



THE EMPLOYMENT TRIBUNALS

Claimant **Maya Forstater**

Respondent **(1) CGD Europe**
(2) Centre for Global Development
(3) Masood Ahmed

HELD AT: **London Central**

ON: **13-21 November 2019**

EMPLOYMENT JUDGE: **Mr J Tayler**

Appearances

For Claimant: **Ms A Palmer, Counsel**
For Respondent: **Ms J Russell, Counsel**

JUDGMENT

The specific belief¹ that the Claimant holds as determined in the reasons², is not a philosophical belief protected by the Equality Act 2010.

REASONS

Introduction

1. The second Respondent, the Center for Global Development, is a not-for-profit think tank based in Washington DC that conducts research about international development. The first Respondent, is the European arm of the Center for Global Development. The third Respondent is the President of the Center for Global Development.
2. In these reasons I shall use the term Respondent to refer to the first and/or second Respondents as there is an outstanding issue as to the Claimant's status and precise relationship with the first and second Respondents.

¹ Whether put as a belief or lack of belief

² See in particular the analysis at paragraphs 77-94

3. The Claimant has been a Visiting Fellow and has entered into consultancy agreements with the Respondent since January 2015. The last consultancy agreement ended on 31 December 2018. The Claimant contends that the relationship came to an end and/or the Respondent refused to continue it because she expressed “gender critical” opinions; in outline, that sex is immutable, whatever a person’s stated gender identity or gender expression. The Claimant contends that her gender critical views are a philosophical belief and that she has been subject to direct discrimination because of them; or has suffered indirect sex discrimination as such views are more likely to be held by women than men.

Procedural History

4. By a Claim Form submitted to the Employment Tribunal on 15 March 2019 the Claimant brought complaints of belief and sex discrimination against the first Respondent.
5. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Elliott on 16 July 2019. The second and third Respondents were added to the claim. Employment Judge Elliott fixed this Preliminary Hearing to determine the following Preliminary Issues:
 - 5.1 Whether the belief relied upon by the Claimant at paragraph 67 of her Re-amended Particulars of Claim amounts to a philosophical belief pursuant to section 10 EqA.

Para 67 “The Claimant believes that “sex” is a material reality which should not be conflated with “gender” or “gender identity”. Being female is an immutable biological fact, not a feeling or an identity. Moreover, sex matters. It is important to be able to talk about and take action against the discrimination, violence and oppression that still affect women and girls because they were born female”
 - 5.2 Whether the belief relied upon by the Claimant at paragraph 69 of her Re-amended Particulars of Claim amounts to a philosophical belief pursuant to section 10 EqA, such that her lack of belief is also protected.

Para 69 “Some people believe that everyone has an inner “gender”, which may be the same as or different to their sex at birth, and that gender effectively trumps sex, so that “trans men are men” and “trans women are women”. Typically such proponents believe that that “trans women are women” from the moment they identify as women (if not before)”
 - 5.3 Whether the Claimant was in “employment” as defined in section 83(2)(a)EqA.
 - 5.4 Whether section 39 EqA was engaged between the period 1 January 2019 to the last act complained of, on or about 5 or 6 March 2019 when the Respondent says that there was no contract between the parties.”

6. At the outset of the hearing I raised a concern with the parties as to whether these issues were well suited for consideration as preliminary issues. I referred, in particular, to the comments of Lord Hope of Craigheadad at paragraph 9 of **SCA Packaging LTD v Boyle** [2009] IRLR 746. My particular concern was the potential overlap between the questions of whether the Claimant held a philosophical belief and whether that was the reason for any adverse treatment; as opposed to manifestation of the belief or treatment by her or others that might be said to constitute harassment. There is potentially significant overlap between identification of the belief and the causation question of whether holding the belief was the reason for any detrimental treatment. The Respondent's representative accepted that there was a potential overlap that meant it would be better for the issues of belief to be dealt with at the same time as liability. The Claimant's representative did not accept that that was the case. The Claimant contended that the Preliminary Hearing should progress as listed as otherwise there would be unnecessary waste of expense and a very substantial delay until the matter could be determined. In the absence of agreement between the parties, there having been no material change of circumstances, it was not appropriate for me to reconsider the decision to hold the Preliminary Hearing: **Sodexo Ltd v Gibbons [2005] IRLR 836** and **Goldman Sachs Services Ltd v Montali [2002] ICR 1251 EAT**. However, the parties did agree that I should consider the specific nature of the belief held by the Claimant as a necessarily element of determining the preliminary issues. I would have to determine what the belief was. That was not necessarily limited to way it was pleaded in the Claim Form.
7. It was also agreed that I would first hear evidence and submission on issues 1 and 2 and only go on to determine preliminary issues 3 and 4 should there be sufficient time; there was not.

