Case Number: 1304602/2018

EMPLOYMENT TRIBUNALS

Claimant Respondent

Dr David Mackereth v **(1) The Department for Work and Pensions**
(2) Advanced Personnel Management Group (UK) Ltd

FINAL MERITS HEARING

Heard at: **Centre City Tower, Birmingham** On: **9-12 July 2019 and 18 July 2019 (in chambers)**

Before: **Employment Judge Perry** Members: **Mr RS Virdee**
Mr PR Trigg

Appearances

For the Claimant: **Mr M Phillips (counsel)**
For the First Respondent: **Mr R Morello (counsel)**
For the Second Respondent: **Mr T Hussain (Litigation Consultant)**

JUDGMENT

1. In our unanimous judgment there was no contravention of part 5 of the Equality Act 2010 and the claimant was not subjected to discrimination in contravention of s.13 (direct), s.19 (indirect) and s.26 (harassment) Equality Act 2010. Those complaints are dismissed.

2. Unless objections are received from either party within 14 days of this judgment being sent to them, the provisional remedy hearing listed for 15 November 2019 is vacated.

REASONS

During the course of this hearing the parties used the term "transgender" throughout. Despite its use in ss. 7, 16, 195 & Sch. 9 Equality Act 2010 the term 'transsexual' is viewed by many as dated and it is widely acknowledged that some people may find it stigmatising. Apart from references within statutory definitions we adopt the term "transgender" throughout these reasons.

References in square brackets below are unless the context suggests otherwise to the page of the bundle or if they follow a case reference or a document reference or a witness' initials, the paragraph number of that authority or document (e.g. [DM/36 or ET1/8.2]). References in curved brackets are to the paragraph of these reasons.

1. Dr Mackereth presented this claim on 11 October 2018 having conciliated via ACAS between 13 and 14 September 2018.

2. The nature of the complaints being pursued were clarified at a case management hearing held in December 2018 before Employment Judge Findlay as complaints of harassment, direct and indirect discrimination pursuant to ss 13, 19 and 26 Equality Act 2010 (EqA). Employment Judge Findlay relayed the issues in her order [57-60] and also directed the parties to inform the Tribunal if the issues as set out by her were not agreed. She also set out a trial timetable that was agreed and directed the respondents to provide details of the legitimate aims relied upon. Both did so (see (25) & (28) below).

3. The Second Respondent (APM) is an employment services provider that describes itself as assisting businesses with the recruitment, hiring and "on-boarding" process of employees, workers and contractors in various sectors including healthcare. It undertakes the recruitment and co-ordination of healthcare professionals for a number of organisations including the first respondent (DWP).

4. Dr Mackereth was one of the health care professionals recruited by APM to undertake a role as a Health and Disabilities Assessor (HDA) on behalf of the DWP undertaking assessments of what were sometimes referred to as its customers and clients but what we will refer to (unless we quote or refer to the comments of others) as its service users.

5. Dr Mackereth asserts [ET1/4] that he is a Christian and his religion is a relevant protected characteristic for the purposes of ss. 4 & 10 EqA.

6. He further relies [ET1/5], cumulatively or alternatively, on the following religious and/or philosophical beliefs:

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

   b. *Lack of belief (i) that it is possible for a person to change their sex/gender, (ii) that impersonating the opposite sex may be beneficial for an individual's welfare, and/or (iii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex ("****lack of belief in Transgenderism"****)*

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

7. Both respondents accept that Christianity is a protected characteristic. They do not accept that is so where Dr Mackereth goes further in seeking to define the beliefs he relays at [ET1/5] as a protected characteristic. The respondents argue that at the heart of those beliefs is intolerance towards transgender people, and that a refusal to respect the dignity of transgender people and their preferred form of address is incompatible with human dignity and conflicts with the fundamental rights of others (Mr Moretto's Skeleton/35 & 36).

8. To place that in context Dr Mackereth argues that as a result of his beliefs he cannot in conscience refer individuals he was contracted to assess on behalf of the DWP who were contemplating, undergoing or had undergone gender reassignment using the pronoun of that person's choice, as the DWP required. It later became apparent the issue also extended to styles and titles of address.

9. Following the case management hearing before Employment Judge Findlay in December 2018 neither party sought to challenge the list of issues, but they were able to narrow some of them [69] namely:-

   a. that Dr Mackereth was a 'contract worker' supplied to the DWP as 'a principal' within the meaning of s. 41 EqA,

b. that the DWP should be liable for the alleged discrimination set out below under s. 109 and that the APM should be liable under s. 110 EqA.

c. If any discrimination by AMP (Mr Owen) is established, any such discrimination should be treated as being done by the DWP (on the basis that it was done by Mr Owen acting as DWP's agent with the authority of DWP as principal) within s. 109(2) EqA.

d. If any discrimination by DWP is established, it should also be treated as being done by AMP (on the basis that AMP was acting as the DWP's agent) within the terms of s. 110 EqA.

and so the list of issues was revised by an order of Employment Judge Findlay in April 2019 [69.02] to reflect that. The trial timetable was also revised. Employment Judge Findlay stated that a telephone hearing that had previously been listed on 10 June 2019 to ensure the claim was ready for trial and to address any issues that might affect the trial would be vacated if the parties confirmed to the Tribunal all directions had been complied with and no issues were outstanding by 3 June 2019. They did so and the telephone hearing was vacated.

10. Due to pressure on tribunal time this hearing was only allocated to Employment Judge Perry to hear when a multi-day case he was hearing settled the day before this claim was due to be heard. He was allocated to this case but was unable to sit on the provisional date set for remedy on 3 October 2019. Accordingly, at the outset we sought to clarify the trial timetable would be met, which witnesses were to be called to address an application by Dr Mackereth's representatives to rely upon and call an expert, and to clarify the issues.

11. Accordingly, because of those applications, the number and length of witness statements and skeletons and volume of authorities relied upon the first day was spent on case management and reading.

12. Before we turn to the clarification of the issues provided on day one and how the application to rely upon the expert evidence was addressed, we first need to set out some background.

13. As to the application made by Dr Mackereth seeking permission to rely upon an expert report provided by Dr Martin Parsons dated 2 July 2019, the respondents stated that this had been supplied very late (no more than a week before the start of the trial) and thus they had been denied the opportunity to obtain expert evidence of their own and this also disregarded the order of Employment Judge Findlay. Whilst an expert certificate complying with the CPR was provided that did not include the expert's CV that was referred to. After much discussion it was agreed the application would not be pursued but that instead that two reports referred to within the expert report would be relied upon, namely:-

a. Evangelical Alliance – 'Transformed' - 2018

b. Christian Medical Fellowship – 'Gender Dysphoria' - CMF Files no. 59 - Spring 2016

14. Certain documents within the bundle having been redacted we sought to clarify if a restricted reporting order was sought. We were informed that order was not sought.

Further clarification of the issues provided as the case progressed

15. In order to place the claim into context we set these out now.

16. Firstly, it is agreed that Dr Mackereth's complaints fell within s. 39, 40 and 41 EqA and that references to discrimination in the revised list of issues [[69] at 1.1 to 1.4] include harassment.

17. The acts of harassment and less favourable treatment relied upon as pleaded in the claim form were:-

    a. The pressure put on him to renounce his beliefs, as pleaded [ET1/11-15];

    b. His 'suspension' from work on 13 June 2018, as pleaded [ET1/12];

    c. His summary dismissal as pleaded [ET1/17].

18. Dr Mackereth confirmed during cross examination he made no harassment complaint against Mrs Harrison nor against Dr Ahmed.

19. It was confirmed by the representatives at the start of the hearing that it was agreed that Dr Mackereth did not assert that he was treated less favourably than a person who, for reasons unrelated to Christianity or other belief refused to comply with the DWP's gender reassignment or equal opportunities policy.

20. Mr Phillips defined the appropriate comparator for the purposes of s.23 EqA as someone who was then undertaking the role of a health and disability assessor, who did not hold Dr Mackereth's beliefs.

21. That being so we sought to clarify if it was accepted that comparator would have been treated in the same way by the respondents. It was accepted by Mr Philips that the comparator would have been. We therefore sought to clarify the basis for the direct discrimination complaint. Mr Phillips confirmed it was positively asserted the only reason Dr Mackereth was treated that way was because of his beliefs. We took that to mean a *James v Eastleigh Borough Council* (*[1990] 2 AC 751)* argument (see (173)).

22. In the closing submissions lodged on his behalf Dr Mackereth confirmed that only his beliefs as relayed at [ET1/5] (see (6)) were relied upon for the direct discrimination and harassment complaints but both his religion and/or his beliefs [ET1/4 & 5] were relied upon for the indirect discrimination complaints.

23. Dr Mackereth asserts [ET3/22] that the Respondents applied the following provisions, criteria or practices (PCPs):

    a. "The DWP requires all Health and Disability Assessors to use such pronouns as may be preferred by a particular client, regardless of that client's biological sex.

    b. In the event of doubt, the DWP requires a Health and Disability Assessor to confirm his or her adherence to the said PCP (1) at an early stage of their training and without any such issue arising in practical work.

    c. The penalty for employee's/worker's non-compliance with the said PCPs (1) and/or (2) is a suspension and/or dismissal."

24. The DWP accepted its policy [ET3/13] and [175.02 – para. 151] is to use a service user's presented sex and to address them using their preferred name, and that extends to using their preferred pronouns, style or title.

