IN THE EMPLOYMENT TRIBUNAL **2200179/2022 & 2211483/2022**

BETWEEN

RACHEL MEADE

Claimant

-and

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

Respondents

CLAIMANT'S OPENING SKELETON

The facts in outline

1. Between October 2018 and April 2020, the Claimant, Rachel Meade, shared or "liked" on her private Facebook page a number of posts promoting a "gender critical" viewpoint; that is, campaigning against reforms (since dropped) which were then proposed of the Gender Recognition Act 2004 to make it easier to get a gender recogn€ition certificate; campaigning for the retention or restoration of female-only categories in women's sports; campaigning for freedom of belief and expression, and respectful debate, on contentious issues around sex and gender; raising the alarm about the medical treatment of gender-distressed children; and similar. These were expressions or manifestations of mainstream "gender critical" views of a kind widely discussed online and in the broadcast and print media.

2. On 15 June 2020 [222], Aedan Wolton, a former colleague of the Claimant's who was one of her Facebook "friends" raised a complaint about her private social media activity to the Second

Respondent, Social Work England, which is the regulator for social workers. Introducing his complaint, Wolton said:

> "Consistently, Rachel has made transphobic comments on her Facebook account, signed petitions published by organisations known to harass the trans community, and donated money to causes which seek to erode the rights of trans people as enshrined by law in the Equality Act, 2010."
>
> [223]

3. SWE's triage decision-making group determined that the complaint merited investigation, and an investigator was appointed on 3 November 2020. The allegations to be investigated were identified thus:

> "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]

4. The Claimant was informed of the complaint and asked for her comments on 9 November 2020 [250]. She kept her managers at Westminster City Council informed of the complaint, and her first line manager, Jackie Gilroy, provided a testimonial on 23 November 2020. Ms Gilroy's testimonial included this:

> I have been Rachel's line manager and supervisor for the past 9 years and I am confident that Rachel has never practised in a discriminatory way. In fact, Rachel has proven to be an extremely competent and respected practitioner and is a role model for less experience members of the team. One of Rachel's many qualities is her ability to empathise and reach out to marginalised groups to ensure that their rights are not eroded or ignored…
>
> [374]

5. Once the initial investigation was complete, the case was passed to two Case Examiners to decide whether a Fitness to Practice hearing was necessary. The Case Examiners decided that there was a reasonable prospect of a finding of impairment if the matter went to a FtP hearing, and offered the Claimant a one-year warning by way of "accepted disposal". The Claimant agreed to the proposed disposal, hoping that that would be the end of the matter. The sanction was issued and the decision (which referred to a materially unchanged formulation of the charges) was published on 8 July 2021 [537].

6. Although the Claimant had kept her managers informed throughout the process, and there had until this point been no suggestion of any workplace disciplinary action resulting from Aedan Wolton's complaint, on 22 July 2021 the matter came to the attention of Senel Arkut, the Council's Director of Health Partnerships. Donna Barry (Head of Service and the Claimant's second line manager) assured Ms Arkut that the Claimant's conduct had always been impeccable, but despite that the Claimant was suspended the same day pending investigation of charges of gross misconduct based on the regulatory sanction [577]. Donna Barry was suspended the same day, and given a disciplinary warning dated 2 February 2022 [1104]. Aleks Gruska, the Claimant's line manager from April 2021, and Jackie Gilroy, her line manager at the time the complaint was raised by SWE, were both also subjected to disciplinary investigations, and Ms Gilroy was suspended on 26 October 2021 and given a disciplinary warning on 10 March 2022 [1130].

7. The disciplinary charge against the Claimant echoed SWE's finding:

> That following a fitness to practice investigation undertaken by Social Work England it was found that you:
> (1) Used social media to share posts that were **discriminatory in nature**
> (2) Signed petitions and donated funds to **organisations that discriminate against specific groups** and (3) Acted in a **discriminatory manner**.
>
> [578; emphasis supplied]

8. The disciplinary charge against Donna Barry was:

> Through your actions as a senior manager, you have breached trust and confidence and brought the council into serious disrepute.

