Neutral Citation Number: [2022] EAT 99

Case No: EA-2019-001051-LA

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 June 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

MR D BLEIMAN

MR D G SMITH

- -

Between :

DR DAVID MACKERETH **Appellant**

- and –

THE DEPARTMENT FOR WORK AND PENSIONS (1)
First Respondent

ADVANCED PERSONNEL MANAGEMENT GROUP (UK) LIMITED (2)
Second Respondent

- -
- -

Michael Phillips (instructed by Andrew Storch, Solicitors) for the **Appellant**
Robert Moretto (instructed by Government Legal Department) for the **First Respondent**
Rad Kohanzad (instructed by Croner Group Ltd) for the **Second Respondent**

Hearing dates: 28 and 29 March 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30 am on 29 June 2022

Summary

Religion or belief discrimination – sections 4 and 10 Equality Act 2010 – direct discrimination - harassment – indirect discrimination

We recognise that this case may touch on issues of wider social concern and debate. We make clear that we express no views as to the merits of any side in that debate, it is not the role of the Employment Appeal Tribunal to do so (**Forstater v CGD Europe and ors** [2022] ICR 1 EAT). Our function is to determine such questions of law as arise in the case before us; specifically, to decide whether the ET erred in the Judgment under appeal.

The claimant is a doctor. He is a Christian who holds the following beliefs or lack of belief: (a) in the truth of Genesis 1:27, that a person cannot change their sex/gender at will and attempting to do so is pointless, self-destructive and sinful; (b) a lack of belief in "*Transgenderism*" and "*gender fluidity*", such that he does not believe (i) a person can change sex/gender, (ii) that "*impersonating*" the opposite sex may be beneficial for a person's welfare, or (iii) that society should accommodate/encourage such "*impersonation*"; and (c) a belief that it would be irresponsible and dishonest for a health professional to accommodate/encourage a patient's "*impersonation*" of the opposite sex.

Having started employment as a health and disabilities assessor, carrying out assessments on behalf of the first respondent in relation to claimants for disability-related benefits, during his induction training, the claimant explained that his beliefs were such that he would not agree to use the preferred pronouns of transgender service users. This conflicted with the respondents' policies and attempts were made to clarify the claimant's position to see if his beliefs could be accommodated; ultimately the claimant left his employment and brought proceedings in the Employment Tribunal ("ET") relying on the protected characteristic of religion or belief and claiming direct discrimination, harassment and indirect discrimination.

Although accepting that Christianity was a protected characteristic, the ET found that the claimant's particular beliefs did not meet the **Grainger** criteria (**Grainger plc v Nicholson** [2010] ICR 360, EAT): beliefs (b)(ii) and (iii) and (c) did not meet **Grainger** (ii), (iii) and (iv) and none of the claimant's beliefs (a)-(c) satisfied **Grainger** (v). Even if his beliefs did amount to a protected characteristic for the purposes of the **Equality Act 2010** (EqA), however, the ET went on to find, in the alternative, that he had not suffered the acts of less favourable treatment/harassment complained of and that he had not suffered direct discrimination or harassment. The ET further held that the provisions, criteria and practices ("PCPs") applied (to use service users' preferred pronouns and to confirm a willingness to adhere to that policy) were necessary and proportionate means of achieving the respondents' legitimate aims (to ensure transgender service users were treated with respect and in accordance with their rights under the **EqA**, and to provide a service that promoted equal opportunities). The claimant appealed.

Held: *dismissing the appeal*

It was not in dispute that the claimant's Christianity was a protected characteristic under the **EqA** but his case depended upon his demonstrating that his specific beliefs, or lack of belief, (a)-(c) fell within section 10 **EqA**; the ET did not err in focusing on the case before it. Given that the claimant's statements of belief at (b)(ii) and (iii) and (c) related to how society should treat those who present other than in conformity to their natal sex, the ET had erred in finding these did not relate to weighty and substantial aspects of human life and behaviour (**Grainger** (iii)). It had also erred in failing to engage with the claimant's case regarding the matters at (b) as one of *lack* of belief, which would fall to be protected under the **EqA** irrespective of the **Grainger** criteria (**Forstater** paragraph 106 applied). In any event, the progressively narrow way the claimant's beliefs were defined meant the ET was entitled to find that the matters at (b)(ii) and (iii) and (c) lacked the necessary cogency, seriousness, cohesion and importance for **Grainger** (iv), although it had been wrong to find these were merely opinions based on the information available (**Grainger** (ii)) when the statements were

extrapolations from the claimant's belief (a) and were properly to be viewed as manifestations of that belief. More generally, the ET had erred in its approach to the question whether the beliefs were worthy of respect in a democratic society, not incompatible with human dignity, and not in conflict with the fundamental rights of others (**Grainger** (v)): the ET had wrongly considered the claimant's beliefs relative to his particular employment; had erroneously assumed they must give rise to unlawful discrimination or harassment; had focused on the potential manifestation of the claimant's beliefs instead of the beliefs themselves; and had applied too high a threshold (**Forstater** applied).

Notwithstanding its findings on belief, in the alternative, the ET had appropriately gone on to consider each of the claimant's claims on the merits; those alternative findings were not tainted by the ET's approach to the question of philosophical belief. The claimant's grounds of appeal had not included any separate points of challenge to the ET's rejection of his claims of direct discrimination and harassment but he had impermissibly sought to take objections to the ET's conclusions on these claims in argument. Those objections were, in any event, without merit: (1) the ET had found as a fact that the claimant had not suffered the acts of less favourable treatment/harassment complained of; (2) it had permissibly found the claimant's beliefs were not the reason for the respondents' conduct; (3) it had been entitled to draw a distinction between the claimant's beliefs and the way he wished to manifest those beliefs (**Page v NHS** applied); and (4) it was satisfied that the relevant conduct had neither the purpose nor effect required to amount to harassment under section 26 **EqA**.

As for the ET's findings on indirect discrimination, on the issue of group disadvantage, as the claimant had accepted that his particular beliefs were not shared by all Christians, there could be no objection to the ET's conclusion in this regard. On justification, the claimant had neither challenged the ET's finding that no penalty had been applied by the respondents (the claimant's third PCP), nor its acceptance of the legitimate aims relied on. In finding that the PCPs that had been applied were necessary and proportionate means of achieving those aims, the ET had properly taken account of the relevant context and had carefully evaluated the respondents' concerns; it had been entitled to find

there were particular sensitivities arising from the face-to-face interactions the claimant would have with service users as part of his role but had also accepted that the respondents were seeking to clarify the claimant's position and to accommodate his beliefs. In finding, however, that there were no practical options that would allow for the claimant's manifestation of his beliefs in his role in that workplace, the ET noted that no further alternatives had been identified by the claimant. That did not amount to the imposition of a burden of proof on the claimant, the ET was merely identifying the lack of evidential challenge to the respondents' case (paragraph 47 **Essop v Home Office** applied) and the claimant could not avoid that difficulty by seeking to reinstate on appeal a point he had not pursued before the ET. More generally, the ET did not lose sight of the potential impact of the PCPs on the claimant but was entitled to keep in mind the limited nature of the intrusion (no penalty having been applied by the respondents, who were seeking to accommodate the claimant). Given the particular context, it could not be said that the ET had erred in finding the measures adopted by the respondents were necessary and proportionate to meet a legitimate focus on the needs of potentially vulnerable service users, and on the risks to those individuals and, in consequence, to the respondents.

The Honourable Mrs Justice Eady DBE, President:

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Introduction

1. This appeal concerns the approach to be taken to belief as a protected characteristic for the purposes of the **Equality Act 2010** ("the EqA"). It also raises questions relating to how claims of direct and indirect discrimination and harassment were addressed by the Employment Tribunal ("ET").

2. We recognise that this case may touch on issues of wider social concern and debate. We make clear that we express no views as to the merits of any side in that debate; as was made clear by in **Forstater v CGD Europe and ors** [2022] ICR 1, it is not the role of the Employment Appeal Tribunal to do so. Our function is to determine such questions of law as arise in the case before us; specifically, to decide whether the ET erred in the Judgment under appeal.

3. In giving our Judgment, we refer to the parties as the claimant and the first and second respondent, as below. This is the full hearing of the claimant's appeal against the Judgment of the Birmingham ET (Employment Judge Perry sitting with lay members, Mr Virdee and Mr Trigg, over four days in July 2019, with an additional day in chambers for deliberations), sent out to the parties on 27 September 2019. By that Judgment, the ET

dismissed the claimant's claims of direct and indirect religion or belief discrimination and of harassment relating to religion or belief.

4. Mr Phillips represented the claimant before the ET as he does today. Similarly, Mr Moretto has appeared for the first respondent throughout. The second respondent was represented before the ET by a litigation consultant but today appears by Mr Kohanzad.

The Factual Background

5. Our summary of the relevant factual background is taken from the ET's written reasons.

The Workplace Context

6. The claimant is a doctor who applied to work as a health and disabilities assessor ("HDA") at the first respondent's assessment centre at Five Ways, Birmingham. That role would require him to assess claimants for disability-related benefits; his duties would include conducting face-to-face assessments and preparing reports.

7. HDAs were provided to the first respondent by the second pursuant to a contract requiring the second respondent, and the HDAs it supplied, to adhere to the first respondent's guidance and policies and procedures, including its diversity and equality policy. Day-to-day supervision of the HDAs was the responsibility of the first respondent's clinical leads, who would raise any concerns with its operations manager (Mr Medlycott); these would be discussed, in turn, with the second respondent's contract manager (Mr Owen). It would be for Mr Owen to carry out any investigation, and to then revert to the first respondent to seek guidance on what, if any, action should be taken. Generally, the first respondent would have the final say in relation to the termination of an HDA's contract.

8. As for the service provided at the Five Ways assessment centre, those invited for assessment would be given an appointment for a particular day and time, although the

appointments allocated would exceed the number that could be undertaken given the likelihood of non-attendance. Each assessment involved a 30 to 40-minute interview and service users would be seen on a first-come first-served basis. Generally, claimants would already have completed an on-line benefits claim but if a mental health condition was the basis for the claim they were not required to complete the form in advance.

9. As this case is concerned with the claimant's beliefs regarding transgender people, it is relevant to understand the particular context in which HDAs at the first respondent's assessment centres might have dealings with transgender service users.

10. The evidence before the ET was that an HDA might be expected to have interactions with transgender service users on only a handful of occasions a year. It was, however, common ground that transgender people were more likely to suffer from mental health impairments than society as a whole and, therefore, might be disproportionately less likely to have completed an on-line claim form in advance of any attendance at the assessment centre. The ET noted that transgender claimants were unlikely to be claiming disability benefits as a result of gender dysphoria (that did not, in the normal course, prevent the individual working); such claims were more likely to arise as a result of mental health conditions, specifically anxiety and depression, stemming from, amongst other matters, the past mismatch, or - as it was described to the ET - the "*confusion*", concerning identity that gender dysphoria encompasses.

11. It was the evidence of Mrs Harrison, clinical lead at the Five Ways assessment centre, that if a transgender claimant was not acknowledged in their preferred way, by using their preferred pronoun and title, that could be detrimental to their mental health. It was also the evidence of Dr Ahmed, clinical lead on the induction training for HDAs, that transgender claimants were often unhappy about the way society had treated them and he considered that if one HDA sought to pass a service user to another HDA, having discovered that person was transgender,

then, however sensitively this was handled, the service user would be offended because they would see this as demonstrating the same lack of understanding with which they felt they had been treated by society. A specific example was provided by Mrs Harrison relating to a transgender service user the previous year, whose gender history had been incorrectly relayed and to whom an apology had been provided.