25. The respondents were ordered to provide details of the legitimate aim they relied upon by Employment Judge Findlay. DWP responded [61-63] thus :-

"2. In this respect, as set out in paragraph 13 of the First Respondent's Grounds of Resistance, the First Respondent has a policy of addressing its transgender customers in their presented sex, the purpose of which is to ensure that transgender customers are treated with respect and in accordance with their rights under the Equality Act 2010, in particular to ensure they are not discriminated against in respect of services provided by the First Respondent.

3. Accordingly, in respect of the above policy, and/or any other PCP as pleaded by the Claimant, the First Respondent will contend that the legitimate aim of the policy is to:

3.1. Ensure that transgender customers are treated with respect and in accordance with their rights under the Equality Act 2010, in particular to ensure that such customers are not discriminated against in respect of services provided by DWP or its employees or contractors; and/or

3.2 Provide a service which complies with the First Respondent's overarching policy of being a public authority wholly committed to the promotion of equal opportunities and therefore to require all its employees and contractors to act in a way which does not discriminate against others.

4. For the sake of completeness, in respect of the reference in the paragraph above to the First Respondent's contractors, this is in compliance with the Respondent's Diversity and Equality Requirements for Contractors, which sets out the requirements upon external organisations performing any function contracted to it to deliver on behalf of the First Respondent, to equally ensure that the function or service is provided without discrimination.

5. In addition to the above, the First Respondent notes the General Medical Council's ("GMC's") Code of Conduct, Good Medical Practice which states, amongst other matters, that:

> *"47. You must treat patients as individuals and respect their dignity and privacy.*
> *48. You must treat patients fairly whatever their life choices and beliefs.*
> *…*
> *54. You must not express your personal beliefs (including political, religious and moral beliefs) to patients in ways that exploit their vulnerability or are likely to cause them distress.*
> *…*
> *59. You must not unfairly discriminate against patients or colleagues by allowing your personal views to affect your professional relationships or the treatment you provide or arrange…*"

6. Guidance provided by the GMC (Personal Beliefs and Medical Practice, 25 March 2013) also makes it clear that a doctor "must not refuse to treat a particular patient or group of patients because of your personal beliefs or views about them" (paragraph 8).

7. Accordingly, should the Claimant argue that he should have been entitled to choose not to assess transgender customers and/or refer to transgender customers by their presented sex, then in addition to being inconsistent with the Respondent's policies set out above, that would also have been inconsistent with his duties as a doctor under the GMC Code of Conduct.

…"

26. Mr Medlycott in his witness statement [AM/4] identified two possible alternatives:-

a. Giving the Claimant a non-face-to-face customer role. There were two roles that healthcare professionals ("HCP") carried out that were not the Claimant's role. The first one was file work which involved previewing claimant's medical evidence to see if an assessment was required. It is standard practice for a HCP

to have 12 months experience doing the job before being considered suitable for that role. The other role was auditing HCP's work. Again, this needs 12 months experience doing the job before an individual was considering suitable for the role. The Claimant was still training and therefore did not have the required experience for these roles.

b. Giving the Claimant non-transgender claimants to assess. I was told by Mrs Harrison and Dr Ahmed that this wasn't possible because often transgender claimants do not present as transgender until the assessment.

27. Dr Mackereth confirmed he did not challenge the respondents' evidence that there was no alternative work he could do by way of file audit or paperwork namely head (a) above.

28. In APM's particulars of the legitimate aims it relied upon [64-65] it repeated 2, 3, 3.1 & 3.2 from (25) and in essence adopted the legitimate aims relied upon by DWP.

THE EVIDENCE

29. We had before us a bundle of 256 pages, extensive skeleton arguments from all three parties and closing submissions from the Claimant. The representatives of all three parties orally elaborated on the skeletons (and closing submissions) provided.

30. Mr Moretto also provided a reading list, chronology, copies of the GMC Guide to Good Medical Practice and referred us to selected parts of the Gender Recognition Act 2004 and the Gender Recognition (Disclosure of Information) (E,W & NI) (No. 2) Order 2015 SI 2005/916. We also had before us the two reports referred to at (13.a & 13.b).

31. As the authorities we were provided with were extensive and indexed we do not propose to list them here we should note that we referred the parties to a number of authorities including *Rodriguez v Minister of Housing* [1], *Taiwo v Olaigbe* [2], *Amnesty International v Ahmed* [3], Hewage v Grampian Health Board [4] and *Bressol v Gouvernement de la Communauté Française* [5].

32. The following witnesses adopted their witness statements and were cross examined:-

a. **Dr Mackereth** [DM];

b. **Mrs Heather Harrison [HH],** joined the Respondent in March 2016 and is a registered nurse. She told us she has 9 years' experience as a Disability Analyst and has been the Clinical Lead at the DWP's Assessment Centre at Five Ways, Birmingham for the last 3 years. It was not in dispute that a Clinical Lead provides overall leadership and guidance to health professionals who carry out medical assessments for the DWP.

c. **Dr Omar Ahmed [OH]** has been the Clinical Lead at the DWP's Assessment Centre at Tresco House, London since 7 March 2016. He worked in the NHS in various clinical roles from 1994 until 2002, when he started working as a disability assessor, carrying out medical assessments on individuals applying for various disability-related benefits for private providers pursuant to contracts awarded by the DWP;

d. **Mr James Owen [JO]** is a contract manager for APM, whose responsibilities include, *inter alia*, managing the overall performance of HCPs for the department.

e. **Mr Anthony Medlycott [AM]** is a Senior Operations Manager who has

overall responsibility for running the DWP's assessment centres at Tresco House and Five Ways and making sure that APM provides services in accordance with its contract with the DWP. As such he liaises with Mr Owen.

33. The witness statement of Mr Gary Thorogood having been agreed was read by us and thus he was not cross examined. Since July 2018, he has been the Head of Wellbeing & Inclusion for DWP and is responsible for the DWP's internal policies relating to creating a safe, healthy and inclusive working environment for its employees and for DWP's Equality & Diversity statement [175.05–175.08] which was updated in March 2019.

34. Given the press interest in the case at the outset of the claim we gave a general reminder to all the witnesses of their obligations when giving evidence referring them to *Chidzoy v BBC* [6].

35. At the conclusion of the oral hearing a provisional date was set for remedy (15 November 2019) and it was agreed that a telephone case management hearing would be listed to address if any further case management required once the parties had an opportunity to digest these reasons.

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[1] *[2009] UKPC 52*
[2] *[2016] UKSC 31, [2016] ICR 756, [2016] WLR 2653, [2016] IRLR 719*
[3] [2009] UKEAT/0447/08, [2009] ICR 1450, [2009] IRLR 884
[4] [2012] UKSC 37
[5] *Case C-73/08* [2010] 3 CMLR 559
6 [2018] UKEAT/0097/17

OUR FINDINGS

We make the following primary findings of fact on the balance of probabilities and from the evidence before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

Dr Mackereth

36. Dr Mackereth told us, and we find, that he became a Christian in 1982 whilst in his first year at medical school. Having qualified in Medicine in 1988 he trained for the Christian ministry from 1990-92 and thereafter worked as a full time evangelist for 2 years between 1992 and 1994 when he returned to the medical professional where he has worked thereafter, albeit he told us he undertakes extensive evangelistic work in his spare time especially in Scotland.

37. In essence Dr Mackereth told us, and we find, that he holds to the principles of the Great Reformation of the 16th Century including a commitment to the supremacy of the Bible as the infallible, inerrant word of God as his final authority in all matters of faith and practice.

38. He relays in detail the doctrinal principles that underlie his beliefs at [DM/9-23] amongst which he states:-

> ***"17. The Bible, in Genesis 1:27, teaches: "So God created man in His own image; in the image of God He created him; male and female He created them."***
>
> ***18. Several important points follow from this verse:***
>
> ***a. Man was created by God, in "the image of God". This is true of all***

humans regardless of biological sex.

b. God made humans "male and female". That leaves no scope for any other sex or gender. This is completely inconsistent with the theory of 'gender fluidity'.

c. God's creation was perfect or "very good" (Genesis 1:31). When God made mankind perfect, he made them male and female.

…

21. The law of God in the Old Testament forbids cross-dressing: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the LORD thy God." (Deuteronomy 22:5). …"

39. He explained to us the difference between relative and propositional truth [DM/12-15] giving the example "Muslims say Jesus cannot be God, whereas Christians say He must be. The relativist holds both to be equally true. I cannot take such an approach. One is right, the other is wrong. I am a Christian, and I am convinced of the deity of Jesus Christ."

40. He describes his lack of belief in and conscientious objection to what he describes as "Transgenderism" and "gender fluidity" at [DM/24-39]. He defines "Transgenderism" thus [DM/24]:-

"i. that it is possible for a person to change their sex/gender,

ii. that impersonating the opposite sex may be beneficial for an individual's welfare, and/or

iii. that the society should accommodate and/or encourage anyone's impersonation of the opposite sex"

41. In his witness statement Dr Mackereth refers to *"Transgenderism"* and *"gender fluidity"* as having no sound medical or scientific basis [DM/28] and refers to *"Transgenderism"* as a *"delusional" belief"* [DM/30].