Terminology

8. In this Judgement I have sought to use appropriate terminology that will not be offensive to the parties, their witnesses or others reading this Judgement; while ensuring that I am able to properly identify and determine the dispute between the parties; which involves, in part, disputes about terminology. I have particularly sought to avoid using terminology that will be offensive to any of the parties; although I have not been able to entirely avoid using terminology that some of the parties may dispute. I have had regard to the guidance given at chapter 12 of the Equal Treatment Bench Book.
9. I will not use the term transsexual save where referring to its use in the Equality Act 2010 and case law.
10. I use the term to trans woman or trans man to refer to transgender people by the gender they are living. When it is necessary to do so, I refer to sex assigned at birth. I appreciate that the Claimant objects to this term, considering that sex is observed at birth, but she did not suggest that she viewed the term "assigned" to be offensive. I consider it is broad enough to include being assigned because of observation. I will not use the term cis-woman as the Claimant finds it offensive. Where necessary to do so, I will refer

to women assigned female at birth. I have sought, wherever possible, to refer to people by the pronouns they prefer; although, in some cases, I do not know the person's preference.

11. The use of particular terminology does not reflect any pre-conceived views of the relevant belief or non-belief in this case, but is done heeding the guidance in the Equal Treatment Bench Book, while seeking to properly reflect the issues in dispute.

Equal Treatment Bench Book guidance relevant to women and transgender people

12. Women and transgender people often face serious discrimination and violence. The commentary in the Equal Treatment Bench Book provides a useful summary.
13. Chapter 6 considers gender (which the Claimant would refer to as sex) and includes the following;

1. Women remain disadvantaged in many public and private areas of their life. They are under-represented in the judiciary, in parliament (32% in 2017) and in senior positions across a range of jobs.

2. Gender inequality is reflected in traditional ideas about, and expectations of, the roles of women and men. Though they have shifted over time, the assumptions and stereotypes that underpin those ideas are often very deeply rooted. It is common to assume that a woman will have children, look after them and take a break from paid work or work part-time to accommodate the family. However, such assumptions and stereotypes can, and often do, have the effect of seriously disadvantaging women and may be discriminatory, with the effect of preventing women from accessing opportunities and experiences open to men.

33. On International Women's Day (8 March) 2016, the End Violence Against Women Coalition published a survey of British women's experience of sexual harassment in public places. It found that 85% of women aged 18–24 had experienced unwanted sexual attention in public places, and 45% had experienced unwanted sexual touching.

35. In 2016, the TUC reported that:

- More than half of all women polled had experienced some form of sexual harassment at work.
- 35% of women had heard comments of a sexual nature being made about other women in the workplace.
- 32% of women had been subject to unwelcome jokes of a sexual nature.
- 28% of women had been subject to comments of a sexual nature about their body or clothes.
- Nearly one quarter of women had experienced unwanted touching (such as a hand on the knee or lower back).
- One fifth of women had experienced unwanted sexual advances.

- More than one in ten women reported experiencing unwanted sexual touching or attempts to kiss them.
- In 9 out of 10 cases, the perpetrator was a male colleague, with nearly one in five reporting that their direct manager or someone else with direct authority over them was the perpetrator.
- Four out of five women did not report the sexual harassment to their employer. Many employees who suffer harassment are reluctant to complain because of the fear that they may lose their job as a result of complaining.

37. On average, two women in England and Wales are killed every week by a current or former male partner.

54. The Ministry of Justice Statistical Bulletin in January 2013 reported that an annual average of 404,000 women and 72,000 men are the victims of sexual offences.

14. Chapter 12 considers the discrimination faced by transgender people and includes the following:

1. Whilst awareness and understanding towards transgender people has increased in recent years, transgender people are highly likely to experience prejudice, discrimination and harassment in their daily lives, as well as violence. As a consequence, they are less likely to report crime or press charges, and they are likely to be apprehensive about coming to court, whether as an offender, witness or victim. Some transgender people may be particularly concerned about their previous name and gender assigned at birth being unnecessarily revealed in court. They may also be worried about receiving negative attention from the public and the press.

11. A survey for the TUC of over 5000 LGBT employees in the first half of 2017 found that almost half of transgender Respondents had experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will. A 2017 ACAS research paper confirmed that workplace bullying is common and that many transgender staff experience it on a daily basis. The ACAS report also found that the level of bullying may be higher than other rates of bullying related to, for example, sexual orientation, and that transgender staff may look for another job rather than endure the costs and emotional labour of going to tribunal or court. The limited protection of the Equality Act 2010, which only covers those who are undergoing or have undergone (or who are perceived to be undergoing or to have undergone) gender reassignment, means non-transitioning, non-binary or otherwise gender non-conforming people are particularly vulnerable.

12. UK research indicates that over two-thirds of transgender people have experienced harassment or violence from strangers in public places because they were identified as transgender. This includes verbal abuse, threatening behaviour, physical and sexual assault. Transphobic hate crime is widely believed to be greatly under-reported.

