IN THE EMPLOYMENT TRIBUNALS **Case No. 2200909/2019**

LONDON CENTRAL

BETWEEN:

MAYA FORSTATER

Claimant

-and-

CGD EUROPE

CENTER FOR GLOBAL DEVELOPMENT

MASOOD AHMED

Respondents

RESPONDENTS' CLOSING SUBMISSION

22 March 2022

Contents

Introduction

The parties

1. The Center for Global Development (CGD) is a non-profit think tank dedicated to reducing global poverty and inequality through policy-oriented research and active engagement on development issues with the policy community and the public. A principal focus of CGD's work is the policies of the United States and other industrial countries that affect development prospects in poor countries. CGD's research assesses the impact on poor people of globalization and of the policies of industrialized countries, developing countries and institutions.

2. In October 2011, CGD established CDG Europe (CGDE) in the UK, as a "company limited by guarantee and not having a share capital" under The Companies Act 2006. CGD is the sole member of CGDE. CGDE's mission is to promote, for the public benefit, education and research into poverty, health, sustainable development, economics, good governance and transparency in public life and administration and public finance.

3. Mr Masood Ahmed is the President of CGD and Chair of the Board of Trustees of CGDE; his bio is here.

4. Neither of the Respondents' missions are concerned with or have ever been concerned with the definition of a "woman" and whether it should exclude transwomen. This is not an issue that CGD or CGDE have ever sought to opine on nor do they want to express any position on this issue which falls well outside of their policy areas.

Issues to be determined

5. The Tribunal is directed to the revised List of Issues (LOI).

The Respondent's case in a nutshell

The preliminary issue on status

6. The Respondents submit that:
   a. At no time was the Claimant employed under a contract to do work personally for either of the corporate Respondents (within the meaning of s.83 of the Equality Act 2010 "EqA"), she was at all times genuinely self-employed, and

accordingly her claims fall outside the Tribunal's jurisdiction. If this is the Tribunal's finding, all of the claims (save for the alleged refusal to engage her as an employee in November 2018) will fail at the first hurdle; and

b. In respect of the claim that in November 2018 the Respondents took a decision not to employ the Claimant on the Gates funded project and any other projects, she does not fall within the scope of s.39(1) EqA because she was not an applicant for employment (nor akin to one) and there was no decision at that time not to offer her employment. The position with respect to her prospects of being offered an employment role remained the same as it had in February and March 2018 as articulated by MA to OB and VR, and never got to a stage where the prospect was any more certain.

The substantive dispute

7. If there is jurisdiction to hear the claims, then this case brings before the Tribunal a conflict between Ms Forstater's manifestation of her ideas about sex and gender identity and its impact on the mission of CGD and CGDE and their fundamental rights.

8. The Respondents' case, in short, is that undertakings are not obliged, on pain of legal liability, to have their mission undermined by an individual's communications and behaviours, whether internally or on social media, which cause offence and disruption, contradict its policy of inclusion, and which are reasonably regarded as discriminatory. The Respondents will submit that there is no such obligation in law, even where some of the communications are manifestations of a protected philosophical belief.

9. The Respondents do not accept that every message and communication inspired by the Claimant's protected belief was a manifestation of it. Some of her communications were reductive and dismissive and demonstrated antipathy towards both gender identity and to those who did not share her gender critical belief.

10. Further, even if the Tribunal finds that part of the reason why the Respondents took the decisions which they did was because of the Claimant's expressions of her protected belief, s.26 EqA has to be read down under s.3 HRA 1998 to conform with the law under articles 9 and 10 ECHR. This includes the right to interfere with

an individual's protected rights in the circumstances prescribed under article 9(2) and 10(2).

11. Moreover, even if the Tribunal find that the Respondents did make the decisions because of her protected belief, then by reason of article 10 ECHR, neither a corporate body nor an individual can be compelled to associate with, campaign for or promote a message they do not wish to express. By finding liability against the Respondents for not renewing the Visiting Fellowship ("VF"), the Tribunal will be obliging employers into compelled speech which is contrary to the corporate Respondents' fundamental rights under article 10 ECHR.

12. Similarly, under article 9 ECHR, the individuals behind a corporation cannot be compelled to associate with or express beliefs that are contrary to their protected beliefs.

13. The Respondents emphasise that they do not and did not seek to prevent the Claimant from expressing her views. They do and did object to the manner in which she chose to express her views both internally and externally and in association with CGD and CGDE. It is submitted that neither human rights nor domestic equality law requires them to tolerate such behaviours or interference with the rights of others.

14. The Respondents took a measured balanced approach to handling the disruption caused to their organisations and staff. MA recognised that it was the public affiliation with the Claimant (by way of the Visiting Fellowship) that presented the greatest risk that the infringements of their corporate and individual fundamental rights would continue. This is because it was by reason of the Visiting Fellowship that the Claimant could hold herself out as being "of CGD / CGDE" in person and online. Therefore it was by reason of this association that the public could associate the messages with CGD and CGDE. The decisions were this justified.

15. Even in her "final plea" to remain a Visiting Fellow on 22.02.19, the Claimant stated: that she would use a person's preferred pronouns *"in <u>most</u> social situations"*; that she has "*decided not to tweet <u>very much</u>*" about the issue of sex and gender on her main twitter account (in affiliation with CGD); and that she would *"continue to write about it and engage in public debate"* on the topic. Had she remained a Visiting Fellow, she would have been entitled to publish single authored blogs on the joint

website and use her title and affiliation with CGD / CGDE in any publication elsewhere, including at any event and online. Therefore, there was a significant risk of a continued violation of the corporate Respondent's article 10 rights and the article 9 rights of their employees.

16. MA considered the Claimant's strong desire at all stages to make space for a debate on the issue within CGD and CGDE and the vehemence with which she argued that hers was the "true" viewpoint. His concern was heightened by the indications even in her "final plea" that she had every intention of continuing to promulgate such messages in association with CGD and CGDE in the future. MA took the decision that the risk to the fundamental rights and freedoms of the two entities, and those working for them overrode the Claimant's right to maintain a public affiliation with them. This decision was entirely proportionate and appropriate.

17. MA even agreed that she could remain as a contractor on the Gates proposal, so as not to cause her a loss of expected income. The interference with her rights under article 9 and 10 was simply to not express those views as an affiliate of CGD / CGDE. As a contractor, she would have no public affiliation and the risk of harm was much reduced.

The Claimant's status vis-à-vis CGD/CGDE

18. For all claims bar one, the Claimant will have to demonstrate that she was "employed under a contract personally to do work" under s.83 EqA. If she cannot, all such claims fail.

19. In respect of one claim, namely not offering her an employed role on the Gates grant in November 2018, the Claimant can either persuade the Tribunal that she was in "employment" by this time or that she was an applicant within the meaning of s.39(1) EqA.

Law on "employment" status for the purposes of the Equality Act 2010

20. The jurisdiction of the Tribunal to resolve disputes under EqA is set out in s. 120. Essentially it concerns allegations of unlawful acts contrary to Part 5 - Work. Part 5 defines when prohibited conduct related to protected characteristics concerning employment is unlawful.

21. S.83(2)(a) Equality Act 2010 ("EqA"), defines employment -

> Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

22. This comprises three types of relationship all of which fall within scope of EqA. The first of which is "Employment under an employment contract" in the narrow sense as used under s.230 ERA.

23. This third concept: "Employment under…. a contract personally to do work" allows a broader category of individuals to fall within the scope of "employment" under the EqA than would under the ERA definition of employee.

24. Many commentators and caselaw suggest that the definition of "Employment under a contract personally to do work" under s.83(2) EqA is essentially the same as the definition of "worker" under s.230(3)(b) ERA, so called "limb b workers", which are defined as follows -

> 1) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
> and any reference to a worker's contract shall be construed accordingly
> [emphasis added]

25. Accordingly, as HHJ Tayler stated in ***Alemi v Mitchell and Another*** ***[2021] IRLR 263***, at [9] -

> The position is now reasonably clear. There are three basic categories:
>
> (1) those employed under contracts of employment – "employees in the narrow sense" who obtain all of the statutory protections;
>
> (2) those who work under contracts to do work personally who are to an extent self-employed but work in circumstances that are akin to employment, who benefit from some statutory protection – often referred to as "limb (b) workers" for the purposes of the Employment Rights Act 1996 and similar provisions, or "employees in the extended sense" for the purposes of the Equality Act 2010; and

> (3) the "genuinely" self-employed, who are in business on their own account and undertake work for their clients or customers; they benefit from none of the statutory protections.
> [paragraph breaks added for clarity]

26. The definition under s.83(2) EqA does not contain the same express exception under s.230(3)(b) ERA (for limb b workers) whereby the individual will not amount to a worker if the "employer" is a client or customer. This wording included under s.230(3)(b) ERA essentially distinguishes the truly self-employed worker as being outside of the scope of protections prescribed by the ERA or EqA.

27. Whilst the wording of EqA is different, in that it does not contain the express statutory exception for clients or customers, it is submitted that the same distinction applies under both s.83(2) EqA and s.230(3)(b) ERA, such that the truly self-employed are not protected. Indeed in ***Alemi*** it was held at [11] -

> The main point in this appeal is whether the additional wording [in s.230 ERA] makes a significant difference. It is now well established in the authorities that it does not.

28. The same conclusion had been reached by Lord Wilson in his judgment (for the whole court) in ***Pimlico Plumbers Ltd v Smith*** ***[2018] IRLR 872*** at 874, at [13]–[15]

> 13. On its face section 83(2)(a) of the Equality Act defines "employment" in terms different from those descriptive of the concept of a "worker" under section 230(3) of the Act and under regulation 2(1) of the Regulations. For it defines it as being either under a contract of employment or of apprenticeship or under "a contract personally to do work". Comparison of the quoted words with the definition of a limb (b) "worker" in section 230(3) of the Act demonstrates that, while the obligation to do the work personally is common to both, the Equality Act does not expressly exclude from the concept a contract in which the other party has the status of a client or customer.
>
> 14. As it happens, however, this distinction has been held to be one without a difference. Part 5 of the Equality Act, which includes section 83, primarily gives effect to EU law. Article 157(1) of the Treaty on the Functioning of the European Union requires member states to ensure application of "the principle of equal pay for male and female workers for equal work or work of equal value". In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328 the Court of Justice of the European Communities, at paras 67 and 68, interpreted the word "workers" in what is now article 157(1) as persons

who perform "services for and under the direction of another person in return for which [they receive] remuneration" but excluding "independent providers of services who are not in a relationship of subordination with the person who receives the services". In *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1 WLR 1872, the Supreme Court applied the concepts of direction and subordination identified in the Allonby case to its interpretation of a "contract personally to do … work" in the predecessor to section 83(2)(a). In *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 1 WLR 2047, Lady Hale observed at paras 31 and 32 that this interpretation of the section yielded a result similar to the exclusion of work for those with the status of a client or customer in section 230(3) of the Act and in regulation 2(1) of the Regulations. She added, however, at para 39 that, while the concept of subordination might assist in distinguishing workers from other self-employed people, the Court of Appeal in that case had been wrong to regard it as a universal characteristic of workers.

29. Accordingly, case law in respect of the definition of a limb b worker under the ERA applies to the concept of "employment under a contract personally to do work" under s.83 EqA.

30. As to how the distinction is to be made between those "employed under a contract personally to do work" and the "truly self-employed", Lord Clarke JSC said in ***Jivraj v Hashwani [2011] UKSC 40***, at [34]:

> The essential questions … are … those identified in paras 67 and 68 of *Allonby [2004] ICR 1328* , namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties … The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case."
> [emphasis added]

31. Sir John Donaldson MR in ***O'Kelly v Trusthouse Forte Plc [1984] QB 90*** (cited with approval by the Court of Appeal in ***Clark v Oxfordshire HA [1998] IRLR 125***) stated that:

> …the test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application

to the facts. But it is for the tribunal not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract; those findings and that assessment will dictate the correct legal answer. In the familiar phrase 'it is all a question of fact and degree'. It is only if the weight given to a particular factor shows a self-misdirection in law that an appellate court with a limited jurisdiction can interfere. It is difficult to demonstrate such a misdirection and, to the extent that it is not done, the issue is one of fact.

The core test for employment under the Equality Act 2010

32. In light of the above, when determining whether an individual is "employed under a contract personally to do work" there are three questions for the Tribunal to address -
    (1) Was there a contract between the parties?
    (2) If so, did the contract require the Claimant to do work personally?; and
    (3) If so, looking at all the circumstances, was the Claimant in business on her own account or was she working for and under the direction of the Respondent(s)?

33. Where there is no contract between the individual and the entity in question, the claim will fail at that stage. It does not matter if the individual is in fact performing work for the entity and being paid for it, or that the work has economic value to the organisation. Unless there is a contractual relationship, the individual is out of scope of the legislation, as demonstrated by the following cases:
    (a) In ***R (Independent Workers Union of Great Britain) v Central Arbitration Committee [2019] EWHC 728*** (Admin), the High Court upheld the CAC's decision that workers engaged by an outsourcing company to supply security services to a university were not workers of the university as they did not have a contract with the university. The IWGB could therefore not apply to the CAC for compulsory recognition to conduct collective bargaining with the university on their behalf; and
    (b) In ***X v Mid Sussex CAB [2013] ICR 249***, a volunteer who provided legal advice as a CAB advisor one to three days a week under a volunteer agreement was outside the scope of the DDA 1995 despite providing labour that the CAB would otherwise have had to pay for. The claims failed due to the lack of a contract and the lack of remuneration.

34. Personal service is a necessary requirement under s.83 EqA. However, whilst a contract requiring personal service is a necessary element, this is not sufficient to prove the requisite status as "employed under a contract personally to do work" under s.83 EqA.

35. One other relevant factor is the concept of mutuality of obligation, in the sense of whether there is any obligation to offer work or any obligation to accept work offered between contracts. Per Elias LJ in ***Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99*** :

> 12. In order for the contract to remain in force [between assignments] it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612* , 623, approved by Lord Irvine of Lairg LC in *Carmichael v National Power plc [1999] ICR 1226* , 1230. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee . This was the way in which the employment tribunal analysed the employment status of casual wine waiters in *O'Kelly v Trusthouse Forte plc [1983] ICR 728* , and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse.
> [emphasis added]

36. In ***Windle and anor v Secretary of State for Justice [2016] IRLR 628,*** in the CA, Underhill LJ relied on the dicta in ***Quashie*** in the context of claims brought under EqA stating at [24]:

> The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in *Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667* , para 17(5)), in considering the latter question the boundary is

pushed further in the putative employee's favour—or, to put it another way, the pass mark is lower.