Dr Mackereth's role as a Health and Disabilities Assessor

42. Dr Mackereth was a health care professional (HCP) recruited by APM and the role he was recruited to undertake on behalf of the DWP was as a HDA (Health and Disabilities Assessor) at DWP's assessment centre at Five Ways, Birmingham.

43. Mrs Harrison told us there were approximately 20 HCPs that worked at the Birmingham assessment centre at which there were 12 interview rooms where appointments could be conducted and there were always at least four HCPs working at any time. She told us that when service users were invited to the centre, they were given an appointment time on a given day and the number of appointments allocated exceeded the number that could be undertaken to reflect the historic likelihood of non-attendances.

44. We were told by Mrs Harrison and Mr Medlycott, and this was not disputed, that each assessment involved a 30-40-minute interview with the service user followed by 40 minutes writing up. That is also consistent with what Mr Medlycott told us namely that each HDA undertook on average 5.5 assessments per 7.5-hour day that is 80 minutes or so for each assessment.

45. Given the wait service users would have had to undergo before an appointment was made and to reduce the stress from waiting on the day, she told us that service users

were seen on a first come first served basis.

46. Whilst service users were required to complete an on-line benefits claim we were told that if a mental health condition was the basis for that claim the service user was not required to complete the online claim form in advance and as a result it was only during an assessment that a customer might be identified as transgender.

47. Dr Ahmed told us that prior to the adoption of the current assessment system, vulnerable individuals were assessed in their homes and this included transgender service users. At the time he exclusively undertook home assessments and so saw a disproportionate number of transgender individuals.

48. He told us in his experience that Transgender individuals were often unhappy about the way society had treated them and were easily offended. We find that it was his view that if a HDA sought to pass a customer to another assessor having discovered that person was transgender that, however sensitively this was handled, the customer would be offended. This was because the transgender person would see this as the assessor treating the transgender person with the same lack of understanding with which he, she (or by whichever pronoun by which that individual wished to be described), felt they had been treated by society and thus, the customer would be offended.

49. Both Dr Ahmed and Mrs Harrison indicated that a HDA working on a full time equivalent basis would only be likely to see a handful of transgender service users each year.

50. We were pointed to a complaint on behalf of a transgender person (who had obtained a gender recognition certificate) which Mrs Harrison had been asked to deal with in Summer 2017, a year before the events that concern us. In that case the customer's gender history was incorrectly relayed. Mrs Harrison ensured an apology was provided and the report corrected [69.07-69.09].

51. Essentially, we were told, and find, that the context in which transgender claimants made claims to the DWP did not, on balance, emanate from gender dysphoria itself because that did not in the normal course prevent the individual working and thus needing to claim benefits. Instead such claims arose out of Mental Health conditions, specifically anxiety and depression associated with this and this stemmed from, amongst other matters, the past mismatch, or as it was described to us, the ***'confusion'*** concerning to their identity that gender dysphoria encompasses.

52. Dr Mackereth accepted that transgender people were more likely to suffer from Mental Health impairments than society as a whole. He also accepted the reports he relied upon from Evangelical Alliance and Christian Medical Fellowship support that.

53. Mrs Harrison also told us that the individual having disclosed confidentially that he, she or whichever pronoun by which that individual wished to be described was transgender for that person not to be acknowledged in the customer's preferred way could well be a backward step and detrimental to that person's mental health.

54. Mr Owen (APM's Contract Manager for its DWP contract) told us that the HDAs were provided to DWP by APM pursuant to a contract between APM and DWP. We were told and accept APM and the HDAs it provided to the DWP were contractually required to adhere to the guidance, policies and procedures set out by the DWP to include recruitment, hiring and contract termination process of HDAs [159-175] and by virtue of the DWP's 'Guidance for Contractors' APM's responsibilities relating to diversity and equality included promoting equality and complying with DWP's policies on

diversity and equality [160].

55. He told us that in practice, day to day supervision and management of the HCPs is the responsibility of the DWP's Clinical Leads, here, Dr Ahmed and Mrs Harrison, but if there was any concern in relation to the HCPs, the Clinical Lead would usually be the first person to raise this with the DWP's Operations Manager (Mr Medlycott) and that concern would in turn be discussed with Mr Owen. Mr Owen as APM's contract manager would then investigate the matter further and revert to the DWP and seek its guidance on what action should be taken regarding the HCP in relation to that concern.

56. If any concern came to his attention, he told us he would usually raise that with the DWP's Clinical Leads with whom he had weekly face to face meetings in London.

57. He stated that generally the DWP would have final say in relation to the termination of any HDA and that if the DWP did not feel that they need services of any HDA for any reason, the DWP will direct the APM to terminate the contract of the relevant HDA.

58. There was no copy of Dr Mackereth's contract with APM before us (nor indeed that between APM and DWP) but it was common ground that Dr Mackereth's duties included conducting face-to-face and/or paper based assessments and preparing reports, to be relied on by the DWP to determine the suitability of service users for Employment Support Allowance or the work capability element of universal credit.

The events that concern us

59. Dr Mackereth's engagement with APM and DWP lasted from 29 May 2018 to 27 June 2018.

60. He attended, what is agreed, was an intensive induction process at DWP Assessment Centre at Tresco House, London from 29 May.

61. We find that on 6 June 2018 Dr Ahmed, who was the lead physician for the course, was undertaking the training that day when during a discussion whether service users should be referred to by their first name or their surname and title. One of the three other HDAs who was undertaking the course with Dr Mackereth asked how someone who was transgender should be referred to. Dr Ahmed told us, and we accept, this was not the first time he had been asked this question by doctors in training and having looked it up previously knew that DWP's policy was to refer to transgender individuals by their preferred name and so replied that we should address transgender individuals by the title they choose to be addressed by.

62. We were referred to the DWP's Policy on Gender Reassignment **[175.01-175.04]**. which included amongst other matters.

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

63. It was not in dispute before us that the pre-reading for the course did not explicitly cover this point, but it did state:

> ***"All work is performed in a manner that recognises everyone's rights. This applies to both claimant and Healthcare Professional. Everyone is entitled to be treated with respect whatever their gender, sexual orientation, race, religion,***

nationality, culture, age, health, (dis)ability, marital status or physical characteristics/ appearance."

64. Dr Mackereth appeared to suggest that this was not the respondent's policy and that only developed later, him having raised this as an issue. He asserts the email we refer to at (118) as support for that. We address that and whether the DWP managers were aware that was its policy and the effect of the same below.

65. Dr Mackereth accepted in his witness statement that Dr Ahmed, did not expressly mention the word "transgender" as had been alleged in his claim form [ET1/10(a)] and apologised for the inaccuracy.

66. Dr Mackereth's account of what happened next is that he said "As a Christian, I cannot use pronouns in that way in good conscience", or words to that effect and that Dr Ahmed then repeated ***"The policy is that we don't ask questions, we just use whatever pronoun the client prefers. I am not sure I agree with David, but I will have to pass his comment up the chain"***; or words to that effect.

67. Thus, it is not in dispute that the discussion developed, and that Dr Ahmed relayed the DWP's policy to the HDAs in those terms. That provides support for Dr Ahmed's contention he was aware of that policy and had looked it up previously. We find that he was aware at the time of that discussion that that was the DWP's policy.

68. At this point we should record that before us Dr Mackereth stated he did not have an issue with using whatever first name the service user wished to use but did having an issue using pronouns inconsistent with the service user's birth gender. It later became clear that also extended to using a title or style of address, Mr, Mrs, Ms, Miss etc inconsistent with the service user's birth gender.

69. Dr Mackereth told us orally several times that in setting out his position, he felt he was ***"cutting his professional throat"*** and was stressed and at another point that he expected to lose job and not to be employed again.

70. Despite that, Dr Ahmed told us that Dr Mackereth did not appear surprised by his response and that he jumped in to the conversation and said he understood that was the Government's position but that as a Christian he believes that God assigned people's gender at birth and he could not refer to individuals by a gender that was different to their birth sex. Dr Ahmed added that Dr Mackereth stated that he was prepared to defend his beliefs if challenged in court if he had to.

71. Dr Ahmed told us that given the length of time Dr Mackereth had been practicing he had asked Dr Mackereth if he had any interactions with transgender people. Dr Mackereth said that he had not, so he had not had to address the issue in the past.

72. Dr Ahmed asserts given he was aware Dr Mackereth had worked in Accident and Emergency previously and that the GMC guidance (Good Medical Practice) is that doctors should refer to patients by their preferred name ([125] at paragraphs 48, 54 and 59) [he asked Dr Mackereth how that was so. Dr Ahmed stated that Dr Mackereth told him that the hospital he worked at was aware of his beliefs and helped the Claimant avoid having to deal with transgender people. The claimant denies that this was the case.