Evidence

15. The Claimant gave evidence on her own behalf.
16. The Claimant called:
 - 16.1 Kristina Jayne Harrison, who described herself as a “54 years old transwoman, that is (properly) a person who lives as a woman but was born biologically male and (usually) socialised as a male.”
17. The Respondents called:
 - 17.1 Luke Easley, Director of HR and Administration for CGD
 - 17.2 Clair Quentin who described themselves as a “trans non-binary person”
18. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.
19. I was provided with an agreed bundle of documents. References to page numbers in this Judgement are to the page number in the agreed bundle of documents.

Facts

20. Save in determining the specific belief held by the Claimant, I have set out the facts as they appear currently without making any final determination or seeking to bind the tribunal that will determine the complaints at the Final Hearing.
21. The Claimant describes herself as a researcher and writer on topics related to public policy, tax and business, with an active social media presence. She posted 2,994 tweets in 2018 (on average between 5 and 10 tweets a day).
22. The Claimant entered a first consultancy agreement with the Respondent from 6 January 2015 to 31 May 2015. She held a Visiting Fellowship from 9 November 2016 to October 2017. She entered into consultancy agreements for the periods 1 Mar 2018 to 1 May 2018 and 5 April 2018 to 31 December 2018. She did not enter into any further contract thereafter, but contends that she was an applicant for employment and so subject to the protection of the Equality Act 2010 (“EqA”).
23. The Claimant stated that she first became concerned about proposed changes to the Gender Recognition Act 2004 (“GRA”) in 2017 because of proposals for a move to permitting people to self-identify their gender. The Claimant started to research the subject in 2017 to 2018 and began to tweet about it in August 2018.

24. On 2 September 2018 the Claimant tweeted about the GRA stating;

“UK gov consultation on reforming the #GenderRecognitionAct - proposes to dramatically change scope of the law; from requiring medical diagnosis of gender dysphoria for change of sex on birth certificate, to using the basis of 'self identification' ...

I share the concerns of @fairplaywomen that radically expanding the legal definition of 'women' so that it can include both males and females makes it a meaningless concept, and will undermine women's rights & protections for vulnerable women & girls. ...

Some transgender people have cosmetic surgery. But most retain their birth genitals. Everyone's equality and safety should be protected, but women and girls lose out on privacy, safety and fairness if males are allowed into changing rooms, dormitories, prisons, sports teams.”

25. In later September 2018 the Claimant made a number of comments about Pips/Philip Bunce, who is a senior director at Credit Suisse, wears dresses and a wig as Pips, according to press reports states “for me, being gender fluid means I am non-binary, at no fixed point on the gender expression spectrum. I personally have no desire to transition” and was awarded a place on a list of the Top 100 Women in Business. The comments were mainly made on twitter. They included the following:

““I’ve got a Q for my male twitter friends who have pledged not to appear on all male panels - if u were invited on a panel w Pip Bunce – one of FT’s top 100 female champions of women in biz & another guy would u say yes or call the organisers & say sorry I don’t do manels”

[A manel is a panel with only men on it]

““Bunce does not ‘masquerade as female’ he is a man who likes to express himself part of the week by wearing a dress”

“Yes. & weird he felt entitled to accept the award, instead of saying “sorry there has been a mistake I am a man who challenges gender norms”

“He is a part-time cross dresser who mainly goes by the name of Phillip”

“Yes I think that male people are not women. I don’t think being a woman/ female is a matter of identity or womanly feelings. It is biology”

“Bunce is a white man who likes to dress in women’s clothes”

26. The Claimant has regularly supported campaigns where the definition “woman, wōmən, noun, adult human female” is put on billboard, projected onto buildings and printed on T shirts.

27. At the end of September 2018 the Claimant stated in a conversation on Slack, when challenged about what she had said about Pips Bunce;

“Thanks Arthur. Yes I think feminists and non gender conforming and trans people are natural allies. If you look at the people that are concerned about this they are lesbians, longtime LGBT activists, transsexuals, left wing campaigners. They don't want to enforce gender conformity.

But I think there are also a group of misogynist people, and others who want to undermine protections for women and children that have become entryists to the Trans Rights Activists movement that are **not** natural allies to women: gamergaters, incels, narcissists, extreme porn advocates. They are exploiting vulnerable young people and everybody's empathy and concern to do the right thing in respect of them - (For an example see the recent case of ...

(I am not saying all trans people - -I know this sounds like 'moral panic' and I know most people just want a quiet life, but there is a dark side to some of the people making a political career out of arguing that males should be allowed into women's spaces. - - this vocal group is never going to be on common ground with feminists, or benefit people suffering gender dysphoria or depression etc)

You are right on tone. I should be careful and not unnecessarily antagonistic. But if people find the basic biological truths that "women are adult human females" or "transwomen are male" offensive, then they will be offended.

Of course in social situations I would treat any transwomen as an honorary female, and use whatever pronouns etc...I wouldn't try to hurt anyone's feelings but I don't think people should be compelled to play along with literal delusions like "transwomen are women"

28. On 30 September 2018 in a letter to Anne Main MP, the Claimant stated

“Please can you not support the proposed new GRA, and instead make space for a broader national conversation about how to reconcile the welfare of people who seek treatment for gender dysphoria and the basic human rights of women and girls.

