EAT Case No: UKEAT/0081/20/JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

B E T W E E N:

MAYA FORSTATER

Appellant

-and-

CGD EUROPE (and others)

Respondents

-and-

INDEX ON CENSORSHIP

Intervenor

RESPONDENTS' SKELETON

FOR EAT HEARING

27 AND 28 APRIL 2021

The following abbreviations are used:

European Convention on Human Rights	**ECHR**
European Court of Human Rights	**ECtHR**
Equality Act 2010	**EqA**
Gender Recognition Act 2004	**GRA**
Gender Recognition Certificate	**GRC**
Human Rights Act 1998	**HRA**
Particulars of Claim	**POC**

References to paragraph numbers below are references to paragraph numbers in the Employment Tribunal decision

Introduction

1. Before embarking on a detailed analysis of the issues in this case it is worth standing back to consider a well-known, overarching, principle upon which the jurisprudence which concerns this case is based:

> "*That the only purpose for which power can rightfully be exercised over any member of a civilised community , against his will, is to prevent harm to others*[1]."

2. Ms Forstater is claiming that she holds the following "*belief*" which amounts to a "*philosophical belief*" pursuant to **S.4 EqA**.

> "*The Claimant believes that "sex" is a material reality which should not be conflated with "gender" or "gender identity". Being female is an immutable biological fact, not a feeling or an identity. Moreover, sex matters. It is important to be able to talk about and take action against the discrimination, violence and oppression that still affect women and girls because they were born female*" (see paragraph 67 POC).
>
> The "**Gender Critical Belief**"

3. This case <u>is about</u> whether or not Ms Forstater's Gender Critical Belief gains protection as a "*philosophical belief*" under the EqA. That issue raises the question of the balancing of competing rights: her right to freedom of conscience and freedom of expression under **Articles 9** and **10 ECHR** (limited by the second part of both Articles) on the one hand and the rights and freedoms of others, in particular their right to respect for private and family life under **Article 8** and their right to be protected from discrimination, harassment and victimisation because of a protected characteristic of theirs under the **EqA**[2] on the other hand.

[1] "***On Liberty***" John Stuart Mill
[2] Sections 13, 19, 26 and 27 **EqA**.

4. It was the Tribunal's view that Ms Forstater's Gender Critical Belief lost protection under the **EqA** because, as the Tribunal concluded at §90, that belief was not worthy of respect as:

> "*it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment*".

That conclusion was based on its earlier finding, at §85, that she did not accept that she should: "*avoid the enormous pain that can be caused by misgendering a [person] even if that person has a Gender Recognition Certificate*".

5. The reason it is important to understand this issue is explained in the Equal Treatment Bench Book[3]:

> "*People who identify with a gender which differs from their legal gender, or who have adopted a new legal gender, or who identify with no particular gender sometimes face discrimination, stigma or violence in their everyday lives. This can mean that they are less likely to report crime or press charges, and they may be apprehensive about coming to court, whether as an offender, witness or victim. Some people may be particularly concerned about their previous name and gender assigned at birth being unnecessarily revealed in court. They may also be worried about receiving negative attention from the public and the press*."

6. This case is <u>not about</u> the legal status and/or legal recognition of transgender people, which is a matter for Parliament and not the courts[4], and has already been settled, by Parliament, in the form of the **GRA**.

[3] Chapter 12 §1

[4] ***The Queen on the application of Harry Miller v The College of Policing, The Chief Constable of Humberside*** [2020] 4 All ER 31, per Knowles J at §17.

Law

GRA

7. **S.9 of the GRA** states that:

> "*Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)*."

EqA

8. The **EqA** prohibits discrimination and harassment in relation to a number of protected characteristics, including "*religion or belief*" and "*gender reassignment*" **(section 4 EqA**).

9. **Section 7 EqA** defines the protected characteristic of gender reassignment and provides:

> *"(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*
>
> *(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*
>
> *(3) In relation to the protected characteristic of gender reassignment—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to transsexual persons."*

10. As Hansard makes clear, Parliament's thinking in enacting this section was to move away from medicalising protected characteristics. There is no need for medical, let alone

surgical, intervention for the person to be protected for the purposes of gender-reassignment[5].

11. The guidance given in the Equal Treatment Bench Book[6] supports this view:

> *"The Gender Recognition Act 2004 ('GRA') applies to a narrow group of people who have a desire to change their legally assigned gender on their birth certificates so that they are legally to be treated as being of their 'acquired' gender, and to do so they must satisfy a mix of legal and medical criteria which are discussed elsewhere in this section. The Equality Act 2010 covers the protected characteristic of 'gender reassignment' and describes people with that protected characteristic as 'transsexual'. See the 'Gender reassignment' section in Appendix A on the Equality Act 2010 for a discussion of the scope of this concept. However, it should always be borne in mind that by no means all people who identify with a gender other than their birth gender have a desire to take legal steps or medical ones."*

12. **Section 10 EqA** defines the protected characteristic of religion or belief and, so far as relevant, provides:

> *"(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*."

[5] Column 171 Hansard. See also Employment Judge Pauline Hughes' analysis of **S.7 EqA** and the relevant passages in Hansard (Columns 170, 171 and 172) cited in ***Taylor v Jaguar Land Rover*** 1304471/2018 ET at §§173-178. See also the Equal Treatment Bench Book §3 p362.
[6] Chapter 12 §6

Code of Practice

13. The EqA does not define "*philosophical belief*" but guidance is provided by **§§2.52 and 2.57-2.59 inclusive of the Code of Practice on Employment 2011 (**the **"Code of Practice"):**

> "*2.52. The meaning of religion and belief in the Act is broad and is consistent with article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).*
>
> *…*
>
> ***Meaning of belief***
>
> *…*
>
> *2.57. A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include humanism and atheism.*
>
> *2.58. A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.*
>
> *2.59. For a philosophical belief to be protected under the Act:*
>
> - *it must be genuinely held;*
> - *it must be a belief and not an opinion or viewpoint based on the present state of information available;*
> - *it must be a belief as to a weighty and substantial aspect of human life and behaviour;*
> - *it must attain a certain level of cogency, seriousness, cohesion and importance;*
> - *it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others*."

Convention rights

Article 8

14. **Article 8 EHCR** provides[7]:

> "*Right to respect for private and family life*
>
> *1) Everyone has the right to respect for his private and family life, his home and his correspondence*
>
> *2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

15. The Equal Treatment Bench Book explains that, in the context of the way someone should be treated in court, the normal course of action will be to accept someone's legal gender or their gender identity without further inquiry. It cautions against making further inquiries (unless necessary to do so for the reasons given therein) on the basis that doing so many not only be:

> "*intrusive and offensive, but could breach article 8 of the European Convention on Human Rights (respect for private life), which arguably means that the disclosure would need to be relevant and necessary for the proper disposal of the legal proceedings*."[8]

[7] Raised by the Respondents in their Closing Argument before the Tribunal at §51(b).
[8] Chapter 12 §23

Article 9

16. This includes **Article 9 ECHR** (freedom of thought, conscience and religion) which provides an absolute right to freedom of belief and a qualified right to freedom to manifest that belief[9].

17. **Article 9** provides:

> " *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*."