73. Dr Ahmed states that those discussions lasted several minutes and as the course timings were quite tight on time he told Dr Mackereth that his own view was that his intention to address transgender claimants by the title he thinks is appropriate would not be acceptable and claimants should be referred to be the gender they choose. He

told us Dr Mackereth did not seem convinced by what he had said and continued to argue his case, and as Dr Mackereth had said his consultant previously had accommodated his beliefs, Dr Ahmed wanted to check whether there was something the DWP could do to accommodate the Claimant's beliefs so he decided he would refer the issue to the person holding the role parallel to his own (clinical lead) Mrs Harrison, at the DWP's Five Ways site, where Dr Mackereth was contracted to work, so she could check if the DWP could accommodate Dr Mackereth's beliefs. He states he told Dr Mackereth that he would escalate the point to Mrs Harrison. Dr Mackereth's account is slightly different. In his witness statement [DM/53] he alleges that Dr Ahmed said, "***The Policy is that we don't ask questions, we just use whatever pronoun the client prefers."*** In his witness statement that was followed by the following phrase that was also used in his claim form [ET1/10.c] [19] **"*I am not sure I agree with David, and I will have to pass this up the chain*".**

74. Mr Owen told us that at one of the weekly face to face meetings held with the DWP's Clinical Leads in London in the first week of June 2018, Dr Ahmed had raised that the issue concerning the appropriate way to address a service user who was undergoing gender reassignment had arisen at the training course. Mr Owen stated Dr Ahmed had has set out his own reply, that the Dr Mackereth had joined the discussion, presented his own opinion stating that his Christian beliefs prevented him from addressing a person in any way other than by the gender that was assigned to them at birth. Mr Owen told us that Dr Ahmed had gone on to say that as this was a potential breach of the rights of transgender service users and/or the service users going through gender reassignment and he was not Dr Mackereth's Clinical Lead, Dr Ahmed had raised the issue with Mrs Harrison (Dr Mackereth's Clinical Lead) as this needed to be investigated further [JO/6 & 7].

75. Dr Ahmed called Mrs Harrison immediately after the training and suggested that she speak to their manager Ms Lindsay Tickle to see if this could be accommodated.

76. Despite Dr Ahmed not recollecting a brief discussion he had with Mr Medlycott that Mr Medlycott refers to on Wednesday 6 June we find the fact that Dr Ahmed did so and that accommodations were considered by the DWP and the internal DWP exchanges that followed that we refer to below support Dr Ahmed's version in preference to Dr Mackereth's version of that conversation.

77. Mrs Harrison was unable to speak to Ms Tickle but having spoken to Ms Tickle's deputy she contacted Emma Mitchell one of the DWP's HR business partners. There was an exchange of emails between them on 7 June in which Ms Mitchell suggested she would not be available until the following afternoon. Early the following afternoon Mrs Harrison contacted various members of the DWP's Contracted Health and Employment Service and within the hour received some advice in reply from Andrew Screech one of the individuals she had sought the advice from that it was a matter for APM to manage [111-112].

78. That day, 8 June, was the day Dr Mackereth completed the training course. Dr Mackereth and the other trainees on his course should have undertaken what we understood to be an end of course the test that day but as the course had not finished in time it was held over until the following Monday.

79. Also, on Friday 8 June, and shortly before her exchange of emails with the DWP's Contracted Health and Employment Service Mrs Harrison, emailed Mr Owen to check if he had managed to seek advice in relation to the issue concerning Dr Mackereth's views about transgender service users [113-114].

80. As we state above (26) Mr Medlycott identified two potential means of circumventing the issue [AM/4]. As they are set out above, we do not repeat them in full here suffice to say

    a. Giving the Claimant a non-face-to-face customer role. Dr Mackereth does not challenge that was not possible because he did not have the required experience for these roles

    b. Giving the Claimant only non-transgender claimants to assess.

81. Given Dr Mackereth no longer advances the proposal made in the opening skeleton prepared on his behalf at [42b & 50b] namely not to use pronouns at all, the sole remaining alternatives for us to consider are Mr Medlycott's suggestion (b) or the other suggestion proposed in the skeleton argument lodged for Dr Mackereth, namely [42a] to require the assessor to undertake an initial triage of service users to identify if they were transgender, should the service user self-identify as transgender and should the service user wanted to be referred to by non-biological pronouns, then refer the service user onto another assessor.

82. Mr Medlycott told us [AM/5] that he checked the ACAS website for guidance on what was acceptable treatment in the workplace for people who hold religious beliefs and identified the need to consider making accommodations (as they were referred to before us). Late on the afternoon of Friday 8 June 2018 he sent an email to Mrs Harrison [116-117] summarising his researches. He set out within his email a quote from the ACAS website:-

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

but he also made clear that the ACAS guidance did not assist with how people transitioning through gender reassignment should be referred to, but stated

> ***"… but I would have thought that, by default, they would be required to acknowledge them by their chosen name and gender address (Mr, Miss …. etc).***
>
> ***We are already working in quite a sensitive area and I would have concerns if David were to refuse to see someone in this protected group or was inflammatory in how he addressed people if he is called upon to assess them, so I think APM do need to have conversation with him about how he would deal with such situations if placed with them as there is a potential here severe reputational damage if not addressed.***
>
> ***Happy for you to share this with James when you speak to him on Monday. "***

83. Mrs Harrison forwarded that email to Mr Owen on Monday 11 June [116]. Mr Owen replied by email later that day to Mr Medlycott (copying in Mrs Harrison) thanking for Mr Medlycott the information and that it was supported by Mr Owen's own conversations with APM's HR. He stated that he would speak again to APM's HR the following morning and that the other issue he was concerned about was to clarify what the stipulated DWP process was that Dr Mackereth should be following. Mr Owen stated that hiss view was that if it was the DWP's process to call the person by their chosen name and chosen gender and that is what Dr Mackereth should do.

84. Also, on Monday 11 June Dr Mackereth undertook what we understood, was the end of course test, in Birmingham. The following day, Tuesday 12 June, he observed assessment(s).

85. At 13:46 on 12 June 2018, further to Mrs Harrison's email of the previous Friday (see (79)) Mr Owen wrote to APM's 'Responsible Officer' Dr Alastair Baker to seek guidance on the issue of transgender service users. By way of background, all doctors have a Responsible Officer. This service is provided by APM, as a designated body, to the doctors working with it. Responsible Officers are responsible for the annual appraisals and revalidation of the doctors at [118-124]. We should add that at the start of his contract with APM, Dr Mackereth, on becoming aware Dr Alastair Baker was its Responsible Officer, alerted APM that he had an issue with Dr Baker [105-106]. The emails before us do not disclose that Dr Baker, when giving that advice, was aware it related to Dr Mackereth. Mr Owen stated he had not told Dr Baker of the involvement of Dr Mackereth nor does any of the evidence before us suggest that Dr Baker was made aware Dr Mackereth was the person in relation to whom that advice was sought. We find he was not.

86. Dr Baker's advice [118] emailed at 15:27 on 12 June was consistent with that of Dr Ahmed; namely that he believed "people have the right to entitle themselves any way they wish and to be addressed as such. Let me look into what the GMC thinks.". Later that day he did so extracting parts of the GMC guidance at [46-48 & 54], attaching a document 'Personal beliefs and medical practice from the GMC' and advising if it was a doctor patient relationship it was hard to defend the doctor's responses [120-124].

87. In the interim Mr Medlycott also told us [AM/6] he had looked at the respondent's Equality and Diversity policy: guidance for contractors [159 - 175] and having done so replied to Mr Owen mid-afternoon on 12 June stating that the guidance was not so detailed to say that people should be called by their chosen name, because if every eventuality had to be covered it would be too unwieldy. Mr Medlycott went on to say that he felt it would be reasonable for the claimants to be called by the preferred name, regardless of sexual identity and his real concern was that if that were not complied with it could be construed as harassment. Mr Medlycott acknowledged that individuals were entitled to their own beliefs, but the ACAS guidance was that employees must not refuse to provide a service on account of gender reassignment, so reassurance was required given the sensitive nature of the work that the DWP did [115].

88. Both Mr Medlycott and Mrs Harrison accepted orally that they were not aware of the DWP's gender reassignment policy at the time of the events that concern us. That provides [175.02] amongst other matters:-

> ***"151. You should always address the customer in their presented sex - try to use the person's name where possible rather than referring to a person's gender."***

89. Having received the advice from Dr Baker and in the light of the reassurance sought by the DWP on 13 June Mr Owen decided to meet with Dr Mackereth and he told us around lunchtime that day he drafted some questions he wished to ask of Dr Mackereth in advance of their meeting. We find he did so because Dr Mackereth accepts those questions were as they were set in Mr Owen's subsequent note of that meeting [133]

The events of 13 June

90. On 13 June Dr Mackereth undertook supervised assessments and writing up of those assessments [142]. Dr Mackereth explained the events that day thus :-

> ***"53. On Wednesday the following week, 13 June 2018, I was engaged in working on my second real case, when Mr Owen of APM arrived at the Fiveways assessment centre in Birmingham, and called me out of my work for an urgent meeting. The purpose was to interrogate me about my beliefs in relation to the use of pronouns; which Mr Owen later sought to summarise in his note at [133].***
>
> ***54. … We had a general discussion, polite but also emotionally charged.***
>
> ***55. To the best of my recollection, in fact there was no mention of the word "transgender" during our meeting; rather, we talked about the DWP's more general policy of using whatever pronoun the client wants.***
>
> ***56. That discussion culminated in Mr Owen asking me the following question (I am trying to recall his words as precisely as I can now): "Let's just summarise this: if you have a man six feet tall with a beard, who says he want to be addressed as 'she' and 'Mrs'; would you do that?". I am quite sure that this is exactly what he said to me, in substance if not verbatim. I told him that, as a Christian, I would not be able to accede to such a request in good conscience.***
>
> ***57. Mr Owen then made it quite clear that, unless I agree to use the pronouns in that way, I was overwhelmingly likely to lose my job, although the final decision was for the DWP rather than for him. He explained that the DWP would not allow me to work directly with clients. They have doctors who only work with case notes and never talk to clients face to face, but Mr Owen said I did not have enough experience to do that kind of work."***

91. Mr Owen's account of his meeting with Dr Mackereth was that when he arrived at the Five Ways assessment centre at around 2:30 pm he saw Dr Mackereth initially and asked how he was getting on and that he said he would meet with him shortly. Mr Owen suggests that they met again roughly two hours later, allowing Doctor Mackereth time to finish the work he was doing at the time.