Please stand up for the truth that it is not possible for someone who is male to become female. Transwomen are men, and should be respected and protected as men.”

29. In early October 2018 some staff of the Respondent raised concerns about some of the Claimant's tweets, alleging that they were “transphobic”. This was put to the Claimant who denied the allegation. There was lengthy correspondence and investigation of the complaints, the details of which are not relevant to these preliminary issues.

30. On 2 October 2018 the Claimant stated in part of her response to the complaints against her:
- “I have been told that it is offensive to say "transwomen are men" or that women means "adult human female". However since these statement are true I will continue to say them. Yes the definition of females excludes males (but **includes** women who do not conform with gendered norms). Policy debates where facts are viewed as offensive are dangerous. I would of course respect anyone’s self-definition of their gender identity in any social and professional context; I have no desire or intention to be rude to people.”
31. The Claimant’s last contract with the Respondent ended on 31 December 2018. She contend that thereafter she was an applicant for employment with the Respondent.
32. The Claimant submitted her Claim Form to the Employment Tribunal on 5 March 2019.
33. I bear in mind the fact I must consider the belief held by the Claimant at the date of the alleged treatment, not thereafter. However, views expressed after the alleged treatment could demonstrate the view that were held before. The Claimant has not contended that her views have changed.
34. The bundle included tweets from Clair Quentin in about June 2019 who alleged the Claimant had retweeted transphobic material, which included:
- 34.1 A newspaper cartoon of a person flashing two women at “Hampstead Heath Ladies Pond” with the caption “It’s alright – it’s a woman’s penis”.
- 34.2 A tweet by the Claimant stating: “Pronouns are rohypnol: important article by ... Sure, sometimes preferred pronouns are polite, and we can be polite when we chose. Bu every women has learnt from experience that politeness is exploitable & can put us in danger.
- Pronouns are Rohypnol. They change our perception, lower our defences, make us react differently, alter the reality in front of us
- They’re meant to.
They numb us.
They confuse us.
They remove our instinctive safety responses.
- They work.”
- 34.3 A tweet by the Claimant stating: “Interestingly for all my radfem followers who have read this far in a thread that is for the tax and transparency people :) it does raise (but not answer) the question of privacy for trans people changing their names. Which as we know would be a loophole that would be exploited

UK. the government has been urged to prevent Companies House from publishing former names of transgender people in the PSC register due to concerns expressed by trans people that the requirement would effectively “out” them.”

35. On 10 August 2019 the Claimant responded to a very strongly worded complaint to the Scout Association made by Gregor Murray, who describes themselves as a “non-binary person”, who alleged that the Claimant had misgendering them:

“28. On Twitter I referred to Murray by the pronoun ‘he’. This was not purposeful or meant to cause harm. I had simply forgotten that this man demands to be referred to by the plural pronouns “they” and “them”.

29. Murray states that my failure use the pronoun “they” in relation to the complainant breaks the third and seventh scout laws (“A Scout is friendly and considerate” and “A Scout has self-respect and respect for others”) because Murray believes that Murray is not a man. Murray also calls it “transphobic” that I recognise a man when I see one. I disagree.

30. In reality Murray is a man. It is Murray’s right to believe that Murray is not a man, but Murray cannot compel others to believe this. Women and children in particular should not be forced to lie or obfuscate about someone’s sex.

31. I reserve the right to use the pronouns “he” and “him” to refer to male people. While I may choose to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe. I think it is important that people are able to refer to the sex of other people accurately and without hesitation, shame or censure. This is important for children to be able to speak up about anything that makes them feel uncomfortable, and for adults to be able to risk assess the difference between a single sex and mixed sex situation.”

36. On 13 August 2019 the Claimant states when discussing the same subject:

“I think that framing the question of transgender inclusion as an argument that male people should be allowed into women's spaces discounts women's rights to privacy and is fundamentally illiberal (it is like forcing Jewish people to eat pork).”

37. On 2 September 2019 the Claimant tweeted about her views on trans women in sport:

“Short and to the point by .. “It is unfair and unsafe for transwomen to compete in women's sport”

38. On 3 September 2019 the Claimant posted a tweet about blood transfusion:

“This is madness. The FDA and American Red Cross replaced the objective criteria of sex with the subjective criteria of self declared gender identity in screening blood donors for HIV transmission risk”.