37. The Respondents advance the following non-exhaustive list of factors (drawn from a variety of cases on point) relevant to the fact sensitive enquiry that the Tribunal must undertake when determining where the Claimant was in business on her own account or "employed under a contract personally to do work" -
    (a) How the relationship is defined under the written express contracts (***Autoclenz Ltd v Belcher & Ors [2011] IRLR 820***);
    (b) The relative bargaining power of the parties (***Autoclenz*** and ***Uber BV and others v Aslam and others [2021] IRLR 407***);
    (c) Whether the terms of any written agreement truly represent what was agreed (***Autoclenz*** and ***Uber***);
    (d) How the parties considered / treated their relationship at the time;[1]
    (e) The degree of integration (***Bates van Winkelhof***)
    (f) The degree of control exercised by the employer over the individual as to:
        i) How to carry out the services;
        ii) Timetable of work (***Allonby*** para 72);
        iii) Content of work (***Allonby*** para 72);
        iv) Place of work (***Allonby*** para 72);
        v) Whether uniform etc is prescribed / dictated;
        vi) Whether the worker can take holiday without needing permission;
    (g) Whether there was any mutual obligation between the parties in the periods falling between contracts, namely any obligation to provide work or any obligation to accept any work that is offered (***Windle*** para 23*)*;
    (h) Exclusivity of services, noting that dependence on a key customer does not mean a person is an employee if they are genuinely in business on their own account (***Bates van Winkelhof*** para 39);
    (i) How payment is rendered (i.e. salary through PAYE versus fees paid following invoices) *"a regular wage or salary tends towards a contract of employment; profit sharing or the submission of invoices for set amounts of work done, towards independence"*[2]

[1] In Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99, CA, Elias LJ cited Lord Denning's judgment in Massey and also that of Ralph Gibson LJ in Calder v H Kitson Vickers Ltd [1988] ICR 232, CA and summed the overall position up as follows:
''It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…''

[2] Harvey on Industrial Relations and Employment Law, Div A1, 1, B(2) "Criteria of employment"

(j) Who bears responsibility for tax and other liabilities[3];
(k) Provision of equipment;[4]
(l) Duration of the engagement;
(m) Level of risk;[5]
(n) Whether the worker is given paid holiday, sick pay or other leave;[6]
(o) Whether there was a *"traditional structure"* of employment in the trade / profession or whether it has always been a *"bastion of self-employment"*[7]; and
(p) How the arrangement was terminable. A power of dismissal *"smacks of employment"*.[8]

38. This protection under s.39(1) EqA is specifically provided for those who are applicants for employment, not those who already are employees. An internal candidate for a vacancy, even if advertised externally, would thus not fall within this protection. Thus, it was held (***Clymo v Wandsworth London Borough Council [1989] IRLR 241***) that SDA 1975 (protection for applicants for employment) had no application to an employee who is already in post.

Facts and submissions on the Claimant's status

39. The Claimant set up a consultancy business in approximately 2000 according to her answers in live evidence.

40. At all times whilst offering services to the Respondents, she had her own website page (hiyamaya.wordpress.com e.g at [482] and since approximately 2019 this moved to hiyamaya.net) and offered her services to other clients and customers. Her CV as provided to VR in February 2018 stated [637-640]:

> I am an experienced researcher, writer, advisor and facilitator working on the role of the private sector in sustainable development. As a research consultant I have worked with international organisations, business groups, NGOs and multi-sector collaborations over the past 15 years in setting up, supporting and researching initiatives aimed at shaping policies, standards, public scrutiny

[3] Harvey as above
[4] Harvey as above
[5] Harvey as above
[6] Harvey as above
[7] Harvey as above
[8] Harvey as above

> and business norms in relation to mobilizing private investments towards sustainable development….
>
> I have built up a strong network across international organisations, policy makes, tax practitioners, NGOs and academia….
>
> Working with research institutions including the Center for Global Development, ODI, Oxford Climate Policy, Project Catalyst….
>
> [emphasis added]

41. Accordingly, for approximately 15 years prior to working with CGD, the Claimant had been running her own consultancy business and had an established CV, consultancy business and an extensive portfolio of clients.

First Contract

42. The Claimant's first interaction with the Respondents was when she entered into the First Contract on 6 January 2015 which was for a one-off paper for the fixed sum of $7,500.00 with CGDE (London). The Claimant accepts that she was not an employee during this contract (para 12 C's WS). She contends that she became an employee in 2017 whilst working under the Second Contract and having the affiliation as a Visiting Fellow.

43. During 2016, the Claimant accepts that she "collaborated" with VR, of CGD (Washington), to develop a concept paper for securing funding for her work on tax and illicit financial flows (IFFs) (para 17 C's WS she uses the word "collaborated"). It is clear that she had a high degree of control and autonomy in shaping the work she wanted to secure funding for. This is evident as early as January 2016 when VR asks her *"would you be willing to send me some ideas? You mentioned case studies which is great – can you write up 2 to 3 paragraphs on that? Anything else you want to do"* [453].

44. In May 2016, the Claimant sent VR some further ideas for topics she wanted to pursue and concluded the email *"I really hope we are able to get funding to do a next phase of work on this stuff. I would like to wind up my UNEP contract and devote some time properly to this, while getting paid!"* [456-7]. VR replied *"Let's focus on getting funding and on our longer term research."* [455]

45. On 11 May 2016, VR sent an email to colleagues with a draft of the concept note stating *"Maya and Matt has been major contributors to this draft"* [462]. (Matt Collin clarified he had only written two lines of it [461]).

46. During this time, the Claimant was in direct contact with potential funders and met with them alone (including Omidyar) to discuss funding her work in collaboration with CGD [465, 464, 469] and para 17 C's WS. She also wrote concept notes (para 17 C's WS). Where there were areas of work that she wanted to pursue that CGD were not interested in, she pursued funding for that work in her own right elsewhere, as a sole trader such as with the B-Team [469].

47. All of this activity was done at a time when she had no contract and no Visiting Fellowship with CGD or CGDE and no obligation or promise of work from either. There was a mutual hope that she might in future undertake paid work for one of them, but no expectation or obligation on either side.

48. The fact that she did such activities in 2016, at a time she had no relationship whatsoever with the Respondents, demonstrates that this sort of activity is most properly seen as attempts to gain paid work. It is not work that she was entitled to delayed remuneration in respect of, under some form of promise that if she did the activity at the earlier time, she would be remunerated for it later. The Claimant seeks to argue that the fundraising efforts carried out in 2018 formed part of some umbrella contract, but this is a contortion of the facts that is untenable given her earlier activities and the language of hope and aspiration (rather than obligation and expectation) in respect of such activities, right into late 2018.

49. In summer 2016, the Claimant wrote concept notes for the Ford proposal and when it was successful, VR wrote to the Claimant that it was *"all credit to you"* acknowledging that it was C's work product [473]. It was the concept note drafted by the Claimant that became appended to the contract she was offered commencing in January 2017 as can be seen from page [498-499] where she attaches the draft TORs for VR which then is adopted as an annex to the Second Contract [245]. Essentially, she had dictated to VR what work she wanted to do and, working with VR, managed to secure funding for a project within CGD that incorporated her work.
50. On 8 November 2016, VR informed the Claimant that she had been accepted as a VF and that at that point she should submit a bio and photo for the website [477].

It is clear from this that a website profile and the right to hold herself out as being "of CGD" was due to the VF, not any contract. When she was a contractor in 2015, she did not have this privilege. All of the Respondents' witnesses stated that contractors do not have this privilege but all VFs do (whether they also have a paid contract or not).

51. Further, the VF carried with it the right to publish sole-authored blogs on the combined website which she could submit directly [484]. This was not a privilege enjoyed by contractors, and was an incident of being a VF. It was a privilege that all VFs had, whether they had a contract or not.

52. In November 2016, the Claimant was very independent meeting with potential funders, attending tax events and suggesting work to VR that could be done [489].

53. At that time, VR noted that C would *"periodically come into the London office to interact with staff"* [479] there was no obligation to do so and indeed under the Second Contract she was working with VR, who was based in Washington. The Claimant was informed she could *"attend Thursday lunches in London office whenever you wish"* [484]. This is consistent with the conversation she had with OB in late 2016, that she was *"strongly encouraged"* though not required to attend the office and lunches (para 38 C's WS).

54. The formal invite to be a VF was sent to the Claimant on 8 November 2016 and is written in purely aspirational terms. It is clearly not contractually binding [481]. C accepted it was non-contractual in her live evidence. It placed no obligations on the Claimant and did not constrain her consultancy practice in any way.

55. In December 2016, the Claimant wrote to VR *"I will, if it works, aim to get into the rhythm of being in the office 1 or 2 days a week and taking part in CGD lunches."* She also informed VR of the various other clients she had already secured work for by that date, including the B-Team (a client she continued to receive work from throughout her involvement with the Respondents and into 2019), a paper for CMI and a paper for the European Tax Policy Forum [498].

Second Contract

56. On 12 December 2016, the Claimant signed the Second Contract which was with CGD (USA) and due to run from 1 January to 31 December 2017 [243]. The contract was entitled "Agreement for Consulting Services" and under the contract:

a) The Claimant was described as a "consultant" [243];
b) She was responsible for her own tax and other deductions [243];
c) There was a requirement for personal service but permission could be agreed in writing in advance to substitute [243], and in his oral evidence, LE stated that he could recall an instance in the past when a contractor had used this clause to substitute;
d) The Claimant was required to indemnify CGD for any losses caused by subcontractors [243];
e) The Claimant was entitled to terminate the agreement on 30 days' notice;
f) The Claimant was not entitled to expenses unless agreed in advance (hence her fees were to cover all work and expenses) [244];
g) The fees were fixed at a total of $50,000 split into portions to be billed upon attainment of specific deliverables [244];
h) The agreement was governed by the laws of Washington DC [244];
i) The actual work to be done was included as Exhibit A, which is the TOR the Claimant had herself drafted [245].

57. The key part of the Second Contract is Exhibit A. Whilst the boiler plate terms define the nature of the working relationship and some key rights with respect to intellectual property etc. the actual work to be done is set out in Exhibit A (taken from the TOR drafted by the Claimant). The Tribunal should note from this document that:
    a) The overall aim of the project was specified under the heading "Background and Objective of the Project" and is extremely vague. The contract gave the Claimant ultimate autonomy to explore areas she wished to explore to develop a longer programme of work [245];
    b) "Consultant's Scope of work" sets out very broad parameters and uses language such as *"undertake interviews with individuals building knowledge in this area: <u>including</u> from research organisations <u>such as</u> …."* [245]. She therefore had the power to decide which organisations to interview, how many and when. The rest of the paragraphs numbered 1-7 are similarly vague, giving the Claimant almost complete autonomy to develop the work programme as she saw fit [246];
    c) Under the "Deliverables" even those are caveated with *"over the course of the year the consultant will produce several deliverables, however the direction, form and timing will be determined following the outputs and learning from the mapping exercise"* [246]. It was the Claimant that determined these following the mapping exercise. No one dictated to her what to do;

d) There is no requirement imposed on her in terms of how and when she should complete the work other than to aim to have the mapping paper done by 30 April 2017 and deliver 6 blogs, 2 working papers, 2 briefs and hold 2 convenings within the contract term [246].

58. It is clear therefore that the Claimant's situation in negotiating the contract and her working relationship under it are markedly different to the position of claimants in ***Autoclenz*** or ***Uber***. She was not in a position of subordination nor was there any inequality in bargaining power. She determined what work she was to do and she did it her way. This is not a case where the contractual documents fail to accurately represent the parties' relationship and need to be gleaned from how the parties operated in practice. This is a case where the relationship was entirely consistent with the contractual expectations and language and demonstrate an arms' length consultancy contract, not one under which she was "*employed under a contract to do work personally".* At all times, CGD was a client of hers, and she continued to work for other clients throughout 2017.

59. The Claimant's work under the Second Contract did not initially require her to work with anyone in the London office. She worked solely with VR. It was not until late June 2017 when PC joined CGDE that they worked together on the Second Contract.

60. The Claimant's assertion that she was paid a salary is plainly false. Her reliance on the wording of page [420] is misleading. She was required to invoice for fees billed against specific deliverables at intervals under the contract and that is exactly what she did in practice. Hence there was no salary and her fees varied[9] according to her invoices, and when she delivered the work. For some months, she billed nothing. In others, she billed up to $15,000.

61. The Claimant was given business cards but she continued to use her own email address on the business cards (and in her communications with CGD in practice). She did not receive a CGD email until August 2017 [501]. Thereafter, she largely continued to use her personal email address even when conversing with

[9] $5,000 for deliverables achieved in January and February 2017 [520], $10,000 for deliverables achieved in March 2017 [521], $10,000 for deliverables achieved in April to June 2017 [522], $10,000 for deliverables achieved in July and August 2017 [523], then no invoices until December 2017 which was "for work done to the end of December 2017 in the final sum of $15,000. Tis rather tends to suggest she did not achieve any deliverables between September, October and November 2017, otherwise she would have billed for them sooner. Presumably, she was prioritizing other client work during this time.

individuals within CGD and CGDE (the same email she used for her other clients) even though she had a CGD email.

62. The Claimant was asked to contribute to the content of an outcomes report in January 2017. She claims that she was asked to "write an outcomes report" and that this is not something that a contractor would normally be required to do (para 54 C's WS). Page [514] shows that VR merely asked for a *"couple of paragraphs on each of the two sections"* and that VR would *"review and send on to [Complainant 2]"* [514]. C produced a series of bullet points, not a report [513]. The report was to be drafted by Complainant 2 and VR. In any event, AG clarified in supplementary questions that it is not unusual to ask a one-off contractor for input into outcomes reports even after they have left.

63. The Claimant produced invoices for her work at all times [520-529]. In her invoices she distinguished (correctly) between which entity to bill under the relevant contract. The invoices matched the contractual arrangements for billing for lump sums against deliverables (and latterly, in 2018, for a fixed number of days at an agreed daily rate). At no time did she receive a "salary".

64. In May 2017, VR suggested that any work extension under the Ford grant should be hosted by CGDE and asked the Claimant *"do you want to do a grant with CGD / CGDE next year, running for two or three years"* [542]. Plainly, if VR had to ask this question, by this time there had not been any agreement or understanding as to any ongoing relationship with the Claimant beyond the Second Contract, which was due to cease on 31 December 2017.

65. The Claimant replied *"Guess would be OK with it being at CGDE…"* and expressed her reservations [541]. She clearly delineated between the two offices (and two corporate Respondents) at this time. In her live evidence she explained that this was before PC joined CGDE (in late June 2017) at which point she felt more involved with the London office.

66. In August 2017, the Claimant was given an email address solely because it was the only way the administrator could get her email on the CGDE distribution list [552].

