profession on these subjects was unchallenged.

Harassment

77. Similar arguments apply only with slightly more force to the first question, namely whether the conduct complained of was related to the Claimant's protected belief; clearly it was. Unquestionably it was also unwanted conduct.

78. It is submitted that it is equally clear that it was conduct that had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. There

was ample evidence of that, but perhaps most tellingly Donna Barry's evidence in chief at ¶¶ 9-12 about the process of facilitating the Claimant's return to work. Given the evident vehemence of some of the witnesses' distaste for the Claimant's protected belief (both in the documentary record and in some cases in their oral evidence), it would be understandable if the tribunal suspected that that was - at least in some cases - its purpose. But it is sufficient if it was its effect, and the Claimant does not ask the tribunal to go that far.

Individual detriments - SWE

79. The Claimant does not pursue items 9(d), (f) or (g) from the list of detriments complained of against SWE. As to (d), the Claimant accepts the SWE witnesses' evidence as genuine (even if arguably mistaken) that they did not have power to do this; and she accepts that it did not have power to remove the flawed Case Examiner decision from its website once made until displaced by a valid fresh decision.

80. The Claimant pursues the other complaints, all of which can be viewed indifferently either as individual acts of discrimination or as aspects of a single ongoing discriminatory process. Each of the detriments was something that the Claimant was subjected to as a direct result of her regulator's willingness - by reason of its disdain for her protected belief - to entertain and pursue as a regulatory matter a complaint against her which it ought to have been able to identify at triage and at many later stages as malicious and in itself discriminatory.

Individual detriments - WCC

81. The Claimant pursues her complaint against WCC in respect of all the individual detriments listed at paragraph 2 of the agreed list of issues, with the exception of the complaints (c) and (h) of refusal to postpone the disciplinary hearing.

82. Similarly, the remaining complaints against WCC can be viewed indifferently either as individual acts of discrimination or as aspects of a single ongoing discriminatory process. Each of the detriments was something that the Claimant was subjected to as a direct result of her employer's failure to apply an independent judgment to the question

whether the regulatory charges against her could properly found a disciplinary process, and to conclude that being attacks on her protected gender-critical belief they could not. Instead WCC enthusiastically prosecuted the flawed charges against the Claimant, motivated by its officers' own apparent (or in some cases, possibly fearfully feigned) disdain for her protected belief.

Conclusion

83. Repeatedly, the respondent witnesses in this case have faced the difficulty that, after the judgment of the EAT in *Forstater*, they needed to find a way of reversing out of the cul-de-sac into which they had backed themselves. But they have been wholly unable to do that in a graceful manner because their respective institutions remain wholly committed to a version of the gender identity belief which cannot tolerate dissent. For that reason, they have been unwilling to confirm in a public forum the Claimant's GC belief was something she was entitled to promote vigorously and publicly if she chose as well as - where relevant - freely bring to work without fear of censure.

84. In other words, the forces that the Tribunal has seen operating to silence the Claimant almost completely on this subject since November 2020 have been continue to operate on the respondent's witnesses as they have given evidence in the tribunal.

85. The tribunal will note that the Claimant's evidence at ¶¶45-51 of her statement was not challenged. The profession as a whole - to which questions about sex and gender, the right to single-sex spaces and single-sex intimate care, and the best approach to gender-distressed children will be highly salient - has been effectively silenced on these matters. As matters stand today, the regulator shows no sign that it is willing to remove that restraint and encourage social workers to discuss these important matters freely and openly. That is a matter of the utmost gravity for the profession as a whole, and for the vulnerable clients it serves.

Naomi Cunningham

OUTER TEMPLE CHAMBERS

14 July 2023