39. In the Claimant witness statement she stated:
- 39.1 "I believe that people deserve respect, but ideas do not." Para 5
- 39.2 "I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender" Para 13
- 39.3 "I believe that there are only two sexes in human beings (and indeed in all mammals): male and female. This is fundamentally linked to reproductive biology. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy." Para 14
- 39.4 "Women are adult human females. Men are adult human males." Para 15
- 39.5 "Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome)." Para 16
- 39.6 "Some women have conditions which mean that they do not produce ova or cannot conceive or sustain a pregnancy. Similarly, some men are unable to produce viable sperm. These people are still women and men." Para 17
- 39.7 "I believe that it is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female." Para 23
- 39.8 "Losing reproductive organs or hormone levels through illness or surgery does not stop someone being a woman or a man." Para 24
- 39.9 "A person may declare that they identify as (or even are) a member of the opposite sex (or both, or neither) and ask others to go along with this. This does not change their actual sex." Para 26
- 39.10 "There are still areas of scientific discovery about the pathways of sexual development, including chromosomal and other "disorders of sexual development" (so called "intersex" conditions), and about the psychological factors underlying transgender identification and gender dysphoria. However I do not believe that any such research will disprove the basic reality that there are two sexes" Para 60
- 39.11 "Under the Gender Recognition Act 2004, a person may change their legal sex. However this does not give them the right to access services and spaces intended for members of the opposite sex. It is an offence

for a person who has acquired information in an official capacity about a person's GRC to disclose that information. However this situation where a person's sex is protected information relates to a minority of cases where a person has a GRC, is successfully "passing" in their new identity and is not open about being trans. In many cases people can identify a person's sex on sight, or they may have known the person before transition, or the person may have made it public information that they are trans. There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain." Para 108

39.12 "In most social situations we treat people according to the sex they appear to be. And even when it is apparent that someone's sex is different from the gender they seek to portray through their clothing, hairstyle, voice and mannerisms, or the name, title and pronoun they ask to be referred to by, it may be polite or kind to pretend not to notice, or to go along with their wish to be referred to in a particular way. But there is no fundamental right to compel people to be polite or kind in every situation." Para 110

39.13 "In particular while it may be disappointing or upsetting to some male people who identify as women to be told that it is not appropriate for them to share female-only services and spaces, avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their bodies."

40. I accept that these passages reflect core aspects of the Claimant's belief.

41. When questioned during live evidence the Claimant stated that biological males cannot be women. She consider that if a trans woman says she is a woman that is untrue, even if she has a Gender Recognition Certificate. On the totality of the Claimant's evidence it was clear that she considers there are two sexes, male and female, there is no spectrum in sex and there are no circumstances whatsoever in which a person can change from one sex to another, or to being of neither sex. She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a "woman's space", but also more generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position. The Claimant made it clear that her view is that the words man and woman describe a person's sex and are immutable. A person is either one or the other, there is nothing in between and it is impossible to change form one sex to the other.

42. The Claimant focussed on inheritance of genetic material rather than chromosomes stating that "Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome)". She accepted that women do not necessarily have XX chromosome and men may not have XY chromosomes.

43. In the bundle I was provided with the Expert Declaration of Deanna Adkins, M.D. from litigation in north Carolina that the Claimant accepted set out the possible chromosomal variations and differences in hormone production and reception (although she notes that these are rare and does not accept the concept of gender identity):

“a. Individuals with Complete Androgen Insensitivity have 46-XY chromosomes, which are typically associated with males, but do not have the tissue receptors that respond to testosterone or other androgens. The body, therefore, does not develop external genitalia or secondary sex characteristics typically associated with males but does, generally, have testes. At birth, based on the appearance of the external genitalia, individuals with Complete Androgen Insensitivity are generally assigned female.

b. Individuals with Klinefelter Syndrome have 47-XXY chromosomes and internal and external genitalia typically associated with males, however, the testicles in individuals diagnosed with Klinefelter Syndrome lose function over time. This may lead to breast development and infertility in addition to a number of other health issues.

c. Individuals with Turner Syndrome have 45-XO chromosomes, which means they have one less chromosome than everyone else. In utero, these individuals form sex characteristics typically associated with females including all internal structures but the ovaries begin to die soon after birth and the individuals are unable to make oestrogen. Without treatment, individuals with Turner Syndrome do not develop secondary sex characteristics typically associated with women.

d. Individuals with Mosaic Turner Syndrome may have two different sets of chromosomes. They lose a sex chromosome in the early stages of embryonic development. The cells that are descendants of the cell that lost a chromosome will have Turner Syndrome features. The cells that are descendants of the cells that did not lose a sex chromosome will have features of the embryo's initial chromosomal sex. Sometimes this initial sex was XX and sometimes it is XY. When there are cells with XY chromosomes present, the fetus produces testosterone and there is at least some testicular tissue. There may also be ovarian tissue. The external genitalia can then be a mixture of external genitalia typically associated with both males and females.

e. Individuals with congenital adrenal hyperplasia (CAH) are individuals who have XX chromosomes and external genitalia typically associated with women but are born with extra androgens, including testosterone, and from early in gestation, their brains are exposed to high levels of androgen. Despite frequently being assigned female at birth because of external genitalia, many individuals with this condition have a male gender identity.

f. Individuals with 5-alpha reductase are chromosomally XY but they have an enzyme deficiency that does not allow them to convert testosterone to dihydrotestosterone, the active form of testosterone. At birth, based on external genitalia, they are often assigned female, but their gender identity is almost always male as adults. Their external genitalia also changes at puberty because hormonal changes allow them to make more dihydrotestosterone which is needed for the physical changes that occur causing the development of external genitalia typically associated with males. During early development there is enough testosterone to affect the brain, which often results in a male gender identity.”