67. During 2017, the Claimant worked to build a longer term project for which she and PC hoped to secure additional funding from the Ford Foundation [556, 557]. This

was the aim of the seed grant which funded the Second Contract and was the purpose of that contract. Hence, any "fundraising" and development of concept notes at this time was a contractual requirement under the Second Contract.

68. On 18 October 2017, VR asked the Claimant whether she would be interested in being employed as a Research Associate and stated *"it would be tied to new funding so we would have to wait till new funding comes through. Is this something you would be interested in?... nothing can be done until funding is secured."* [561]. From this is it clear that there had not been any prior discussion between the Claimant and VR about the possibility of an employed role, since VR would no doubt have mentioned that in the email.

69. The Claimant replied *"Yes I think I would be interested in being staff, but not if it means commuting daily! I wasn't sure if Owen was all that keen on me"* [561]. This reply also indicates this was the first mention of being employed, since there is no reference to any earlier discussions. Further, that she appreciated the flexibility of not being employed in not having to attend the office daily. Further, it suggests that she was not at that point integrated into the team since she was not even sure Owen liked her.

70. In late October 2017, the renewal of the Claimant's VF for a further year was approved by the SPG.

71. On 31 December 2017, the Second Contract ceased. The Claimant billed for the final portion of the work on 15 December 2017 [524]. Thereafter, she was not given any additional work nor any additional pay until the Third Contract commenced in March 2018. It is clear from this that there was no obligation to provide work at this time. The communications between the Claimant and others within CGD do not indicate any *expectation* of work, less still that there was any *obligation*. The efforts after this date are attempts to fundraise with no expectations on either side.

72. There was no obligation on the Claimant to accept any work offered. In her live evidence she accepted that she could have rejected the Third and Fourth Contracts.

73. Of course there were *hopes* that funding would be secured, but there was never anything in the manner of a promise or expectation that there would be further

work. This is evident from the communications after this date. For example at page [574] where Complainant 1 was seeking to ensure the Claimant's contractual obligations would be finalised in time. Further, by January 2017, VR was asking the Claimant "*Any luck with your various funding efforts? Owen was asking. I think he would like for you to stay on and keep working with us*" (note, not for us). The Claimant replied updating VR on her activities [579]. This, and various other communications, demonstrates that the Claimant operated very independently under the Second Contract and often had to inform / update VR of what she was doing.

74. Similarly, on 9 January 2017, the Claimant had to inform PC, IM, OB and Complainant 3 of her activities in fundraising. This tends to suggest she was not integrated into the London office or working closely with any of these people. It is notable that at this time, January 2017, Gates was not interested in funding the Claimant's work [581, penultimate row in table]. This is relevant to the discovery later (by MA) that upon speaking to Gargee at the Gates Foundation in November 2018, they were not particularly interested in the work designated to the Claimant under the proposal and thought it was CGDE that was pushing for this (para 39 MA WS).

75. The Ford Foundation did not agree to cover any additional work under the programme developed during the 2017 seed phase.

76. On 15 February 2018, VR informed the Claimant that she and OB had begun a conversation with MA about employing the Claimant. VR stated *"I am pitching you as wider than tax – this is key"* [631]. This signalled that the work the Claimant had done to date lacked the necessary breadth to support an employed position (which would carry financial risk for CGDE if adequate funding for tax work failed in the future).

77. The Claimant continued to advance her profile in the area of international tax even though the Ford funding had failed and there was no guarantee of any additional work from CGD or CGDE, less still that it would be *tax* work. In February 2018 she was planning attendance at events in May and June 2018 [632]. This was a normal part of business development for her consultancy. In her live evidence, she accepted that she had attended conferences and events throughout her career up

to this point (but that it was only after having done additional tax work for CGD in 2017 that she then started attending as many tax related events).

78. It is therefore clear that her work at CGD gave her a platform in tax which assisted her in her consultancy as well as in her work with CGD. It was mutually beneficial. No one at CGD: required her to attend these events; arranged them for her; paid for her attendance; or paid expenses for her attendance. She arranged them in her own right, at her own cost and attended them to advance her own profile and business. She used her title of VF when she did so: Not because she was required to, but because it gave her gravitas which benefitted her.

79. Also by 15 February 2018, OB was disappointed that funding had not been secured for the Claimant's tax work commenting *"I'd really like us to work out where we can get some funding for Maya on this"* [634]. Clearly, OB did not consider there was any obligation to her, and she did not at any time suggest to anyone within the Respondents that she believed there was any obligation to her to provide work. The Claimant was reporting back to OB and PC on the strategy adopted by the B-Team during this time, presumably because she was working for the B-Team at this time [635].

80. On 21 February 2018, the Claimant corrected a draft reply that OB had drafted to inform him that she was not at that time receiving any pay from CGD and stating *"I will need to get some funding from somewhere soon"* [641]. Her reply reveals that she did not consider there to be any obligation to her whatsoever. Otherwise she would have said so. Instead she simply informs OB that she needs funding and in her live evidence she said that if it had not been provided reasonably soon after that time, she would have stopped working with CGD / CGDE (and presumably offered her time to another client).

81. On 22 February 2018, VR reported back to the Claimant (having sent MA the Claimant's CV and discussed hiring her with him) that MA had said that the Claimant should remain a VF at that time and look to secure funding and expand the breadth of her work. VR stated *"My sense is that he would like to see you broaden the scope of your work before we revisit the possibility of appointing you as full time staff"* [643]. This clearly superseded any prior discussion which had been had between VR and the Claimant on this. The Claimant's attempt to resurrect these prior

discussions as being somehow relevant to decisions taken in November 2018 is untenable (see for example paras 95 and 99 C's WS).

82. On 2 March 2018, OB explored with MA what paid work might be available for the Claimant. In his live evidence MA stated that OB had come to him stating that the Claimant did good work and he wanted to offer her some paid work to keep her involved with CGDE. The discussion was not in terms of obligation but wishes.

83. MA suggested she could either secure funding for her tax work, or do some work on the commercial confidentiality project which had been delayed. Crucially he stated *"In any event, any commitment we make to her would be limited in time and scope"* [646]. By this time, MA knew that both OB and VR had wanted to employ the Claimant, since he had had discussions with both VR and OB on this in February 2018 (para 27 MS WS). Therefore, his reiteration of his message in writing to OB (following a further discussion) is clearly a broad statement, not confined to the commercial confidentiality project. This is plain from the language of page [646] and obvious from the context. Further, in paragraph 5 of the email at [646] we see MA using the phrase "taking on Maya" in the context of the commercial confidentiality contract, which demonstrates that this phrase is not used to mean "taking on" for an employed role, as the Claimant suggested it meant in subsequent communications.

Third Contract

84. The Third Contract commenced on 1 March 2018 officially [247], but it must have been backdated given the context of the discussion between OB and MA on 2 March 2018 at [646]. It was not signed until 1 April 2018 [256].

85. The boilerplate portion of the contract is in near identical terms to the First Contract (in 2015) which the Claimant agreed was a genuine consultancy agreement. The Third Contract was entitled "Contract for Consultancy Services" and:
    a) Was with CGDE (whereas the Second Contract was with CGD);
    b) Was for a one-off paper (for the CDI) [257]
    c) Was two months' duration (shorter than even the First Contract in 2015);
    d) Defined the Claimant as a Service Provider [247] and expressly defined her employment status at clause 9.1 [253];
    e) Did not require her to work from any specific location, or on any specific days or at any specific times;

f) Allowed for substitution in the event of illness or injury [249];
g) Permitted her to work elsewhere;
h) Did not permit for expenses, holiday pay or sick pay [clause 4.3 page 250];
i) Expressly stated that there is no obligation to provide further work nor any obligation to accept any work offered [254]; and
j) Was remunerated by a fixed lump sum fee of £4,000 [257].

86. The contract did not require collaboration with employees of CGD / CGDE and gave the Claimant broad discretion as to how to complete the work, to such an extent that it was for her to inform them of the various stages reached and which experts she chose to include (Schedule at page [257]).

87. This was plainly a consultancy contract and is entirely consistent with the message MA gave to both VR and MA that the Claimant could be given additional contract work but any commitment would be *"limited in time and scope"* [646].

Fourth Contract

88. As to the Fourth Contract, in her live evidence, the Claimant conceded she was under no obligation to accept this work. When asked about the discussion at page [668] she stated it would have been odd for her to have declined it at that stage, because she had already indicated a willingness to do it by then. This demonstrates that she did not see herself as bound to accept it at the earlier stage, only that by having indicated a willingness she would not have backed out of it by late March 2018. Clearly then, there was no obligation to have accepted it at all.

89. The discussion at [668] demonstrates the degree of power the Claimant had to shape and negotiate the terms of the Fourth Contract. IM notes that it was for her to agree the scope of her work with CK and OB. He suggests (but does not dictate) a proposed day rate or offers her the right to instead have a lump sum. He concludes with *"what do you think?"*. Again, this is not a situation such as in the cases of ***Autoclenz*** and ***Uber.*** The Claimant had a high degree on input into the scope of her work and the terms of payment (the method and the sum of it). She accepted the suggestion of a day rate capped at 90 days' work and proposed bullet points in her reply [667]. It is also clear that Jacqueline Craig and IM (who she was liaising with by email) considered the Claimant to be a "freelancer" under this contract [669].

90. The Fourth Contract was with CGDE and commenced on 4 April 2018 [259] (and ran to 31 December 2018 [269]). The boilerplate terms are identical to the Third Contract. As with each of the contracts, the actual work was contained in a schedule [269]. Similar to the other contracts, this schedule gave the Claimant a great degree of autonomy as to how to go about the work, in collaboration with CK.

91. In her live evidence, the Claimant accepted that the time and date of undertaking the work was only constrained by the need to coordinate with others involved in the project. It was not dictated by CGDE.

92. The Claimant's invoiced fees varied from month to month under the Fourth Contract (running from April to December 2018). In some months, she worked as little as 4 days a month for CGDE, such as in May 2018 [526]. The Claimant produced the invoices herself, they were not generated for her nor was she given a template. She used the same format invoice for her other clients, as confirmed in her oral evidence.

93. Throughout 2018, the Claimant worked for other clients as well as her two contracts with CGDE. As early as March 2018, she declared four additional clients she was or would be working for that year, namely [663]:
    a) B-Team, another non-profit: B-Team was an ongoing client of the Claimant's that she wished to retain into 2019, even when discussing the prospect of being employed by CGDE [831].
    b) Principles for Responsible Investment (a United Nations-supported international network of investors working together to implement its six aspirational principles);
    c) The Council on Foreign Relations (an American think tank specializing in U.S. foreign policy and international relations).
    d) Tax Journal [663]; and
    e) By September 2018, she also had also worked "over a couple of weeks in the summer" for the World Bank [911].

94. In August 2018, MP (the programme lead for DRM under which the Claimant's prospective tax work had been organised) stated *"On funding, the most I think we can squeeze out of this grant [Gates] is 50 percent of your time. We'd then look to DFID or other sources to bring you up to 90 percent. And my understanding is that with 50 percent*

funding we could discuss bringing you on as a staff member fellow rather than a visiting fellow." [830]. In her live evidence, the Claimant accepted that she did not have further discussions about this prospect and waited until the announcement on the Gates grant in November 2018 to raise this. Hence between 8 August 2018 and 21 November 2018, there was no discussion with the Claimant about her employment prospects.

95. It is clear from the email at [830] that the matter was only ever at the stage of starting a discussion, and further, that even *that* discussion was contingent on securing the 50% funding, with the prospect of employment itself being contingent on 90% funding.

96. Further, it is now clear from MP's live evidence that he had not spoken to MA about MA's views on employing the Claimant before he sent this email. Upon speaking to MA subsequently (on a date neither can specifically recall) MA reiterated the message he had already conveyed to VR and OB in February and March 2018, that the Claimant would need to secure funding and expand the breadth of her work before revisiting the discussion on employing her (para 8 MP WS and para 27 MA WS).

97. It is thus clear that the prospect of the Claimant being employed never got further than MA's position in January and February 2018 and whatever MP understood in August 2018 [830] was an incorrect misunderstanding of the position. In any event, even MP's email made clear that the prospect of employment was contingent on the full funding for the 0.9 FTE role being secured. Further, any employment would have been subject to the Claimant passing the jobs talk (which 50% of candidates fail) and subject to MA's approval.

98. The Claimant's highest academic attainment was an undergraduate degree. In the 20-year history of CGD there had been only one person appointed to research staff without a post graduate degree (David Roodman). MA stated in his live evidence (supplementary questions) that David Roodman had been engaged early on in CGD's history and that whilst he lacked postgraduate degree, he had won prestigious prizes in economics. The lack of post-graduate qualifications would have been a significant hurdle to overcome if the Claimant was to become the second ever researcher to be employed without such qualifications in CGD's 20-year history.

99. The Claimant was never inducted or shown how to use the Respondents' salesforce software (para 42 C's WS on status dated 23 October 2019).

100. The Claimant was not held subject to any workplace policies, as is clear from the RS report which the Respondents accepted.

101. She did not have to request time off on holiday at any time and could go on holiday when she wished. She was not paid when she was on holiday and did not receive sick pay or other statutory leave.

102. The Claimant was at all times free to work wherever she wished and had no constraint on the days or hours she had to work other than the availabilities of stakeholders she had to engage with under the contracts.

103. The Claimant relied on the fact that she had access to CGDE's intranet, however she agreed in live evidence that this was a consequence of having a CGD email address (which she secured by happenstance, as set out above).

104. As to having a key card, the Claimant noted that anyone who came in regularly was entitled to request this. It is a matter of pure factual convenience rather than integration to have such a key card. As the Claimant herself noted, even employed staff were not obliged to work in the office (other than weekly lunches) hence attending regularly and having a key card to do so is in fact a red herring.

105. As to hosting CGD events, it is notable that this was a deliverable under the Second Contract. In any event, OB permitted all VFs to host events in the office, whether they had a paid contract or not.

106. The Claimant argued that being invited to the Christmas party and away day demonstrated integration, however she accepted in evidence that she was not privy to who else was invited.

107. In her first witness statement on status, the Claimant accepted that she was never a budget holder and this was a relevant point of distinction between employed staff and herself(para 42 WS dated 23.10.19).

108. The Claimant had no managerial responsibilities (albeit that she oversaw the work of two contractors on discrete pieces of work under the Second Contract). Further, she was not subject to staff appraisals nor did she have a line manager.

Conclusions as to the Claimant's status

109. At all times, it is evident that the Claimant had a high degree of autonomy in negotiating the scope of her work and the rate and method of payment. In such circumstances, the principles derived from cases such as ***Autoclenz*** and ***Uber*** do not apply. There was no inequality of bargaining power, the Claimant was not compelled to accept standard terms and she had a high degree of control over her own work, both in negotiating it and delivering it. She was not in a position of subordination.