92. Contrary to Dr Mackereth's assertion both in his witness statement and orally, that mid consultation he was called in to a room to discuss faith, Dr Mackereth later accepted that that was not during the middle of the consultation with a customer but whilst he was preparing his report on an assessment.

93. Mr Owen told us the meeting lasted approximately 30 to 40 minutes, that he made it very clear to Dr Mackereth that he was there purely to gather information and would relay that back to the DWP. He orally expanded on his witness statement and told us that he gave Dr Mackereth an initial debrief on why he was there.

94. It was put to Dr Mackereth in cross examination that he was aware that there was a risk of him losing his job. Dr Mackereth accepted that. We find that Mr Owen did inform Dr Mackereth of that risk, albeit, Dr Mackereth's account is that in the outset, namely when he first raised his beliefs with Dr Ahmed he was aware of the effect that that could have but only for his role as a HDA but also upon his career. That is reinforced by his use of the words ***"cutting his professional throat"*** (69).

95. Dr Mackereth accepted both orally and in the emails that were before us (see (130)) that Mr Owen's note of that meeting, whilst not using the words that Dr Mackereth would have used, was a fair summary of it.

96. Dr Mackereth also stated that whilst he did not intend to harm or offend anyone, he understood that his behaviour could be offensive [**133**]. He repeated that stance orally before us. We find that whilst he was not deliberately intending to cause offence Dr Mackereth understood both at the time and now that that was how it would be perceived by transgender people. We find that an objective observer would also

consider that that would cause offence to a transgender person.

97. Mr Owen told us Dr Mackereth went out of his way to thank him for his professionalism, and how well he had handled the situation. Dr Mackereth repeated before us that that was so.

98. Both Dr Mackereth and Mr Owen told us that during this meeting, Dr Mackereth was upset by the whole situation. Mr Owen told us that Dr Mackereth had stated that the government, the law and the GMC were all against people like him and he knew how this would end and that it would not be in his favour. Mr Owen went on to say that he reiterated to Dr Mackereth that I did not know what the outcome would be and that it would not be my decision.

99. As to Dr Mackereth's assertion concerning the example of the six- foot tall man with a beard who wish to be addressed as "she" there is no mention of this in the claim form, nor in Mr Owen's note of the meeting [133] which Dr Mackereth was asked to agree. As we state below whilst Dr Mackereth made clear that note was not in his words, he accepted it fairly reflected the content of the meeting (130). Further, Dr Mackereth told us orally that the questions as relayed in the note were those questions that were put to him. Nor at any time did he seek to correct the note having been given the opportunity to do so.

100. Having sought to clarify why Dr Mackereth distinctly recalled those words being used he told us that he remembered telling a national newspaper, the Daily Telegraph, of that in early July 2018. The web version of a Daily Telegraph article from that time was before us [176-180]. It was put to the claimant that made no mention of a six-foot man with a beard. Dr Mackereth told us that he had been told certain matters were redacted from the web version and that he had thought a copy of the print version at home. We asked him to check and to ensure that that was disclosed to the respondents if he located it and a copy provided to the Tribunal. No such copy was provided.

101. Nor was there any mention of a six-foot man with a beard in an article that appeared on the Daily Mail's website [181-187]. Indeed, in the Daily Mail article that is before us (initially uploaded on 13 July and updated on 16 July) an account is given of the specific questions posed to and answered by Dr Mackereth that makes no reference whatsoever to the bearded man.

102. Accordingly, the first mention we can locate of reference to a six-foot man with a beard appears in the claimant's witness statement dated May 2019 almost a year after the events that concern us.

103. We find there is no support in any of the contemporaneous documents at all for the account that Dr Mackereth gives in that regard. In the absence of those words being used in any of the subsequent documentation to which we have been referred in the intervening ten months or so and Dr Mackereth having confirmed that Mr Owen's note was a fair, albeit not verbatim, reflection of what was said, we find the reference to the words, ***six-foot man with a beard***, were not, on balance used.

104. Dr Mackereth also accepts in his witness statement that Dr Ahmed did not expressly mention the word "transgender" in their discussion at the initial training course on 7 June 2018 and so paragraph 10(a) of his Particulars of Claim was inaccurate.

105. We find that the way that Dr Mackereth relayed several of the matters within his witness statement, namely that he was suspended from work on 14 June 2018, that Mr Owen sought to ***"interrogate [him] about his beliefs"*** [DM/53] and that he had "***pressure put***

on him to renounce his beliefs" [ET1/20] do not reflect what occurred at the time.

106. We find that the way Dr Mackereth recounts the purpose of the meeting with Mr Owen being to interrogate him, his being called out of a consultation, which we find was not the case, what he states was pressure to ***renounce*** his beliefs and what he described as his subsequent suspension lead us to conclude he was a poor witness whose perception of events was skewed and save where it is supported by another witness or documentary evidence his account should be given little weight.

107. We remind ourselves that:-

> ***"Remembering is a constructive process. Memories are mental constructions that bring together different types of knowledge in an act of remembering. As a consequence, memory is prone to error and is easily influenced by the recall environment, including police interviews and cross-examination in court."***[7]

and it was common ground that Dr Mackereth was upset by the whole situation. We find those matters being so, he was not deliberately attempting to mislead the tribunal but instead his memory was in error.

108. We find that instead Dr Mackereth was being asked to clarify how he would behave in a given situation. Dr Mackereth was aware of the consequences of that for his role and career from the time the issue first arose, but that does that mean that the respondents were placing pressure upon him. Dr Mackereth accepted before us that the respondent was trying to retain his services. That is reinforced in that even after he had clarified his position Mr Owen wrote to him again, as we will see later, to clarify his stance. The respondent was in a difficult position and we find it was duty-bound to clarify how Dr Mackereth would respond in any given situation before it took a definitive view. That is what it was doing. We find no pressure was applied.

109. Whilst Mr Owen's note of his meeting with Dr Mackereth does not expressly refer to this, we find the inference from that note which is supported by Dr Mackereth's version of that meeting [DM/57] (see (90)) was that the respondents had at least considered if he could undertake other roles (that is explored alternatives), concluded none were workable and explained this to Dr Mackereth via Mr Owen. However, we find, when viewed objectively, in no sense whatsoever was the way that Mr Owen proceeded be viewed as an attempt by Mr Owen or the DWP to persuade Dr Mackereth to renounce his beliefs. We say that because Dr Mackereth accepted that Mr Owen had dealt with matters in a professional and polite manner, and that given the potential effects, those questions had to be asked of him.

110. Before us Dr Mackereth also complained that he was not given proper notice of the meeting nor an opportunity to have a representative present. We find that meeting was in no sense a disciplinary meeting but a fact-finding meeting to clarify Dr Mackereth's position. Accordingly, formal notice and the right to be accompanied did not arise.

The events of 14 June 2018

111. Mrs Harrison [HH/11] told us that on the morning of Thursday 14 June 2018 she came into the assessment centre at 8:30 and met the Claimant in the stairwell. She acknowledged she was aware that Mr Owen had been to the assessment centre the day before to discuss Dr Mackereth's beliefs about addressing transgender people but was not aware of its content at that time.

112. She told us Dr Mackereth said ***"you know that I've come into work to be fired today***

don't you? That would end my career" and he stated that he knew his beliefs were contrary to the views of the GMC (General Medical Council) she responded by suggesting that he carry on today and they both went inside.

113. She told us she saw him later on that day and he was upset and distracted and he would finish the case he was working on and then go home as he felt that he may do any other service users he saw that day an injustice, as he felt distracted.

114. Dr Mackereth's account [DM/60-61] makes it clear he had attended work expecting to be "sacked". He referred to only one conversation with Mrs Harrison but he too stated that he felt it would not be fair on the clients for me to continue working under such pressure as I found myself at the time, so I wanted to go home until the situation was resolved. He stated having explained that to her she said she was fine with that.

115. It is agreed Dr Mackereth left the assessment centre at around 11:00 am on 14 June 2018.

Subsequent events

116. In oral evidence Mrs Harrison and Mr Owen both accept they had spoken sometime in the late morning following Dr Mackereth's departure. Mrs Harrison orally accepted her statement [HH/11] referring to her telling Mr Owen about Dr Mackereth deciding to leave on 15 June 2018 [134] was incorrect.

117. At 4:20 pm 14 June 2018, Mr Owen emailed to Dr Mackereth a draft of his note of the meeting of the previous day (13 June 2018) and asked him if that was agreed [132-133].