44. Chromosomes are the structures in which genetic code is held. The DNA molecules in chromosomes are the genetic code and their structure provides the genes that effect sex. However, it is increasingly understood that there are not simply genes for particular characteristics. Much depends on how genes are controlled. I was provided in the bundle with an article from the New York times by Dr. Fausto-Sterling, a professor of biology and gender studies, who noted that:

“There has been a lot of new scientific research on this topic since the 1950s. But those looking to biology for an easy-to-administer definition of sex and gender can derive little comfort from the most important of these findings. For example, we now know that rather than developing under the direction of a single gene, the foetal embryonic testes or ovaries develop under the direction of opposing gene networks, one of which represses male development while stimulating female differentiation and the other of which does the opposite. What matters, then, is not the presence or absence of a particular gene but the balance of power among gene networks acting together or in a particular sequence. This undermines the possibility of using a simple genetic test to determine “true” sex.”

45. Morphology is not simply a question of what genes a person has, but also of which ones are being switched on, to what extent, in what combinations and how they interact.

The Law

46. Belief is a protected characteristic pursuant to section 4 EqA. It is defined by section 10 EqA:

10 Religion or belief

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

47. Belief is to be interpreted in a human rights context. Section 3(1) Human Rights Act 1998 provides:

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

48. Article 9 European Convention provides:

Freedom of thought, conscience and religion

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

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

49. Article 10 European Convention provides:

Freedom of expression

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

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

50. To qualify as a "philosophical belief" under section 10 EqA, the belief must satisfy the five criteria in **Grainger plc v Nicholson** [2010] ICR 360, para 24 ("the Granger Criteria"):

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

- 51. These criteria have been adopted in the ECHR Code of Practice at paragraph 2.59. The Tribunal is required to take the code into account where it is relevant but is not bound by it.
- 52. The threshold for establishing the Grainger criteria should not be set “too high”: **Harron v Chief Constable of Dorset Police** [2016] IRLR 481, EAT, para 34
- 53. In determining whether the belief is genuinely held the Tribunal is limited to considering whether it is held in good faith: **Williamson v Secretary of State for Education and Employment** [2005] 2 AC 246.
- 54. There is potentially a distinction to be drawn between a belief and “an opinion based on some real or perceived logic or based on information or lack of information available”: **McClintock v Department of Constitutional Affairs** [2008] IRLR 29 at paragraph 45.
- 55. In considering whether a belief attains a certain level of cogency, seriousness, cohesion and importance again the threshold should not be set too high. In **R Williamson** Lord Bingham stated:
 - “The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard.”
- 56. Both belief and lack of belief are protected characteristics. The parties approached the analysis of lack of belief on the basis that it is necessary to apply the Granger Criteria to the belief that the person does not hold. If that belief is protected the corresponding lack of belief is also protected. Thus on their analysis the Granger Criteria are to be applied to the “gender identity belief” that the Claimant does not hold. If the “gender identity belief” is a philosophical belief, her lack of the belief is necessarily also protected.

57. The code of practice provides some support for this approach:

2.50 The protected characteristic of religion or belief includes any religion and any s.10(1) & (2) religious or philosophical belief. It also includes a lack of any such religion or belief.

2.51 For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or any lack of one.

58. While the position is reasonably clear for religion and lack of religion – as they are specifically provided for in section 10(1) EqA, I consider the position is less clear for lack of belief. Section 10(2) provides that “reference to belief includes a reference to a lack of belief”. On that basis if one replaces the word “belief” with “lack of belief”, sub-section 2 could be considered to protect any “religious or philosophical lack of belief” – i.e. the lack of belief must be religious or philosophical, rather than the protection applying to anyone who does not hold a particular religious or philosophical belief. On that analysis the Granger Criteria are to be applied to the lack of belief. I consider this is a more logical analysis, at least in some cases. A person might well hold a religious or philosophical belief that murder is wrong. It would be surprising if not holding that belief was also protected, so, in effect, believing there is nothing wrong with murder is a protected characteristic. On my suggested analysis such a lack of belief in murder being wrong would not comply with the Granger Criteria and so would not be protected. Similarly, atheism would be protected because it is a philosophical lack of belief that corresponds with the Granger Criteria rather than merely because atheist are not adherents of the large number of protected religions.

59. Section 7 EqA provides:

7 Gender reassignment

(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment—

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

60. The specific protection provide by the section to trans persons is limited and uses rather outmoded terminology.

61. There is an exception in respect of service provision set out in paragraph 28 of schedule 3 EqA that might, if it is a proportionate means of achieving a legitimate aim, allow provision to be made for services (such as hostels for survivors of rape) to be made available only to women assigned female at birth.
62. There is also a substantial human rights aspect to the protection that has been provided, and is being considered, for trans persons.
63. Article 8 European Convention provides:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

64. Article 12 European Convention provides:

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

65. UK law historically, and currently, only recognises two sexes; female and male. The sex of a person is assigned at birth and entered onto a birth certificate. Until 2004 there was no mechanism for changing the sex of a person on a birth certificate.
66. The ECJ held in **P v S and Cornwall CC** [1996] 795 that discrimination on the grounds of gender reassignment constituted sex discrimination. The Court held:

“17. The principle of equal treatment 'for men and women' to which the Directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be 'no discrimination whatsoever on grounds of sex'.