The Claimant's Beliefs

12. The claimant told the ET that he had been a Christian since 1982, when he was in his first year at medical school. Having qualified in medicine in 1988, the claimant trained for the Christian ministry from 1990-92 and then worked as a full time evangelist for two years before returning to the medical profession. He thereafter worked as a medical professional, although he continued to undertake evangelist work in his spare time.

13. It was the claimant's evidence that he held to the principles of the Great Reformation of the 16th Century, including a commitment to the supremacy of the Bible as the infallible, inerrant word of God and as the final authority in all matters of faith and practice. In his witness statement, the claimant explained the doctrinal principles underlying his beliefs, as follows:

> "17. The Bible, in Genesis 1:27, teaches: "So God created man in His own image; in the image of God He created him; male and female He created them."
>
> 18. Several important points follow from this verse: a. Man was created by God, in "the image of God". This is true of all humans regardless of biological sex. b. God made humans "male and female". That leaves no scope for any other sex or gender. This is completely inconsistent with the theory of 'gender fluidity'. c. God's creation was perfect or "very good" (Genesis 1:31). When God made mankind perfect, he made them male and female.
>
> …
>
> 21. The law of God in the Old Testament forbids cross-dressing: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the LORD thy God." (Deuteronomy 22:5). …"

14. The claimant further referred to what he described as the "*doctrines of 'Transgenderism' and 'gender fluidity'*", which he believed had:

> "28. …no sound medical or scientific basis. What limited scientific evidence is available, does not go anywhere near the level of knowledge necessary to assert that a person can change sex, or that a man can be trapped in a female body, or vice versa. In fact, if we do not define gender and sex biologically, we are unable to define them at all."

He continued:

> "30. I am, of course, aware that there are men or women who believe they have been trapped in a wrong body; and I do not question the sincerity of their convictions. A small number of such people have always existed. Up until very recently, such a belief was considered by medics to be delusional, and a symptom of a mental disorder. It is only recently that 'Transgenderism' has been recognised as 'normal', and such delusional beliefs accepted at face value. What is responsible for that change is political pressure, not scientific evidence."

15. The claimant did not, however, suggest that his beliefs were dependent upon the scientific evidence available. Rather his case was put on the basis that he was a Christian and his religion was a relevant protected characteristic for the purposes of sections 4 and 10 **Equality Act 2010** ("the EqA"); the claimant also relied, "*cumulatively or alternatively*", on the following statements of religious and/or philosophical belief:

(a) A belief in the truth of the Bible, and in particular, the truth of Genesis 1:27, such that "*It follows that every person is created by God as either male or female. A person cannot change their sex/gender at will. Any attempt at, or pretence of, doing so, is pointless, self-destructive, and sinful*". ("**belief in Genesis 1:27**")

(b) A lack of belief in "*Transgenderism*" and "*gender fluidity*", identifying what he described as "*three basic tenets of the 'belief in Transgenderism'*"", which he did not share, as follows: (i) that it is possible for a person to change their sex/gender, (ii) that impersonating the opposite sex may be beneficial for an individual's welfare, and/or (iii) that society should

accommodate and/or encourage anyone's impersonation of the opposite sex ("**lack of belief in transgenderism**")

(c) A belief that it would be irresponsible and dishonest for e.g. a health professional to accommodate and/or encourage a patient's "*impersonation*" of the opposite sex ("**conscientious objection to transgenderism**")

For ease of reference, in this Judgment we have adopted the same descriptors as the claimant: (a) belief in Genesis 1:27; (b) lack of belief in transgenderism; (c) conscientious objection to transgenderism.

The Relevant History

16. The claimant's engagement with the respondents lasted from 29 May to 27 June 2018.

17. From 29 May 2018, the claimant attended an induction course at the first respondent's assessment centre, at which Dr Ahmed was the lead physician. On 6 June 2018, during a discussion as to whether service users should be referred to by their first name or their surname and title, one of the three other HDAs undertaking the course asked how they should refer to someone who was transgender. This was not the first time a doctor in training had asked Dr Ahmed this question and he was aware that the first respondent's policy was to refer to transgender individuals by their preferred name and title; indeed, as the ET observed, the first respondent's Policy on Gender Reassignment provided (relevantly):

> "150. A transgender customer may be undergoing any stage of their "transitioning" when they start to engage with DWP: They should be treated with respect and referred to in their presented gender at all times.
>
> 151. You should always address the customer in their presented sex – try to use the person's name where possible rather than referring to a person's gender."

Dr Ahmed responded accordingly.

18. The claimant's account of what happened next is that he said "*As a Christian, I cannot use pronouns in that way in good conscience*", or words to that effect, and that Dr Ahmed then replied "*The policy is that we don't ask questions, we just use whatever pronoun the client prefers. I am not sure I agree with David, but I will have to pass his comment up the chain*", or words to that effect. As the ET recorded, the claimant did not have any issue with using whatever first name the service user wished but he did object to using pronouns, or a title or style of address, inconsistent with the service user's birth gender.

19. It was the claimant's evidence to the ET that, in setting out his position, he felt he was "*cutting his professional throat*". Dr Ahmed stated, however, that the claimant did not appear surprised by his response, but said he understood that what Dr Ahmed had said was the government's position but, as a Christian, he believed God assigned people's gender at birth and he could not refer to individuals by a gender different to their birth sex, adding that he would be prepared to defend his beliefs if challenged in court. Given the length of time the claimant had been a medical practitioner, Dr Ahmed asked if he had previously had any interactions with transgender people; the claimant said he had not, and had not had to address the issue before. Aware that the claimant had previously worked in Accident and Emergency, and given that General Medical Council ("GMC") guidance, "Good Medical Practice", provided that doctors should refer to patients by their preferred name, Dr Ahmed asked the claimant how that was so, and the claimant said that the hospital he worked at was aware of his beliefs and helped him avoid having to deal with transgender people.

20. Dr Ahmed recalled that the discussion lasted several minutes. He explained his view that the claimant's intention to address transgender service users by the title he thought appropriate would not be acceptable but the claimant did not seem convinced and continued to argue his case. As the claimant said his consultant had previously accommodated his beliefs, Dr Ahmed wanted to check if the first respondent could provide a similar accommodation and determined

to refer the issue to the clinical lead at the Five Ways site, telling the claimant of this intention. Accordingly, Dr Ahmed called Mrs Harrison immediately after the training and suggested that she speak to their manager to see if this could be accommodated.

21. Dr Ahmed also raised the matter with the first respondent's operations manager, Mr Medlycott. Mr Medlycott told the ET that he had identified two potential means of circumventing the issue but considered neither would be appropriate or practicable. The first was to give the claimant a non customer-facing role, but (as was common ground before the ET) these required at least 12 months' experience. Secondly, Mr Medlycott considered whether it would be possible to ensure the claimant only assessed non-transgender service users, but that would not be practicable as such users might not present as transgender until the assessment (particularly if suffering from a mental health impairment, as they would not have been required to complete an on-line form before attending the assessment centre).

22. Mr Medlycott had checked the ACAS website for guidance on what was acceptable treatment in the workplace for people who hold religious beliefs and identified the need to consider making accommodations, summarising the product of his research in this regard in an email sent to Mrs Harrison late on 8 June 2018, as follows:

> "… an employee must not refuse to work with a colleague or client, or refuse to provide a service to a customer, because of their religion or belief, or because of the colleague/client/customer's sexual orientation, sex, gender reassignment, race, disability, marriage or civil partnership, or religion or belief. Refusal would be discriminatory. The employer could take disciplinary action against the employee, and the refusal could also lead to a discrimination claim against the employee."

Observing that the ACAS guidance did not assist with how people transitioning through gender reassignment should be referred to, Mr Medlycott continued:

> "… I would have thought that, by default, they would be required to acknowledge them by their chosen name and gender address (Mr, Miss …. etc). We are already working in quite a sensitive area and I would have concerns if David were to refuse to see someone in this protected group or was

> inflammatory in how he addressed people if he is called upon to assess them, so I think [the second respondent does] need to have conversation with him about how he would deal with such situations if placed with them as there is a potential here severe reputational damage if not addressed."

23. Mrs Harrison forwarded Mr Medlycott's email to Mr Owen on Monday 11 June 2018. On the same day, the claimant undertook the end of course test and on Tuesday 12 June he observed assessments.

24. Meanwhile, also on 12 June 2018, Mr Owen wrote to the second respondent's responsible officer, Dr Baker, to seek guidance (as the responsible officer, Dr Baker was responsible for the annual appraisals and revalidation of the doctors at the second respondent). His advice, emailed later that day, was that "*people have the right to entitle themselves any way they wish and to be addressed as such*." He also forwarded parts of the GMC guidance, attaching a document entitled "*Personal beliefs and medical practice from the GMC*", advising that if it was a doctor-patient relationship it would be hard to defend the doctor's responses.

25. In the interim, Mr Medlycott had further contacted Mr Owen, acknowledging that individuals were entitled to their own beliefs but noting ACAS guidance that employees must not refuse to provide a service on account of gender reassignment; given the sensitive nature of the first respondent's work, he considered reassurance was needed. In the light of Dr Baker's advice and the reassurance thus sought by the first respondent, Mr Owen decided he should meet with the claimant to address these matters with him.

Events of 13 June 2018

26. On 13 June 2018, the claimant was undertaking supervised assessments. In his witness statement, the claimant said he had been working "*on my second real case*" when Mr Owen arrived, calling him "*out of my work for an urgent meeting*", complaining that this was "*to interrogate me about my beliefs in relation to the use of pronouns*". Other than his acknowledgement that Mr Owen had been polite and courteous, however, the ET rejected the

claimant's characterisation of this meeting, finding he was "*a poor witness whose perception of events was skewed"* and that *"save where it is supported by another witness or documentary evidence his account should be given little weight*". The ET was satisfied that Mr Owen had not interrupted the claimant's work; he had initially just asked how the claimant was getting on and only met with him some two hours later, allowing him time to finish what he was doing. The meeting lasted some 30 to 40 minutes and the ET accepted that Mr Owen made clear that this was purely an information-gathering exercise, which he would relay back to the first respondent, albeit he accepted there was a risk that the claimant might lose his job. During the meeting, the claimant acknowledged that, while he did not intend to harm or offend anyone, his behaviour could be perceived as offensive by transgender people.

27. It was common ground that it was apparent that the claimant was upset by the situation, telling Mr Owen that the government, the law and the GMC were all against people like him and that he knew how this would end and it would not be in his favour. Mr Owen reiterated that he did not know what the outcome would be and it would not be his decision. The claimant thanked Mr Owen for his professionalism and how well he had handled the situation. In his evidence to the ET, the claimant further accepted that the first respondent was trying to retain his services. The ET concluded that:

> "109. … viewed objectively, in no sense whatsoever, [could] … the way that Mr Owen proceeded be viewed as an attempt by Mr Owen or [the first respondent] to persuade [the claimant] to renounce his beliefs."

Events of 14 June 2018

28. On the morning of Thursday 14 June 2018, Mrs Harrison met the claimant in the stairwell at the Five Ways assessment centre when she arrived at 8:30 am. The claimant said: "*you know that I've come into work to be fired today don't you? That would end my career*" and stated that he knew his beliefs were contrary to the views of the GMC. Mrs Harrison responded by suggesting the claimant carry on that day and they both went inside. Later on that morning,

the claimant appeared upset and he told Mrs Harrison he would finish the case he was working on and then go home as he was distracted and felt that he may do any other service users he saw that day an injustice as a result; he left at around 11 am. At some point later that morning, Mrs Harrison spoke to Mr Owen and told him what had happened.