118. By an email sent 8 minutes later [135] Mr Owen informed Mrs Harrison he had sent the note of the meeting to Dr Mackereth and would copy it to her when it was approved. He then went on to state ***"we have agreed it is not in either his interests of DWP's best interest to return to work until this is resolved".***

119. At 9:33 am on Friday 15 June [140-141] Dr Mackereth responded to Mr Owen's email enclosing his record of their meeting on 13 June. Dr Mackereth stated he would need to take legal advice before answering this and did not recognise the words used as his exact responses, stated it would have been better if the questions were put in writing and asked if the approach adopted, referring to fitness to practice, was the correct one. Dr Mackereth went on to state that he was suspended from working from the DWP, asked that be confirmed in writing and asked for the reasons for that and then said

> ***"I have expressed views which have been held historically, and still are, by nearly all Christians. They have also been held by most of the non-Christian population of the world."***

120. At 13:39 the same day, 15 June, Mr Owen responded to Dr Mackereth's email stating that his understanding was that Dr Mackereth left work because he chose to do so and that Dr Mackereth had also stated that he did not feel he could return to work until the situation was resolved [136]. The email also referred to a telephone call the two had had on 14 June. Neither dispute that they spoke sometime after Dr Mackereth left the assessment centre. Mr Owen stated he called Dr Mackereth that afternoon to check he had arrived home ok and to confirm that Mrs Harrison and he understood Dr Mackereth's request not to continue working [JO/27]. Dr Mackereth stated he told Mr Owen about his conversation with Mrs Harrison and that Mr Owen was already aware of it and that Mr Owen had agreed with her that he could not work until the situation

was resolved [DM/62]. Dr Mackereth states that Dr Owen told him ***"before you decided to go we had already decided to send you home"*** and thus suggests Mr Owen's email to him [140] was misleading.

121. It was expressly put to Mr Owen that he and Mrs Harrison had agreed between themselves that Dr Mackereth had to cease working. Mr Owen stated that was incorrect and that they were "***respecting David's wishes not to work***".

122. When it was put that Dr Mackereth was told he could not return until the situation resolved he repeatedly stated that it was Dr Mackereth's ***"request and we agreed to it",*** that and that Dr Mackereth ***"chose to go home"***

123. Returning to the email chain on the day, Dr Mackereth responded few minutes later suggesting Mr Owen's email was a misrepresentation and that he was taking advice [136].

124. Whilst Dr Mackereth makes no criticism of Mrs Harrison and expressly stated he did not make any allegations of harassment against her he maintains that he was suspended on the 14 June. He relies in part of the email of 4:28 pm on 14 June from Mr Owen to Mrs Harrison and his discussion with Mr Owen on the afternoon of 14 June (118) & (120).

125. Mrs Harrison's email to Mr Owen (copied to Mr Medlycott) of 10:23 am on 15 June [134] sets out her account of what happened on the 14 June. ***'he didn't think he would be able to work and that it would be unfair for any customer he saw as he felt too distracted to competently complete an assessment'*** [134]. Ms Harrison recorded that she had agreed with Dr Mackereth ***'that perhaps due to the way he felt that it would be best for him not to be in the work'*** [134]. That is a near contemporaneous record of that discussion and Dr Mackereth accepts it is an accurate reflection of it.

126. We find based on what Dr Mackereth told us ; "I told her that I felt it would not be fair on the clients for me to continue working under such pressure as I found myself at the time, so I wanted to go home until the situation was resolved. I explained this to Heather, and she said she was fine with that." that the suggestion to go home came from Dr Mackereth not Mrs Harrison, Mr Owen, the DWP or APM and in no sense could that be construed as them suspending him.

127. We find the DWP had not sought to prevent Dr Mackereth from attending work on 14 June, but further despite Dr Mackereth expressing concern about his position early that day, that Mrs Harrison suggested that he stay, which he did until around 11:00 am. We find that is in contradiction to Dr Mackereth's suggestion that a view had been formed by the respondents that he should leave earlier. We find, based on the evidence before us, that the first conversation Mrs Harrison and Mr Owen had that day was only after Dr Mackereth had left.

128. When asked about the basis for his assertion that he was placed under pressure to renounce his beliefs Dr Mackereth told us that pressure arose from him knowing that unless ***"I change my views I will lose my job".*** We return to that in a moment but need to record first that he also accepted it was appropriate for Mr Owen to inform him of that and the conversation was conducted professionally by Mr Owen and that also went for the DWP as well, and further there were ***"No sparks"*** and they ***"Went out of the way to be polite and considerate".***

129. The threat to lose his job stems from Dr Mackereth's assertion [DM/57] that after question two Mr Owen made it clear unless he agreed to use pronouns in that way the

DWP would not allow him to work directly with service users. That is in conflict with Mr Owen's account that he told Dr Mackereth their meeting was purely information gathering exercise [JO/20].

130. At 9:57 pm on Monday 18 June Dr Mackereth emailed Mr Owen [153-154] to state that he had had time to take advice and whilst the note of their meeting did not represent his exact words and spoke in a way he would not chose to in writing he accepted that it represented his opinions but not fully and went on to relay his view concerning Genesis 1:27.

131. On Tuesday 19 June 2018, Mr Owen forwarded Dr Mackereth's response to Ms Harrison and Mr Medlycott and informed them that he would wait to hear from them to confirm how they wanted to proceed [147].

132. On Monday 25 June 2018, Mr Owen sent an email to Mr Medlycott containing a draft email to Dr Mackereth referring to discussions they had had and asking if it contained the message the DWP wished to convey to Dr Mackereth [150]. Mr Medlycott responded suggesting some changes [149] which Mr Owen made before emailing the amended draft email back to him for his confirmation [149].

133. At 14:03 on 25 June Mr Owen sent the final version of that email to Dr Mackereth [152-3 & 156]:

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

134. Dr Mackereth's response of 7:54 pm that evening was brief "I am a Christian, and in good conscience I cannot do what the DWP are requiring of me" [152 & 156].

135. On 26 June 2018, Mr Owen forwarded Dr Mackereth's response to Mr Medlycott [151-152] stating he intended to reply, accept Dr Mackereth's resignation and thank him for his time but wanted to know if there was anything else Mr Medlycott wanted him to ***"cover off"***. Mr Medlycott responded on 27 June stating there was nothing he wished to add and thanking Mr Owen for the work he had done [151 & 155].

136. On 27 June 2018, Mr Owen wrote to Dr Mackereth acknowledging his email and that he would not be able to perform as a HDA with APM on behalf of DWP. He thanked Dr Mackereth for his work, wished him the best for the future and addressed some minor housekeeping matters, including whether Dr Mackereth should be paid, and if so how much for 14 June [**155**].

137. Dr Mackereth responded by stating that he had not resigned but had been sacked and commenting on what he considered the consequences of that were for the nation [**155**].

138. No appeal or grievance was raised by Dr Mackereth. They are matters the tribunal will need to address as part of remedy, if appropriate.

Our findings generally

139. We find that Dr Ahmed having raised the issue of Dr Mackereth's concerns, the DWP proceeded on the basis that the view he expressed to Dr Mackereth during training

was its stance without questioning the same. That is unsurprising as he was one of its clinical leads and provided training to the HDAs.

140. We find the stance of the DWP emanated out of a concern to ensure that transgender service users were treated with respect and in accordance with their rights under the EqA. Insofar as Dr Mackereth asserts that this was out of a concern to avoid claims being be pursued against the DWP and not because of a concern to ensure that transgender service users were treated with respect, we find that any concern claims would be bought against it, stemmed directly from the legitimate concern by the DWP that if it failed to treat transgender service users with respect and in accordance with their rights under the EqA then such claims would ensue and as a consequence it was at risk of reputational damage. We find the complaint Mrs Harrison had to deal with the previous year (see (50)) supports that concern.

141. We find that the view the DWP managers came to was that it was not possible to undertake that triaging process. Dr Ahmed told us that the DWP's practice many years ago was to conduct home visits for vulnerable service users and transgender individuals were deemed vulnerable. We accept the evidence of Dr Ahmed, Mrs Harrison and indeed Dr Mackereth that as a result of DWP making allowances for its service users with mental health impairments it was implicit that it might not be known to the DWP and its HDAs prior to any consultation that the claimant was transgender.

142. That being so we find that the first point at which we can be certain a HDA could be aware a service user was transgender would during an assessment; no alternative means having being identified which that could be discerned earlier. That being so we find that it was not possible to "triage" a service user until an assessment.

143. In the event Dr Mackereth's discovered a service user wished to be referred to using a pronoun style etc that he told us was in conflict with his beliefs his preferred course was refer to another physician. We find that could have led to a delay until another physician was free (if not at the start of a session), if their appointment was at the end of a session, until the afternoon session, or if at the end of the day, potentially the service user having to come back on another occasion. We find that contradicted one of the DWP's objectives to where possible to limit the wait for service users and the additional stress that caused.

144. As to Dr Mackereth's suggestion he could triage service users based on the evidence we heard (see (43-53)) we find that no matter how sensitively he or others handled the matter given what we heard as to the sensitivities of the issue for transgender individuals given the way they as a group considered they had been treated by society historically we find that if an assessor having asked questions, however discretely, had discerned the service user was a transgender individual, then ceased to carry out the assessment the service user would almost certainly, given the sensitivities, assume or conclude that the assessor had an issue with transgender individuals.

145. In our judgment that response would be highly likely to have caused offence to the service user. Dr Mackereth accepted that it was likely it would have done so.

146. However, given that information would have been disclosed in a confidential assessment, such a reaction from an assessor would be to merely reinforce the way the treatment individual received by society that in many instances may have been the cause of the mental health impairments that gave rise to assessment. In those circumstances the likelihood of causing and the level of the offence that would cause would be magnified.