18. Thus, the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

19. Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure ...

20. Accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”

67. The decision emphasised the importance on the dignity of the person who had transitioned, or was transitioning.

68. In **Goodwin v United Kingdom** [2002] IRLR 664, the European Court of Human Rights held that the UK was in breach of its obligations under articles 8 and 12 because of the lack of legal recognition for a “post-operative transsexual”. The Court held:

“15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the industrial tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance (‘NI’) number. She was concerned that the new employer would be in a position to trace her details as once in the possession of the number it would have been possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security (‘DSS’), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. Colleagues stopped speaking to her and she was told that everyone was talking about her behind her back.

76. The Court observes that the applicant, registered at birth as male, has undergone gender reassignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, inter alia, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she nonetheless has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, *Dudgeon v the United Kingdom* Judgement of 22 October 1981, Series A no.45, paragraph 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (*Sheffield and Horsham*, cited above, p.2028, paragraph 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v Bellinger* cited in paragraph 52 above; and the Judgement of Chisholm J in the Australian case, *Re Kevin*, cited in paragraph 55 above).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

85. ... In the 21st century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy

requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”

69. The court considered the importance of a person being able to live in the gender to which they had transitioned and not being forced to identify the gender they were assigned at birth. The Court also rejected a purely biological approach to gender based only on chromosomal analysis.

70. In response the UK government enacted the Gender Recognition Act 2004. This provides a mechanism for people to obtain a Gender Recognition Certificate (GRC). Section 9 Gender Recognition Act provides:

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

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

71. In considering competing human rights arguments it is to be noted that Article 17 European Convention provides:

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

72. in **Lee v Ashers Baking Company Ltd** [2018] IRLR 1116, the Supreme Court held that the defendants should not have been compelled to express a message with which they profoundly disagreed, unless justification was shown for compelling them to do so.

73. Harassment is defined in the EqA as follows:

"(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 effect referred to in subsection (1)(b), each of the following must be taken into account-

- (a) the perception of B;?
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

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

Analysis

- 74. At the outset of the hearing I expressed my concern about whether this matter was best dealt with at a preliminary issue. There is potentially significant overlap between the belief a person holds, the manifestations of that belief and things that are said to be justified by the belief.
- 75. Much of the debate that I was shown has played out on Twitter, giving little space for subtle development of ideas. Some of the debate is in vitriolic terms. It is important to note that if a person is guilty unlawful harassment of others that conduct is likely to be the reason for any action taken against them, rather than the holding of a philosophical belief. Having protected characteristics, including philosophical beliefs, does not prevent people from having to take care not to harass others. That being said, full regard must also be given to the qualified convention right of freedom of expression.
- 76. It can be difficult to tease out what constitutes a belief and what are expressions of that belief. For example, in considering some of the Claimant's tweets it is necessary to consider whether they evidence the nature of her belief or are statements she made that are based on that belief, or even may not actually reflect what she believes, having been made in the heat of the moment. For example, I was taken to certain tweets by the Claimant, particularly retweets, which it strongly arguable included stereotypical assumptions about trans people (see paragraph 34 above). On the totality of the evidence I do not consider that those specific tweets represent the core of the Claimant's belief.
- 77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender", "gender identity" or "gender expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds.