29. During the afternoon, Mr Owen called the claimant to check he had arrived home okay and to confirm that he and Mrs Harrison understood the claimant's request not to continue working. At 4:20 pm that day, Mr Owen emailed the claimant a draft note of the meeting of 13 June, asking if it was agreed. Mr Owen also emailed Mrs Harrison, stating (referring to his earlier telephone conversation with the claimant): "*we have agreed it is not in either his interests or [the first respondent's] best interest to return to work until this is resolved*".

Subsequent Events

30. The next morning, the claimant replied to Mr Owen's email, saying he would need to take legal advice before answering. He went on to state that he had been suspended and asked for that to be confirmed in writing and for reasons for his suspension to be provided. Mr Owen responded saying it was his understanding that the claimant left work because he chose to do so and did not feel he could return to work until the situation was resolved.

31. Before the ET, it was the claimant's case that he had been suspended on 14 June 2018. The ET noted, however, that in an email to Mr Owen on the morning of 15 June 2018, Mrs Harrison had set out her account of what happened the previous day, as follows:

> "he didn't think he would be able to work and that it would be unfair for any customer he saw as he felt too distracted to competently complete an assessment"

And she had gone on to record that she had agreed with the claimant:

> "that perhaps due to the way he felt that it would be best for him not to be in the work"

The ET concluded that the suggestion to go home came from the claimant himself, not Mrs Harrison, Mr Owen, or either respondent.

32. On the morning of Monday 18 June 2018, the claimant emailed Mr Owen to state that he had had time to take advice and he accepted that Mr Owen's note of their meeting represented his opinions, albeit not fully, and he went on to relay his view concerning Genesis 1:27. On Tuesday 19 June 2018, Mr Owen forwarded the claimant's response to Mrs Harrison and Mr Medlycott. There were subsequent communications between Mr Owen and Mr Medlycott agreeing the wording of an email to the claimant, which Mr Owen sent out on 25 June 2018, making the following request:

> "… on behalf of [the first respondent] we would like to ask you one final time whether you would follow the agreed process as discussed in your training and that in any assessment you conduct, that you refer to the customer by their chosen sexuality and name? We are of course happy to provide help and support on this. If however you do not wish to do this, we will respect your decision and your right to leave the contract."

33. The claimant responded that evening, stating:

> "I am a Christian, and in good conscience I cannot do what the [first respondent] are requiring of me."

34. On 27 June 2018, Mr Owen wrote to the claimant acknowledging his email and that he would not be able to perform as an HDA with the second respondent on behalf of the first respondent. He thanked the claimant for his work and wished him the best for the future. The claimant responded to Mr Owen, stating that he had not resigned but had been sacked and commenting on what he considered the consequences of that were for the nation. He did not seek to raise an appeal or grievance.

The ET's Decision and Reasoning

Belief

35. It was common ground before the ET that Christianity is a protected characteristic. The respondents did not, however, accept that was the position in relation to the further matters relied on by the claimant ((a) belief in Genesis 1:27; (b) lack of belief in transgenderism; (c) conscientious objection to transgenderism).

36. Applying the **Grainger** criteria (**Grainger plc v Nicholson** [2010] ICR 360 EAT), the ET accepted that the claimant's statements of belief were genuine. It further accepted that: (a) the claimant's belief in Genesis 1:27 and the first aspect of (b) – (i) his lack of belief that it is possible for a person to change their sex/gender – related to a weighty and substantial aspect of human life and behaviour and had a certain level of cogency, seriousness, cohesion and importance. As for the other matters set out at (b) - (ii) the claimant's lack of belief that impersonating the opposite sex may be beneficial for an individual's welfare, and/or (iii) his lack of belief that society should accommodate and/or encourage anyone's impersonation of the opposite sex – the ET concluded that, by reference to the use of the word "*impersonation*", these were opinions or viewpoints predicated on the assertion that transgenderism was a delusional belief and did not relate to a weighty and substantial aspect of human life and behaviour, or attain a certain level of cogency, seriousness, cohesion and importance, because of the narrowness of the issue they represented (that is to say, they failed the tests laid down at paragraph 24 (ii), (iii) and (iv) **Grainger**; see paragraph 71 below). Although the ET did not expressly address (c) conscientious objection to transgenderism, our understanding of its reasoning (read holistically) is that it also found this failed **Grainger** tests (ii), (iii) and (iv).

37. In any event, the ET further concluded that all three matters – (a) belief in Genesis 1:27; (b) lack of belief in transgenderism; and (c) conscientious objection to transgenderism – failed

Grainger (v), as they were incompatible with human dignity and conflicted with the fundamental rights of others, specifically transgender individuals. In explaining its decision in this regard, the ET noted the claimant had accepted that transgender individuals "*… may find my beliefs to be offensive*", although he made it clear that was not his intention. Considering whether this might amount to harassment, for the purposes of section 26 **EqA**, the ET took into account what it considered to be the likely effect of the claimant's beliefs, set against the background explained by the respondents; doing so, it was satisfied that his beliefs "*were likely to cause offence and have the effect of violating a transgender person's dignity, or creating a proscribed environment, or subjecting a transgender person to less favourable treatment*". The ET further concluded that the claimant's beliefs (or, at least, the manifestation of those beliefs in the context explained by the respondents) may also have breached the **Gender Recognition Act 2004** ("GRA") (ET paragraph 198).

38. The claimant had argued the GMC guidelines included a conscientious objection provision relevant to the issues in this case. The ET disagreed, finding that the right of conscientious objection in those guidelines was limited to the right to refuse to participate in particular procedures, not to pre- or post-treatment care advice or management. It further noted that, under the guidelines, a practitioner was required to: *"5… follow the law relevant to their work. For example, the Equality Act 2010 … prohibit[s] doctors from discriminating directly or indirectly, against others, or from harassing them, on grounds of a protected characteristic.*" and to "*48. … treat patients with respect whatever their life choices and beliefs*".

39. Taking the view that "*refusing to refer to a transgender person by his/her/their birth sex, or relevant pronouns, titles or styles would constitute unlawful discrimination or harassment under the EqA*" (ET paragraph 201), the ET concluded that the claimant's (a) belief in Genesis 1:27; (b) lack of belief in transgenderism; and (c) conscientious objection to transgenderism "*fall foul of Grainger*" (ET paragraph 202). It considered that conclusion was compatible

with the **ECHR**, given that "*the right to manifest a religion or belief is subject to art. 9(2) which includes 'the protection of the rights and freedoms of others'*." (ET paragraph 203). To the extent, therefore, that the claimant's complaints were contingent upon those beliefs, the ET held they must fail.

40. The ET went on, however, to consider the claimant's case on its merits, making findings in the alternative on each of the claims before it.

Harassment

41. The claimant's complaint of harassment relied on four incidents of unwanted conduct: (1) Mr Owen calling the claimant out of his work on Wednesday 13 June 2018 to "*interrogate*" him about his beliefs in relation to the use of pronouns, the claimant saying that he felt pressure to renounce his beliefs; (2) what the claimant contended had been his suspension on 14 June 2018; (3) Mr Owen's letter of 25 June 2018 asking the claimant if he would refer to service users by their "*chosen sexuality and name*", which the claimant again argued was pressure applied on him to renounce his beliefs; and/or (4) what the claimant characterised as his dismissal on 27 June 2018. Before the ET, the claimant clarified that he took no issue with the manner in which things were said or done, acknowledging that the individuals concerned were courteous and professional to him at all times. As the ET summarised his complaint:

> "207. …Essentially the issue he raises is that he was asked if he would refer to service users by their chosen … style or title, relevant pronouns and their name, and that equated to the respondent applying pressure upon him to renounce his beliefs."

42. The ET accepted that the treatment afforded to the claimant in this case was both unwanted by him and related to his stated beliefs (ET paragraph 209). It concluded, however, that the claimant's perception of events was unreliable, finding that: (1) Mr Owen had not called him out of his work on 13 June 2018 and he was not interrogated about his beliefs; and (2) as for the "suspension", the claimant had asked to be excused from providing assessments on 14

June 2018, after Mrs Harrison had sought to persuade him to stay at work. More generally (and relevantly for complaints (3) and (4)), the ET found that the claimant's real complaint related to the fact that the respondents sought to clarify with him, via Mr Owen, what his position was (accepting that was done in a professional and polite way); but, although the respondents were considering how to address the claimant's concerns, the ET held:

> "213. … they had taken no decision on that at that time; indeed, … they were still, from their perspective, at the information gathering stage, as both the meeting on 13 June and subsequent events demonstrate. …
>
> 214. In our judgment the respondents were doing exactly what paragraph 11 of the GMC guidance … required [the claimant] to do namely to be '*open with employers, partners or colleagues about your conscientious objection. You should explore with them how you can practice in accordance with your beliefs without compromising patient care and without overburdening colleagues*'…."

43. The ET further recorded that the claimant had accepted that "*it was only right that Mr Owen address those matters with him*" (ET paragraph 214). Although, therefore, the ET accepted that the conduct in question was unwanted by the claimant and related to his beliefs, it found "*the purpose of those enquiries was not to violate [the claimant's] dignity or create an adverse environment for him nor viewed objectively did it have that effect.*" (ET paragraph 216)

Direct Discrimination

44. In his claim of direct discrimination, the claimant relied on the same four matters as he had in respect of his complaint of harassment, contending he had thereby been treated less favourably because of his beliefs (a)-(c). The ET disagreed; considering matters in the round, it held that the reason for the claimant's treatment:

> "222. … was that the [first respondent] (and thus [the second respondent]) wanted to treat its service users in the manner (using the style, titles and/or pronouns) of their choosing … any person holding [the claimant]'s beliefs would have been treated in the same way as a person not holding those beliefs who refused to refer to a service user using the service user's preferred pronoun(s), style and/or title of choosing".

On that basis, the ET held that the claimant's treatment was not indissociable from his beliefs:

> "… because other persons who did not hold those beliefs would have been treated in the same way."

45. The ET found that the respondents' policy meant that the first respondent complied with its public sector equality duty, reduced the risk of claims of harassment and other forms of discrimination (and the potential for harm to service users), and avoided reputational damage. It was clear, however, that these were not the reason for the conduct in issue but were the consequences of that conduct (ET paragraph 223).

46. The ET considered the claimant's case was akin to that of Ms Ladele (as described by Elias J, as he then was, at paragraph 52 **Islington Borough Council v Ladele** [2009] ICR 387 EAT), that is: "*about a failure to accommodate [his] difference, rather than a complaint that [he] was being discriminated against because of that difference*", and thus analogous to that summarised by the Supreme Court in **Lee v Ashers Baking Co Ltd** [2018] 3 WLR 1294, at paragraph 23, as follows:

> "… The reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way. In *Islington Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] 1 WLR 955, para 29, Lord Neuberger of Abbotsbury MR adopted the words of Elias J in the EAT: "*It cannot constitute direct discrimination to treat all employees in precisely the same way*". By definition, direct discrimination is treating people differently."

47. The ET therefore rejected the claimant's complaint of direct discrimination.

Indirect Discrimination

48. It was the claimant's case that the respondents had applied the following provisions, criteria or practices ("PCPs"): (1) requiring all HDAs to use such pronouns as may be preferred by a particular client, regardless of that client's biological sex; (b) in the event of doubt, requiring an HDA to confirm his or her adherence to the said PCP at an early stage of their training and

without any such issue arising in practical work; (3) imposing a penalty for non-compliance with the said PCPs of suspension and/or dismissal.

49. It was common ground before the ET that the first PCP relied on by the claimant had been applied. As for the second PCP, the ET found that whilst this was not a practice – it was a response to a set of circumstances emanating from an individual wishing to opt out of compliance with the first PCP – as the respondents would have responded in the same way whenever that issue arose, it too constituted a PCP. The ET did not, however, accept that the third PCP had been applied, finding:

> "229. … this was in no sense whatsoever the necessary consequence of events nor was the claimant suspended nor dismissed … the respondents sought … to accommodate the claimant's position and to clarify his position before taking any further steps."