147. We find however sensitively those matters were handled that the triaging suggested by Dr Mackereth would have violated the dignity of a transgender individual and/or the prescribed environment such that the treatment of the service user constituted harassment. In the alternative we find that is likely to have given rise to direct discrimination or a breach of the requirements of the GRA than a person with a full Gender Recognition certificate was entitled to be referred to by that Gender.

148. It was common ground before us that:-

a. the definition within s. 7 EqA of gender reassignment encompasses not only individuals who hold a full gender recognition certificate, but

b. the DWP's requirement to refer to service users using their preferred gender, pronouns, styles etc. meant that requirement was applied to persons who potentially did not satisfy the EqA definition of gender reassignment (or it follows) to those who held a full gender recognition certificate.

149. That being so it could be that individuals who wished to be referred to by a gender, pronouns, styles etc. did not fall within the definition of transgender within the EqA or fulfil the requirements of the GRA.

150. In those circumstances the potential breaches of the EqA and GRA that we refer to above (143-147) would not necessarily follow, although it could be that reputational damage could still be caused to the DWP.

151. Whilst that is so in our judgment the only means by which it could be determined (if at all) that a service user fell within the GRA, or the EqA definition of gender reassignment, or did not fall within either, having done so the effect of that enquiry would have been to give rise to the consequences at (144-147), no means of averting the same having been identified before us. Notwithstanding that a HDA might only see a handful of transgender individuals during the course of a year given the reason for the assessment and sensitivities involved we find it was incumbent upon the DWP to avoid that risk.

THE LAW

Religion or belief

152. The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) provides so far as is relevant:

> ***Article 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.***
>
> ***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."***

153. Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out. Thus art. 9 of the Convention does not protect every act motivated

or inspired by a religion or belief [8] nor can it be said that even where the belief in question attains the required level of cogency and importance, that every act constitutes a "manifestation" of the belief [9]. The matters in art. 9(2) aside, the right to hold religious belief and to change religion or belief, is absolute and unqualified [10].

154. The Convention also amongst other matters provides that :-

> ***Article 14***
>
> ***"The enjoyment of the rights and freedoms set forth in [the] 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."***

155. Article 1 of the **"**Framework" Directive (2000/78) includes religion or belief as one of the characteristics it protects.

156. For the purposes of the EqA, religion and/or belief are defined in s. 10 EqA thus:-

> ***"(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."***

157. In the case of *Grainger v Nicholson* *UKEAT/0219/09* Burton J gave extensive consideration to the meaning of "philosophical belief" having considered previous House of Lords authority (in particular that of *R. (Williamson) v Secretary of State for Education and Employment* *[2005] 2 AC 246 HL),* a number of authorities in the European Court of Human Rights and the case of *Eweida v British Airways plc* *[2010] EWCA Civ 80*, he said this:

> ***"24. I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" … I shall endeavour to set out the limitations, or criteria, that are to be implied or introduced by reference to the jurisprudence set out above:***
>
> > ***(i) The belief must be genuinely held.***
> >
> > ***(ii) It must be a belief and not, as in McClintock [v Department of Constitutional Affairs [2008] IRLR 29], an opinion or viewpoint based on the present state of information available.***
> >
> > ***(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.***
> >
> > ***(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.***
> >
> > ***(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of Campbell [and Cosans v United Kingdom [1982] 4 EHRR 293] and paragraph 23 of Williamson).***"

158. As to genuineness in *Williamson* Lord Nicholls said this:-

> ***"22. … When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', … emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. … religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed'…***
>
> ***23. Everyone … is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection…"***

159. Whilst *Grainger* was determined prior to the EqA the Equality and Human Rights Commission Statutory Code of Practice on Employment 2011 has to be taken into account by a Tribunal in reaching its decision and at [2.59] the Code recites the five criteria precisely as Burton J had identified them to be and that the meaning of religion and belief in the EqA is broad and is consistent with art. 9 the Convention [Code 2.52].

160. To reinforce both points in *Harron v Dorset Police [2016] IRLR 481, [2016] UKEAT 0234/15* Langstaff P cautioned Tribunals to be wary of setting the threshold requirements at too high a level before going on to state that, in determining what constituted a belief qualifying for protection, there was no material difference between the domestic approach and that under Article 9 of the Convention. He then continued

> ***"37. … where a belief has too narrow a focus it may, depending upon the width of that focus, not meet the standards at the appropriate level identified in summary by Burton J and explored in greater detail in paragraph 23 of Lord Nicholl's speech in Williamson."***

Generally

161. Section 212(1) & (5) EqA headed 'General interpretation' effectively provide that if an act is found to be harassment it cannot also be a detriment (and thus direct discrimination), but where an act is not found to be harassment that does not prevent conduct amounting to a detriment for the purposes of direct discrimination complaint.

162. Thus, harassment needs to be considered first.

Harassment

163. Section 26 EqA is concerned with harassment. Where relevant, it provides 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."

164. Three questions thus arise [11]

(1) The unwanted conduct. Did the respondent engage in unwanted conduct?

(2) The purpose or effect of that conduct. Did the conduct in question <u>either</u>:

(a) have the purpose <u>or</u>

(b) have the effect

of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him/her?

(3) The grounds for the conduct. Was that conduct <u>related</u> to the claimant's protected characteristic?

165. The Court of Appeal [12] recently suggested the following reformulation of the guidance previously given [13] whether conduct has either of the proscribed effects:-

"88. … In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as 14 having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment [15] created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

166. When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. Whilst:

"22. … not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things

said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." [11]

167. Elias LJ in *Grant v HM Land Registry* [16] reinforced that point stating that

> "47 ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.".

168. Langstaff P subsequently endorsed that view in *Betsi Cadwaladr University Health Board v Hughes* [17] :-

> ***"12. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."***

169. It will also be relevant to deciding whether the response of the alleged victim is reasonable. Langstaff P also in *Betsi Cadwaladr* said this:-

> ***"9. Whether [the conduct] has that effect is a matter of fact is to be judged by a Tribunal … objectively. In determining that, the subjective perception of the Claimant is relevant, as are the other circumstances of the case. But, as was pointed out in Dhaliwal it should be reasonable that the actual effect upon the Claimant has occurred."***

170. That was also the view of Elias LJ in *Grant*:-

> ***"13 … When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable."***

Direct discrimination

171. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a person is treated less favourably than another person has been or would be treated. That involves a comparison and for that comparison there must be no material difference in the circumstances of the case (save for the protected characteristic) [18]. ***'Would treat'*** allows for a hypothetical comparator in addition to an actual comparator.

172. Thus, it is not sufficient merely for a claimant to have a protected characteristic and to be treated less favourably; for a respondent to be guilty of direct discrimination the less favourable treatment must be done '***because of'*** the protected characteristic. The protected characteristic also need not be the sole or even principal reason for the

treatment so long as it has significantly influenced (that is *one which is more than trivial)* the reason for the treatment [19].

173. In cases where the difference in treatment is based on a criterion which a protected characteristic or that cannot be disassociated from it (and thus the category of those suffering the disadvantage coincides exactly with the category of people with the particular protected characteristic) [20] the application of the criterion will constitute the reason or ground for the treatment complained of, this constitutes direct discrimination [21] and there is no need to look any further because;

> ***"… By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic." [22]***

Thus,

> ***"If an owner of premises puts up a sign saying, 'no blacks admitted', race is, necessarily, the ground on which (or the reason why) a black person is excluded." [23]***

174. In other cases ***[24]*** the question to be asked is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? [25] Unlike causation, which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact [26].

175. The one (subjective) question the tribunal must not concern itself with is "if the discriminator treated the complainant less favourably on racial grounds, why did he do so?" That question is irrelevant. [27] Discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds.

> ***"… Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is." [28]***

The burden of proof

176. The burden of proving discrimination is initially with the claimant. A difference in treatment alone is not sufficient to establish that discrimination could have occurred and passed the burden of proof to a Respondent, similarly unreasonable conduct without more is not enough either. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of the Respondent's conduct. If the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter [29].

177. If the Tribunal cannot make such positive findings, s. 136 EqA provides that the claimant must prove facts from which the court or tribunal could decide, in the absence of any other explanation, that there has been a contravention of the act. In doing so the ET has to consider all the primary facts, not just those advanced by the complainant, the total picture has to be looked at [30]. It is only the explanation which cannot be considered at the first stage of the analysis. Whereas evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the "facts" are in order to see if a *prima facie* case of discrimination has been established by the claimant [31]. Where there are allegations of discrimination over

a substantial period of time, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture [32].

178. If, the initial burden is met, s.136 provides the ET ***must*** conclude there was discrimination unless the Respondent proves on the balance of probabilities that the conduct or decision in issue was in no sense because of the relevant protected characteristic [33], that requires a consideration of the subjective reasons which cause the employer to act as he did [34].

> ***"At the second stage, the ET must 'assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities'. "*** [35]

and cogent evidence is required to discharge that burden.