110. The written contracts are highly significant and the Claimant has not demonstrated any ways in which they did not accurately reflect the relationship between the parties at each given time.

111. Addressing the legal elements of the test, there plainly were contracts between the parties at different times. However, they were not in the manner of an umbrella contract. This is clear because the Second Contract was not even between the same parties as the Third and Fourth Contracts.

112. Further, there was no mutuality of obligation between the Second and Third Contracts. When the Second Contract ended, the communications as to future work for the Claimant demonstrate that neither side considered there to be obligations on either side. There may have been hopes of the Claimant continuing to work with CGD / CGDE, but there was no expectation or obligation. The Claimant accepted in evidence that she was free to reject work offered and that she would have "walked away" if acceptable work had not been provided to her within a short period after the end of the Second Contract.

113. The Claimant seeks to argue that the corporate Respondents were in effect the same entity. However this is incorrect as a matter of law. They are separate legal entities (albeit that CGDE is wholly owned by CGD). They have different boards and until late into 2018, they operated independently save for communications and fundraising, which had been integrated prior to summer 2018 [804]. It was not until September 2018, when MP moved to London, that he started integrating the

"programmes structure" in the London office (which MA had devised in 2017 and which had been applied in DC). All of the Respondents' witnesses were clear that this integration of the London office was part of an ongoing project that did not start in London until after the discussions in summer 2018 [804] and to this day, HR, Administration and Finance are still separate across the two locations.

114. It cannot be said that CGDE is in essence no more than a PO Box, or a brass plaque. It is a genuinely separate legal entity with its own employees, separate board, separate office, separate budget and separate operations (HR, administration and finance). They did and do share a joint website and Twitter profile and present themselves to the world as One CGD. However, this is an outward facing presentation and cannot be elevated to a finding that they were legally the same employer.

115. Given the separation of entities, the fact that the Second and Third contracts were with different Respondents and the gap in work and pay (with no obligation on either side) in January and February 2018, the only period which the Tribunal can truly be concerned when considering the Claimant's status is the period of time falling under the Fourth Contract.

116. For all the reasons set out above, even during that late stage in the Claimant's involvement with the Respondents, she was not "employed under a contract personally to do work". She was genuinely in business on her own account when delivering the work under the Fourth Contract. This clear from:

a) The input / power she had in negotiating the terms of the contract at the outset which demonstrates there was no inequality of bargaining power;
b) The fact she accepted in her oral evidence that she could have rejected the Third or Fourth Contract if she wished;
c) The fixed duration of the contract (it was not open ended);
d) The fact that the contract was pegged to a specific project that had specific and limited funding thus dictating the duration of the contract;
e) The custom and practice in the non-profit sector of relying on contractors due to the financial risk of taking on employees when funding is linked to projects;
f) The reality of her needing to invoice to receive fees;
g) That she was responsible for her own tax and other deductions;
h) The irregular pattern of work, sometimes doing just 4 days' work a month and sometimes doing 16 days' work a month;

f) The fact she continued to work for at least five other clients during 2018, including the B-Team, Tax Journal, The World Bank, The Principles for Responsible Investment and The Council on Foreign Relations;

i) Her continued activities on the topic of tax, such as attending a large number of tax related events to advance her own profile in that area with no contractual obligation or request from CGDE to do so also indicates she was not employed under a contract personally to do work but was instead operating her own consultancy. Her contracts in 2018 were not in respect of tax, hence these activities were in her own right. She was not paid to attend them nor paid expenses to do so as she explained in her email at page [806] where she stated *"In practice when I am working on this topic (and expenses getting to meetings etc.) are unpaid…").* From page [812] it is clear that the Claimant attended a great number of events in respect of tax and only one of those listed was attributable to contract work with CGD / CGDE as she explained in her oral evidence. The rest were attended of her own volition and at her own cost. She also continued to write on the subject of tax;

j) The lack of control exerted by CGDE in respect of: the scope of her work; the times when she was obliged to work; the days she was required to work; her right to take holiday as and when she wished without any need to inform CGDE less still obtain permission;

k) The lack of sick pay, holiday pay etc;

l) The way the parties described themselves, including the way the Claimant described herself to friends. Even as late as December 2018, when informing Kathleen Stock of her situation, the Claimant noted she was *"not staff but a consultancy contract"* and stated that "*So they said we think we'd like you to stay as a visiting fellow and do the work on consultancy, which is a bit of a blow, but I thought might be for the best in terms of remaining at arms length*." [2335]. This is how she truly saw herself, at arms' length from the organisations, even by this late stage, December 2018;

m) The fact she provided her own equipment (laptop, mobile phone etc);

n) The fact she was not subject to any performance appraisals or under line management;

o) She was invited to, but not obliged to attend the weekly lunches (this is consistent with CGDE's policy that employed staff are required to attend weekly lunch whereas VF's are merely invited [1677];

p) She was invited to attend the DEI training on 15 January 2019 because of the concerns raised about her tweets, not because she was obliged to (as employed staff were) as stated by MP in his live evidence.

117. Taking into account the totality of the evidence, the Respondents submit that at no time was the Claimant "employed under a contract personally to do work" within the meaning of s.83 EqA.

118. As to the argument that she was an applicant for employment, such as to bring herself within the scope of s.39(1) EqA for the claim that she was not offered employment on the Gates grant in November 2018, the Respondents submit that:

a) She was neither an applicant nor akin to an applicant given that employment was not a real prospect, but a conditional and distant one;
b) There was in fact no employed role available at that time for her to have been considered for, one might have been created at a later date if funding had been secured, but as at November 2018, there was a no role available;
c) The prospect of employment was no further advanced than MA had explained in February and March 2018 to VR and OB (as above);
d) The conditions for employment (0.9 FTE funding and expansion of her work) were never met, DIFD funding failed and the Omidyar grant was not extended. In his live evidence on 21 March 2022, MA stated that whilst she had expanded her work base somewhat by doing commercial transparency in 2018, she would have to have done a few more years of such expansion to be a credible candidate for employment; and
e) MP did not make a decision to not offer her employment in November 2018, no one did. MA had decided this in January and February 2018 and in November 2018 MP merely corrected his prior misunderstanding of the position.

119. For all these reasons, the Respondents submit she was not in the position of being an "applicant" for employment. Accordingly, she does not have any requisite status to bring her within the scope of Part 5 EqA for any of her claims.

Relevant law on the substantive claims

Direct discrimination

120. S.13 (1) EqA 2010, states -

> 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.

121. In the predecessor legislation, the words "on the grounds of" were used. However, subsequent case law has confirmed that the change in wording has not changed the legal test.

122. The shifting burden of proof under s.136 EqA applies to s.13 claims.

123. The correct comparator under s.23 EqA is a person who does not share the protected characteristic but whose relevant circumstances are otherwise the same or not materially different than the Claimant. In this case, the correct comparator is someone who does not hold the gender critical belief but who was otherwise in the same material circumstances, including having behaved the way the Claimant did - by posting the same Tweets and making the same internal communications (***Azmi v Kirklees Metropolitan Borough Council 2007 ICR 1154*** at [55-56]). This has been more recently endorsed by the CA in the case of ***Page v NHS trust Development Authority [2021] ICR 941*** at [79].

124. Therefore, if the Tribunal finds that the Respondents would have behaved the same way in respect of someone who does not hold the Claimant's gender critical belief but who said and did the same things, the claim under s.13 EqA will fail. The Respondents submit that this must be the case.

125. The Claimant is likely to argue that her expressions of her beliefs were indissociable from the belief itself, however the Tribunal is reminded of the dicta in ***Lee v Ashers Baking Company Ltd and others [2018] UKSC 49*** [2020] AC 413 at [25] as to the narrow circumstances in which indissociably applies –

> 25. The District Judge also considered at length the question of whether the criterion used by the bakery was 'indissociable' from the protected characteristic and held that support for same sex marriage was indissociable from sexual orientation (para [42]). This is, however, to misunderstand the role that 'indissociability' plays in direct discrimination. It 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 BC [1990] 2 All ER 607, [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 *Bull v Hall [2013] UKSC 73, [2014] 1 All ER 919, [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 heterosexual orientation. There is no need to consider that question in this case, as the criterion was quite clear. But even if there was, there is no such identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.

126. In the present case, the Claimant cannot say that the act of Tweeting about sex and gender, blogging about it, debating it in the workplace or promoting campaigns opposing reforms to the Gender Recognition Act were indissociable from the protected belief. Many people hold the gender critical belief but do not feel the need to do these things. Nor do they feel the need to express themselves using phrases such as those adopted by the Claimant ("Man in a dress" and "man in heels" and "literal delusion" etc. see below).

127. The Claimant's actions in tweeting, bringing campaigning into the workplace, pushing for internal discussion and debate and campaigning online are not a proxy for the belief itself. At best, they are acts motivated by the belief and even then, the Respondents submit they are not even manifestations or expressions of it, as set out below.

128. Accordingly, the main submissions in respect of the law are in respect of manifestation / expression and the circumstances in which articles 9 and 10 are and are not engaged, under the section on harassment immediately below.

129. However, even if the Tribunal reached the decision that all or any of the proven detriments were because of the beliefs the Claimant held rather than the acts she did, and/or that the acts are indissociable from the belief, the Tribunal will be obliged to read down s.13 EqA under s.3 HRA to render it compatible with the competing article 10 and 9 rights of the corporate Respondents and the employees comprising them. The rights protected under articles 9 and 10 ECHR include the right to not to hold or practice a belief and the right not to express respectively (see

[49-52] of ***Lee v Ashers Baking Company Ltd and others [2018] UKSC 49*** [2020] AC 413).

106. At [48-57] in ***Lee v Ashers,*** Lady Hale, considering Mr Lee's claim for direct discrimination because of his political belief stated -

> 48. … there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are "indissociable" for the purpose of direct discrimination on the ground of political opinion. This would not always be the case, because the person ordering a particular message may in fact be indifferent to it. But in this case Mr Lee was perceived as holding the opinion in question. It becomes appropriate, therefore, to consider the impact of the McArthurs' Convention rights upon the meaning and effect of the 1998 Order.
>
> IV. The Convention rights
> 49. The Convention rights to freedom of thought, conscience and religion and freedom of expression are clearly engaged by this case. Article 9.1 provides that
> "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."
> Article 9.2 permits limitations on the freedom to manifest one's religion or beliefs but not on the freedom to hold them. In its first case dealing with article 9 , *Kokkinakis v Greece* (1993) 17 EHRR 397 , para 31, the European Court of Human Rights expressed the importance of the right in a passage which has been much-cited since:
>
> "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. It is, in its religious dimension, 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."
>
> One is free both to believe and not to believe.

50. Furthermore, obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9.1 rights. In *Buscarini v San Marino* (1999) 30 EHRR 208 , the Grand Chamber held that it was a violation of article 9 to oblige non-believers to swear a Christian oath as a condition of remaining members of Parliament. The court reiterated that freedom of thought, conscience and religion "entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion" (para 34).

51. The Judicial Committee of the Privy Council took the same view in Commodore of the *Royal Bahamas Defence Force v Laramore* [2017] 1 WLR 2752 . The Board held that a Muslim petty officer had been hindered in the exercise of his constitutional right to freedom of conscience when he was obliged, on pain of disciplinary action, to remain present and doff his cap during Christian prayers at ceremonial parades and at morning and evening colours. This was a sufficiently active participation to hinder the claimant in the enjoyment of his conscientious beliefs. Nor had any justification been shown for it.

52. The freedom not to be obliged to hold or to manifest beliefs that one does not hold is also protected by article 10 of the Convention. Article 10.1 provides that:
"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."

The right to freedom of expression does not in terms include the right not to express an opinion but it has long been held that it does. A recent example in this jurisdiction is *RT (Zimbabwe) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening)* [2013] 1 AC 152 . The issue was whether asylum seekers should be sent back to Zimbabwe where they would face a real risk of persecution if they refused to demonstrate positive support for the then regime in that country. Citing, among other cases, both *Kokkinakis v Greece* 17 EHRR 397 and *Buscarini v San Marino* 30 EHRR 208 , Lord Dyson JSC held that the principle applied as much to political opinions as it did to religious belief: "Nobody should be forced to have or express a political opinion in which he does not believe" (para 42).

…

54. The district judge did not accept that the defendants were being required to promote and support a campaign for a change in the law to enable same-sex marriage (paras 40 and 62). The Court of Appeal, while not deciding the point, appears to have agreed with this: "the fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either" (para 67). These are, in fact, two separate matters: being required to promote a campaign and being associated with it. As to the first, the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. As to the second, there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed.

55. Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and in so far as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake—or any other of their products—to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different—obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake—support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the 1998 Order claim.

56. Under section 3(1) of the Human Rights Act 1998 , all legislation is, so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights. I have already indicated my doubts about whether this was discrimination against Mr Lee on the grounds of his political opinions, but have acknowledged the possibility that it might be. But in my view, the 1998 Order should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.

57. As the courts below reached a different conclusion on this issue, they did not have to consider the position of the company separately from that of Mr and Mrs McArthur. It is the case that in *X v Switzerland* (1979) 16 DR 86 and in *Kustannus Oy Vapaa Ajattelija Ab v Finland* (1996) 22 EHRR CD69 , the European Commission of Human Rights held that limited companies could not rely upon article 9.1 to resist paying church taxes. In this case, however, to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9 ; rather, it is upholding the rights of the McArthurs under that article.
[emphasis added]

107. Therefore, even if the Tribunal were to find that the Respondents' acts / omissions were because of the Claimant's belief, it would be obliged to consider the test set out at para 40 in ***Lee v Ashers*** where it was stated that:

40. Three questions therefore rise on this aspect of the claim.
(i) Did the bakery discriminate against Mr Lee on the grounds of his political opinions by refusing to supply him with a cake iced with this particular message?
(ii) If it did, is the 1998 Order invalid, or should it be read down under section 3(1) of the Human Rights Act 1998 , as incompatible with the rights of freedom of religion and freedom of expression protected by articles 9 and 10 of the European Convention?
(iii) If the answer to (i) is "yes" and the answer to (ii) is "no", is the 1998 Order invalid under section 17(1) of the Northern Ireland Constitution Act 1973 to the extent that it imposes civil liability for refusing to express a political opinion contrary to the religious belief of the person refusing to express that view?