9. Having been suspended, the Claimant instructed lawyers and then sought the removal of the regulatory sanction. As a result of her application for review of the accepted disposal of the regulatory case against her, R2's Case Examiners substituted a new decision dated 28 January 2022 [1081] referring the matter to a Fitness to Practice hearing. That decision was based on the charges as originally formulated.

10. After a further delay of over 5 months, R2's statement of case for the regulatory proceedings dated 6 July 2022 [1374] was sent to the Claimant's solicitors under cover of a letter dated 15 July. This statement of case (drafted by its solicitors) proceeds on the basis of reformulated charges, which now read:

> Whilst a registered social worker:
> 1 Between October 2017 and December 2020, you shared the posts at Schedule 1 on Facebook and:
> 1.1 one or more of the posts may be considered to be offensive by others, and/or;
> 1.2 the post(s) has/have the potential to undermine public confidence in the profession

11. That reformulation was not mentioned in the covering letter, nor is it explained in the statement of case.

12. R1 conducted a disciplinary hearing on 28 June 2022 [1312], after the Claimant had been suspended for over 11 months. At that hearing, the investigating officer, Helen Farrell, presented the management case. Ms Farrell drew a distinction between holding and "expressing" or "manifesting" a protected belief:

> We live in a liberal society where there is freedom of speech. There is however a difference between holding a belief and expressing or manifesting a belief. We must be mindful that our expressed beliefs might cause others great offense [sic] and of the protection of the rights of others including others with protected characteristics… It is **manifesting her beliefs** as a social worker that is central to Ms Meade's case. Her views are now firmly in the public domain and so members of the public and clients can access these. We need to consider that her expressed beliefs may cause great offense to some clients and their wider families especially those that are transgender.

13. The outcome of the disciplinary hearing was that on 8 July 2022, R1 gave the Claimant a final written warning to last for 2 years [1421]. The outcome letter explained:

> The nature of your misconduct was that you shared some posts on your Facebook account (posts on pages 58 and 94 of the screenshots provided to SWE and the Local authority) which could undermine a service users' confidence in you as a social worker. You are entitled to your own views, however, when such views are portrayed in such a public manner this is at odds with your professional role to serve all groups in our community equally. Whilst your Facebook Account was a private account, your beliefs are now in the public domain via newspaper articles and your crowdfunding page.

14. The Claimant appealed that warning. Her suspension was lifted on 12 July 2022, and she returned to work.

15. The Claimant's FtP hearing was scheduled for 17 October 2022, and the hearing or her disciplinary appeal for 8 November 2022. At the FtP hearing, R2 discontinued the regulatory case [1667], and on 15 November 2022, R1 withdrew the warning [1798]. By 15 November 2022, just over two years (and having incurred significant legal costs) after she was first notified of the regulatory complaint against her, the Claimant once again had an unblemished disciplinary and regulatory record.

The complaint and the issues

16. The Claimant's complaint against both Respondents is (put compendiously) that they either engaged in unwanted conduct in the form of their respective processes related to a relevant protected characteristic (gender-critical belief) which had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her within the meaning of s.26 of the EqA 2010; or they subjected her to their respective processes because of the same protected characteristic, within the meaning of s.13. That treatment, if proved, is unlawful in the case of R1 by virtue of ss. 39 and 40, and in the case of R2 by virtue of s.53.

17. Both Respondents have now (on 3 July 2023) conceded the fact of the Claimant's protected belief despite having been invited to do so throughout the Tribunal process.

18. The agreed list of issues separately enumerates 16 alleged detriments or acts of harassment by R1, and 10 by R2. In the case of R1, each act relied on 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 act relied on 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.

19. 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.

20. The question whether the treatment was unwanted by the Claimant is another 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 that risks her right to practice her chosen profession.

21. The central questions in relation to harassment will be 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 or not being perceived to have her protected belief.

22. Both respondents contend that some of the acts relied on are out of time. The tribunal will need to decide whether the various elements of the disciplinary procedure and the regulatory procedure formed a succession of unconnected or isolated specific acts or parts of a single course of conduct or state of affairs.

The applicable law

23. The Claimant is afforded protection from direct discrimination in her employment on grounds of a protected characteristic by section 39 of the EqA, and from harassment by section 40. Section 53 protects her from direct discrimination or harassment at the hands of her qualifications body.