18. Where an individual's religious observance impinges on the rights of others, states are entitled to make necessary restrictions. A fair balance needs to be struck between the competing interests of the individual and of the community as whole: ***Eweida v United Kingdom*** (2013) 57 EHRR 8 at §84.

19. The interests of the community that are represented in the restrictions made in this country are contained in the **EqA** (for example, protection from harassment in section 26 **EqA**) and in **Grainger V**[10] (that a belief must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others). **Grainger V** is based upon the jurisprudence of the ECtHR on the protection of

[9] ***Eweida v UK*** (2013) 57 EHRR 8 at §80
[10] See full case citation at §28 below.

"*belief*" by **Article 9 ECHR** and "*philosophical convictions*" by **Article 2 of Protocol No. 1 ECHR** (right to education), which is:

> "*Having regard to the Convention as a whole, including Article 17, the expression "philosophical conviction" denotes, in the Court's opinion, such convictions as are worthy of respect in a "democratic society"*[11] *and are not incompatible with human dignity"*
>
> ***Campbell v United Kingdom*** (1982) 4 EHRR 293 at §36.

Article 10

20. **Article 10 ECHR** provides:

> *"Article 10 Freedom of expression*
> *1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

21. An interference with **Article 10** rights is justified where an individual publicly states that their views would affect their professional conduct: ***Page v Lord Chancellor*** [2021] EWCA

[11] The reference to democratic society is a reference to §63 in ***Young, James and Webster v UK*** (1981) 4 EHRR 38.

Civ 254 per Underhill LJ at §78 (the "**Magistracy Case**") [12]. The essential task of the Tribunal is to balance the infringement of an individual's right to express in public beliefs that are important against the importance to the employer of mitigating or avoiding the risk of damage to its work from the individual remaining in post. A first instance decision should only be interfered with if the way that that balance has been struck is wrong: ***Page v NHS Trust Development Authority*** [2021] EWCA Civ 255 (the "**NHS Case**") per Underhill LJ at §58. [13]

Article 14

22. **Article 14 ECHR** provides

"*Article 14 Prohibition of discrimination*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Article 17

23. **Article 17 ECHR** provides:

"*Article 17 Prohibition of abuse of rights*

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."

[12] ***R (on the application of) Ngole v The University of Sheffield*** [2019] ELR 443, which was distinguished in the **Magistracy Case**, came to the opposite conclusion, that it had been wrong to exclude a student who had expressed vehement views about same-sex relationships on social media using biblical language such as "*wicked*" (§10) and "*abomination*" (§11), although the context of ***Ngole*** was a Judicial Review challenge and not the **EqA**.

[13] The CA found that neither Article 9 nor Article 10 were infringed (§67).

24. **Article 17** provides a limit to the reliance that can be placed on **Article 10** when the basis for that reliance is abusive behaviour towards groups with certain protected characteristics:

> "*The Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups: Perincek v Switzerland [GC], §206."*[14]

25. **Article 17** operates to prevent reliance on **Article 10** where, for example, there has been distribution of homophobic material[15].

Human Rights Act 1998

26. By **S.3(1) HRA** imposes the following obligation on the courts:

> "*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*."

International Human Rights

27. Gender identity is integral to a person's dignity and humanity and must not be the basis for discrimination and abuse. This is made clear in the Yogyakarta Principles (Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity) adopted in March 2007 (the "**2007 Yogyakarta Principles**"), in particular Principle 1 (the right to the universal enjoyment of human rights), Principle 2 (the right to equality and non-discrimination), Principle 3 (the right to recognition before the law). Further, Principles 30-32 of the Yogyakarta Principles Plus 10, adopted on 10 November 2017, (the "**2017 Yogyakarta Principles**") provides the right to state protection, the right to legal recognition and the right to bodily and mental integrity.

[14] Strasbourg's Court "***Guide on Article 17***", section E "***Incitement to hatred***", §115
[15] ***Molnar v Romania*** App No: 16637/06

Grainger

28. The five bullet points set out in §2.59 of the Code of Practice are derived from the judgment of Burton J in the EAT in ***Grainger v Nicholson*** [2010] ICR 360 at §24 (the "**Grainger Criteria**").

29. The Grainger Criteria are:

"*(i) The belief must be genuinely held;* (referred to hereinafter as "**Grainger I**")

(ii) It must be a belief and not, as in McClintock v Department of Constitutional Affairs [2008] IRLR 29, an opinion or viewpoint based on the present state of information available; (referred to hereinafter as "**Grainger II**")

*(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour; (*referred to hereinafter as "**Grainger III**")

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance; (referred to hereinafter as "**Grainger IV**")

(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 (para 36 of Campbell v United Kingdom 4 EHRR 293 and para 23 of Williamson's case [2005] 2 AC 246)" (referred to hereinafter as "**Grainger V**").

30. The Grainger Criteria were approved by the EAT in ***Gray v Mulberry Co (Design) Ltd*** [2019] ICR 175 per Choudhury J at §23 (and his decision was upheld on appeal [2020] ICR 715).

31. Only **Grainger V** is an issue in this appeal.

Grainger V

32. Grainger V reflects the proposition that, in order to gain protection under the **ECHR** a belief must be worthy of respect in a democratic society. The genesis of this criterion is in the discussion of convention rights in cases such as ***Regina (Williamson and Others) v Secretary of State for Education and Employment*** [2005] 2 AC 246. The threshold requirement was articulated as being, in ***Williamson***, that:

> "*a belief must satisfy some modest, objective minimum requirements*", one of which is that a "*belief must be consistent with the basic standards of human dignity or integrity*" (§23).

33. The mischief which **Grainger V**, the **ECHR**, the **HRA** and the **EqA** set out to remedy concerns the protection of human dignity. A key aspect of human dignity is the right to establish a person's identity as an individual human being: ***Goodwin v United Kingdom*** (2002) IRLR 664 at §90:

> "*Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings*[16]*. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved*."

34. Human dignity is an underlying value of equality. It necessitates the recognition of the equal worth of every individual. Acting in a way that denies the intrinsic importance of every human life affects, at a basic level, a person's dignity and impacts on their autonomy

[16] Reference was made here to ***Pretty v United Kingdom*** (2002) 35 EHRR 1 §62 and App No 53176/99 ***Mikulic v Croatia*** 7 February 2002 §53

(because they have less freedom). Treating someone less well because they have a protected characteristic undermines the special and unique value of human dignity and that is why we should be blind to considerations of this type: to do otherwise fails to recognise the equal worth of every human being. The decision in ***P v S and Cornwall CC*** [1996] ICR 795 emphasised the importance on the dignity of the person who had transitioned, or was transitioning (at §22). These principles have been further articulated by Advocate General Maduro in ***Coleman v Attridge Law*** (C-303/06)[17]:

"9. At its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. As Ronald Dworkin has recently reminded us, even when we disagree deeply about issues of political morality, the structure of political institutions and the functioning of our democratic states we nevertheless continue to share a commitment to this fundamental principle. (8) Therefore, individuals and political institutions must not act in a way that denies the intrinsic importance of every human life. …

10. The aim of Article 13 EC and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably."

[17] European Court Reports 2008 page I-05603 at §§9-10

Equal Treatment Bench Book

35. The guidance given in the Equal Treatment Bench Book explains how dignity may be undermined by mis-gendering or deadnaming[18] someone[19]:

> "*It should go without saying that all people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or gender history. It is important to be alive to the fact that the gender history of a person may be something which an opponent litigant may seek to use in order to place pressure on them, such as by deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents*."