78. The Claimant contends that the belief is “important” because it is necessary to support her sense of self, her feminism and political activism, belief in the importance of single sex services, support for single sex education, use of women only changing rooms and showers, old-age care, family planning and maternity services, upbringing of children, women only services for the vulnerable and her political online activism. In her evidence, she focused particularly her contention that it is important that there can be some spaces where particularly vulnerable women and girls, who have been subject to sexual assault by men, are only open to women assigned female at birth. I consider that on a proper analysis these are reasons why she considers that her belief in the immutability of sex is important, rather than the belief itself.
79. Many of concerns that the Claimant has, such as ensuring protection of vulnerable women, do not, in fact, rest on holding a belief that biological sex is immutable. It is quite possible to accept that transwomen are women but still argue that there are certain circumstances in which it would be justified to exclude certain trans women from spaces that are generally only open to women assigned female at birth because of trauma suffered by users of the space who have been subject to sexual assault. This may be lawful under EqA where it is a proportionate means of achieving a legitimate aim.
80. There might be circumstances in which a trans woman is recognised as an woman, but is not permitted to compete in sport on an entirely equal basis with women assigned female at birth, if that would create an unfair advantage.
81. Many of the illustrations the Claimant relies on do not, in fact, rely on the belief that men can never become women; but on the analysis that there may be limited circumstances in which it is relevant that a person is a trans woman or trans man, such as when ensuring appropriate medical care is provided, which takes proper account of trans status.
82. I accept that the Claimant genuinely holds the view that sex is biological and immutable. For her it is more that an opinion or viewpoint based on the present state of information available. Even though she has come to this belief recently she is fixed in it, and appears to be becoming more so. She is not prepared to consider the possibility that her belief may not be correct. I accept that the belief Claimant goes to substantial aspects of human life and behaviour.
83. I next considered whether the Claimant’s core belief that sex is immutable lacks a level of cogency and cohesion. It is avowedly not religious or metaphysical, but is said to be scientific. Her belief is that a man is a person who, if everything is working, can produce sperm and a woman a person who, if everything is working, can produce eggs. This does not sit easily with her view that even if everything is not, in her words, “working”, and may never have done so, the person can still only be male or female. The Claimant largely ignores intersex conditions and the fact that biological opinion is increasingly moving away from a absolutist approach to there being genes the presence or absence of which determine specific attributes, to understanding that it is necessary to analyse which genes are present, which are switched on, the extent to which they are switched on and the way in which they interact with other genes. However, I bear in mind that “coherence” mainly requires that the belief can be understood and that “not too much should be not expected”. A

“scientific” belief may not be based on very good science without it being so irrational that it unable to meet the relatively modest threshold of coherence. On balance, I do not consider that the Claimant’s belief fails the test of being “attain a certain level of cogency, seriousness, cohesion and importance”; even though there is significant scientific evidence that it is wrong. I also cannot ignore that the Claimant’s approach (save in respect of refusing to accept that a Gender Recognition Certificate changes a person’s sex for all purposes) is largely that currently adopted by the law, which still treats sex as binary as defined on a birth certificate.

84. However, I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned. In Goodwin a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for “all purposes”. Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore.
85. Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will. The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a persons, even if that person has a Gender Recognition Certificate. In her statement she say of people with Gender Recognition Certificates “In many cases people can identify a person’s sex on sight, or they may have known the person before transition.... There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain.” The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act.
86. There is nothing to stop the Claimant campaigning against the proposed revision to the Gender Recognition Act to be based more on self-identification. She is entitled to put forward her opinion that these should be some spaces that are limited to women assigned female at birth where it is a proportionate means of achieving a legitimate aim. However, that does not mean that her absolutist view that sex is immutable is a protected belief for the purposes of the EqA. The Claimant can legitimately put forward her arguments about the

importance of some safe spaces that are only be available to women identified female at birth, without insisting on calling trans women men.

87. Human Rights law is developing. People are becoming more understanding of trans rights. It is obvious how important being accorded their preferred pronouns and being able to describe their gender is to many trans people. Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
88. As set out above, I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief, rather than something separate, and will be relevant to determining whether the belief is a protected philosophical belief. While the Claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others. In her response to the complaint made by her co-workers the Claimant stated "I have been told that it is offensive to say "transwomen are men" or that women means "adult human female". However since these statement are true I will continue to say them".
89. When in an, admittedly very bitter, dispute with Gregor Murray, who alleged that they had been misgendered by the Claimant, rather than seeking to accommodate Gregor Murrays legitimate wishes she stated: "I had simply forgotten that this man demands to be referred to by the plural pronouns "they" and "them", "Murray also calls it "transphobic" that I recognise a man when I see one. I disagree", "In reality Murray is a man. It is Murray's right to believe that Murray is not a man, but Murray cannot compel others to believe this." and that "I reserve the right to use the pronouns "he" and "him" to refer to male people. While I may choose to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe."
90. I conclude from this, and the totality of the evidence, that the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society.
91. I do not accept that this analysis is undermined by the decision of the Supreme Court in **Lee v Ashers** that persons should not be compelled to express a message with which they profoundly disagreed unless justification is shown. The Claimant could generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person sex at all. However, where it is, I consider requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the Claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the

rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts.

92. In respect of the belief that the Claimant contends she does not hold, that everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and transwomen are women. I consider that this is a good example of why, at least in certain circumstances, one needs to apply the Grainger criteria to the lack of belief, rather than the alternative belief. Believing that a trans woman is a woman does not conflict with the approach of the European Court of Human Rights in Goodwin, or the Gender Recognition Act, or involve harassment. It does not face the same issue of incompatibility with human dignity and fundamental rights of others as the lack of that belief does because that lack of belief necessarily involves the view that trans women are men. The lack of belief fails to meet the Grainger criteria.
93. It is also a slight of hand to suggest that the Claimant merely does not hold the belief that transwomen are women. She positively believes that they are men; and will say so whenever she wishes. Put either as a belief or lack of belief, the view held by the Claimant fails the Grainger criteria and so she does not have the protected characteristic of philosophical belief.

Employment Judge Tayler

18 December 2019

Judgment and Reasons sent to the parties on:

18/12/2019

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For the Tribunal Office