50. The ET accepted that the claimant suffered an individual disadvantage. As for group disadvantage, the ET noted that the claimant accepted that not all individuals who describe themselves as Christian would share his beliefs. To the extent that such individuals did not hold (a) a belief in Genesis 1:27, or (b) a lack of belief in transgenderism; or (c) a conscientious objection to transgenderism, the ET was satisfied that they would have been able to comply with the PCP in issue; equally, it concluded, those who did hold those particular beliefs would not (ET paragraphs 234-237).

51. Turning to the question of justification, the first respondent contended that the PCPs were necessary and proportionate to achieve the following legitimate aims: (a) to ensure transgender customers were treated with respect and in accordance with their rights under the **EqA**, in particular to ensure such customers were not discriminated against in respect of services provided by the first respondent, its employees or contractors; and/or (b) to provide a service complying with an overarching policy of commitment to the promotion of equal

opportunities and, therefore, requiring employees and contractors to act in a way which did not discriminate against others. The ET accepted that the first respondent had indeed acted:

> "140. … out of a concern to ensure that transgender service users were treated with respect and in accordance with their rights under the EqA … [which] … stemmed directly from the legitimate concern by [the first respondent] that if it failed to treat transgender service users with respect and in accordance with their rights under the EqA then such claims could ensue and as a consequence it was at risk of reputational damage".

The ET further found that concern was supported by the issue Mrs Harrison had had to address the previous year (as referenced at paragraph 11 above).

52. Given the reason for the assessment and the sensitivities involved, the ET found it was incumbent upon the first respondent to avoid the risks it had identified, and accepted that the first respondent's policy was to ensure that those consequences did not arise and that transgender service users were treated with respect, in accordance with their rights under the **EqA**, and in accordance with the first respondent's duties as a public authority to promote equal opportunities and not to discriminate (which we understand to include the public sector equality duty, pursuant to Chapter 1, Part 11 **EqA**). Those were legitimate aims, which underlay and were the basis for the application of the PCPs (ET paragraph 240).

53. As for proportionality, the ET found that the first respondent had considered whether the claimant's beliefs could be accommodated but had concluded that there were no options that would have prevented offence, or the potential for offence, to be caused to a transgender service user; that was particularly so as a service user's wish to be identified other than by reference to their birth sex might only become apparent during an assessment. As was common ground, the claimant did not have the necessary experience for the first alternative identified by the first respondent (desk work). The second alternative was for the claimant to assess only non-transgender service users, but a service user's wish to be identified other than by reference to their birth sex might only become apparent during an assessment (in particular

in cases involving mental health impairments, where service users were not required to give details of their conditions in advance). The claimant had argued that this difficulty might have been overcome by a form of triaging but the ET found that the evidence demonstrated that transgender service users had a heightened sensitivity to the questions that would be necessitated by such a triage appointment and, however carefully addressed, these would be likely to cause offence. Similarly, the ET concluded, once an assessment appointment had commenced, a referral by the claimant to another HDA (the other possibility canvassed by the claimant before the ET) would again - however carefully the issue was addressed - be likely to cause offence. In addition, such measures would cause delay and additional stress, which would be a greater issue for service users with mental health issues (ET paragraphs 242-251).

54. In the claimant's opening skeleton argument for the ET hearing, a further alternative had been canvassed, that, when dealing with transgender service users, he might simply avoid using pronouns altogether. As the ET recorded, however, this was an argument that the claimant abandoned during the hearing (ET paragraph 81), such that the only alternatives identified were as set out in the preceding paragraph.

55. The ET acknowledged that the claimant would be unlikely to have to assess transgender service users more than "*a handful of times per year*", and that not all those who might wish to be referred to by the style and pronouns of their choosing would fall within the relevant **EqA** protected characteristic (gender reassignment), and yet fewer would have full gender recognition certificates so as to give rise to a breach of the **GRA**. It observed, however, that, to be able to identify which protected category (if any) individuals who were being assessed fell within (and thus whether the **EqA** applied), would necessitate questions, that, however sensitively they were couched, "*would have constituted potential harassment or discrimination within the **EqA** (if it applied)*" and might also give rise to a possible breach by the first respondent of its other legal duties, to reputational damage, and to the risk of harm to

the service user (ET paragraphs 253-255). Moreover, as it was the claimant's position that he could not in conscience refer to individuals who had obtained full gender recognition certificates by their non-birth gender, this might also give rise to a potential breach of the **GRA** (ET paragraph 257).

56. The ET found that the first respondent had considered the possible alternatives in this case but concluded they were not workable. That conclusion was conveyed to the claimant by Mr Owen on 13 June 2018, who had asked the claimant to think again, thus providing the claimant with the opportunity to raise additional alternatives but he had not done so, which suggested that proportionate alternatives were not available (ET paragraph 258).

57. Carrying out the requisite balancing exercise, the ET considered that all these matters outweighed the effect on the claimant and his beliefs. The balance thus fell in favour of the respondents (ET paragraphs 259-260).

The Appeal and the Parties' Submissions

Religion or Belief

58. By grounds of appeal 1-3, the claimant contends that the ET erred in its approach to defining religion and belief as a protected characteristic. He submits:

(1) The reasoning of the EAT in **Forstater v CGD Europe** [2022] ICR 1 applies *a fortiori* to the present case, where the beliefs in question are religious in nature. The claimant's (b) lack of belief in transgenderism, and (c) conscientious objection to transgenderism were extrapolations from his belief in Genesis 1:27, which was the philosophical source of his beliefs. The ET was wrong to find that these beliefs conflicted with the fundamental rights of transgender individuals and had applied too high a threshold for the protection of belief; its reasoning in relation to **Grainger** (v) could not stand.

(2) The ET had also erred in respect of the other **Grainger** criteria. The claimant's beliefs were not mere opinions or viewpoints based on the current state of available information but were inherent to his faith. His beliefs had a concern for human dignity and were derived from a single philosophical source; it was an error for the ET to find that one aspect of that belief, but not another, met the requirements of **Grainger** (ii), (iii) and (iv).

59. For the respondents, it is argued:

(1) Merely attaching a belief to a religion cannot give that belief a protected nature it would not otherwise have (**McFarlane v Relate Avon Ltd** [2010] EWCA Civ 880; [2010] IRLR 877, paragraphs 21-23); even if a belief is a religious belief, it must still meet the threshold requirements (**R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC 246, HL, paragraph 23). Although its decision pre-dated **Forstater**, Mr Moretto (for the first respondent) argues the ET did not err in its approach to **Grainger** (v), which required that the belief must meet each of the three requirements there specified; an inherently transphobic belief must fall outside the protection (see **Grainger** paragraph 28 and the examples given of racist or homophobic beliefs). In oral argument, Mr Kohanzad (for the second respondent) conceded, following **Forstater**, the claimant's belief at (a), that sex was immutable, could not be said to offend against **Grainger** (v); otherwise, however, the second respondent adopts the arguments of the first.

(2) The progressively narrower way in which the claimant's beliefs were characterised suggested he was seeking to define his belief so as to ensure it was indissociable from the PCP in this case. As his argument demonstrated, however, the claimant's (b) lack of belief in transgenderism and (c) conscientious objection to

transgenderism could only be understood in the light of (a) his belief in Genesis 1:27; viewed separately, the beliefs specified at (b)(ii) and (iii) and at (c) did not satisfy the **Grainger** criteria (ii)-(iv): they were viewpoints or opinions and did not attain the required level of cogency.

Direct Discrimination and Harassment

60. The claimant further contends, as part of ground 3, that the ET's error on belief was so fundamental that its findings on direct discrimination and harassment (expressed in the alternative) could not stand. In argument, the claimant expanded on this point (albeit these arguments were not foreshadowed by his grounds of appeal), submitting:

(1) The respondents' decisions were informed not by any application of a policy but by the claimant's statement of his beliefs; that was the true reason for the detrimental treatment and for his dismissal.

(2) The claimant's inability to use the preferred pronouns of transgender service users was indissociable from his conscientious objection to transgenderism. Even if it might have been a benign motive for the direct discrimination, the respondents' concern over potential harassment or discrimination of service users was, therefore, not "*the reason why*"; see **R(E) v JFS** [2010] 2 AC 728 SC; **Amnesty International v Ahmed** [2009] ICR 1450, EAT.

(3) The ET's approach to belief inevitably impacted upon the question whether the unwanted conduct objectively had the effect of creating the prohibited environment for the purposes of the claimant section 26 harassment claim.

61. For the respondents, it is contended:

(1) There is no separate ground of challenge to the ET's findings on the claims of harassment and direct discrimination; the grounds of appeal merely asserted that any error in the ET's approach to the question of belief must render its conclusions in respect of these claims unsafe. That failed to engage with the ET's alternative reasoning, which was expressly predicated upon the assumption that the claimant had established that his beliefs fell within the protection of the **EqA**.

In any event:

(2) The ET's findings of fact relevant to the claims of harassment and direct discrimination were not (and could not be) challenged.

(3) Moreover, the ET's approach to the claim of direct discrimination was plainly correct (and see **Page v NHS Trust Development Authority** [2021] EWCA Civ 255; [2021] ICR 941).

Indirect Discrimination

62. By his remaining grounds of appeal, the claimant contends that the ET further erred in its alternative finding on indirect discrimination, as follows:

(1) As with its analysis in relation to direct discrimination and harassment, the ET's conclusions on indirect discrimination were rendered unsafe given its determination that the claimant's beliefs were not worthy of protection.

(2) The ET had, further, failed to properly assess the impact on others holding the claimant's religion or belief (as evidenced by documentation from the Evangelical Alliance and the Christian Medical Fellowship).

(3) As for its approach to justification, the ET had: (i) wrongly required the claimant to prove (contrary to section 19(2)(d) **EqA**) how his beliefs should have been accommodated; (ii) failed to carry out the requisite balancing exercise, failing to balance the severity of the effect on the rights of the claimant (**Bank Mellat v HM Treasury (No. 2***)* [2014] AC 700, paragraph 4); (iii) failed to identify the precise factors and specific context (focusing on face-to-face assessments) when holding that indirect discrimination was justified; (iv) failed to take into account paragraph 151 of the first respondent's policy, which sought to avoid the use of gender-specific terminology; (v) wrongly interpreted the expert evidence before it.

63. The respondents submit, however:

(1) The ET had properly (see **Forstater**, paragraph 119) gone on to determine the claim of indirect discrimination on the assumption that the claimant had established that his beliefs were protected characteristics for the purposes of the **EqA**; its alternative reasoning was not impacted by its earlier findings on belief.

(2) The ET's approach to group disadvantage could not be faulted: it found that those Christians who did not hold the claimant's narrower beliefs would suffer no disadvantage as they would be able to comply with the PCPs; to the extent that Christians did share the claimant's narrower beliefs, however, the ET had accepted they would suffer the requisite group disadvantage (see ET paragraph 237).

(3) The ET's approach to justification and proportionality was also correct. The claimant was seeking to re-argue the facts of the case, suggesting alternative options that he had not canvassed below.

The Law

Religion or belief

64. It is the claimant's case that he has suffered direct and indirect discrimination because of a relevant protected characteristic, namely his religion or belief, and/or that he has suffered harassment related to his religion or belief.