36. Mis-gendering, in particular, is harassment as proscribed by the **EqA**. A degrading, humiliating and offensive environment is created where, for example, "*a hotel receptionist repeatedly refers to a trans woman as "sir" and "he" whenever she uses reception, despite her objections*"[20].

37. The Equal Treatment Bench Book goes on to explain some important context: how discrimination, harassment and violence is experienced by people who do not conform to perceived gender norms:

> "*Awareness, knowledge and acceptance of gender-variant people such as those who are transgendered or gender-fluid has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non- conventional gender appearance and behaviour and many people experience social isolation and/or face*

[18] Deadnaming is explained at Chapter 12 §71 as: "*a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or when their birth name is otherwise referred to, instead of their chosen name. This is highly disrespectful and may well be inhibiting and possibly humiliating to witness, since it amounts to a reference to what may be sensitive part of their social or medical history. If done in public in court, it may also deprive them of the confidentiality protections under the Gender Recognition Act 2004 (by placing their gender reassignment in the public domain permanently*".

[19] Chapter 12 §9

[20] This is the example used at §10 on p363 of the Equal Treatment Bench Book.

prejudice, discrimination, harassment and violence in their daily lives – in schools and places of further education, in the workplace, and whilst being customers and service users."[21]

"*A survey for the TUC of over 5,000 LGBT employees in the first half of 2017 found that almost half of transgender respondents had experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will. A 2017 ACAS research paper confirmed that workplace bullying is common and that many staff identified as transgendered experience it on a daily basis. The ACAS report also found that the level of bullying may be higher than other rates of bullying related to, for example, sexual orientation, and that transgender staff may look for another job rather than endure the costs and emotional labour of going to tribunal or court. The limited protection of the Equality Act 2010, which only covers those who are undergoing or have undergone (or who are perceived to be undergoing or to have undergone) gender reassignment, means non-transitioning, non-binary or otherwise gender non-conforming people are particularly vulnerable[22]*."[23]

"In a poll of 1,000 employers across a variety of industries in June 2018, one in three employers admitted they were less likely to hire a transgender person and 43% were unsure if they would[24]."[25]

"Social isolation, social stigma and transphobia can have serious effects on transgendered people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher

[21] Chapter 12 §15
[22] Reference is made here to "T*he Cost of Being Out at Work: LGBT+ workers' experiences of harassment and discrimination*" TUC (2017); "*Supporting trans employees in the workplace*": ACAS Research paper (04/17).
[23] Chapter 12 §17
[24] Reference is made here to "*Transphobia rife among UK employers as 1 in 3 won't hire a transgender person*": Crossland Solicitors (18 June 2018)
[25] Chapter 12 §18

than for cisgender people (those whose gender identity corresponds to the gender assigned to them at birth)[26]."[27]

38. Trans people are also at greater risk of being victims of crime.[28]

39. In view of this, the Equal Treatment Bench Book cautions against disclosing someone's gender at birth or their transgender history in court[29]. Where a person has applied for or obtained a GRC, section 22 of the **GRA** makes it an offence for someone who has obtained "*protected information*" in an official capacity to disclose that information to any other person[30]. There are a number of exceptions to S.22 but none of them cover the situation in which someone like Ms Forstater is entitled to disclose this information. There is no "*Forstater*" exception.

Employment Tribunal cases

40. There have been a number of recent tribunal cases that have considered the issue of whether certain beliefs are worthy of respect which, although not binding on the EAT, are informative.

41. The first of these was ***Mackereth v Dept for Work and Pensions[31]***. In **Mackereth**, the Tribunal found that the claimant, who was dismissed from his role as a Health and Disabilities Assessor for refusing to use the preferred pronouns of trans service users, did not have a protected belief pursuant to **S.4 EqA** because the belief failed to satisfy **Grainger V**. His beliefs were: (1) a belief in Genesis 1:27 "*Male and female He created*

[26] Reference is made here to "*Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*" (Whittle et al 2007); see also "*Self-harming thoughts and behaviors in a group of children and adolescents with gender dysphoria*": Skagerberg et al (2013) and "*Suicide risk in the UK trans population and the role of gender transition in decreasing suicidal ideation and suicide attempt*": Bailey, Ellis and McNeil (2014)

[27] Chapter 12 §19

[28] Chapter 12 §§30-37 records that trans people are twice as likely to be a victim of crime (not fraud) in the year ending March 2020 (§31), that over 40% of trans people had experienced a hate crime or incident because of their gender identity in the previous 12 months (§32) and that the number of reported transphobic hate crimes trebled between 2012 and 2015 and has continued to increase (§34).

[29] Chapter 12 §22

[30] Chapter 12 §27

[31] 1304602/2018 ET

them", (2) lack of belief in '*transgenderism'* (i) that it is possible to change sex/gender (ii) that society should accommodate '*opposite sex impersonation'*. The Tribunal concluded that all these beliefs were "*incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals*"[32]. Having explored the relevant factual background[33], the Tribunal concluded that the claimant's views "*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*."[34] The Tribunal went on to determine that: "*refusing to refer to a transgender person by his/her/their birth sex, or relevant pronouns, titles or styles would constitute unlawful discrimination under the EqA*"[35].

42. In ***Higgs v Farmor's School***[36] , the claimant's beliefs (which included a lack of belief in gender fluidity and a lack of belief that someone could change their sex/gender) did qualify for protection, although that was on the basis of the Tribunal's conclusion that it was not inevitable that her beliefs would necessarily result in unlawful action by her[37]. A key difference between ***Higgs*** on the one hand and ***Mackereth*** and the Tribunal decision in this case on the other is that there was no exploration, in ***Higgs***, as to what her belief would have caused her to do when confronted, in the course of her duties, with a gender fluid person or someone that had changed their sex/gender.

43. In **Omooba v Leicester Theatre Trust**[38], the claimant was an actor with strong Christian beliefs including a belief that homosexual acts are sinful and morally wrong[39]. Although

[32] §197 ***Mackereth***
[33] §§141-151 ***Mackereth.*** In particular, in the event that the claimant, a health care professional undertaking health and disabilities assessments including for mental health conditions discovered a service user wished to be referred to using a pronoun style that was in conflict with his beliefs, his preferred course was to refer to another physician (§§43, 46 and 143). That action could have led to a delay and, therefore, a breach of one of the DWP's objectives but, more importantly, could have also given the impression to the service user that the assessor had an issue with transgender individuals which would have caused offence and, given that that information was disclosed in a confidential assessment, such a reaction from an assessor would have merely reinforced the negative way that the individual was treated in society that, in many instances, may have been the cause of the mental health impairments that gave rise to the assessment in the first place (§§143, 144, 145 and 146).
[34] §198 **Mackereth**
[35] §201 **Mackereth**
[36] 14012642/2019 ET
[37] §§40-41 ***Higgs***
[38] 2202946/2019 ET
[39] §81 **Omooba**

the Tribunal found that her belief "*did scrape over the threshold for protection*"[40] after "*anxious and careful consideration*"[41], the Tribunal were careful to point out that, in that case, her belief did not "*advocate harassment*".[42]