24. Section 4 provides that religion or belief is a protected characteristic, and by section 10, belief means any religious or philosophical belief.

25. Protection from discrimination on grounds of religion or belief was introduced to implement the European Framework Directive on discrimination, Council Directive 2000/78/EC. The Framework Directive notes in its recitals the foundational importance of the rights guaranteed by the ECHR; and by section 3 of the Human Rights Act 1998, the Tribunal is required to give effect to the provisions of the Equality Act in a manner which is, so far as possible, compatible with those rights. As public authorities, both respondents are directly bound by s.6 of the Human Rights Act 1998 not to act in a way incompatible with the Claimant's Convention rights. That obligation is not of course itself justiciable in the Employment Tribunal, but its existence puts it beyond doubt that the interpretative obligation at s.3 applies here to require the EqA to be read so far as possible in such a way as to give effect to her Convention rights. (The case law establishes that the EqA must equally be read in that way in a case between purely private parties; that proposition is not argued here only because it is not necessary in this case.)

26. Articles 9 and 10 provide:

> **Article 9 Freedom of thought, conscience and religion**
>
> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

27. Article 17 provides:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

28. Article 10 recognises the particular importance of protection of political speech and contributions to a debate on a question of political and/or public interest: see *Vajnai v Hungary* (2010) 50 E.H.R.R. 44, §§47, 51 & 57. The protection:

> extends to " ideas" that are not favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and

> broadmindedness without which there is no " democratic society": Vogt v Germany 19 (1996) 21 EHRR 205, ¶61;

29. In domestic law, the leading case on the meaning of s.10 is *Grainger plc v Nicholson* [2010] ICR 360, which set out five criteria which must be satisfied for a belief to fall within the definition. Only the last of those is at issue in this case: that the belief must be "worthy of respect in a democratic society".

30. In *Forstater v CGD Europe* [2022] ICR 1, the EAT considered for the first time whether so-called "gender-critical" belief (in a nutshell, that "biological sex is real, important, immutable and not to be conflated with gender identity") met *Grainger V.* The EAT held at ¶62:

> The two passages on which Burton J (President) relied in formulating Grainger V clearly establish the extremely grave threat to Convention principles that would have to exist in order for a belief not to satisfy that criterion. We do not accept [Counsel for the Respondent's] submission that the claimant has misconstrued these passages in pursuit of her submission that article 17 provides the appropriate standard against which Grainger V is to be assessed. Far from being merely one of the factors to be taken into account, it appears to us that article 17 was mentioned because that is the benchmark against which the belief is to be assessed; only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society.

31. The EAT held at ¶110 that the only proper conclusion was that Ms Forstater's belief did fall within section 10, for three reasons. First, and fundamentally (¶111) it did not "get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of article 17"; and that was enough on its own to find that *Grainger V* was satisfied. But additionally, (¶113), it was a belief that was widely shared, including among respected academics, and although wide acceptance was not enough alone to establish that a belief was worthy of respect in a democratic society, the contention that it was not would

require to be particularly carefully scrutinised in those circumstances. Finally, Ms Forstater's belief was consistent with the law, and (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.

32. In *Forstater,* the EAT said at ¶45:

> A precise definition of those aspects of the belief that are relevant to the claims in question would, in our judgment, suffice. In this regard, we do not consider it incorrect for a tribunal to seek to identify the "core" elements of a belief in order to determine whether it falls within s.10, EqA. There may be aspects of a belief that are peripheral or merely practical instances of its main tenets, which need not form part of the definition of the belief that falls to be tested against the Grainger Criteria.

33. "Manifestation" of a protected belief is protected along with the belief itself: an employee or registrant cannot lawfully be discriminated against or harassed for manifesting her protected belief unless there is something objectionable in her manner of manifesting it. But a respondent that defends its treatment of a claimant on that basis has a high standard to meet: "there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under articles 9(2) or 10(2) ECHR": *Higgs v Farmor's School* [2023] EAT 89. That means its restriction must be prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others.