65. Section 4 **EqA** provides that religion or belief are protected characteristics; for these purposes, religion and belief are defined at section 10 **EqA**, as follows:

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

66. The starting point is to define exactly what the belief is, see **Gray v Mulberry Co (Design) Ltd** [2020] ICR 715, CA. Having thus identified the belief in issue, the question will be whether it is capable of amounting to a "philosophical belief" for the purpose of section 10.

67. There is an obligation pursuant to section 3 of the **Human Rights Act 1998** to read and give effect to statutory provisions in a way which is compatible with the rights conferred by the **European Convention on Human Rights** ("the ECHR"). Relevantly, by article 9 **ECHR**, it is provided:

> "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."

68. In **Eweida v United Kingdom** [2013] 57 EHRR 8, ECtHR, the following general principles were identified in relation to article 9 **ECHR**:

> "79. … as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A).
>
> 80. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. … Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.
>
> 81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance … Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed ….
>
> 82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 …. In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. … the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question …."

69. In **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC 246, HL, considering the potential application of article 9 **ECHR** to what was said to be a religious belief in corporal punishment for children, Lord Nicholls provided the following guidance, making clear that religious and philosophical beliefs are to be approached in the same way:

> "23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention ….
>
> 24. This leaves on one side the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious. This question will seldom, if ever, arise under the European Convention. It does not arise in the present case. In the present case it does not matter whether the claimants' beliefs regarding the corporal punishment of children are categorised as religious. Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. …."

70. That a belief does not gain protection merely by virtue of its being a religious belief was also made clear by Laws LJ, refusing an application for permission to appeal in **McFarlane v Relate Avon Ltd** [2010] EWCA Civ 880, at paragraphs 21-23.

71. Considering what is meant by "philosophical belief" under domestic law, and drawing on the guidance provided, in particular, by the ECtHR in **Campbell and Cosans v UK** (App 7511/76) (1983) 4 EHRR 293 and by the House of Lords in **R (Williamson)**, in **Grainger plc and ors v Nicholson** [2010] ICR 360, EAT, Burton J set out the following criteria:

> "24. …
>
> (i) The belief must be genuinely held.
> (ii) It must be a belief and not … an opinion or viewpoint based on the present state of information available.
> (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
> (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
> (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others …."

72. The second of the **Grainger** criteria also reflected the decision reached in the earlier case of **McClintock v Department of Constitutional Affairs** [2008] IRLR 29, EAT. Mr McClintock was a justice of the peace who complained of discrimination by reason of religion or belief in being asked to potentially place children with same sex parents when he took the view that, in conscience and compatibly with his philosophical and religious beliefs (he was a practising Christian), he could not agree to such a course. It was not Mr McClintock's case that he rejected, as a matter of principle, the possibility that a placement with same sex parents might be in a child's best interests, but he considered the evidence supporting that view was unconvincing. Dismissing Mr McClintock's appeal, the EAT concluded that the ET had been entitled to find that his views did not fall within the scope of the protection, reasoning that:

> "45. … to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes, it is not enough 'to have an opinion

> based on some real or perceived logic or based on information or lack of information available'."

73. The ET's decision in the present case requires us to consider further the distinction drawn in **McClintock** between a belief and an opinion or viewpoint based on the present state of information available. This is not a distinction between faith based beliefs and beliefs founded on science; as Burton J made clear in **Grainger**:

> "30. … if a person can establish that he holds a philosophical belief which is based on science, as opposed, for example, to religion, then there is no reason to disqualify it from protection …"

Equally, the distinction cannot be said to exclude a philosophical belief that does not constitute "*a fully-fledged system of thought*" (see **Grainger** at paragraph 27, referring to the conclusion of the ECtHR in **Campbell v United Kingdom** 4 EHRR 293, at paragraph 36), or a belief based upon an objectionable political philosophy (see **Grainger** at paragraph 28, where it was suggested that (for example) "*a racist or homophobic political philosophy*" might instead be held to offend against the requirement at criterion (v)).

74. What then is the distinction between a philosophical belief and an opinion or viewpoint based on the present state of available information? In **Harron v Chief Constable of Dorset Police** [2016] IRLR 481, EAT, the ET had found the belief in issue (in the proper and efficient use of money in the public sector) did not satisfy **Grainger** criteria (ii), (iii) and (iv), holding that it was *"not so much a belief but a set of values which manifest themselves as an objective or goal principally operating in the work place ...*". The EAT allowed Mr Harron's appeal on this point, holding that the ET's reasoning failed to demonstrate a proper application of **Grainger**; referring to the terminology used by the ET, the EAT observed:

> "36. … This no doubt is intended to be a reference to a case such as that of *McClintock*. *McClintock* was a case in which a registrar had a view as to the effect of allowing same-sex partners to adopt children, but he took this view not as a matter of principle but as a matter of that which the evidence then available showed to him. It was not so much therefore a matter of belief as of opinion based upon the facts then available to him. There is no discussion by

> this tribunal that could place the belief of this claimant into that category. That is not to say that the argument may not be made and may not succeed, but it is certainly not obvious why it would. Moreover, the words 'which manifest themselves as an objective or goal principally operating in the work place' are also problematic. An objective or a goal may be the result of adopting a particular belief. …."

75. That said, the EAT did not agree with Mr Harron, that the ET had erred by excluding a belief that operated merely in the workplace:

> "37. … where a belief has too narrow a focus it may, depending upon the width of that focus, not meet the standards at the appropriate level identified in summary by Burton J and explored in greater detail in paragraph 23 of Lord Nicholls's speech in *Williamson*. After all, he was asking that the belief be a belief on a fundamental problem. That might be thought to exclude beliefs that had so narrow a focus as to be parochial rather than fundamental."

76. More generally, the EAT in **Harron** warned that it was insufficient to simply set out the **Grainger** wording: regard should be had to the way in which the criteria are to be applied:

> "34. … as, for instance, indicated by the speech of Lord Nicholls [in *Williamson*], … [who] made it clear that the belief must relate to matters more than merely trivial. That is a hint towards the approach that regards as substantial that which is more than merely trivial. The fact that he meant it in that sense is indicated by the use of the word 'again' in the expression, 'But, again, too much should not be demanded in this regard', when talking about the meaning of 'coherence'. 'Coherence' is to be understood in the sense of being intelligible and capable of being understood. … The paragraph ends with a plea not to set the threshold requirements at too high a level. …"

77. It seems to us that difficulties can arise in seeking to define in general terms the precise distinction between a philosophical belief, on the one hand, and an opinion or viewpoint based on the present information available, on the other. As a minimum, however, a philosophical belief implies the acceptance of a claim, whether founded on science or faith, and – as something that amounts to a protected characteristic - it must be capable of being understood as a characteristic of the individual in question. As we consider the EAT allowed in **Harron**, an opinion or viewpoint might be a manifestation of a belief but, where it is dependent upon the present information available, it may be found, as in **McClintock**, that there is in fact no link between that opinion or viewpoint and any religious or philosophical belief. Moreover,

the additional test of cogency, seriousness, cohesion and importance (**Grainger** (iv)) may mean that the more narrowly a belief is defined the less likely it is to be found to be a philosophical belief for the purposes of section 10 **EqA**.

78. Turning, more specially, to the test at **Grainger** (v), in our approach to the questions raised in relation to the statements of belief at the heart of this case, we are assisted by the recent Judgment of the EAT in **Forstater v CGD Europe** [2022] ICR 1, which addresses a number of the matters we are required to consider on this appeal.

79. The question for the EAT in **Forstater** was whether the ET had erred in concluding that the claimant's belief, that sex was immutable, failed criterion (v) of **Grainger** (namely, that it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others). Having been referred to numerous authorities emphasising the importance given by the ECtHR to diversity and pluralism of thought, belief and expression, and their foundational role in a liberal democracy, at paragraph 55 of its Judgment the EAT helpfully summarised the key principles that might be derived from that case-law. Focusing on article 9 **ECHR**, and the right to freedom of religion and belief, we set out those principles in précis form:

(1) In assessing any belief, it is not for the court to inquire into its validity: "*Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising*.", per Lord Nicholls at paragraph 22 **R (Williamson)**. That said, when issues of manifestation arise, "*a belief must satisfy some modest, objective minimum requirements*" per Lord Nicholls at paragraph 23 **R (Williamson)**; those requirements we take to be as set out in the five stage test identified in **Grainger**.

(2) Freedom to hold any particular belief goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgement as to whether a

particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other; **Eweida v UK** paragraph 81, **Metropolitan Church of Bessarabia v Moldova** (2002) 35 EHRR 13 at paragraphs 115 and 116.

(3) A belief that has the protection of article 9 **ECHR** is one that only needs to satisfy very modest threshold requirements and, as stated by Lord Nicholls at paragraph 23 **R (Williamson)**, those threshold requirements "*should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention*"; the bar should not be set too high, see **Harron** at paragraph 34.

80. In asking what standard a court or tribunal should apply in determining whether a particular belief falls foul of the threshold requirement arising from **Grainger** (v), the EAT in **Forstater** considered it instructive that in **Campbell and Cosans** the ECtHR had referred to article 17 **ECHR**. In that case it had been claimed that the use of corporal punishment by a school to discipline a child would amount to a violation of article 2 of Protocol no. 1 **ECHR**, namely the need to respect "*the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*". Having concluded that the term "*philosophical convictions*" was akin to "*beliefs*" for article 9 purposes, the ECtHR held that:

> "Having regard to the Convention as a whole, including Article 17 … the expression "philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a "democratic society" … and are not incompatible with human dignity;"

81. Article 17 prohibits the use of the **ECHR** to destroy the rights of others, providing:

> "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."

82. The EAT in **Forstater** reasoned that article 17:

> "59. … becomes relevant where a State, group or person seeks to rely on Convention rights in a way that blatantly violates the rights and values protected by the Convention. One cannot, for example, rely on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy…."

It further observed, however, that:

> "… The level at which Article 17 becomes relevant is clearly (and necessarily) a high one. The fundamental freedoms and rights conferred by the Convention would be seriously diminished if Article 17, and the effective denial of a Convention right, could be too readily invoked: see *Vajnai v Hungary* (2010) 50 EHRR 44 at paras 21 to 26. Thus, when the ECtHR refers to Article 17 (as it did in *Campbell and Cosans v UK)* in considering whether a philosophical conviction is worthy of respect in a democratic society and not in conflict with the fundamental rights of others, it would have had in mind that it is only a conviction that e.g. challenges the very notion of democracy that would not command such respect. To maintain the plurality that is the hallmark of a functioning democracy, the range of beliefs and convictions that must be tolerated is very broad. It is not enough that a belief or a statement has the potential to "offend, shock or disturb" (see *Vajnai* at para 46) a section (or even most) of society that it should be deprived of protection under Articles 9 (freedom of thought conscience and belief) or Article 10 (freedom of expression). The stipulation that the conviction or belief must not be in conflict with the fundamental rights of others must also be viewed with regard to Article 17. The conflict between rights in this context of satisfying threshold requirements is not merely that which would arise in any case where the exercise of one right might have an impact on the ECHR rights of another; in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others."

83. Further, referring back to Burton P's reliance on paragraph 23 **R (Williamson)** in the formulation of the **Grainger** criteria, the EAT in **Forstater** noted that, in considering what beliefs might fall outside the protection of article 9, Lord Nicholls had opined that "*Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection*,". The EAT reasoned:

> "61. The reference there to a belief involving 'torture or inhuman punishment' is consistent with the principle that only the gravest violations of Convention principles should be denied protection. Such violations go far beyond what might be regarded as potentially justifiable interference with a right: they seek to destroy such rights."

It continued:

> "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. … 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. We do not consider that the ECtHR would have referred to article 17, or the House of Lords to 'torture and punishment', if a belief involving some lesser violation of others' rights - not sufficiently grave to engage article 17 - was also capable of being not worthy of such respect."