Ground 1

44. Ground 1 is hopeless because it does not articulate any errors of law that are said to have occurred and appears to be proceeding on the (unarticulated) basis that the Tribunal's findings were perverse and/or biased. A particular flaw in Ground 1 is that it is an attempt to make an unparticularised perversity challenge. That is fatal to its success[43]. In any event, even if proper particulars had been set out, there is no "*overwhelming case*" that the Tribunal reached a decision that no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached.[44] It is not the case that the conclusions reached by the Tribunal were unsupported by evidence.[45] Nor it is the case that a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal were biased.[46]

45. In unpacking Ground 1 in a sensible and logical manner, the following questions fall to be addressed:

    (1) Whether the Tribunal mis-characterised[47] Ms Forstater's belief and whether it failed to consider that belief on its own terms [48];

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[40] §93 **Omooba**
[41] §93 **Omooba**
[42] §93 **Omooba**
[43] ***Yeboah v Crofton*** [2003] EWCA Civ 794 §92
[44] ***Yeboah v Crofton*** §93. See also ***Stewart v Cleveland Guest (Engineering) Ltd*** [1996] ICR 535 at 542G,
[45] ***Chiu v British Aerospace*** [1982] IRLR 56 §16
[46] ***Porter v Magill*** [2002] AC 357 per Lord Hope at §103 affirmed in ***Lyfar-Cisse v Brighton and Sussex University Hospitals NHS Trust*** [2020] 10 WLUK 358 per Lord Fairley at §§45-46. It is assumed, for the purposes of this skeleton, that no allegation of actual bias is being made.
[47] Referred to in §5.1 Notice of Appeal as *"(mis-) characterisation*"
[48] §5.1 and §5.1(h) Notice of Appeal

(2) Whether the Tribunal disregarded aspects of her belief based on its own views[49] and, in particular, its own view that her belief was "*wrong*" based on "*scientific evidence*"[50];

(3) Whether the Tribunal "*substituted its own assessment of validity*"[51] instead of a "*proper consideration of whether [her] belief was within the range of beliefs that may be held in a democratic society*"[52] / "*by reference to the plurality of beliefs that people may hold in a democratic society*"[53];

(4) Whether the Tribunal failed to recognise that "*whether sex is a material reality which matters and should not be conflated with expressions of gender identity is not an issue on which there is a settled democratic consensus, but is a matter of important contemporary debate*"[54]; and

(5) Whether the Tribunal adopted a particular viewpoint[55] within that 'debate' which infected its analysis[56].

(1) Whether the Tribunal mis-characterised Ms Forstater's belief and whether it failed to consider that belief on its own terms [57]

46. The Notice of Appeal's criticisms of where and how the Tribunal mis-characterised Ms Forstater's belief are set out at §5.1(h). It is not clear whether the Notice of Appeal is criticising the Judgment for being too reductive[58] in its analysis of her belief generally or for simply getting her belief wrong. Particular reference is made in the Notice of Appeal to the "*Appellant's explanation that as a matter of courtesy she will generally refer to*

[49] The full sentence at §5.1(a) is "*disregarded aspects of the Appellant's belief based on its own views and/or analysis of the rationale for those aspects*".
[50] §5.1(a),(b)and (g) Notice of Appeal
[51] §5.1 Notice of Appeal
[52] §5.1 Notice of Appeal
[53] §5.1 Notice of Appeal
[54] §5.1(c) Notice of Appeal
[55] That "*sex is indistinguishable from expressions of gender identity, that there is a spectrum in sex which can be changed from one sex to another or to being of neither sex, and that it is unacceptable in any circumstances to refer to someone other than in accordance with the gender (or lack thereof) with which they identify (whether they have legally changed their sex via a Gender Recognition Certificate or not)*" §5.1(d) Notice of Appeal
[56] §5.1(d) Notice of Appeal
[57] §5.1 and §5.1(h) Notice of Appeal
[58] §5.1(h) says that the conclusion at §90 was "*reductionist*".

people using their preferred pronouns, but may not do so in certain circumstances where that is relevant to the issues/debate (e.g. where this is relevant to defending the rights of others, most pertinently women and girls)"[59] although there is no finding of fact in this regard and no evidential reference for this statement is given.

47. The Tribunal, in its findings of fact at §39 (and, particularly regarding pronouns, §39.12), referred extensively to Ms Forstater's own witness statement. It is difficult to see, therefore, how it can be said that the Tribunal mis-characterised her view and nor does it appear to be said that the Tribunal left out other important passages containing her opinion.

48. The Tribunal dealt with Ms Forstater's explanation regarding pronouns at §§88 and 89. The Tribunal found that her belief was that she would never "*accept that a trans woman is a woman or a trans man is a man, however hurtful it is to others*"[60]. The Tribunal based that finding on her own words: she said, in response to a complaint made by co-workers, that although she had been told: "*that it is offensive to say 'trans women are men" or that women means 'adult human female'… since these statements[s] are true I will continue to say them*"[61]. She also said that she "*reserve[d] the right to use pronouns 'he' and 'him' to refer to male people"*[62]. The Tribunal were neither reductive nor inaccurate in making these findings. Nor was there any factual finding that Ms Forstater's refusal to use preferred pronouns was limited to "*certain circumstances*". If it had been, then there may have been some force in the argument that the Tribunal's conclusion at §90 was unsafe. But that is not this case. It is not the Tribunal that have been "*absolutist*"[63] in its analysis: it simply analysed what was presented to it. It is not the Tribunal that has mis-characterised her view: it is Ms Forstater herself, in a revisionist attempt to characterise her view as having more nuance than it really did. Of course, if what the Notice of Appeal is really getting at is that the Tribunal were perverse in reaching its conclusions because

[59] §5.1(h) Notice of Appeal
[60] §88
[61] §88
[62] §89. In her statement before the Tribunal, she said that she considered she had the "*right*" to use the pronouns 'he' and 'him' because of her belief that she should be able to refer to the sex of other people "*accurately*" (§§ 31, 35 of Ms Forstater's statement).
[63] As alleged by Ms Forstater at §5.1(f) Notice of Appeal

there was evidence that it ignored, then that has been not been adequately pleaded and, in any event, is hopeless (see §44 above).

49. The Tribunal took the correct approach. The Tribunal hearing proceeded, with the agreement of both parties, on the basis that the Employment Judge had to consider the specific nature of Ms Forstater's belief "*as a necessary element of determining the preliminary issues*" and would have to determine what the belief was, which would not be necessarily limited to what was pleaded in the Claim Form.[64]

50. In forming its conclusions about the nature of Ms Forstater's belief, the Tribunal had regard to what she said in her own words as recorded in: (1) her tweets[65] (2) the contributions she made to slack conversations[66] (3) a letter she had written to Anne Main MP[67] (4) her response to the complaints against her[68] (5) her response to a complaint from the Scout Association and her comment about that[69], and, of course, (6) what she said in her witness statement prepared for the Preliminary Hearing[70] about which the Tribunal recorded its acceptance that such reflected "*core aspects*" of her belief[71].