130. Following ***Lee v Ashers***, in the context of the present case, the correct questions for the Tribunal to ask itself would be -

a) Did the Respondents discriminate against the Claimant because of her protected belief by way of the alleged detriments (i.e because of the belief itself or some proxy that is indissociable from it)?
b) If they did discriminate against her because of her belief, is s.13 EqA invalid, or should it be read down under section 3(1) HRA 1998, to have regard to the rights of the Respondents and the employees engaged by them under articles 9 and 10?

c) If the answer to (i) is "yes" and the answer to (ii) is "no", is s.13 EqA invalid to the extent that it imposes civil liability for refusing to express a belief contrary to the belief of the person refusing to express it such that it should be subject to a declaration of incompatibility under s.4 HRA 1998?

131. In ***Page*** at [37], Underhill LJ stated there is no obligation to consider ECHR principles first and it is perfectly appropriate for the Tribunal to use the provisions of EqA as the primary basis of its analysis of claims brought under EqA.

Law on harassment

108. Sections 26(1) and (4) EqA state -

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ...
> (4) In deciding whether conduct has the purpose or 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.

109. The Claimant must demonstrate that "unwanted conduct" was related to her belief. "Related to" is broader than "because of" under s.13 EqA. It is not, however, a mere "but-for" test. In considering whether an act or omission is conduct "related to" the protected characteristic, the Tribunal must ask itself whether, objectively, the behaviour relates to the protected characteristic, looking at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA*** at [24]).

110. In ***Wasteney v East London NHS Foundation Trust [2016] ICR 643*** at [54-55] HHJ Eady stated -

> In domestic law, the expression of right and limitation - as allowed by Article 9 of the **Convention** - is most easily discernible when addressing cases of

indirect discrimination under section 19 **EqA** (which may be the more obvious route of challenge in most cases involving the manifestation of a religious belief). Whilst there is no statutory means of "justifying" direct discrimination or harassment, however, the Claimant accepts that the limitations permitted by Article 9.2 are relevant to the approach to be adopted to claims brought under sections 13 (direct discrimination) and 26 (harassment). Although the Claimant relies on the protection of the right to manifest religious belief in the workplace, as recognised by the ECHR in **Eweida**, she (correctly) does not seek to suggest that right cannot be subject to limitation.

The concession is in some senses easier to state than apply, but the task will always be made easier by having a clear understanding of the nature of the claim and how it is being put. If the case is one of direct discrimination then the focus on *the reason why* the less favourable treatment occurred should permit an ET to identify those cases where the treatment is not because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is "inappropriate" may be tested by reference to Article 9.2 and the case-law in that respect); see **Chondol v Liverpool City Council** [2009] UKEAT/0298/08 and **Grace v Places for Children** [2013] UKEAT/0217/13. Similarly, whilst the definition of harassment permits the looser test of "related to", a clear sense of what the conduct did in fact *relate to* should permit the ET to reach a conclusion as to whether it is the manifestation of religion or belief that is in issue or whether it is in fact the complainant's own inappropriate conduct (and that must be right, otherwise an employer's attempt to discipline an employee for the harassment of a co-worker related to (e.g.) the co-worker's religion or belief could itself be characterised as harassment related to that protected characteristic
[emphasis added]

111. ***Wasteney*** confirms that the Tribunal is required to read s.26 EqA in conformity with articles 9 and 10 ECHR, including the legal limitations enshrined in those articles.

132. The relevant Convention rights are –

> 9(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.

9(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.

10(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.

10(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.

14. 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

112. Accordingly, the Tribunal will first have to decide whether the unwanted conduct was *related to* the protected belief (or whether, as in ***Page***, the unwanted conduct was something separate from an act of manifestation of the belief, despite occurring alongside an expression of belief). If the Tribunal finds that the unwanted conduct was related to the belief, by being a manifestation of it, the Claimant's convention rights are engaged and the Tribunal will have to consider the justification defence available under art 9(2) ECHR.

Is article 9 engaged?

113. In ***Kalac v Turkey 1999 27 EHRR 552***, the ECtHR held that *"Article 9 does not protect every act motivated or inspired by a religion or belief".*

114. In ***Eweida and others v UK [2013] ECHR 48420/10***, at [82], quoted by the CA in ***Page*** at [44] -

> 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 paragraph 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. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; 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.
> [emphasis added]

115. In ***Page***, Underhill LJ was concerned with whether the claimant was discriminated against (directly or indirectly) when his role as a non-executive director of an NHS trust was not renewed due to him having made public statements to the media opposing same sex adoption, which he contended was part of a protected belief (his Christian faith). The ET found that the reason for the treatment was because he expressed his beliefs about homosexuality in the national media [71-72].

116. At [47-48] in ***Page*** Underhill LJ stated -

> 47 In the second sentence the tribunal finds that the appellant's expression of those views in public "was not . . . intimately linked to his religion or his beliefs." That phrase derives from the passage from *Eweida* which I have quoted, and the tribunal was evidently seeking to make the kind of determination which the ECtHR there says is required of whether, based on the facts of the particular case, there was a "sufficiently close and direct nexus between the act and the underlying belief".

48 In so far as that finding relates to the appellants religion, I can see no error of law in it. Although it will have been apparent from the interview that his views about homosexuality derived from his Christian faith, it is clear from the passage which I have quoted from *Eweida* that a causative link of that kind is not necessarily enough. The primary focus of what the appellant is saying is his belief about the importance of a child having a mother and a father. The fact that that belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a "direct expression" of the appellant's Christianity. The closeness and directness of the relevant nexus was a matter for the assessment of the tribunal, and it was in my view open to it to reach the conclusion that it did. I note that in *R (Ngole) v University of Sheffield [2019] ELR 443*, which involved a student who had been disciplined for expressing views about homosexuality derived from his Christian belief, this court endorsed the finding of the judge that article 9 was not engaged: see para 61 of its judgment. [emphasis added]

117. At [68-69] in ***Page*** Underhill LJ stated –

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: see para. 29 above. 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.

The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytization at work – ***Chondol v Liverpool City Council [2009] UKEAT 0298/08***, ***Grace v Places for Children [2013] UKEAT 0217/13*** and ***Wasteney v East London NHS Foundation Trust [2016] UKEAT 0157/15, [2016] ICR 643***. In essence, the reasoning in all three cases is that the reason why the employer disciplined

> the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately.

118. The law thus draws a distinction between cases where the reason for the treatment was because of something separate from the belief or a manifestation of it, such that article 9 is not even engaged, despite the fact that the conduct arose in the course of expressing the belief. In ***Page*** the conduct relied on was the claimant's expression of his beliefs about homosexuality in media interviews (which was compounded by the fact he had not told his employer, as he had been asked to do), see [49]. Therefore the EAT held in that case that the ET had been entitled to find that article 9 was not engaged because it was the fact that he expressed those views in that context which led to the decision not to renew his non-executive position.

133. Where there is finding that an act of manifestation engaged both articles 9 and 10, the ECtHR has analysed cases through just one of those, as it deemed most appropriate. According to paragraph 54 of the Council of Europe's Guide on Article 9 of the European Convention on Human Rights -

> By its very nature, the substantive content of Article 9 of the Convention may sometimes overlap with the content of other provisions of the Convention; in other words, one and the same complaint submitted to the Court can sometimes come under more than one article. In such cases the Court usually opts for assessing the complaint under only one article, which it considers more relevant in the light of the specific circumstances of the case; however, in so doing, it also bears the other article(s) in mind and interprets the article which it had opted to consider in the light of the latter.

119. In ***Page,*** the CA took each article separately. There is no fixed way that a court or tribunal must consider the matters. Further, at paragraph 38 in ***Page***, the CA stated that it is perfectly acceptable to analyse the matter starting with the domestic legislation. There is no obligation to go to articles 9 and 10 first.

120. In ***Bougnaoui and anor v Micropole SA 2018 ICR 139, ECJ,*** Advocate General Sharpston observed that a clear distinction had to be drawn between manifesting and proselytising one's religion. The latter had no place in the workplace and it is legitimate for an employer to impose rules that prohibit such behaviour. However, a proper act of manifesting one's religious beliefs (such as wearing a hijab) came within the scope of anti-discrimination

protection guaranteed by the Framework Directive. When the case came before the ECJ, the Advocate General's remarks were not repeated but they do not seem to be particularly controversial and, at any rate, reflect the general approach taken by the ECtHR towards the interpretation of Article 9 ECHR.

121. If the Tribunal finds that there was unwanted conduct and it was related to the protected belief, such that article 9 is engaged, the Tribunal would have to interpret s.26 EqA to give effect to articles 9(2) and 10(2) ECHR, which renders it legally permissible to interfere with a person's article 9 and 10 rights in certain circumstances. The Respondents will argue that any interference was legally permissible for Masood Ahmed's reasons, as outlined in his witness statement at paragraph 56 and in his live evidence. When considering whether any interference with the Claimant's rights was lawful, the Tribunal will be obliged to apply the test from ***Bank Mellat v HM Treasury (No 2) [2013] UKSC 39*** at [20]:

> …the question depends on 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. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

Facts and submissions on the direct discrimination and harassment claims

122. In January 2017, when the Claimant was working under the Second Contract (with CGD), she was made aware that CGD:

> "do[es] not collectively promote any ideas: individual scholars and researchers are free to publish their analysis and conclusions, provided that it is of high standard, transparent, and communicated in a way that is respectful of others" [505] [emphasis added].

123. On 06.03.18, when the Claimant was working under the Third Contract (with CGDE), she attended a "brainstorming" session on gender in CGDE's

London offices. There was discussion about sex discrimination and the intersection with LGBTQ rights [659]. The follow-up memo proposed having break-out meetings *"by gender identity"* [659]. The session also advocated greater diversity and inclusion more generally. From this, the Claimant would or should have known that CGD and CGDE's culture was inclusive towards trans-peoples' rights and respected their gender identity.

124. Also on 06.03.18, Ian Mitchell of CGDE sent a group email (which included the Claimant) forwarding part of its harassment statement, which stated that harassment of any kind is prohibited including due to *"gender identity or expression"* [655]. This was sent in the context of a discussion about formulating CGDE's approach to equality and diversity as is clear from the email at [653]. The Claimant therefore should have been aware that CGD did have a policy which sought to promote and protect trans rights and that CGDE was seeking to develop a similar policy.

125. On 13.03.18, CGDE sent a group email (which included the Claimant's CGD email) proposing some follow-up from the brainstorming session of 06.03.18. It copied CGD's Handbook and highlighted the Gender Equality Policy, Policy Against Discrimination and Harassment as being relevant to forming future discussions on CGDE's approach [657]. In that Handbook, it stated that -

> CGD is committed to maintaining a working environment that is free of unlawful discrimination and harassment. Thus it is the policy and practice of the Center to maintain and foster a work environment in which all employees are treated with decency and respect. Accordingly, no form of unlawful discriminatory or harassing conduct towards any employee, customer, supplier, contractor or other person in our workplace will be tolerated…
>
> This policy applies to and prohibits all forms of illegal harassment and discrimination, not only sexual harassment. Accordingly CGD absolutely prohibits harassment or discrimination based on race, color, religion, gender identity or expression, personal appearance…. [emphasis added]

126. On 22.06.18, in a memo to all those on the CGD and CGDE mailer list, which included the Claimant, AG and LE informed staff that the website would be updated to communicate recent efforts to enhance diversity and its commitment to have at least one woman on a panel of three or more (i.e. a no

manel pledge) [788]. In mid-summer 2018, the joint CGD/CGDE website was updated to include the "no manels" pledge [1603].

127. In August 2018, the Claimant started engaging in discussions on Twitter about gender and the proposed reforms to the Gender Recognition Act 2004 ("GRA") which would have made it easier for trans people to obtain a gender recognition certificate (112-115 Claimant's WS). At this time, she was engaged under the Fourth Contract with CGDE and was a Visiting Fellow of CGD.

128. The Claimant's Twitter profile stated she was a "Visiting Fellow @CGDEV" (para 30 C's WS) thereby linking her messaging on Twitter to CGD / CGDE.

129. The Twitter handle "@CGDEV" included on her Twitter profile linked directly to CGD/CGDE's shared Twitter page.

130. The Claimant's Twitter handle was also on her bio on CGD's website and in her CGDE email footer. Again, creating a link or association between her and CGDE/ CGD.

131. She sometimes used her Twitter handle on articles she published such as in a Guardian piece on the topic of IFFs (international tax) where she invited readers to follow her on Twitter and which stated *"Maya Forstater is a visiting fellow at the Center for Global Development"* (see hyperlink on page [517]). She was entitled to use her affiliation with CGD when publishing elsewhere.

132. The Claimant used her Twitter account to post work related content to her 2000 followers, many of whom worked within the same area as CGD and CGDE (para 293 and 372 C's WS accepts that her followers on that account were mainly following her for tax and international development content [1824]).

133. The Claimant was entitled to post single-authored blogs on the combined CGD/CGDE website due to being a VF (para 46 and 61 C's WS and page 484).

134. Anyone receiving an email from the Claimant, reading her bio, or reading an article of hers could have clicked the link to her Twitter account and seen her tweets or followed her and thereby seen all subsequent tweets.

135. In September 2018, when the Claimant was present in CGDE's London offices, she expressed gender critical beliefs which MP considered to be expressed appropriately. OB disagreed with her position (para 4-5 MP's WS).

136. On 25.09.18, the Claimant started a Twitter discussion about whether having a gender fluid individual (Pips Bunce) on a panel would make it an all-male panel, for the purposes of a "no manels" pledge [912] (see paragraphs 120-122 of the Claimant's WS). As stated above, this was a pledge CGD and CGDE had recently included on their website and which the Claimant had been informed of. In her oral evidence she accepted that the reason she chose this example was because it was relevant to the development community that comprised her followers. Therefore she deliberately picked a subject that was one of CGD/CGDE's public policies and used it to spark a discussion where she advanced gender critical arguments focusing on one individual and in the context of excluding them.

137. In her oral evidence, the Claimant accepted that prior to these tweets she knew that Pips Bunce described themself as gender fluid and found the term "transvestite" "horrible" [914 and para 118 C's WS). In that Twitter thread, the Claimant nonetheless referred to Pips Bunce as being a "part-time cross-dresser" [919] in the context or arguing that they should be excluded from the panel. Her tweet is reductive and dismisses Pips Bunce's gender identity, reducing it to merely cross dressing and even that being "part-time". In the link to an article that the Claimant herself posted in respect of Pips Bunce, they had described that their gender expression (wearing women's clothes) was "more internal" [979] and that they are *"Gender Fluid, Non-Binary and Trans"* [901].

138. The Claimant had already decided she thought it was *"obscene that the FT included this self identified man in a list of top female executives because he wears a wig and dress <u>occasionally</u>"* [979]. In fact she knew before this message on Slack that Pips Bunce described that they spent half their time as Pippa and half as Philip (per the article she referenced in her tweets). Therefore she took to

Twitter to express how obscene she thought this was and denigrated Pip Bunce's gender identity in the process.