84. The EAT in **Forstater** thus concluded that it would only be "*in extremely limited circumstances in which a belief would be considered so beyond the pale*" that it would not qualify for any protection under article 9 **ECHR**. Recognising that the architecture of the **EqA** did not precisely follow the structure of the **ECHR**, the EAT nevertheless considered:

> "68. In determining whether a person falls within section 10 of the EqA, the tribunal is … considering only whether the person falls within the scope of the relevant protection at all. At this stage, therefore, in order to ensure that section 10 of the EqA is applied compatibly with article 9 of the ECHR, the question will be whether the belief meets the 'modest threshold requirements' as established by the case law, and as encapsulated in the *Grainger* criteria. In relation to *Grainger* V, that means that only those beliefs whose characteristics are such that they would fall outside the scope of article 9 of the ECHR by virtue of article 17 would fail to satisfy that criterion.
>
> 69. … it is correct, in our judgment, to apply s 10 EqA with art 17, ECHR in mind."
>
> See also **Forstater** at paragraph 102.

85. Moreover, as the EAT went on to make clear, this approach does not change depending on whether the court is concerned with a belief *simpliciter* or with the manifestation of a belief:

> "77. … at this preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the analysis (assuming that there is any manifestation at all) and should be considered only in determining whether the belief meets the threshold requirements in general. It is also right to note that an approach that places the focus on manifestation might lead the Tribunal to consider whether a particular expression or mode of expression of the belief is protected, rather than concentrating on the belief in general and assessing whether it meets the *Grainger* criteria.

> 78. That approach follows from the language of s.10, EqA which, as we have said, is concerned only with whether a person *has* the protected characteristic by being *of* the religion or belief in question, and not with whether a person *does* anything pursuant to that religion or belief."

86. Summarising its approach, the EAT concluded:

> "79. In our judgment, it is important that in applying Grainger V, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be."

87. The EAT subsequently returned to this point, postulating a belief that would be likely to fall outside **Grainger** (v) (with which Ms Forstater's belief was not comparable):

> "100. Some beliefs, for example a belief that all non-white people should be forcibly deported for the good of the nation, are such that any manifestation of them would be highly likely to espouse hatred and incitement to violence. In such cases, it would be open to the Tribunal to say that the belief fails to satisfy *Grainger* V. However, the rationale for doing so would be that it is the kind of case to which Article 17 might be applied because of the inevitability that the rights of others would be destroyed. The Claimant's belief is not comparable."

88. The EAT in **Forstater** also addressed the question whether the existence of a gender recognition certificate ("GRC") would mean that a claimant was not entitled in any circumstances to refer to a trans woman holding such a certificate as a man (or, presumably, a trans man holding such a certificate as a woman). It recorded that, pursuant to section 9 of the **GRA**, the gender of a person with a GRC (save for certain specified circumstances) "*becomes for all purposes the acquired gender.*" Acknowledging that the **GRA** made it an offence to disclose information acquired in an official capacity as to the pre-acquired gender of an individual holding a GRC, the EAT nevertheless concluded that there was nothing in the **GRA** "*that requires a person acting in any private capacity to refer to a person's acquired gender or to refrain from referring to a person's gender before it became the acquired*

gender." (see **Forstater** paragraph 94). The EAT further explained its reasoning in relation to Ms Forstater's beliefs in cases where an individual held a GRC, as follows:

> "99. The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the claimant, continues to believe that a trans woman with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not, any more than the recognition by the state of civil partnerships can compel some persons of faith to believe that a marriage between anyone other than a man and a woman is acceptable. That is not to say, of course, that the claimant can, as a result of her belief, disregard the GRC; clearly, she cannot do so in circumstances where the acquired gender is legally relevant, eg in a claim of sex discrimination or harassment."

89. The EAT in **Forstater** allowed that referring to a trans person by their pre-GRC gender in any of the settings in which the **EqA** applies might amount to harassment related to one or more of the following protected characteristics: gender reassignment (where the definition at section 7(2) **EqA** was satisfied), sex (see **P v S and Cornwall County Council** [1996] IRLR 347 at paragraphs 17-22), disability based on the conditions of gender dysphoria or gender identity disorder (see **EHRC Code** at paragraph 2.28), or to a philosophical belief that gender identity is paramount and that a trans woman is a woman. As to whether it would in fact amount to harassment, however, the EAT concluded that would depend:

> "99. … as in any claim of harassment, on a careful assessment of all relevant factors, including whether the conduct was unwanted, the perception of the trans person concerned and whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the trans person. …whether there is harassment in a given situation is a highly fact-sensitive question."

90. More specifically, the EAT addressed the suggestion that had been made by the ET in **Forstater**, that the claimant must be required to refer to a "*trans woman as a woman to avoid harassment*", finding that wrongly imposed what was, in effect, a blanket restriction on a person not to express those views irrespective of any specific circumstances (see **Forstater** paragraph 103), albeit the EAT observed:

> "104. That does not mean that in the absence of such a restriction the Claimant could go about indiscriminately "misgendering" trans persons with impunity. She cannot. The Claimant is subject to same prohibitions on discrimination, victimisation and harassment under the EqA as the rest of society. Should it be found that her misgendering on a particular occasion, because of its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EqA. The fact that the act of misgendering was a manifestation of a belief falling within s.10, EqA would not operate automatically to shield her from such liability. The Tribunal correctly acknowledged, at para 87 of the Judgment, that calling a trans woman a man "may" be unlawful harassment. However, it erred in concluding that that possibility deprived her of the right to do so in any situation."

91. The EAT in **Forstater** also considered that the ET had erred in its approach to the alternative formulation of Ms Forstater's claim, as one of *lack of belief*. Finding that the ET had wrongly assumed that the lack of belief necessarily denotes holding a positive view that is opposed to the belief in question, the EAT explained:

> "106 … a lack of belief under section 10 of the EqA is merely the absence of belief: see *Grainger* [2010] ICR 360 at para 31. A lack of belief may arise from simply not having any view on the issue at all, either because of indifference, indecision or otherwise. It would also include a person who has some views on the issue but would not claim to have a developed philosophical belief to that effect. … That lack of belief is protected under section 10(2) of the EqA irrespective of whether the *Grainger* criteria could be applied to it. Indeed, it is difficult to see how the *Grainger* criteria could be applied to a person who held no view on an issue at all."

92. The belief that Ms Forstater did not subscribe to was described as being the "*gender identity belief*", that "*everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and trans women are women*." (**Forstater** paragraph 107). Accepting that the gender identify belief was a philosophical belief, the EAT ruled that the ET had fallen into error:

> "108. … instead of treating the claimant's lack of the gender identity belief as also qualifying for protection, the tribunal treated the claimant's lack of that belief as necessarily equating to a positive belief that trans women are men (which the tribunal considered to be a belief not worthy of protection). In our judgment, that approach was wrong. The fact that the claimant did not share the gender identity belief is enough in itself to qualify for protection. …"

93. The EAT was clear, if an individual was treated less favourably by their employer for their failure to profess support for such a belief, that could amount to unlawful discrimination because of a lack of belief. Moreover:

> "109. There was no 'sleight of hand' here as suggested by the tribunal in putting the claim on the basis of a lack of belief. That is a valid course open to putative claimants and its efficacy should not be undermined by treating any lack of belief as necessarily amounting to a positive opposing belief."

94. Returning to the question whether Ms Forstater's belief fell within section 10 **EqA**, the EAT concluded:

> "110. On a proper application of *Grainger* V, as analysed above, it seems to us that the only possible conclusion is that the claimant's belief does fall within section 10 of the EqA.
>
> 111. Most fundamentally, the claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of article 17. That is reason enough on its own to find that Grainger V is satisfied. The claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the tribunal was that she believed that it is not 'incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender': see para 39.2 of the judgment. That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether."

Harassment; Direct Discrimination; Indirect Discrimination

95. The claimant complained of harassment, direct discrimination and indirect discrimination. Such forms of conduct are defined for the purposes of the **EqA**, (relevantly) as follows:

> "Section 26 Harassment
>
> (1) A person (A) harasses another (B) if- (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of- (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) …
>
> (3) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account- (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are- age; disability; gender reassignment; race; religion or belief; sex; sexual orientation."

"Section 13 Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

"Section 19 Indirect Discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if- (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are- age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

96. The claimant contends that the ET erred in its approach to direct discrimination. It is his case that, whatever the intent, the respondents' actions were taken for a reason that was indissociable from his beliefs.

97. It is right to say that, where the reason for the treatment complained of is inherent in the act in issue, it is irrelevant that the putative discriminator might have acted with some benign intent: the protected characteristic will be indissociable from the less favourable treatment and will constitute direct discrimination see **Amnesty International v Ahmed** [2009] ICR 1450, at paragraph 33. As was explained in **Lee v Ashers Baking Company Ltd** [2018] UKSC 49; [2020] AC 413, SC, the concept of indissociability:

> "… comes into play when the express or overt criterion used as the reason for less favourable treatment is not the protected characteristic itself but some proxy for it. Thus, in the classic case of *James v Eastleigh Borough Council* [1990] 2 AC 751, the criterion used for allowing free entry to the council's swimming pool was not sex but statutory retirement age. There was, however, an exact correspondence between the criterion of statutory retirement age and sex, because the retirement age for women was 60 and the retirement age for men was 65. Hence any woman aged 60 to 64 could enter free but no man aged 60 to 64 could do so. Again, in *Preddy v Bull* [2013] UKSC 73; [2013] 1 WLR 3741, letting double-bedded rooms to married couples but not to civil partners was directly discriminatory because marriage was (at that time) indissociable from hetero-sexual orientation. …". See per Baroness Hale at paragraph 25.

98. In other cases, however, the act complained of will not, of itself, be discriminatory but is rendered so by the mental processes (conscious or unconscious) which led the putative discriminator to do that act (see **Amnesty International v Ahmed** at paragraph 34). Where the relevant protected characteristic is religion or belief, there is a particular need for clarity as to the reason for the treatment complained of; as explained by Underhill LJ in **Page v NHS Trust Development Authority** [2021] EWCA Civ 255; [2021] ICR 941 CA:

> "68. … In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it …. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself."

99. Underhill LJ went on to observe that this distinction - between the respondent's reason for acting being the objectionable manifestation of a belief as opposed to the belief itself – achieved "*substantially the same result as the distinction in article 9 of the [ECHR] between the absolute right to hold a religious or other belief and the qualified right to manifest it*";

paragraph 74 **Page v NHS**. Addressing the argument that the reason for acting in that case was indissociable from Mr Page's religion or belief, Underhill LJ continued, at paragraph 78:

> "There is no difficulty in dissociating, in a proper case, an objection to a belief from an objection to the way in which that belief is manifested".

100. The claimant also complains of the ET's approach to his claim of indirect discrimination, in particular as to its approach to the question of group disadvantage and the issue of justification.

101. In assessing whether the PCPs relied on would put persons sharing the claimant's religion or belief at a particular disadvantage when compared with persons who did not, the ET focused on the specific beliefs relied on by the claimant in this case rather than his Christian religion more generally. As the ET noted, the claimant had accepted that not all individuals identifying as Christian would have the same beliefs as he (see the ET at paragraph 236). To the extent that his more specific beliefs amounted to a manifestation of the claimant's Christian faith, the ET was still required to consider whether there was a sufficiently close and direct nexus between that manifestation and the underlying religion or belief such as would result in a shared disadvantage to him and other holders of the religion or belief in question; see **Eweida v UK** at paragraph 82, and **Gray v Mulberry** at paragraphs 46-47.