51. Further, the Tribunal were mindful of what Ms Forstater said in oral evidence:

> "*She consider[ed] that if a trans woman says that she is a woman that is untrue, even if she has a Gender Recognition Certificate*."[72]
>
> "*She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a 'woman's space', but also more*

[64] §6
[65] §24, 25, §34.2, §34.3, §38
[66] §27
[67] §28
[68] §30
[69] §35, §36
[70] §§39.1 – 39.13
[71] §40
[72] §41

generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position."[73]

52. The Tribunal did exactly the opposite of what Ms Forstater said that it did: it took her words at face value. The real difficulty that she faces is that the truth is that her belief involves undermining the dignity of trans people by misgendering them, and that, according to the Equal Treatment Bench Book, is harassment (see §§35-36 above).

(2) Whether the Tribunal disregarded aspects of her belief based on its own views and, in particular, its own view that her belief was "*wrong*" based on "*scientific evidence*"[74]

53. The first question is whether the Tribunal disregarded aspects of her belief based on its own views[75]. There are two parts of Ground 1 dealing with this point. First, §.5.1(a) and, second, §5.1(g).

54. Dealing with §5.1(a): The difficulty with engaging with this part of Ground 1 is that there is no articulation of what it is that the Tribunal are said to have disregarded. It is not evident, from the paragraphs referred to (§§78-81 and 86) that the Tribunal were disregarding any aspects of her belief. The only evidence that the Tribunal did disregard was her tweets (and retweets) in which it was "*strongly arguable included stereotypical assumptions about trans people*"[76] (at §77). That was to her advantage.

55. Dealing with §5.1 (g), it is said that the Tribunal: "*disregarded evidence that the Appellant's belief is shared by many people, including the Appellant's witness, Kristina Jayne Harrison, a transwoman who has a Gender Recognition Certificate*". It did not. Reference was made to that witness at §16.1. In any case, the amount of people who share a belief is not part of any aspect of the **Grainger** criteria.

[73] §41
[74] §5.1(a),(b)and (g) Notice of Appeal
[75] §5.1(a) Notice of Appeal
[76] Particular reference was made to its earlier finding at §34

56. The second question is whether the Tribunal expressed a view that Ms Forstater's belief was "*wrong*" based on "*scientific evidence*"[77].

(1) The first point to note, about this, is that, nowhere in §83, does the Tribunal express a view that her belief was "*wrong*" based on "*scientific evidence*". What the Tribunal does do is to observe that: "*there is significant scientific evidence that it is wrong*".[78] That was supported by its earlier findings at §§42, 43 and 44.

(2) Second, it is apparent from §83, that it was Ms Forstater who prayed in aid science to lend support to her view that "*sex is immutable*". As the Tribunal found, at §43, there is scientific evidence which undermines her view: there are possible chromosomal variations and differences in hormone production and reception which produce the syndromes referred to at §43(a) to (f). These are also referred to as Intersex. That term is not tendentious: it appears in the Equal Treatment Bench Book.[79]

(3) Third, it is fair for the Tribunal to point out, at §83, that her belief "*may not be based on very good science*".

(4) Fourth, in any case, the Tribunal gave her the benefit of the doubt here. The context is that the Tribunal were dealing with this question within its consideration of **Grainger IV**, namely, whether her belief had the required level of *"cogency, seriousness, cohesion and importance"*. In the event, the Tribunal found that her belief did meet this criterion.

57. Finally, on this point, even if the Tribunal had excluded important aspects of her belief from its decision-making, there is nothing in the Tribunal decision to suggest it did so because of its "*own view*". The Tribunal did not express a view.

[77] §5.1(b) Notice of Appeal
[78] The Tribunal were entitled, in any case, to take Judicial notice of that evidence, as well as the decision in ***Goodwin*** which rejected the purely biological approach to gender, as was pointed out in the Answer at §10.
[79] P364 §15

(3) Whether the Tribunal "*substituted its own assessment of validity*"[80] instead of a "*proper consideration of whether [her] belief was within the range of beliefs that may be held in a democratic society*"[81] / "*by reference to the plurality of beliefs that people may hold in a democratic society*"[82]

58. The Tribunal did not impose a requirement that the belief must not be "*absolutist*". In the context of considering **Grainger V**, it used that term to describe the extremity of Ms Forstater's position, which went as far as being:

> "*that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman*"[83]
>
> And, further, that it was :
>
> "*a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment*."[84].

59. That position, the Tribunal said, applying **Grainger V**, was "*not worthy of respect in a democratic society*"[85] because "*it is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act*."[86] The particular human right that the Tribunal had in mind was the right to respect for private and family life **(Article 8**).

60. As to the second aspect, the Tribunal were not "*absolutist*": it simply applied the law. The law is that a trans woman with a GRC legally "*becomes*" the acquired gender.[87] The Tribunal were right to say, that that person is "*legally a woman*" and "*that is not*

[80] §5.1 Notice of Appeal
[81] §5.1 Notice of Appeal
[82] §5.1 Notice of Appeal
[83] §85
[84] §87
[85] §§85 and 87
[86] §85
[87] Section 9 GRA.

something that the Claimant is entitled to ignore"[88] particularly in view of the important principle contained within **Article 8 ECHR,** the decision in ***Goodwin*** (at §90) and the guidance given in the Equal Treatment Bench Book (see §§35, 36 and 39 above).

61. Ms Forstater's position, in its extremist stance, conflicts with **Article 8 ECHR** because the notion of dignity and personal autonomy is an important principle within **Article 8 (**see ***Coleman*** cited at §34 above): protection is given to the personal sphere of an individual including the right to establish details of their identity as individual human beings (see ***Goodwin*** at §90). This includes the ability to obtain legal recognition of a change in sex, something which is guaranteed by **S.9 GRA** and **Article 8 ECHR** (see ***Goodwin*** *§90*) and something which she does not accept (§§41, 83-85).

(4) Whether the Tribunal failed to recognise that "*whether sex is a material reality which matters and should not be conflated with expressions of gender identity is not an issue on which there is a settled democratic consensus, but is a matter of important contemporary debate*"[89]

62. The issue identified by Ms Forstater above is otiose for two reasons: either it has already been decided upon by Parliament (for which decision there clearly is a "*settled democratic consensus*") and enacted by virtue of the **GRA**, or, it is not a matter for the courts to resolve.