34. The question whether a restriction is necessary for the prescribed purposes is to be considered by reference to the test set out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, SC, by Lord Sumption at ¶20. What is required is:

> an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally

> connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

35. In short, the case law establishes these three propositions:
    a. a belief will not fail Grainger V unless it is in the wholly exceptional category of beliefs that would fall foul of article 17;
    b. the protection afforded to a belief attaches also to manifestations of the belief, except insofar as those manifestations are in themselves objectionable;
    c. manifestations will not be found objectionable unless their restriction can be justified by reference to the tests at articles 9(2) and 10(2), including in the case of "necessity" the four-stage Bank Mellat test.

The relevant regulatory framework

36. The Children and Social Work Act 2017 established Social Work England as the regulator of social workers in England, taking over from the Health and Care Professions Council (HCPC). The detail of its regulatory powers and procedures is set out in the Social Workers Regulations 2018.

37. Regulation 25 of the Social Workers Regulations 2018 provides:

> 25.— Fitness to practise proceedings
>
> (1) Where a question arises as to a social worker's fitness to practise by reason of any of the grounds in paragraph (2), and regulation 26(5) does not apply, the regulator must ensure that—
>
> (a) proceedings are carried out in accordance with this regulation and Schedule 2, and any rules made under paragraph (5) ("fitness to practise proceedings"),

(b) any outcome of the fitness to practise proceedings which is mentioned in regulation 9(2) is recorded in the register in accordance with that regulation, and

(c) the particulars of any orders and decisions made in fitness to practise proceedings, together with the reasons for them, and the particulars of any order made on review or appeal, are published as soon as reasonably practicable.

(2) The grounds referred to in paragraph (1) are—

(a) misconduct…

38. Social Work England has made the Social Work England (Fitness to Practise) Rules 2019 under a power conferred by these Regulations [1784]. Those rules set out the procedure to be followed for triage, investigation, determination by case examiners, and referral to a fitness to practise hearing.

39. Fitness to practise provisions very similar to those at regulation 25 of the 2018 Regulations are to be found at section 35C of the Medical Act 1983. These were considered in *Remedy UK v* GMC [2010] EWHC 1245 (Admin) at paragraph 37, by Elias J (as he then was):

(1) Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.

…

(6) Conduct falls into the second limb if it is dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession of medicine into disrepute. It matters not whether such conduct is directly related to the exercise of professional skills.

40. Bearing in mind the close resemblance between the relevant provisions of the Medical Act 1983 and the Social Workers Regulations 2018, these remarks must be taken to apply with full force to the fitness to practise regime for social workers.

The Respondents' case

41. The Respondents, having abandoned their contention that the Claimant's belief is not *Grainger*- compliant, appear to be left to an attempt to deny that it was the Claimant's protected belief (or expression or manifestation of her belief) that was the reason for their respective processes and thus their treatment of her, and seek to shift their focus away from the views that she expressed to the manner in which she expressed herself or the potential for her Facebook posts to cause offence. As a matter of law, this strategy pays heed neither to the high standard required to justify a restriction on the Claimant's freedom of expression (especially political expression) under article 10(2) nor (in SWE's case) to the requirement for conduct outside professional practice to be "morally culpable or otherwise disgraceful" before it can be said to go to fitness to practise on the misconduct ground.

42. On the facts, this strategy is in any event undermined - fatally, the Claimant will argue – by the Respondents' own contemporaneous documentary records.

Conclusion

43. The Claimant has not posted on the subject of sex and gender since November 2020, even on her private Facebook page. She is an experienced social worker with clear, well-informed views on a subject of urgent current controversy that is directly relevant to her profession, but her contribution to that debate has been completely silenced for over two years. She is her family's main breadwinner, and the regulatory investigation and disciplinary process put her in real, well-founded fear over a long period that she would lose her livelihood and her right to practise in her chosen profession. Even if this tribunal finally gives her a complete vindication

of her article 10 rights in principle, it is not clear whether she will ever regain the confidence to exercise them fully in practice.

44. Malcolm Feeley called his seminal 1979 study of criminal justice in the US "The Process is the Punishment". That phrase has resonance for this case and many like it; Rachel Meade's story of silencing and intimidation is only one of many similar stories. The fundamental question raised by this case is "Can colleagues, regulators and employers lawfully use regulatory and disciplinary processes to punish engagement in the urgent, important and increasingly ubiquitous public debate about sex and gender?"

Naomi Cunningham
OUTER TEMPLE CHAMBERS

4 July 2023