102. As for the question of justification, the relevant legal principles are not in dispute; as summarised at paragraph 10 **MacCulloch v Imperial Chemical Industries plc** [2008] ICR 1334 EAT:

> "(1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways* [2005] IRLR 863 at [31].
>
> (2) The classic test was set out in *Bilka-Kaufhas GmbH v Weber Von Hartz* (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end' (para 36). This involves the application of the proportionality principle, which is the language used in

> regulation 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see *Rainey v Greater Glasgow Health Board (HL)* [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.
>
> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA."

103. Although section 19(2) places the burden of establishing justification firmly on the employer, it will be for the employee to challenge an assertion that there was nothing else that could have been done; as Baroness Hale observed in **Essop v Home Office, Naeem v MOJ** [2017] UKSC 27; [2017] 1 WLR 1343 SC:

> "47. … The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this court to do so."

104. Where rights under the **ECHR** are engaged, the ET is required to carry out:

> "20. … 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." See per Lord Sumption **Bank Mellat v Her Majesty's Treasury (No.2)** [2013] UKSC 39, [2014] AC 700.

105. Applying this approach in **Page v NHS**, where Mr Page was arguing that disciplinary action taken against him after his public expression of his beliefs amounted to an interference with his rights under article 9 **ECHR**, Underhill LJ observed that:

> "58. … The essential task of the Tribunal in the circumstances of this case was to balance the infringement of the Appellant's right to express in public beliefs that were evidently important to him against the importance to the Trust of mitigating or avoiding the risk of damage to its work from his remaining in post, …. This Court should only interfere with the way in which it struck that balance if we are satisfied that it was wrong.
> 59. The extent to which it is legitimate to expect a person holding a senior role in a public body to refrain from expressing views which may upset a section of the public is a delicate question which can only be decided by reference to the facts of each particular case. …"

106. As for the role of the Employment Appeal Tribunal, as Pill LJ observed in **Hardys & Hansons**, at paragraph 33:

> "… just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification."

Discussion and Conclusions

Religion or Belief

107. In determining whether the belief relied on by the claimant amounted to a protected characteristic for the purposes of the **EqA**, the starting point for the ET was to define exactly what the relevant belief was (**Gray v Mulberry**). There was (and is) no dispute that Christianity is a protected characteristic, but the claimant's complaints were not of how he was treated as a Christian but of how he was treated as a result of his holding (or not holding) certain more narrowly defined beliefs; it was those beliefs that the ET found fell outside the ambit of section 10 **EqA.** The claimant says there is an interconnection between his Christian faith and the three specific beliefs that lay at the heart of his case; he complains that, insofar as those beliefs formed part of his Christian faith, the ET's finding meant that his religion was not protected either. He further argues that the religious source of the beliefs in issue meant it was more likely that they fell to be treated as protected characteristics for the purposes of the **EqA**. The case the claimant pursued before the ET depended, however, upon the particular beliefs he relied on, rather than his

Christianity more generally, and, as he accepted, not all individuals who describe themselves as Christian would hold those beliefs. For its part, the ET had to determine the particular complaint the claimant had brought; it did not err in its focus on that which was in issue in the case before it. More than that, as the case-law makes clear, a belief does not gain protection merely by virtue of its being a religious belief; whether considered under the **ECHR** or the **EqA**, the belief must still meet the modest threshold requirements for protection (see **McFarlane v Relate**; **R (Williamson)**).

108. The relevant threshold criteria are those laid down in **Grainger**. In the present case, the ET accepted that the claimant's statements of belief were genuine and that (a) his belief in Genesis 1:27 and the first aspect of (b) – (i) his lack of belief that it is possible for a person to change their sex/gender – met the requirements of **Grainger** (ii), (iii) and (iv). It did not, however, accept that the remaining statements were more than opinions or viewpoints (**Grainger** (ii)), related to a weighty and substantial aspect of human life and behaviour (**Grainger** (iii)), or attained a certain level of cogency, seriousness, cohesion and importance (**Grainger** (iv)).

109. Given the matters to which the claimant's statements of belief related, if they satisfied the other **Grainger** criteria, we cannot see how they can properly be said *not* to relate to a weighty and substantial aspect of human life and behaviour (**Grainger** (iii)). The ET's reasoning in this regard is set out as follows:

> "196. As to (b)(ii) notwithstanding the low threshold, we find that the lack of belief impersonating the opposite sex may be beneficial for an individual's welfare, and/or (b)(iii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex are opinions or viewpoints predicated on the assertion that Transgenderism in Dr Mackereth's words is a "delusional belief[s]" by reference to the use of the word "impersonation" … and do not relate to a weighty and substantial aspect of human life and behaviour or attain a certain level of cogency, seriousness, cohesion and importance because of the narrowness of the issue they represent."

That passage does not, however, demonstrate any differentiation between the criteria at **Grainger** (ii), (iii), and (iv) and does not explain why the underlying issues addressed by the

claimant's statements of belief (or lack of belief) – that is, how society should treat those who present other than in conformity to their natal sex - would *not* relate to weighty and substantial aspects of human life and behaviour. To the extent that the ET found that the claimant's stated beliefs did not satisfy **Grainger** (iii), we consider it fell into error.

110. We have rather more sympathy, however, for the difficulties identified by the ET in relation to the criteria at **Grainger** (ii) and (iv). As the respondents have observed, the progressively narrow way in which the claimant's beliefs were defined meant it was hard to see those as meeting the relevant threshold (see **Harron** paragraph 37). That said, we consider that problems can be seen to arise in the ET's reasoning, (1) from a mischaracterisation of the statement made at (b), and (2) from an elision between belief and what might amount to a manifestation of that belief.

111. Focusing first on the matters set out at (b) - (i) that it is possible for a person to change their sex/gender, (ii) that "*impersonating*" the opposite sex may be beneficial for an individual's welfare, and/or (iii) that society should accommodate and/or encourage anyone's "*impersonation*" of the opposite sex – these were matters that the claimant understood to amount to the "*three tenets*" of a "*belief in Transgenderism*", which he did not share; as the claimant had stated, he had a *lack* of belief in "*Transgenderism*". Whether or not the claimant was correct in his understanding of what "*Transgenderism*" meant, as the EAT explained at paragraph 106 **Forstater**, this *lack* of belief fell to be protected under section 10 **EqA** irrespective of whether the **Grainger** criteria could be applied to it.

112. Even if that was not correct, however, it is difficult to understand the ET's approach to **Granger** (ii). As in **Harron**, there was no analysis by the ET that would suggest the particular views expressed at (b) and (c) were simply based on the information available (see **Harron** paragraph 36). Indeed, as the claimant has characterised those views, they are more

appropriately to be understood as extrapolations from (a), his belief in Genesis 1:27 (that a person cannot change their sex or gender at will and that any "*attempt at, or pretence of, doing so, is pointless, self-destructive, and sinful*"). So understood, we consider the statements at (b)(ii) and(iii) and at (c) are more properly to be characterised as manifestations of that belief: the claimant does not believe that "*impersonating the opposite sex may be beneficial*", or that it should be accommodated or encouraged by society, because he believes that an "*attempt … or pretence*" of changing sex or gender "*is pointless, self-destructive and sinful*"; likewise, he believes it would be irresponsible and dishonest for a health professional to accommodate or encourage such an "*attempt … or pretence*". These may be viewpoints, but they are based on the claimant's belief (a) in Genesis 1:27, not the present state of information available.

113. That said, we consider the ET did not err in its approach to **Grainger** (iv) in this regard; it was entitled to find that the more narrowly focused statements at (b) and (c), taken in isolation, did not have the required level of cogency, seriousness, cohesion and importance. Indeed, in our judgement, the relevant statements at (b) and (c) could only meet the **Grainger** (iv) test when understood in the context of the claimant's underlying belief at (a). That confirms to us that the statements in issue at (b) and (c) are properly to be understood as statements of opinion or viewpoints that make manifest the claimant's belief in Genesis 1:27. Although, therefore, we consider the ET erred in its approach to the claimant's more narrowly focused statements of belief, we do not think it was wrong in concluding that the statements at (b)(ii) and (iii) (to the extent that these represented positive beliefs at all) and at (c) would not, if considered in isolation, satisfy **Grainger** (iv).

114. We turn at this stage to the ET's further finding that the claimant's beliefs would not satisfy the criterion at **Grainger** (v), namely, that they must be worthy of respect in a democratic society, not incompatible with human dignity, and not conflict with the fundamental rights of others. In explaining its conclusion in this regard, the ET made clear that, taking into account

the factual context ("*Set against the background relayed by Dr Ahmed, Mrs Harrison and Dr Mackereth …*"), it considered the claimant's beliefs:

> "198. … were likely to cause offence and have the effect of violating a transgender person's dignity or creating a proscribed environment, or subjecting a transgender person to less favourable treatment. They may also have breached the GDA *[sic]*."

Further stating:

> "201. In our judgment, refusing to refer to a transgender person* by his/her/their birth sex, or relevant pronouns, titles, or styles would constitute unlawful discrimination or harassment under the EqA.
>
> 202. For those reasons in our judgment the beliefs relayed … fall foul of Grainger."
>
> * We suspect that this should in fact read *"… refusing to refer to a transgender person other than by his/her/their birth sex or relevant pronouns, titles or styles …"*

115. The ET went on to consider whether the conclusions it had reached in this regard were compatible with the **ECHR**, holding:

> "203. … they are because … the right to manifest a religion or belief is subject to art.9(2) which includes "the protection of the rights and freedoms of others"."

116. Accepting that the ET did not have the benefit of the guidance provided by the EAT in **Forstater**, we consider that the reasoning in this regard confuses a number of entirely separate points. First, although relevant to the questions the ET would need to go on to consider in relation to the claimant's claim of indirect discrimination, the "*background relayed by Dr Ahmed, Mrs Harrison and Dr Mackereth*" (ET paragraph 198) could not be determinative of the question whether the claimant's stated beliefs amounted to a protected characteristic for the purpose of section 4 **EqA** and as defined by section 10. Whether a belief meets the **Grainger** criteria cannot be relative to the particular employment context (the question is, after all, whether the belief in issue is worthy of respect in a democratic society not simply in relation to the complainant's employment). Secondly, the ET fell into the same error as the

first instance tribunal in **Forstater**, holding that a failure to use a transgender person's preferred pronouns must necessarily constitute unlawful discrimination or harassment under the **EqA** (ET paragraphs 198 and 201). Such behaviour may well provide grounds for a complaint of discrimination or harassment but, as the EAT in **Forstater** made clear, that will be a fact-specific question to be determined in light of all the circumstances of the particular case (see **Forstater** paragraphs 99 and 103). Third, the ET's reasoning suggests that it was seeking to carry out a balancing exercise between competing rights in this case but, while relevant to substantive issues raised by the claimant's claims, at this preliminary stage the ET was concerned only with whether the claimant's beliefs fell within section 10 **EqA**, not with possible restrictions on their manifestation (see **Forstater** paragraphs 78-79 and 102).

117. More generally, we are satisfied the ET erred in its approach to **Grainger** (v) by imposing too high a threshold for the protection of a belief under section 10. As has been made clear in the case-law, in a pluralist democratic society it is necessary for the threshold to be set at a low level so as to allow for protection not just of beliefs held to be acceptable by the majority but also of minority beliefs, even where those beliefs might offend others; we respectfully agree with the EAT in **Forstater** that the bar can be seen to be set by article 17 **ECHR**, such that:

> "in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others" (**Forstater**, paragraph 59)

118. For these reasons, we agree with the claimant that the ET erred in finding that (a) his belief in Genesis 1:27 did not amount to a protected characteristic for the purpose of sections 4 and 10 **EqA**. Similarly, to the extent that the claimant's lack of belief (b)(i) (that it is possible for a person to change their sex/gender at will) fell to be considered against the **Grainger** criteria, we find the ET also fell into error.