63. In any event, the Tribunal did recognise that there were different viewpoints at §75 and §86.

[88] §84
[89] §5.1(c) Notice of Appeal

(5) Whether the Tribunal adopted a particular viewpoint[90] within that "debate" which infected its analysis[91]

64. The viewpoint that is said to have been adopted by the Tribunal is described thus:

> "*- to the effect that sex is indistinguishable from expressions of gender identity, that there is a spectrum in sex which can be changed from one sex to another or to being of neither sex, and that it is unacceptable in any circumstances to refer to someone other than in accordance with their gender (or lack thereof) with which they identify (whether they have legally changed their sex via a Gender Recognition Certificate or not) – "*[92]

65. That was not a viewpoint that was adopted by the Tribunal. Nowhere does the Tribunal give a view that "*sex is indistinguishable from expressions of gender identity"* nor that that "*it is unacceptable in any circumstances to refer to someone other than in accordance with their gender (or lack thereof) with which they identify (whether they have legally changed their sex via a Gender Recognition Certificate or not)"*. In fact, the Tribunal expressly referred to what might be described as the 'opposite' view, that there may be circumstances in which it would be justified to exclude certain trans women from "*spaces that are generally only open to women assigned female at birth*" where this is a proportionate means of achieving a legitimate aim[93] or where a trans woman is "*not permitted to compete in sport on an entirely equal basis with women assigned female at birth, if that would create an unfair advantage*."[94] The position that it is unacceptable to refer trans people other than in accordance with their acquired gender is one that has the support of the guidance given in the Equal Treatment Bench Book (see §§35-39 above).[95]

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[90] That "*sex is indistinguishable from expressions of gender identity, that there is a spectrum in sex which can be changed from one sex to another or to being of neither sex, and that it is unacceptable in any circumstances to refer to someone other than in accordance with the gender (or lack thereof) with which they identify (whether they have legally changed their sex via a Gender Recognition Certificate or not)*" §5.1(d) Notice of Appeal

[91] §5.1(d) Notice of Appeal

[92] §5.1(d) Notice of Appeal

[93] §79

[94] §80

[95] As was pointed out in the Answer, at §11, the issue of whether someone can legally change their sex is not a matter of debate since the introduction of **S.9 GRA**. See also ***Goodwin*** §90.

66. It is misconceived to interpret the reference to the view, held by Ms Forstater, that "*there is no spectrum in sex and there are no circumstances whatsoever in which a person can change from one sex to another, or to being of neither sex"*[96] as a reference to the Tribunal adopting the contrary position. It did not. It simply recorded what Ms Forstater's view was, recorded what the legal position was (contained in section 9 of the **GRA**) and recorded the discrepancy between those two things.

67. This ground is, in reality, a ground which alleges bias but fails to meet the bias test (see §44 above).

Ground 2

68. Ground 2 makes two criticisms. First, that the Tribunal "*wrongly treated (presumed) manifestations of [her] belief as intrinsic to that belief*". Second, that, in doing so, it ignored her own account, which was that "*the way in which she refers to individuals is dependent upon the context and not intrinsic to her belief in all circumstances*".

69. Dealing with the first issue, the Tribunal did not make any presumptions about the way that she said she would act on her belief. Instead, it relied upon what she said and what she said she would do (see above at §§41, 49-50, 88, 89 and 93).

70. The Tribunal drew a distinction between "*belief and separate action based on the belief that may constitute harassment*"[97]. However, the suggestion that the Tribunal should not have considered that the way that she manifested her belief was a part of her belief is misconceived. Why not? The way that Ms Forstater referred to individuals <u>was</u> an important part of her belief; she insisted on misgendering them, thereby causing them harm.

As the Tribunal found at §41:

> "*She would generally seek to be polite to trans person and would usually seek to respect their choice, of pronoun but would not feel bound to; mainly if a trans woman who was not assigned female at birth was in a "woman's space", but also more*

[96] §41
[97] §88

generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position."

As the Tribunal concluded at §88:

"*In her response to the complaint made by her co-workers the Claimant stated 'I have been told that it is offensive to say 'transwomen are men' or that women means 'adult human female'. However, since these statements[s] are true I will continue to say them*'".

And at §89:

"*Rather than seeking to accommodate Gregor Murrays legitimate wish she stated … 'I reserve the right to use the pronouns 'he' and 'him' to refer to male people.*'"

And at §93:

"*She positively believes that [trans women] are men; and will say so whenever she wishes*."

71. Secondly, it is not correct that the way that she referred to individuals depended upon the context. That was not the finding made by the Tribunal (see §48 of this Skeleton above). If her complaint is that the Tribunal's findings were perverse, then that is doomed to failure (see above at §44).

72. It is hard to resist the conclusion that what she is doing here is reserving the right to misgender whenever she wants. The Tribunal concluded as much at §93. The Tribunal's conclusion, at §87, that her insistence on "*calling a trans woman a man*" may be not only "*profoundly distressing*" but also "*harassment*" is reasonable: such behaviour crosses the line in that it is contrary to **Article 8**, **Section 26 EqA**, **Goodwin** and the guidance given in the Equal Treatment Bench Book.

Ground 3

73. Ground 3 makes three criticisms. First, that the Tribunal failed to protect adequately Ms Forstater's **Articles 9 and 10 ECHR** rights. Second, that the effect of its analysis means that she has to change her beliefs or never articulate them[98]. Third, that in imposing a requirement on her to refer to a "*trans woman as a woman*"[99] it "*destroy[ed*]" her **Article 9 and 10** rights.[100]

74. As regards the first question, the Tribunal adequately considered **Articles 9 and 10 ECHR**:

(1) The Tribunal clearly acknowledged that "*full regard must be given to the qualified convention right of freedom of expression*" in its analysis at §75. The convention rights are also set out, at §49, where the Tribunal clearly stated that the interpretation of what constitutes a philosophical belief requires consideration of **Article 10**. This is also explicitly stated with regard to **Article 9**, in §§47 and 48 of the Judgment.

(2) The Tribunal concluded, at §87, that "*calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment*". It went on to consider this specifically in the context of freedom of expression:

> "*Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them*."

(3) At §§86 and 91, the Tribunal considered the different ways that Ms Forstater could express her views:

> "*There is nothing to stop the Claimant campaigning against the proposed revision to the Gender Recognition Act to be based more on self-*

[98] §5.3(a) Notice of Appeal
[99] §5.3(b) Notice of Appeal
[100] §5.3 and 5.3(c) Notice of Appeal

identification"…"*the Claimant could generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman*".

If she chose to express herself in this way then she would not harm others, that is to say, she would not impinge upon the **Article 8** and **Article 14** rights of trans people and nor would her conduct enter into the territory proscribed by **S.26 EqA**.

(4) At §91, the Tribunal concluded:

"*I do not accept that there is a failure to engage with the importance of the Claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. <u>The human rights balancing exercise goes against the Claimant</u> because of the absolutist approach she adopts.*" (emphasis added).

(5) The Tribunal's approach is consistent with international human rights law, which it acknowledged at §87, and, in particular, Principles 1-3 of the **2007 Yogyakarta Principles** and Principles 30-32 of the **2017 Yogyakarta Principles**.

75. As the underlined passage demonstrates (at §74(4) above), the Tribunal undertook the required balancing exercise, balancing Ms Forstater's rights pursuant to **Articles 9** and **10 ECHR** with those of the harm caused to trans people (which would violate their **Article 8** and **Article 14** rights)[101] and concluded that such went "*against*"[102] her. The Tribunal's approach is consistent with the proportionality analysis undertaken by Lord Reed ***in Bank Mellat v HM Treasury*** (No 2) [2014] AC 700 at §74:

[101] Of course, to the extent that the way Ms Forstater expresses her beliefs causes harm to trans people because it enters into the territory of '*harassment*' proscribed by **S.26 EqA**, then, arguably, Article 17 ECHR is engaged preventing reliance on a part of the Convention to destroy the rights and freedoms of others.
[102] §91

"*The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*[103]."