139. Also on 25.09.18 she stated *"I didn't think the manel thing was about wanting one person in a dress"* to which Joshua Powell (from a development non-profit) replied *"comes across as trivializing discrimination against trans men / women because of their identity / glibly reducing trans identity to wearing a dress. Don't see how the answer to discrimination against women is to sideline trans non-binary"* [917].

140. There are similar objections made by a variety of people who engaged with the Claimant on this topic on Twitter. Some of those had up to 64,500 followers each. There was a combined audience of over 160,000 followers who could have seen the tweets and engaged in the discussion. Many of those people were in the area in which CGD and CGDE operates. Various of them were former, current or prospective affiliates or employees of CGD / CGDE. Any one of them could have taken the view that the Claimant's expressions were consistent with CGD or CGDE's position on the topic, when in fact her messaging ran contrary to their internal culture of inclusion.

141. Other tweets posted by the Claimant during this conversation included:

a) *"But other people are not compelled to accept it as relating to any material reality"* [921]
b) *"a man's internal feeling that he is a woman has no basis in material reality"* [1034]
c) Comparing transwomen to Rachel Dolezal [915] and [932] thereby inferring that men masquerade as trans women;
d) When asked by Arthur Baker (an existing junior staff member) *"I don't see why you have to refuse to acknowledge their womanhood in normal life"* the Claimant replied *"Because the places that women and girls get assaulted and harassed are *normal life*!!!"* [934]. Thereby catastrophising from a situation about recognising transwomen's rights to be regarded as female on a panel to extreme circumstances of violence;
e) *"Under self ID a transwoman is any male who identifies as a woman (a feeling in their head). I am a woman but I don't have a feeling in my head."* [958] which infers some sort of mental illness;
f) She also mocks those who do not share the gender critical belief stating:

(i) *"You can colour me totally surprised that the good people of development twitter (at least most who've chatted with me) say they believe that male people can be woman, in some real sense. And that insisting we need a word for female people is old hat (and mean and not inclusive)"* [958]; and

(ii) *"What I am surprised at is that smart people who I admire, who are absolutely pro-science in other areas, and champion human rights and women's rights <u>are tying themselves in knots to avoid saying the truth</u> that men cannot change into women (because that might hurt men's feelings"* [1002];

g) She suggested that it would be appropriate to ask someone to prove their birth sex to check the no manel pledge was being adhered to (and confirmed in oral evidence that this was what she meant in this tweet) [1003].

142. Some of the persons who engaged with the Claimant's tweets are very prominent in their fields and directly connected to CGD/CGDE as having done work with them in the past, including Dina D Pomeranz (who has over 66,000 followers) Rachel Meager (who has 34,500 followers) and Alice Evans (who has 30,000 followers). Some people indicated they found the Claimant's tweets offensive. Most disagreed with her [949, 956]. Various commented on her language and tone [956 and 949].

143. On 26.09.18, the Claimant attended a demonstration opposing the proposed reforms to the GRA which. She attended CGDE's offices and informed colleagues that she had been to the protest to object to the reforms and she invited a discussion on the topic. She left a copy of a campaign pamphlet in the office for people to read (para 125-126 of the Claimant's WS and pages [876-891]). In this way she was commending it to her colleagues and bringing the campaign into the workplace.

144. On the same day, 26.09.18, the Claimant also used "Slack", an internal messaging service, to encourage people to come and talk to her about the GRA proposals. She engaged in one extended discussion with a colleague and raised the topic over a lunch break (para 128 Claimant's WS). In the online communication, she described Pips Bunce as a *"man in heels"*, said that *"I don't think people should be compelled to go along with literal delusions like transwomen are women"* and Mr Baker reported her to have said *"I don't care about hurting other people's feelings"* which she did not deny in her reply [978-979].

145. She also included a link to articles, one of which was about a convicted cisgender male paedophile suggesting that the trans rights movement poses risks and dangers to women and children [979]. In her live evidence she tried to justify this by stating David Challenor is a "cross dresser", albeit she accepted he was not trans. She suggested he had infiltrated the Green Party to campaign for trans rights to advance his own position as a paedophile. In her own message on Slack she recognised her message sounded like *"moral panic"* which is exactly what it was.

146. On 28.09.18, Luke Easley was made aware of some of the Claimant's Tweets when two members of staff in CGD's US office (where he is based) complained that the Tweets were transphobic and raised various concerns [982-983] (para 14 Luke Easley's WS). On 01.10.18, Complainant 3 also complained to Luke Easley about the Claimant's Tweets and her discussions in the London office (para 15-16 Luke Easley WS). Complainant 4 complained to Luke Easley subsequently (para 17 Luke Easley WS). Some of them also complained to Amanda Glassman.

147. The initial responses from the core members of the SPG were:

a) LE: *"I reviewed her tweets and believe she is making a nuanced argument that although I disagree with (not entirely sure, but irrelevant), doesn't seem to be offensive or inappropriate"* [990]
b) AG: "*I have reviewed and agree with your assessment… I think this distracts from her influence and of course the outside world does not recognize that we have no institutional positions"* [991]
c) MP: *"I don't think her argument [] is inherently transphobic. It is more an argument about words, although the transgender community is very sensitive to the use of words"* [992]
d) MA also did not consider the tweets to be 'transphobic" but suggested a discussion *"to make people aware of the sensitivities of colleagues and boundaries that should be respected"* [993].

148. It is clear from this that none of these people took a knew-jerk judgment of the Claimant's belief, despite understanding that she was expressing the core belief. In cross examination Mr Cooper suggested that it was not until HS suggested they were "dinosaurs" for not regarding such tweets and transphobic (which was disputed by the witness) that they saw a problem with

her tweets. However that cannot be the case because Complainants 1-3 had already suggested the tweets were transphobic and the members of the SPG were well able to form their own views based on what they had read at the time that they did not consider the tweets to be transphobic.

149. The members of the SPG did not brand the Claimant as a bigot or transphobic at any time. Even after the RS and QI reports, on 4 February 2019, LE stated at [1745]:

"I would emphasize the section in the report that makes a distinction between the topics of debate vs rules of debate . We aren't asking Maya to agree with CGD's institutional position, but rather to adhere to some ground rules about how we engage with each other, especially when some staff have expressed discomfort. The right of any staff person to have a view is not under attack, but it cannot outweigh the right of others to feel comfortable at work. We should also emphasize that if Maya feels like others have characterised her as a bigot or anything else, we can address that too. It goes both ways"

150. In the first draft email to the Claimant, in October 2018, LE suggested a need to create a social media policy. His comments in there as to what concerns arose from the Claimant's messaging is very revealing [994].

151. On 01.10.18, HS suggested to management that she should chat to someone at an external equality and diversity consultancy, Quantum Impact ("QI") *"to get their impressions because to [her] this does seem to be an attack on a group of people based on their identity"* [1001]. Later that day, QI sent an email to Ms Shulman and Mr Easley summarising a call they had had earlier that day [1018] and providing advice and guidance to management on how to manage the implications of the communications both with the Claimant, internally and externally [1018-1021]. There was no investigation, disciplinary or grievance type process.

152. HS' suggested follow up, after speaking to QI, demonstrates a balanced approach that focuses on reputational risks to the organisations [1015].

153. Even after HS' "helpful pause" [1036] LE suggested a balanced and moderate approach to addressing the Claimant's Tweets in an email sent on 02.10.18. Mr Easley stated [1050] -

> Several staff have expressed concern about some of the language and tone in your recent engagement on Twitter in a discussion around gender identity and sex.
>
> CGD does not require staff or affiliated experts to vet their public views and social media usage with the organisation. However, we do ask that these debates be free of exclusionary statements. There are several tweets you posted that are therefore problematic; for instance, you stated that a man's internal feeling that he is a women has no basis in material reality. A lot of people would find that offensive and exclusionary.
>
> Of course, this is not a research topic for CGD. It is only relevant to our organisation as an employer and event host / organizer, where we respect each person's self-definition and wish to convey our commitment to diversity and inclusion.
>
> As to our commitment to have diverse panels, for CGD the inclusion of any person identifying as female would indeed meet the test of diversity.
>
> As a next step could you please include a statement in your Twitter profile that indicates "all tweets and views are my own", and ideally clarify somewhere in the tweet stream that your views are personal and not related to your work at CGD or CGD's policies?
> [Emphasis added]

154. Throughout the proceedings the Claimant sought to argue that her communications were typical of the culture of the London office at the time. However, it is notable that:

a) Ian Mitchell (of the London office) considered the Claimant should apologise for her use of language [1041].
b) Arthur Baker (of the London office) regarded her communications to be offensive [978].
c) Complainant 3 (also of the London office) complained to LE;
d) MP himself stated *"I do feel she needs to be held to task for denying people's feelings – how can she (or any of us) say what anyone feels. That brings the discussion into the personal and implicit belittles those who do feel one way. That language is indeed regrettable (and non-collegial and offensive)."* 1042]
e) Further, in her reply to LE's email at [1052] the Claimant noted that when she had discussions with people in the London office, they had to agree to disagree.

155. The Claimant replied to LE's email the same day, 02.10.18, adding in multiple other recipients, stating that she had added a disclaimer to her Twitter profile (but not that she had clarified in the Tweet thread that her views were her own). Nor did she apologise for the impact her communications had had. The email proceeded with a gender critical argument in which she stated *"I stand by my statement that that a man's internal feeling that he is a woman has no basis in material reality"* and *"I have been told that it is offensive to say "transwomen are men"… However since these statements <u>are true I will continue to say them</u>"* [emphasis added]. [1052]

156. In her reply, she also likened being trans to having anorexia (a psychiatric illness to be cured). She indicated her desire to have a discussion about the topic in DC or London and stated that she was co-writing a blogpost that she would want to publish it on CGD's website [1052-1053]. As a Visiting Fellow, the Claimant was permitted to publish blogs on CGD/CGDE's joint website with no substantive editorial oversight. Further, if she published the blog elsewhere, she would be entitled to use her title of "Visiting Fellow of CGD" on the article.

157. The Claimant sent that reply on to Ian Mitchell, Arthur Baker, Caitlin McKee, Lee Robinson and MP [1058]. For all she knew, they could have been the complainants LE referred to. She had no reason to send this on to them and this rather tends to show her disregard for her colleagues' beliefs and feelings and is a defiant approach.

158. When she sent the email to OB, she said *"Sorry..! I don't have an instinct for self preservation, but I think this is important"* [1057]. Therefore she knew that her reply was combative.

159. On 04.10.18, Ellen Mackenzie (Luke Easley's manager) noted that the Claimant's Visiting Fellowship expired that month and stated she suspected there would be some backlash from staff if it were renewed, thus warranting a robust discussion [1060]. Management was divided on how to manage the risks and consequences of the Claimant's behaviours.

160. On 05.10.18, OB suggested some edits to the Claimmant's blog and stated in hid email *"Let's have a word before you publish it – Is that OK? (I have no intention of discouraging you from saying any of this)."* [1080]. He clearly had reservations about he blog. In his edits he suggested she use the phrase *"anyone who identifies as a woman regardless of the sex at birth"* instead of *"males who identify as women"* [1078]. The Claimant rejected this edit suggesting that OB's language *"serves to make the worry sound far away unreasonable and discriminatory… so all the language has done is play down that risk and distress"* [1078]

161. On 08.10.18, the Claimant sent a copy of her draft blog post "Let's Talk about Sex" to Mr Easley and he sent it on to Ms Shulman, informing the Claimant that Ms Shulman would be better placed to comment [1095]. The article advanced gender critical views and was unrelated to CGD/CGDE's policies or work [1083-1086]. On 09.10.18 she sent a copy to MP stating *"I am also open to suggestions on how to open up a space for internal discussion both in London and also with folks in DC"* [1088].

162. On 13.10.18, the Claimant posted (on Twitter) a photo of herself with a message demonstrating her opposition to the reform of the GRA and including a campaign video from Fair Play for Women which encouraged viewers to vote against the government proposals. The video used dramatic language and visuals (and music) and suggested there would be a greater risk of sexual assaults, murder and rape against women if the law made it easier for trans people to obtain a gender recognition certificate [1125-1148]. This was not discovered by the SPG until 7 December 2018 when CH notified them of it. MP received complaints about the video (para 373 C's WS).

163. Whilst MP and HS suggested that the blog could potentially be edited to make it more relevant and suitable for CGD's combined website [1090 and 1102] others felt it would never be suitable for publication. On 15.10.18, Amanda Glassman discouraged the Claimant from seeking to publish her blog on CGD/CGDE's joint website. LSE and the International Center for Research on Women also declined to publish the blog [2122-2123].

164. In late October 2018, the Claimant re-tweeted an advert from Fair Play for Women, and she used the hashtag "choosereality" (which was used by the Fair Play for Women campaign) [1208-1214].

165. On 31.10.18, Mr Easley reminded Masood Ahmed that the Claimant's Visiting Fellowship expired that day. The issue of renewal of a Visiting Fellowship was put to the Strategy and Planning Group ("SPG") to discuss. Ultimate authority to decide whether to renew rested with Masood Ahmed, as President of CGD (the entity with which Visiting Fellowships are affiliated).

166. On 16.11.18, on Twitter, the Claimant mocked Comic Relief's tweet which stated *"Comic Relief firmly believes every individual has the right to be who they are and define their own identity"* [1250].

167. On 21.11.18, MP informed the Claimant that he did not see a route to her becoming a senior fellow because her work was not core to CGD (para 20 MP WS).

168. On 06.12.18, the SPG discussed renewal of the Visiting Fellowship. There were strong opinions for and against. Accordingly, it was decided that obtaining advice from an independent expert might assist Masood Ahmed in uniting the SPG on a common agreement and therefore facilitate him in making a decision which all members of the SPG found acceptable (as is his management style).

169. On 17.12.18, Sara Godfrey (CGDE Operations Manager) sent copies of updated Health and Safety and Anti-Harassment policies to all CGDE staff and invited questions, stating the policies would be discussed at an equality and diversity training event on 15.01.19 [1459-1464]. The Claimant replied, copying in all recipients (the entire CGDE mailer list) criticising the policy, including comments such as: *"I know that some people are offended by the statement that males who identify as women are not women. However, this is in line with how the Equalities Act [sic] defines women (as a "female of any age"… Thus circulating these definitions from the Equalities Act [sic] or CEDAW might be viewed as offensive and could potentially be prohibited under this policy!"* [1465]

170. In mid December 2018, the Claimant in an email to Kathleen Stock stated: *"I've sent them the article and am trying to get them to understand that this is not a disciplinary matter about the wording of some tweets but is about an issue none of them have thought about clearly but have just assumed that someone else has worked*

out the right side of history" [2335]. Her disrespect for those who do not share her views id apparent in this email. It is also apparent from her communications with the Respondents and in her tweets (though less overt).