119. In arguing that the ET's finding should be upheld, the respondents have sought to distinguish the claimant's beliefs from those in issue in **Forstater** (albeit in oral argument Mr Kohanzad

accepted there could be no point of distinction insofar as the claimant's belief at (a) was that sex was immutable), urging that these involved a very grave violation of the rights of transgender people, such as to amount to the destruction of those rights. The difficulty for the respondents' argument is, however, that the ET did not make this finding. Disregarding (as we are bound to do at this stage of the analysis) the ET's contextual analysis (focusing on the particular employment in question) and its assumption of a finding of discrimination and harassment (an error for the reasons explained in **Forstater** paragraphs 99 and 103), the ET's conclusion is explained only by its finding that the claimant's beliefs were "*likely to cause offence*" (ET paragraph 198). The fact that a belief is likely to cause offence cannot, however, mean that it is automatically excluded from protection and we do not consider this can be said to be a finding that reaches the necessary level so as to engage article 17 **ECHR**.

120. On the basis that the claimant's belief (a) and lack of belief (b) thus fell to be treated as protected characteristics under the **EqA**, we turn to the appeal against the ET's alternative findings on the substantive claims before it.

Direct Discrimination and Harassment

121. To the extent that the ET's conclusions on the direct discrimination and harassment claims were challenged in the grounds of appeal, the claimant's case was stated as follows:

> "The Tribunal's conclusion on *Grainger v Nicholson* is crucial to the outcome of the claims for direct discrimination and harassment; which therefore must be set aside."

122. We can deal with this point shortly. The ET's conclusions on the preliminary question of belief did not impact upon its subsequent findings, in the alternative, on direct discrimination and harassment. Any first instance tribunal will be used to making findings in the alternative and it was entirely proper for the ET to have adopted this course in the present case (see **Forstater** at paragraph 119). In moving to consider the merits of the claimant's substantive

claims, the ET assumed (contrary to its preliminary findings) that his beliefs amounted to protected characteristics; there is nothing in the claimant's objection in this regard.

123. In his submissions for the hearing, the claimant sought to expand his case to argue that the ET erred in its approach to question of indissociability. He contended that his inability to use the preferred pronouns of transgender service users was one and the same as his protected beliefs and any benign motive the respondents might have had, as to the need to avoid the potential harassment or discrimination of service users, was not the real reason why he had been treated less favourably in the ways claimed. We are bound to make the initial observation that this was not a point identified in the grounds of appeal and the claimant made no application to amend in this regard. Even if he were to be permitted to take the point, however, we are satisfied that it does not identify a good basis of challenge to the ET's alternative findings on direct discrimination and harassment.

124. First, the claimant simply fails to engage with the findings of fact rejecting his various complaints on the evidence, the ET having concluded that: (1) the claimant was *not* called out of his work on 13 June 2018 and interrogated about his beliefs; (2) he was *not* suspended; (3) he was *not* pressurised to renounce his beliefs but merely to clarify his position; and (4) the respondents were still at the information-gathering stage and had *not* made a final decision on dismissal (see paragraph 42 above). These findings were fatal to both the claimant's claim of harassment and his complaint of direct discrimination.

125. Second, although the ET accepted that the relevant conduct (seeking to clarify the claimant's position) was *related to* the claimant's beliefs (relevant for the claim of harassment under section 26 **EqA**), it found that the respondents acted in the way that they did *because* (applying the language of direct discrimination for section 13 **EqA** purposes) they wanted to treat service users in the manner of their choosing (ET paragraph 222, as set out at paragraph 44

above). Indeed, the ET was clear that the avoidance of the matters relied on by the claimant as the respondents' "*benign motive*" was a consequence of the conduct, not the reason for that conduct (ET paragraph 223, see paragraph 45 above).

126. Third, the ET found as a fact that if a HDA was not prepared to refer to service users in the manner of their choosing then, regardless of whether that was because they shared the same beliefs as the claimant or not, they would have been treated in the same way. The ET's finding thus drew a permissible distinction between the claimant's beliefs and the particular way in which he wished to manifest those beliefs (**Page v NHS**) and meant that his claim of direct discrimination had to fail.

127. Fourth, the claimant having accepted that "*it was only right*" that the respondents (through Mr Owen) sought to address these issues with him (see the ET at paragraph 214, as referenced at paragraph 43 above), the ET's finding that the conduct in question had neither the purpose nor the effect required under section 26 **EqA** cannot be open to challenge.

128. For the reasons provided, we therefore dismiss the claimant's appeal against the ET's findings on the claims of direct discrimination and harassment.

Indirect Discrimination

129. By his first objection under this head, the claimant again contends that the ET's conclusions are rendered unsafe by reason of its earlier determination on the question of belief. For the reasons we have already provided (see paragraph 122), there is nothing in this complaint.

130. Secondly, the claimant seeks to challenge the ET's approach to the question of group disadvantage, arguing that it failed to reach a clear view of the impact on others of the same religion or belief as the claimant; in this regard, the claimant has sought to rely on material from the Evangelical Alliance (which we are told represents over 4,000 Christian churches

and other organisations globally) and the Christian Medical Practitioners (representing some 4,000 Christian medical practitioners), which he contends shows that many Christians will share the beliefs in issue in these proceedings.

131. We note that the ET had regard to the materials relied on by the claimant in this respect, concluding that these in fact made clear that Christian views differed on the matters in issue (ET paragraph 236). The claimant may disagree with that reading of the documentation but we cannot say that it was a perverse interpretation, and we note the claimant's own concession (as also recorded by the ET at paragraph 236) that not all individuals who describe themselves as Christian would share his beliefs. In any event, the ET found group disadvantage to have been made out: it was only insofar as other Christians did *not* hold the particular beliefs in issue that they would have been able to comply with the PCP and thus avoid the disadvantage (ET paragraph 237).

132. Thirdly, the claimant attacks the ET's findings on justification; specifically, he contends the ET erred in its approach to the assessment of proportionality: (i) improperly placing a burden on the claimant to prove how his beliefs should have been accommodated; (ii) failing to balance the severity of the effect on his rights; (iii) failing to identify the precise factors and specific context relevant to the issue of justification; (iv) failing to take into account paragraph 151 of the first respondent's policy; and (v) wrongly interpreting the evidence before it as to the impact on Christian medical practitioners holding the claimant's beliefs.

133. In the present case, the ET accepted that PCPs had been applied such that HDAs were required to use service users' preferred pronouns, and to confirm that they were willing to do so. It expressly rejected the third PCP relied on by the claimant, however, holding that the respondents did *not* impose the penalty of suspension or dismissal for those who did not comply with the requirement to use preferred pronouns, or confirm their willingness to do so;

rather, they "*sought to accommodate the claimant's position and to clarify his position before taking any further steps*" (ET paragraph 229, see paragraph 49 above). That was a permissible finding of fact, against which there is no challenge, and consideration of the ET's approach to the balancing exercise in this case must, therefore, take into account the limited nature of its finding as to the discriminatory impact on the claimant.

134. As for the PCPs that were applied, we note that the claimant does not challenge the ET's finding that the respondents had established the following legitimate aims: (a) to ensure that service users were treated with respect and did not suffer discrimination in respect of services provided by the first respondent or its contractors, and (b) to provide a service complying with an overarching policy of commitment to equal opportunities. In then determining whether the PCPs were a necessary and proportionate means for the achievement of those aims, it is apparent that the ET undertook a detailed assessment of the relevant context. It did not ignore the fact that the claimant's work would include the writing-up of assessments (a point emphasised in the claimant's submissions), but was entitled to find that there were particular sensitivities arising from the face-to-face interactions the claimant would have with service users as part of his role. It was, after all, the HDA who would carry out the assessments necessary for those seeking to access disability-related benefits; service users were not attending by choice but because they were required to do so in order to access such benefits. It was in that context the respondents had identified that particular risks might arise in respect of transgender service users with mental health vulnerabilities, which they attributed to society's treatment of them in the past, and who might well take offence at behaviour on the part of an assessing HDA that appeared to replicate any earlier lack of understanding.

135. The ET did not, however, simply assume that the various risks identified by the respondents would necessarily arise. It carefully evaluated the respondents' concerns in this regard (carrying out a more nuanced analysis at this stage of its reasoning than when it had considered

the question of belief under section 10 **EqA**), recognising that not all transgender service users would fall within the relevant **EqA** protected characteristic (gender reassignment), and that fewer still would fall under the protection of the **GRA** (and see the helpful discussion of these issues in **Forstater**, as set out at paragraphs 88-89 above). As the ET permissibly accepted, however, there would be difficulties in trying to identify whether a particular service user did fall within one of the relevant protected categories without breaching the respondents' legal obligations and/or giving rise to reputational damage, and without the potential for causing offence or other harm to the individual concerned (ET paragraphs 253-257, summarised at paragraph 55 above).

136. In assessing the proportionality of the measures, the ET expressly had regard to the relatively few occasions when this issue might arise for a HDA and carried out a detailed assessment of the possible alternatives, to see whether there was another option that might have enabled the accommodation of the way in which the claimant sought to manifest his beliefs in the workplace. Accepting the respondents' evidence as to the impracticability of any alternative that might have enabled the claimant to avoid assessing transgender service users (and see the ET's findings, as summarised at paragraph 53 above), the ET noted that the claimant had been unable to identify any further alternatives that might have allowed for the accommodation of his beliefs (ET paragraph 258, see paragraph 56 above). The ET did not thereby impose a burden upon the claimant contrary to section 19(2) **EqA**; it was doing no more than identifying that there was no evidential challenge to the respondents' case that there were no workable means of achieving the aims in this case other than by the adoption of the PCPs in question (see per Baroness Hale, paragraph 47 **Essop v Home Office**).

137. On appeal, the claimant has argued that a workable, and less discriminatory, alternative was provided by paragraph 151 of the first respondent's policy (see paragraph 17 above), which suggested that a person's preferred name be used, in preference to pronouns, something with

which the claimant would have had no issue. The difficulty with this suggestion is that in his case before the ET the claimant had resiled from the argument that when dealing with transgender service users he might simply avoid using pronouns altogether (ET paragraph 81, see paragraph 54 above); the ET is not to be criticised for failing to adjudicate upon an option that was not pursued before it and it cannot be open to the claimant, on appeal, to seek to reinstate this as a point of dispute on the facts (again see Baroness Hale, **Essop v Home Office**).

138. Finally, we are satisfied that the ET did not lose sight of the potential impact of the PCPs in issue, both on the claimant and for other medical practitioners holding the same beliefs. It was entitled, however, to keep in mind the limited nature of the intrusion on the claimant's rights, given that it had found that the respondents had *not* imposed any penalty on him but had sought to clarify and accommodate his position. As was recognised in **Page v NHS**, there are contexts in which the manifestation of particular beliefs will give rise to difficult questions that can only be answered by a careful appraisal of the facts of the individual case. Critically evaluating the reasoning in this case (as we are required to do), we cannot see that the ET erred in concluding that the measures adopted by the respondents were necessary and proportionate to meet a legitimate focus on the needs of potentially vulnerable service users and on the risks to those individuals and, in consequence, to the respondents. That was a conclusion reached by the ET after considering both the evidence adduced by the claimant relating to the views of Christians more generally (the publications from the Evangelical Alliance and the Christian Medical Fellowship) and the guidance provided by the GMC (see the references at paragraphs 38 and 42 above). Having regard to the particular factual context, this is not a case where it can be said that the balance struck by the ET was wrong. We accordingly dismiss the appeal against the ET's finding on indirect discrimination.