The balancing exercise goes against Ms Forstater because (1) the objective of protecting trans people from the harm of misgendering is important, (2) there is a rational connection between that objective and the measure (requiring Ms Forstater not to misgender in the particular circumstances envisaged by §91[104]), (3) a less intrusive measure (one that does not require her to refrain from misgendering in the instances when it is necessary to refer to someone's gender) would unacceptably compromise the achievement of that objective since it would permit the harm of misgendering to take place, and, (4) the impact of the rights infringement (which is limited) is not disproportionate to the likely benefit of the impugned measure.

76. There was no interference with **Articles 9(1)** and **10(1**). Even if there was an interference, the limits contained in **Article 9(2)** and **10(2)** prevent there being a violation because those rights are limited[105] where their exercise interferes with the rights and freedoms of others, which the Tribunal determined that there was, for the reasons stated at §91.

77. As regards the second question, whether Ms Forstater has to change her beliefs or never articulate them[106], as the Tribunal pointed out, the right to freedom of expression is a qualified one[107]. The freedom to express beliefs is not unlimited and there is a need to

[103] This was clarified as meaning "in essence … whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure" (§74) **Bank Mellat**.
[104] In the limited circumstances in which it is necessary to refer to someone's sex (§91).
[105] It is accepted, and assumed to be common ground, that Article 9(2) places no limitations on the freedom to hold beliefs.
[106] §5.3(a) Notice of Appeal
[107] §§ 74, 87 and 91

accept some limitations on how beliefs are expressed in public on matters of particular sensitivity[108]. Once the EqA is engaged, the right to free speech changes, because of the limits placed around individual's conduct by *inter alia* **S.26 EqA**: you are not protected if the purpose or effect of your conduct is that others' dignity is violated or if the proscribed environment referred to therein is created. What this means is, not that she needs to change her beliefs, and not that she is prevented from ever articulating them, but that she needs to take care in the way that she articulates them, so as not to harm others.

78. As regards the third issue, the "*requirement*" to "*refer to a trans woman as a woman*"[109], it is said that this obliges her to manifest a belief that she does not hold contrary to ***Lee v Ashers Baking Co Ltd*** [2020] AC 413, SC at §50 per Baroness Hale. The situation described by Baroness Hale at §50 was entirely different because the issue in question was requiring non-Christians to swear a Christian oath in order to remain members of Parliament. Ms Forstater is not being asked to swear an oath of allegiance.

79. There is another important difference between this case and ***Lee v Ashers***. ***Lee v Ashers*** involved a stance taken against a message as opposed to this sort of case which is a stance taken against a group of people (trans women). The message, in ***Lee v Ashers***, was refusing to ice a cake with the words "*Support Gay Marriage*" and the reason for such refusal was not because of the respondent's actual or perceived sexual orientation but because of the appellants' religious beliefs[110]. The objection was to the message and not any particular person or group of persons. The fact that the message had to do with sexual orientation was irrelevant[111]. If the objection had been to the customer, rather than the message, then it is likely the decision would have gone the other way[112]. By contrast, in this case, the objection is to persons with the protected characteristic of gender re-assignment.

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[108] ***NHS Case*** per Underhill LJ at §101
[109] §5.3(b) Notice of Appeal
[110] See §1 of the headnote in ***Lee v Ashers***
[111] §55 **Lee v Ashers**
[112] In a post-script to the judgment, Baroness Hale records the handing down of a judgment in the United States in another cake case, ***Masterpiece Cakeshop Ltd v Colarado Civil Rights Commission*** (unreported) 4 June 2018. In that case, a Christian baker refused to create a wedding cake for a gay couple because of his opposition to same-sex marriage. In the dissenting judgments of Justices Ginsberg and Sotomayor, a distinction was drawn between an objection to the message and an objection to the customer who wanted the cake. Their view was that in this case, the objection was to the customer and therefore a violation (§§59-62 ***Lee v Ashers***).

80. The Tribunal's analysis does not conflict with that of Baroness Hale in ***Lee v Ashers***[113], which was expressly referred to at §§72 and 91. At §91, the Tribunal determined that Ms Forstater could:

> "*generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person['s] sex at all*."
>
> At §86 it concluded:
>
> "*The Claimant can legitimately put forward her arguments about the importance of some safe spaces that are only be available to women identified female at birth, without insisting on calling trans women men*."

81. In the limited circumstances where it is necessary to refer to someone's sex, the Tribunal considered that the requirement to refer to a trans woman as a woman was justified to avoid harassment of that person.[114] That is not requiring Ms Forstater to manifest a "*belief*" that she does not hold. She is simply required not to harass others. This does not destroy Ms Forstater's **Article 9 and 10** rights[115] because it accords with the limits contained in **Articles 9(2) and 10(2).** The Tribunal was correct in its conclusion because, as the Tribunal pointed out earlier in its analysis, that to call *"a trans woman a man*" is "*likely to be profoundly distressing*"[116]. The Tribunal's approach reflects S**.9 GRA**, **S.26 EqA**, **Goodwin** and has support from the Equal Treatment Bench Book.

82. It is anticipated that Ms Forstater will argue that reliance should also be placed upon the judgment of Lord Dyson in ***RT (Zimbabwe) v Secretary of State for the Home Department***[117] (referred to by Baroness Hale at §52 of ***Lee v Ashers***) in which Lord Dyson held that the principle applied to political opinions as well as religious beliefs. If that is the

[113] [2018] HRLR 22
[114] §91
[115] As complained of at §5.3(c) (i) Notice of Appeal
[116] §87
[117] [2013] 1 AC 152

case, then such reliance would be mis-placed. The legal recognition given to persons who transition pursuant to S.9 GRA is not a 'political opinion'; it is the law.

Ground 4

83. Ground 4 is in two parts.

84. The first part complains that, in balancing competing rights, the Tribunal incorrectly equated the causing of offence and the test for harassment on the one hand with the test in **Grainger V** on the other[118]. It is said that, in order to fall within the latter category, the belief must be "*oppressive and unacceptable*".[119]

85. It is not correct that there was any improper equation or conflation of the test in **Grainger V** and the test for harassment. The Tribunal analysed Ms Forstater's belief in the context of **Grainger V** at §§84 – 91. At the outset of this part of the analysis, it correctly referred to the issue of whether the belief was "*incompatible with human dignity and [the] fundamental rights of others*"[120]. That is the **Grainger V** test. It went on to consider that Ms Forstater's approach, including referring to trans women as men[121], may constitute harassment[122] but distinguished harassment from the violation of dignity that is relevant to the issue of whether the belief is a protected philosophical belief (that is, **Grainger V**).[123] In any event, the question of whether there was some sort of impermissible overlap in its analysis in this regard is an arid debate since "*dignity*" is an essential ingredient in both the test for harassment and **Grainger V**. The Tribunal in ***Mackereth*** undertook a similar analysis at §§201-202, namely, that refusing to refer to a trans person by their relevant pronouns would constitute unlawful discrimination under the **EqA** and, for those reasons, "*fall foul of Grainger*".