171. In this email, even at 19.12.18, the Claimant appears to be hoping that CGD will publish her blog and she clearly wanted to rely on CGD's good reputation so as *"to give legitimacy* [for the blog] *to an international development audience"* [2335]. Accordingly, she was deliberately seeking to associate her messages with the Respondents to give her messaging more gravitas.

172. On 20.12.18, a suitably qualified independent expert, Ruth Szabo (RS) was contracted to advise how to manage the Claimant, the complainants, and wider issues for staff discussion and policies. The consultant delivered her report on 09.01.19 [1613-1617]. She recommended that CGDE obtain a further in-depth analysis of the Tweets from QI and engage the Claimant in a discussion about them.

173. Meanwhile, on 31.12.18, the Fourth Contract expired. The Claimant never received new work nor pay after this date. She billed for the last portion of the contract on 14 January 2019 [525] (erroneously dated January 2018, as is evident by the fact that the work billed was done in October to December 2018).

174. On 14.01.19, Mark Plant contacted QI to instruct them to undertake the further review advised by the independent consultant [1693]. During the review process, QI advised that since its report contained management guidance, it would be appropriate to separate its management guidance and produce two reports: one for management and one for the Claimant to see [1691].

175. On 01.02.19, QI produced its two reports. On 07.01.19 one of the reports was shared with the Claimant and she was invited to comment on it [1774].

176. On 11.02.19, the Claimant replied to the report she had been given with a seven-page reply and covering email [1778-1786]. In the covering email she stated *"I don't think the QI report is useful in finding a way forward… I do not accept the report in its current state"* [1778]. She then critiqued the report and defended her position on sex and gender. Her reply is nor conciliatory or cooperative.

She states that her language is *"not offensive"*, failing to demonstrate any acknowledgement as to why others had complained about her messages and why the Respondents were concerned with the way she framed them [1781].

177. On 13.02.19, Mark Plant met with the Claimant and informed her that he was willing to begin to draft her a contract to work on the Gates Foundation grant but that he felt it would be fruitless for her to raise the issue of renewal of her Visiting Fellowship with the SPG (para 54 Mark Plant's WS). MP also tried to highlight to the Claimant which language and tweets others found offensive.

178. On 20.02.19, Mark Plant met with the Claimant again and because she was intent on renewal of the Visiting Fellowship, he advised her to write directly to the management team (para 57 Mark Plant's WS). The Claimant sent a copy of her note to Mark Plant on 22.02.19 and he passed it on to the management team the same day [1820-1826]. In that note, the Claimant made some concessions as to how she would engage in discussions, but she also copied her response to the QI report and continued to advance her position and encouraged them to make space for a debate on the issue. Further she stated she *"had decided not to tweet very much"* about it [1824], indicating she would tweet about it on a platform linked to CGD / CGDE. She also stated she would use a person's correct pronouns in *"<u>most</u> social situations"* [1822] but not *all*.

179. Even the Claimant's confidante discouraged her from writing in these terms stating *"I fear it is not going to make amends and might even make them slam the door… you accuse them of gagging people with strong opinions and being inconsistent… it's not going o win them over. Also you dig your heels in on the transgender issue and make your point strongly and vociferously. But you're not going to change their minds on it."* [2142].

180. On 22.02.19, the Claimant wrote to anther friend that *"It is absolutely bonkers that all these empirical economist types accept all this stuff with a straight face"* [2137]. This demonstrates the disrespect she had for those who do not hold her gender critical belief. Again, this is more overt here, but is implicit in various of the messages she did convey openly. She expects all those around her to

make space for her views and have a debate on them, but she has no regard for the views of others, that are equally protected in law.

181. By 25.02.18, Masood Ahmed reached his decision not to renew the Claimant's Visiting Fellowship for a third and final year. He took this decision alone after realising that he could not get a consensus at the SPG. His reasons for so doing, articulated at paragraph 56 of his WS are (in brief):

(a) Reputational risks in alienating stakeholders;

(b) Diverting attention away from CGD and CGDE's core areas / mission with a controversial topic that was not related to CGD or CGDE's work;

(c) Wasting resources, including management time and external advisors' costs in trying to manage the risks entailed by and complaints arising from the Claimant's communications;

(d) Risk of offending existing or prospective staff (both cis and trans) that did not share the Claimant's gender critical belief and found the language she used hurtful, thus giving rise to a risk of litigation / legal liability and/or a risk that prospective applicants would be deterred from applying;

(e) Proselytising by presenting her arguments as "the truth" which denied the rights and beliefs of others; and

(f) Division amongst senior management (in respect of how to manage the Claimant's behaviours) which was a threat to the stability and efficient running of the CGD and CGDE offices.

182. MA amplified his reasoning in oral evidence and demonstrated that his key concern was that the Claimant would not be able to adhere to the restrictions she had suggested and he feared further disruption and similar problems in the future if she were to remain as a VF. As a contractor, she would not be able to hold herself our as being "of CGD" and this would reduce the reputational risk.

183. On 28.02.19, Masood Ahmed spoke to the Claimant by telephone (which she surreptitiously recorded) and informed her of his decision not to renew the Visiting Fellowship, but that a contract on the Gates grant was still open to her.

The Claimant challenged Masood Ahmed on his decision and suggested it would not be possible for her to continue to work for CGDE without her Visiting Fellowship. Masood Ahmed encouraged her to consider it further [1861-1867].

184. On that day, the Claimant clearly made up her mind that she would not accept the contract and instead wanted to explore legal avenues for suing the Respondents. She spoke to a former employment lawyer for 38 minutes and formed the view that it would be a *"good case"* [2146].

185. On 01.03.19, the Claimant sent an email to Masood Ahmed seeking confirmation of what had been discussed on 28.01.19 [1884]. Masood Ahmed and others considered the tone of the email to be strange and decided to take legal advice on how to reply (para 64 Masood Ahmed WS). It is clear that this email was designed to bait them to say something she could use in litigation. Her longer initial draft sent to the ombudsperson is very revealing of her thoughts at this time. In that draft, she clearly indicates she had decided not to accept he contract, stating *"I am afraid it does not align with my expectations"* [1880]. She also alleges that the decision not to renew the VF is discrimination contrary to s.10 EqA [1881].

186. On 04.03.19, the Claimant informed Vishal (at Gates Foundation) that she was going to turn down CGDE's offer to work as a consultant on the Gates grant and she tried to poach the work for herself at a new institution she was aiming to join as a Senior Fellow [2339].

187. On 05.03.19, Masood Ahmed wrote to the Claimant to confirm that, as stated in the call on 28.02.19, the Visiting Fellowship would not be renewed [1905].

188. On 06.03.19, the Claimant wrote an email copying in approx. 39 members of CGD / CGDE staff in which she continued to argue her position with statements such as *"It may seem kind to say that 'anyone who identifies as a woman is a woman' it is incoherent and undermines women's rights"* and *"So I am leaving by the same route I came in: being argumentative on twitter and unwilling to stay quiet about 'The Emperor's New Clothes' in service of a progressive movement"* [1923-1925].

Outline of Respondent's submission on detriments

Not employing her in November 2018

189. As to the detriment at 2.1.1 LOI, the Respondents submit that as stated above, the Claimant was never a credible candidate for employment and that the discussion with MP on 21.11.18 was nothing more than him correcting his prior misunderstanding of the position that he had stated to her by email at page [830]. As to the Claimant's alleged shock at the announcement on the Gates grant, she clarified in oral evidence that her surprise was because she had not been named at all, not that she had expected to be announced as an employee that day.

190. Indeed, around this time, the Claimant herself knew that she had never overcome the hurdles that MA had informed VR and OB of in February and March 2018 (to expand her work base and secure funding). In a message to a friend on 19.11.18 she stated *"I don't think I have convinced the powers that be of my value"* [2118].

191. In any event, this claim is out of time and for the reasons set out below the Respondents contend that this is not part of a continuing act and time should not be extended.

192. On **direct discrimination**:

a) She was not treated less favourably than the correct comparator. Anyone in her position who did not hold the gender critical belief but whose work was too narrow and who had not secured funding to support an employed role would have been given the same message from MP; and
b) The reason was not because of her belief. Indeed, the decision that she was not (yet) employable was taken in February and March 2018 and never changed. This was long before anyone was aware of her belief. Therefore, there is no causative link between the Claimant's behaviours or her belief and the decision.

193. On **harassment**:

a) It is accepted that the message conveyed to the Claimant can be said to be unwanted conduct;
b) However, such message was not related to her protected belief. It was taken for the reasons set out above and prior to knowledge of her belief;
c) It cannot be said that this communication on 21.11.18 created the effect proscribed under s.26 EqA. The Claimant herself was not expecting to be employed that day and her last communication about employment was conditional and distant [830]. In her email on 19.12.18, she even reflects that remaining at arms' length might be for the best [2335];
d) If she subjectively received the communication in the proscribed way, it was an unreasonable reaction in the circumstances. She knew she caused offence, disruption and division and she had shown no remorse or contrition.

194. Further and in any event, even if the Tribunal extends time and considers that this was a decision taken in November, and that it was because of the belief or the manifestation of it, such a decision was justified under article 9(2) ECHR because of the disruption that the Claimant had caused, as explained by MA in his live evidence and his witness statement.

195. Applying the justification test under ***Bank Mellat*** and article 9(2):
(i) The objective was to reduce existing disruption / division and avoid the risk of future problems as well as promoting an inclusive workplace that is free from discrimination and promoting the Respondents' values of inclusion. This is objective and sufficiently important to justify any limitation on the Claimant's right;
(ii) It was rationally connected to the objective because if she had been employed, the Respondents would have been drawing her closer into the organisation such that the disruption and risks would have continued;
(iii) No less intrusive measure could have been used. The Respondents appropriately allowed her to remain a contractor on the Gates grant and therefore the decision was appropriate, proportionate and justified.;
(iv) The Respondents' actions plainly struck a fair balance between the Claimant's rights and the rights of their employees and the organisations.

196. Engaging the Claimant as an employee would pose the same sort of risks that MA was concerned with when he decided not to renew her VF. This

includes his belief that she was likely to tweet on the topic again (in association with CGD / CGDE) or blog on that topic (using her VF affiliation) thus linking CGD and CGDE to speech they did not want to express, contrary to their fundamental rights not to be compelled to express under article 10 ECHR.

197. Finally, the decision was lawful because of the risks to those employed by CGD (who do not hold the gender critical belief) being compelled to associate with the messages the Claimant wished to publicly express, contrary to their article 9 rights not to express or be associated with such belief. From the evidence, it is clear that a great number of CGD's employees did not and do not share the Claimant's gender critical belief, this includes:

(i) MA, AG, MP and LE who all stated in their oral evidence or witness statements that they do not share the Claimant's gender critical belief:
(ii) EM who did not share the Claimant's belief;
(iii) OB who had disagreed with the Claimant in the office on the topic (para 5 MP WS);
(iv) The senior male employee referred to in LE's WS at paragraph 40;
(v) Complainants 1-4 who all were offended by the Claimant's communications;
(vi) Sarah Allen [1012]
(vii) Arthur Baker who expressed his disagreement with her on Slack and Twitter;
(viii) The 85 signatories who signed the letter in support of appealing the EAT decision [2010].

198. It is clear that the overwhelming majority of those engaged by the corporate Respondents and MA himself did not and do not share the Claimant's belief. By employing he Claimant, there would have been an ongoing risk of her taking public positions in affiliation with CGD that interfered with the individuals' rights not to be associated with or express a belief they do not hold and indeed in some cases profoundly disagreed with. Like the risk identified to the bakery owners in ***Lee v Ashers***, it was lawful for the Respondents to take the decision which they did.

The "investigations"

199. As to detriments 2.1.2 and 2.1.3 LOI: The management guidance sought from QI and RS is clearly not an investigation in the sense understood under

the ACAS Code. There was a degree of evidence collection to provide materials to the consultants but this is not akin to a formal investigation. Indeed, the complainants were not interviewed. The TOR for each consultant makes plain what the intention of instructing them was to obtain management advice on how to move forward with the Claimant.

200. The Claimant attacks the processes as lacking transparency but it is evident that CGDE requested each expert to include and interview the Claimant. When QI failed to do so, the short version report was sent to her to comment on and she had the opportunity to and did correct any factual inaccuracies and argue her position [1780-1786].

201. MP did inform her of some of the language that was specifically deemed problematic when they met on 13.02.19 (para 53 MP WS). He had also updated her periodically as to the processes and timescales, including informing her of the two different consultants being engaged. In any event, the Claimant had demonstrated previously that she was well aware what language was problematic and she had access to her own tweets and messages.

202. The evidence was available to her and was recorded in black and white. This was not the sort of process where there needed to be a "he said she said" investigation to establish facts.

203. Furthermore, the ACAS Code does not apply to her given that she is not (even on her own case) an employee within the meaning of s.230 ERA. The Respondent's policies were deemed not to apply to her either.

204. Even if the Tribunal accepts that this these processes were an "investigation" to determine whether she had committed misconduct (as opposed to obtaining management advice on how to move forward) the process undertaken by QI and RS could at its highest be regarded as the investigatory stage of any such process because no "charges" were ever brought forward for any disciplinary action. Therefore, even if the ACAS Code applied, there would have been no right to an interview as confirmed under paragraph 5 of the ACAS Code. Nor would she have been entitled to see any evidence or to provide any (or call witnesses). That would only arise if there

were found to be charges to bring to a later disciplinary stage (under paragraph 9 of the Code).

205. Therefore, whatever the Tribunal think of the adequacy or otherwise of the RS and QI reports, or the processes through which they were created, these were obtained in good faith with the aim of moving forward in a constructive way. It was a genuine attempt by management to navigate the tricky territory they had found themselves in. They entrusted that advice to suitably qualified experts and instructed them to interview / involve the Claimant. The Respondents cannot be criticised for any inadequacies in the reports.

206. On **direct discrimination**:

a) Anyone who had behaved in the way the Claimant had would have been treated in the same way irrespective of their beliefs. There is no "less favourable treatment";
b) The reason for the reports was to advise management specifically to see if they could move forward with the Claimant despite her disruptive behaviours, it was not because of her beliefs.

207. On **harassment**:

a) It is accepted that the need for management advice might be seen as unwanted;
b) The need for management advise arose out of the disruption caused by the Claimant's messages but is not "related to" her belief in the legal sense. The connection is too distant;
c) It cannot be said that seeking advice created the effect proscribed under s.26 EqA. The Claimant may have felt unnerved but it, but the Respondents needed advice and guidance and their actions were perfectly legitimate and reasonable;
d) It is not plausible to assert that these processes to obtain advice on how to move *forward* in a constructive way can be said to have had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Her evidence on this was contradictory. On the one hand she says she believed it was more a general process to devise a policy using her a test case, and on the other, that she felt outside a process that was judging her. Even if she did have concerns about the process, it cannot be said that they reach the threshold proscribed under s.26 EqA. If it subjectively did, that was not a reasonable perception in the

circumstances. Particularly given that MP was driving these processes in order to seek to keep her involved with the Respondents.