[118] §5.4(a) Notice of Appeal
[119] §5.4(a) Notice of Appeal
[120] §84
[121] §87
[122] §87
[123] §88

86. There is no authority that, in order to be in **Grainger V** territory, the belief must be "*oppressive and unacceptable*"[124]. Nor is there any finding of fact or determination that Ms Forstater's belief failed to meet a "*threshold of seriousness*[125]" in order to gain entry into that category. On the contrary, the Tribunal concluded that her "*belief harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men or to trans men by insisting they are women*."[126] Not only that but the Tribunal concluded that: "*the Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a person, even if that person has a Gender Recognition Certificate*".[127]

87. The second part complains that the Tribunal failed to give enough focus to (1) the circumstances in which she might decline to refer to someone in the way they prefer (2) the importance of her belief in relation to "*an important topic of contemporary debate*"[128] (3) the practical effect that not protecting her belief will have in destroying her **Article 9 and 10** rights.

88. The Tribunal adequately covered all these points. First, it focused on the circumstances in which she would not refer to someone in the way that they preferred at several places in the judgment.[129] Second, it focused on the importance of her belief at §78[130]. Third, it focused on the effect of excluding her belief from the protection afforded by the Convention, at §91, concluding that the "*human rights balancing exercise*" went against her for the reasons stated therein (see §75 above). In any case, if Ms Forstater's real challenge is that the Tribunal's conclusion was perverse then such a challenge is fundamentally flawed for the reasons set out in §44 above.

[124] §5.4 (a) Notice of Appeal
[125] §5.4 (a) Notice of Appeal
[126] §91 and see also its earlier findings at §§41, 83, 84, 85
[127] §85
[128] §5.4(b)(ii) Notice of Appeal
[129] §§39.12, 39.13, 41, 77, 78, 85 and 89.
[130] The issue of whether this is or is not "*an important topic of contemporary debate*" is not one which the EAT have to decide.

Ground 5

89. Ground 5 in in three parts.

90. First, is a criticism that The Tribunal's conclusion that her belief was unworthy of respect because she denied the right of a person with a GRC "*to be the sex to which they transitioned*" at §84 was unsafe because the GRA does not confer a right "*to be the sex to which they have transitioned*" (as posited by the Tribunal at §84) but, rather, to be "*treated as being of that sex in law*".[131]

91. In fact, **section 9 of the GRA** states that "*the person's gender becomes for all purposes the acquired gender".* The right, therefore, is not "*to be*" nor "*to be treated as*" but "*to become*". On balance, the Tribunal were closer to the **GRA** formulation than Ms Forstater, there being no material difference for these purposes between "*being*" and "*becoming*". The Equal Treatment Bench Book's interpretation is that the right is to be "*recognised*"[132]. However, it does not matter because, clearly, what **section 9 GRA** does is to legally recognise that someone has transitioned and what is important, following that legal recognition, is how someone is treated. The Tribunal were correct in pointing out that this was not something that Ms Forstater was "*entitled to ignore*"[133]: she cannot ignore the law.

92. Second, is a suggestion that Ms Forstater's evidence was that she did not deny the right of a person with a GRC to the rights accorded to them under the **GRA** and the **GRA** does not oblige people who disagree that a person with a GRC is the sex with which they identify to change their beliefs or stay silent about them[134]. The suggestion that her evidence does not deny the rights of trans people with a GRC is wrong: the Tribunal found and concluded that the opposite was the case[135]: she does <u>not</u> recognise the legal transition of someone even where they have obtained a GRC. The Tribunal recorded her

[131] §5.5(a) Notice of Appeal
[132] Chapter 12 §54
[133] §84
[134] §5.5(b) Notice of Appeal
[135] §§41 and 85

position as being that, even if a trans woman has a GRC**,** she cannot honestly describe herself as a woman (§85). In fact, the Tribunal found that she went even further than that because she described the phrase "*trans women are women*" as a "*literal delusion*" (§27). C's position is, exactly, therefore, a denial of someone's right to become the sex to which they have transitioned, which is a right under the **GRA**[136].

93. Third, and rather surprisingly, the criticism is that the Tribunal erred in "*relying upon and/or treating as determinative the current state of the law under the GRA*" because "*the current state of the law is … irrelevant*".[137] It cannot be seriously suggested that it is an error of law for the Tribunal to take into account what is actually the law. The current state of the law is relevant and the Tribunal were entitled to consider it as determinative. The Equal Treatment Bench Book does likewise.[138]

Ground 6

94. Ground 6 is the contention that the Tribunal wrongly applied the test for whether a positive belief is protected to the question of whether her lack of belief is protected. She asserts that, for a lack of belief to be protected, it is sufficient that the belief which is not shared is itself protected.[139]

95. This is sleight of hand because it seeks to gain protection for her belief 'through the back door' of lack of belief.

96. The Tribunal applied the correct test at §§92-93.It concluded that "*believing that a trans woman is a woman does not conflict with the approach of the European Court of Human Rights in Goodwin or the Gender Recognition Act or involve harassment*"[140] and so that belief would have been protected. The opposite of that view (the view held by Ms

[136] **S.9 GRA** provides *"if [the acquired gender] is the female gender, the person's sex becomes that of a woman*".
[137] §5.5(c) Notice of Appeal
[138] Chapter 12 §§49-56
[139] §5.6 Notice of Appeal
[140] §92

Forstater) is that trans women are men[141] and that belief fails to meet the Grainger criteria.[142]

97. It is also not always the case that a lack of belief is always protected where the positive belief would have been protected. In ***Mackereth,*** the claimant lacked a belief in "*transgenderism*". This lack of belief was not protected as it did not satisfy **Grainger V** although the positive belief, that it is possible to transition and that society should accommodate transitioning, was protected. Similarly, in ***Ellis v Parmagan***[143]***,*** a lack of belief that Jewish people were killed in concentration camps was not protected whereas the positive belief that the Holocaust occurred was protected.

Conclusion

98. If this appeal is allowed and Ms Forstater's position is to be supported, the result will be that, in any workplace or in any client-facing situation, she, and those who believe in the Gender Critical Belief, will be able to cause harm (harassment) to others by misgendering them. That, indeed, is what the Tribunal found that she would do.[144] There are two consequences to this. First, no trans person will be safe from harassment in any workplace or in receipt of any service. Second, no employer or service provider will be able to maintain a safe space in any environment in which either she, or those that believe what she does, operate in.

99. That cannot be right.

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[141] The Tribunal rejected her suggestion that she merely does not hold the belief that trans women are women because she positively asserts that they are men "*and will say so whenever she wishes*" §93

[142] §92

[143] 1603027/13 ET

[144] See the Tribunal's findings of fact: §41 "*She would generally seek to be polite to trans person and would usually seek to respect their choice, of pronoun but would not feel bound to; mainly if a trans woman who was not assigned female at birth was in a "woman's space", but also more generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position*." See also the Tribunal's analysis:§88: "*In her response to the complaint made by her co-workers the Claimant stated 'I have been told that it is offensive to say 'transwomen are men' or that women means 'adult human female'. However, since these statements[s] are true I will continue to say them'*". §89: "*Rather than seeking to accommodate Gregor Murrays legitimate wish she stated … 'I reserve the right to use the pronouns 'he' and 'him' to refer to male people.'*" §93: "*She positively believes that [trans women] are men; and will say so whenever she wishes*."

100. The Employment Appeal Tribunal is invited to dismiss the appeal.

Jane Russell

Essex Court Chambers

13 April 2021