208. Further still, whilst the entire process of obtaining advice was linked to the Claimant's behaviours (indeed they sought advice on how to manage the situation) it cannot possibly be said that any inadequacies in the process (which were not even the fault of the Respondents) were done by the Respondents *because* of the Claimant's belief or for a reason *related to* it. The whole purpose of the advice was to devise a way to move forward with the Claimant being involved with the Respondents in full knowledge of her beliefs.

209. Any failures / inadequacies are due to QI and RS's failings and/or management mistakes in following and relying on that expert guidance.

210. In the event that the Tribunal finds that the processes were done for a reason related to the belief, it will have to apply the justification test under ***Bank Mellat*** and article 9(2):

(v) The objective was to advise management to move forward in a way that would respect her rights, their rights and the rights of those in the workplace who were offended by her messages. This is objective and sufficiently important to justify any limitation on her right;

(vi) It was rationally connected to the objective to seek management guidance because the Respondents lacked the expertise internally;

(vii) No less intrusive measure could have been used. The Respondents needed advice and they sought it discreetly (not involving many people);

(viii) The Respondents' actions plainly struck a fair balance between the Claimant's rights and the rights of their employees and the organisations.

Non-renewal of the visiting fellowship

211. On **direct discrimination**:

a) The Claimant was treated in the same way as another person who did not share her belief would have been treated if they had posted the same Tweets and behaved in the same way. Therefore there is no less favourable treatment;

b) The "reason why" MA decided to not renew the Claimant's expired Visiting Fellowship was because of the fall-out and implications of the Claimant's

communications and behaviours, not because of the beliefs she held. This is a case about the disruption, harms and risks caused by the Claimant's inappropriate *manifestation of her belief*, not the belief itself.

212. Even if the Tribunal holds that such matters are indissociable from the belief itself (which is disputed) the Tribunal will be obliged to consider the effects of articles 9 and 10 ECHR when interpreting the claims under EqA, due to the interpretative obligation under s.3 HRA 1998. This includes the principle that interference with Convention rights is expressly permitted in certain situations, as set out in articles 9(2) and 10(2) ECHR (as in ***Lee v Ashers***).

213. The Tribunal will have to balance the rights of the Claimant to manifest her beliefs in public association with CGD (as a VF) against the rights of the entities not to want to express those messages and the rights of the individuals employed by the entities who do not hold the gender critical belief and do not want to express it. The same balancing exercise as set out above (in respect of employing her) should lead to a finding that there was no unlawful discrimination or harassment.

214. The extent of infringement on the Claimant's rights in not renewing the VF (i.e. the loss of the right to publicly associate her views with CGD / CGDE) is a minor infringement in contrast to the risks of the rights and freedoms of others. She was permitted to remain a contractor and would have lost no income whatsoever. She would have been entitled to continue to tweet and publicise her views freely, because the Respondents would no longer fear an infringement of their rights and the rights of those they employ.

215. On **harassment**:

a) It is accepted that the non renewal of the VF can be said to be unwanted conduct;
b) However, such message was not related to her protected belief. It was taken due to the actual disruptions and risk of future disruptions caused if the Claimant maintained a public affiliation with CGD / CGDE which she could use to promote her messages and which they did not want to be associated with;

c) It is disputed that deciding not to renew this honorific unpaid title created the effect proscribed under s.26 EqA. It may have been a disappointment for her, but it cannot be said to have met the threshold required.
d) If she subjectively felt this way, it was an unreasonable reaction in the circumstances. She knew she caused offence, disruption and division and she had shown no remorse or contrition. She also knew that CGD and CGDE did not want to express the gender critical message and even in her final communications she indicated she was going to continue to express it on a platform associated with them.

216. The same matters relied upon directly above apply here to justify any interference with her rights applying the ***Bank Mellat*** test.

Gates contract

217. As to the detriment at para 2.1.5 of the LOI, no one within the Respondents withdrew the contract from the Claimant. It is clear from the internal emails on 28.02.19, that the relevant persons were discussing drafting the contract and presenting it to her [1872]. She may have perceived that the email from MA dated 05.03.19 was withdrawing the contract, but as a matter of fact, no one within the Respondents took any such decision. Further, the email did not articulate words of withdrawal of that contract [1913].

218. It would appear that the Claimant herself did not even perceive the contract to have been withdrawn. In her leaver's email she states *"The offer for me to be employed at CGD to work on the DRM project was rescinded. Finally, the offer to continue as a visiting fellow was also withdrawn last week"* [1924]. If she believed that MA had withdrawn the Gates contract in his email of 05.03.19, surely she would have said this in her leaver's email. That act would have been *"finally, the Gates contract was withdrawn"*. It was not, because she knew that offer had not been withdrawn.

219. It is clear that by 04.03.19, the Claimant had decided to reject the contract in any event. She accepted as much in her oral evidence before backtracking to suggest that she was still undecided. However, her email at [2339] is unequivocal and the fact that she was seeking to poach the work from the Respondents to herself by going behind their back to Gates indicates she cannot

possibly have been undecided at this time. She cannot plausibly argue that she would attempt to poach work and still think it possible to then accept the contract and face Vishal (who she met to poach the work) as a member of CGD on that grant. This demonstrates her lack of credibility.

220. Accordingly, this alleged act of detriment was not done and the claim should fail at that stage.

221. Further and alternatively, if the Tribunal considers that it was somehow withdrawn by the Respondents, she did not want a contract by this date and therefore this is not detrimental to her in the legal sense.

222. Further, even if the Tribunal finds that it was withdrawn, and that this was because of or for a reason related to her beliefs, the Respondents would have been entitled to do so under the same principles enunciated above, relying on articles 10 and 9.

Limitation / Time

223. The following facts are relevant for what is in effect also a preliminary issue: whether the claims have been brought in time, which affects one, possibly two of the detriments.

224. The Claimant presented her ET1 on 15.03.19 [2], which is the same date as both Days A and B (as defined in s.207B ERA) [1]. Accordingly, anything occurring wholly on or before 15.12.18 is *prime facie* out of time.

225. As such, the detriment "decid[ing] not to give the Claimant an employment contract to work on the Gates project and other projects" - is *prime facie* out of time.

226. Further, insofar as the Claimant complains that the initial review of her Tweets by CGDE and QI (conducted on and around 01.10.18) this too is *prima facie* out of time.

Outline of the Law in Respect of Limitation / Time

227. Section 123(1)(a) EqA states that a claim must be brought within three months, starting with the date of the act to which the complaint relates or such

other period as the tribunal thinks just and equitable. Section.123(3)(a) EqA states that conduct extending over a period is to be treated as done at the end of the period.

228. Following ***Tyagi v British Broadcasting Corpn World Service [2001] IRLR 465***, CA complaints of discrimination in refusal of employment (for those who are not employees but fall within the work provisions of EqA as an applicant under what is now s.39(1)(c) EqA) must made within three months of the refusal taking place - there is no scope for arguing that the refusal is in pursuance of a discriminatory policy which is itself a "continuing act". In ***Tyagi*** it was argued that (the then) RRA 1976 s 68(7)(b) (Equality Act 2010 s 123(3)) could be relied on to save an otherwise out-of-time application, but this was rejected.

229. Accordingly, insofar as the Tribunal finds that C is not an employee under s.83 EqA, and can only therefore be treated as a potential "applicant" in respect of this detriment, it can only be seen as a one-off act, not a continuing one.

230. Even if C is found to be an employee, a decision not to engage an individual in a specific role is in any event a one-off act. There may be continuing consequences from that act, but that is qualitatively different than being a continuing act.

231. In ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530***, at paragraph 48, the CA stated that in order to prove a "continuing act" -

> the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period…

232. ***Hendricks*** was cited with approval by the Court of Appeal in ***Aziz v FDA 2010 EWCA Civ 304***, where the CA noted -

> one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents…

233. In ***South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19***, the EAT held that if any of the pleaded acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

234. In ***Virdi v MPC [2007] IRLR 24***, EAT, it was held that the time limit ran from the date of a decision (in that case when an internal appeal was turned down), not from a day later when the claimant was informed of this.

235. In the present case, there is no logical connection with this communication form MP and the later acts relied on. The information relayed to C by MP on 21.11.18 (that she was not in the running to be taken on as a Senior Fellow) was nothing more than a correction of his misunderstanding about whether there was such a prospect. Accordingly, when he informed her on 21.11.18 that there was no real prospect at that time, he was simply correcting his misunderstanding, not making a decision or refusing to offer her a role. There was no role.

236. The claim is thus not part of any continuing act linked to the other detriments and is out of time.

The Respondents' secondary time-limit argument

237. Section 123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so.

238. The Court of Appeal made it clear in ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434*** that when tribunals consider exercising the discretion:

> there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

239. The onus is therefore on the Claimant to convince the tribunal that it is just and equitable to extend time.

240. In exercising its discretion, the Tribunal should consider all the relevant circumstances, which may include: the reason for the delay; whether the

Claimant was aware of her right to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194***).

241. IN the present case, the Clamant knew if the facts giving rise to her claims at each material time. She knew of the right to bring claims no later than her reply to the QI report where she cites legal authority for such claims. She received legal advice on 28.02.19 and at that time formed the view that she would have a good case.

242. She is an experienced researcher and should have investigated her rights. If she was unaware of time limits or the fact that EqA protected workers and employees, these are things she could have readily found out if she had asked the lawyer she spoke to on 28.02.19 or done some basic research. Cases such as ***Uber*** have been widely reported in the mainstream media hence the concepts of challenging one's status is not esoteric.

Indirect discrimination

Outline of the law on indirect discrimination

243. S. 19 EqA states -

> (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.

244. The proper pool for comparison when considering particular disadvantage is: the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively.

245. Article 9 ECHR contains no requirement for group disadvantage, however in ***Mba v Merton London Borough Council [2014] ICR 357***, in the course of their respective speeches, their Lordships stated that group disadvantage is still required in an indirect discrimination claim.

246. In a case of this kind, if the Tribunal finds that article 9 is engaged, the test for justification under s.19 EqA is the same as the test for justification in article 9(2) above.

Respondent's case in respect of the indirect discrimination claims in a nutshell

247. The Respondents did not apply the PCP: "that visiting fellows, employees, and prospective employees should not express the [protected] belief… even on their personal twitter account, failing which they would be penalised". She was asked to moderate her tone and language and not bring the messaging into the workplace

248. The Respondents never sought to deter the Claimant from expressing the protected belief on Twitter, nor did they penalise the Claimant for so doing. The Claimant's Twitter profile cannot accurately be described as "personal" given the facts set out above.

249. The corporate Respondents did and do have a requirement that people express their views in a way that is respectful of others and in accordance with their commitment to inclusion - which the Claimant was aware of. The Claimant failed to adhere to those standards, using language that could reasonably be regarded as discriminatory.

250. In respect of the indirect *sex discrimination* claim, there is nothing to suggest that women are more likely than men to hold the gender critical belief. The statistical evidence which is available demonstrates that women tend to be less likely to hold the gender critical belief than men. For example the data at [2226] shows that 23% of women surveyed by Populus agreed that *"a person*

who was born male and has male genitalia but who identifies as a woman" is a woman, compared to just 14% of men. Further, at page 2257, 47% of women surveyed by YouGov agreed with the statement *"a transgender woman is a woman"* whereas only 33% of men did. This theme continues throughout the surveys provided in evidence at [2225-2334].

251. Further, women who do hold gender critical beliefs can nonetheless express their beliefs using respectful language, without being placed at a disadvantage.

252. In any event, the Respondents submit that any PCP was justified for the same reasons set out above under the discussion of article 9(2).

253. As to the indirect *philosophical belief* claim, the Respondent refutes that the Claimant was placed at a particular disadvantage, because those sharing the gender critical belief can (and often do) express their views effectively using respectful language. Had the Claimant used respectful and moderate language to express her views, there would have been no need for the Respondents to take any action.

254. In the event that the Tribunal finds that the PCP was operated by CGD or CGDE and that it placed people holding the protected belief and/or women at a particular disadvantage, and that the Claimant was placed at such a disadvantage, the Respondents will say that their actions were justified for the reasons set out at paragraph 56 of Masood Ahmed's WS, paraphrased above.

255. The same facts justifying any actions taken by the Respondents under the claims for harassment and direct discrimination above apply equally to justification for the indirect discrimination claims. If the Tribunal finds such justifications are made out, that will be a complete answer to the claims under s.19 EqA and will not require the Tribunal to undertake the exercise afresh.

Victimisation

Outline of the law on victimisation

a) S. 27 EqA states:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

(b) …

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

b) The protected act must be a material factor in the reason for the treatment in order for victimisation to be made out. In the present case, nothing was done because of any protected act.

Respondents' case on victimisation in a nutshell

256. The Respondents accept that the Claimant did protected acts when she did the acts set out at paragraph 7.1(b) and (d-g) LOI. The Respondents do not accept that she made / did a protected act on 28.01.19 on the telephone conversation with Masood Ahmed merely by stating "sex is protected characteristic under UK law" nor that she did so in her email of 01.03.19.

257. However, neither of the detriments were done because of a protected act.

258. The email of 05.03.19 informed the Claimant that, in accordance with the discussion on 28.02.19, the Visiting Fellowship would not be renewed. This email merely confirmed a decision *previously* taken - before any protected act had been done - and communicated to the Claimant on 28.02.19 by telephone. The email did not withdraw any offer for the Claimant to work on the Gates grant as a paid consultant.

259. The Claimant's profile was removed from the website on some unknown date in early May 2019. It is now known that it was the corporate Respondents' practice to place former VFs on an alumni page. The Claimant

had been moved to the alumni page then latterly deleted after the Sunday Times Article.

260. In the Claimant's case, management had believed the practice was to delete the profiles and a request to delete the Claimant's profile was made after she chose to sever all ties on 06.03.19 by sending her "leavers' email" to 39 staff. However, this request was not in fact actioned.

261. The profile was later deleted shortly after the Sunday Times article. However just because there is a temporal link does not mean that this act was done because of any protected act contained in the article. If the Respondents were minded to victimise the Claimant by removing her from the website, this would have been done after one of the earlier protected acts. The fact that it was removed after the Sunday Times article can be explained by LE's live evidence that it was likely to have been removed because of the negative publicity that was being directed towards CGD / CGDE following the article.

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Cloisters, Temple

22 March 2022