Indirect Discrimination

179. Indirect discrimination occurs in the circumstances set out in s.19 EqA :-

> ***"(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."***

180. Lady Hale explains the difference between direct and indirect discrimination thus:-

> ***"An employer or supplier cannot discriminate against you directly because of your religion ("no Jews here"). However, he can impose rules or practices which indirectly discriminate against particular believers who will find it hard to comply with them ("you must work on Friday afternoons in winter") … if it is a proportionate means of achieving a legitimate aim, rather than a disguised way of discriminating against a particular religion." [36]***

Justification

181. In *R (Elias) v Secretary of State of Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 Mummery LJ gave the following guidance on what was required :-

> ***"[151] … the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."***

182. That is a repeat of his view in *Hardy & Hansons plc v Lax* [2005] IRLR 726 CA at [31

& 32], a view that was endorsed by Lady Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] IRLR 601 at [20-23].

183. The leading current authority is the decision of the Supreme Court in *Ministry of Justice v O'Brien [2013] ICR 499.* Following a reference to the European Court the SC adopted the ECJ's guidance. That is encapsulated in the summary of AG Kokott:-

> ***"62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: …*** [37] ***"***

184. The issue of justification must be approached by the ET in a suitably structured way, which means that the right questions must be addressed [38]. The EHRC Code identifies a two-stage approach:

a. Is the aim legitimate? Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?

b. If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

185. Baroness Hale in *Homer* suggested that the approach identified in the Code does not go far enough:-

> ***"[24] Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."*** *[24]*

and repeated that view (albeit in the context of a direct age discrimination claim) in *Seldon v Clarkson Wright & Jakes [2012] IRLR 590 SC*, at [50(6)] citing the ECJ case of *Fuchs v Land Hessen C-159/10 and C-160/10, [2011] 3 CMLR 47*.

186. Whilst that is so and reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test [39].

187. Whilst it is for the alleged perpetrator to justify the provision, criterion or practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be prayed in aid are subjective impressions or stereotyped assumptions [40].

188. Further, the test of determining proportionality is objective so it is no bar to the act being justified if the alleged perpetrator had not turned its mind to the question of proportionality at the time and thus matters that have come to light after the event can be relied upon [41].

Other

189. In P v S *and* Cornwall County Council *C-13/94, [1996] IRLR 347*, the ECJ determined that whilst the Equal Treatment Directive (now superseded) did not explicitly include discrimination arising from ***gender reassignment*** as within the scope of art. 5 was such that it included the same. In such a case the individual concerned was to be seen as treated unfavourably by comparison with persons of the sex to which he or she formerly

belonged [42]. The rationale of the court included this :-

> ***"22 To tolerate such discrimination would be tantamount, … 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."***

Gender Reassignment was thereafter protected in the Recast Directive (*2006/54*).

190. The jurisprudence of the European Court of Human Rights provides like protection acknowledging the effect the failure to do so would have [43] :-

> ***"…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. 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."***

191. In UK law, ***gender reassignment*** is defined in s. 7 EqA thus:-

> ***"(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."***

192. By virtue of s.9 of the Gender Recognition Act 2004 (GRA) where a full gender recognition certificate is issued to a person, the acquired gender becomes for all purposes that person's gender and thus it follows that person is entitled to be referred by the gender (and it follows, title, style and pronouns) on that certificate.

193. Section 29 EqA requires as to the provision of services etc:-

> ***"(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.***
>
> ***(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—***
>
> > ***a. as to the terms on which A provides the service to B;***
> > ***b. by terminating the provision of the service to B;***
> > ***c. by subjecting B to any other detriment.***
>
> ***(3) A service-provider must not, in relation to the provision of the service, harass—***
>
> > ***a. a person requiring the service, or***

b. a person to whom the service-provider provides the service.

(4-5) [victimisation]

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

…

(8) In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic—

a. religion or belief;
b. sexual orientation.

…"

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[7] British Psychological Society Research Board - *Guidelines on Memory and the Law* - June 2008
[8] see *Kalac v Turkey* (1999) 27 EHRR 552 [27] and *Redfearn v UK* [2013] IRLR 53 where a BNP member (the membership of which was restricted to white nationals only and which "[9] … *wholly opposed to any form of integration between British and non-European peoples*"), did not "*disclose any appearance of a violation*" of Art. 9 [58-59].
[9] *Eweida and others v UK - 48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR [2013] IRLR 231* at [82]
[10] *Eweida at [80]*
[11] *Richmond Pharmacology v Dhaliwal* [2009] UKEAT/0458/08, [2009] ICR 724, [2009] IRLR 336
[12] *Pemberton v Inwood* [2018] IRLR 542, [2018] EWCA Civ 564 per Underhill LJ
[13] *Dhaliwal* (above) at [10 & 15]
[14] The insertion of the words "to be regarded as" is a slight expansion of the statutory language, but it only spells out what is necessarily implicit in it.
[15] This is the shorthand adopted in *Dhaliwal* (above) for the cornucopia of epithets deployed in the statute. Although it is a convenient shorthand, it is important not to lose sight of the force of the particular adjectives used: see *Land Registry v Grant [2011] EWCA Civ 769*, *[2011] ICR 1390*, *per* Elias LJ at [47].
[16] [2011] IRLR 748 *CA*
[17] [2014] UKEAT/0179/13
[18] Section 23 EqA
[19] *Nagarajan as applied in Igen v Wong at [*37]
[20] *Bressol v Gouvernement de la Commaunité Française at [*56] and per Lady Hale in *Bull v Hall* [2013] UKSC 73 [19
[21] It is indirect discrimination where some other criterion is applied but a substantially higher proportion of one sex than the other is affected. Both per Advocate General Jacobs in *Schnorbus v Land Hessen* (Case C-79/99) *[2000] ECR I-10997* [33]
[22] Elias P in *London Borough of Islington v Ladele [2009] ICR 387, [2008] UKEAT/0453/08, [2009] IRLR 154 at [32]*
[23] Underhill P (*Amnesty at [33])*
[24]An example is *Nagarajan v London Regional Transport 1999 IRLR 572 HL*
[25] An example is that of the shop keeper given by Lord Phillips in *Governing Body of JFS [2010] 2 AC 728 at [21] "A fat black man goes into a shop to make a purchase. The shop-keeper says* 'I do not serve people like you'. *To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated."*
[26] Chief Constable of West Yorkshire Police v. Khan *[2001] UKHL 48 at [29]*
[27] *R. v Birmingham City Council, ex p. Equal Opportunities Commission [1989] AC 1155*, see Lord Goff at p. 1194.
[28] As Lady Hale put it in *JFS* at [57]
[29] Hewage *at [32]*
[30] see *Hewage* at [31], and *Laing v Manchester City Council [2006] ICR 1519* at [56 to 59]. *"Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."* per Elias P in *Laing* at [65]*).* Discrimination complaints *"rarely deal with facts which exist in a vacuum and to understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. … one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II … since these both provide the context for and cast light on the overall picture."* (see *Kansal v Tullett Prebon Plc* UKEAT/0147/16 at [31] where Langstaff J also *referred to Qureshi v Victoria University of Manchester* [2001] ICR 863 and *X v Y* [2013] a decision of the EAT (UKEAT/0322/12/GE)
[31] *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913 per Singh LJ [67]
[32] *London Borough of Ealing v Rihal [2004] IRLR 642* CA applied in *Laing* [59] and endorsed in *Madarassy v Nomura International [2007] IRLR 246* also CA
[33] see *Ayodele*
[34] see *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*, 341, para. 7, per Lord Nicholls.
[35] see the Igen guidance at Annex paragraph 12 and Laing [51]
[36] 2014 Oxfordshire High Sheriff's Lecture

[37] see *Del Cerro Alonso (Free movement of persons)* [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793, para 44."
[38] Lady Hale in *Homer* at [26]
[39] *Cross v British Airways plc [2005] IRLR 423* EAT and CA in *Woodcock v Cumbria Primary Care Trust [2012] IRLR 491*
[40] see Elias J in *Seldon v Clarkson Wright and Jakes* [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in *Homer [2009] IRLR 601* EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.
[41] *Cadman v Health and Safety Executive [2004] IRLR 971*
[42] *Harvey L.1.B.(5) [84-5].*
[43] *Goodwin v United Kingdom (2002) 35 EHRR 18, at [77-80].*

OUR FURTHER FINDINGS & CONCLUSIONS

Belief

194. As we state above there is no dispute that Christianity falls within art. 9 of the Convention and/or s. 10 EqA. The issue before us relates to the beliefs Dr Mackereth relies upon and we adopt the shorthand used by Dr Mackereth to describe the three sub-sets of the belief he relies upon (see [ET1/5]) namely belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism.

195. We thus turn to the *Grainger* criteria. We accept that the belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism [ET1/5a-c] are genuinely held and that the belief in Genesis 1:27 and the first aspect (b)(i) of lack of belief in transgenderism are beliefs that relate to a weighty and substantial aspect of human life and behaviour and attain a certain level of cogency, seriousness, cohesion and importance. We say that because given the low threshold we find that (b)(i) may follow from (a).

196. As to (b)(ii) notwithstanding the low threshold, we find that the lack of belief impersonating the opposite sex may be beneficial for an individual's welfare, and/or (b)(iii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex are opinions or viewpoints predicated on the assertion that Transgenderism in Dr Mackereth's words is a ***"delusional belief[s]"*** by reference to the use of the word ***"impersonation"*** [DM/30] and do not relate to a weighty and substantial aspect of human life and behaviour or attain a certain level of cogency, seriousness, cohesion and importance because of the narrowness of the issue they represent [44].

197. Irrespective of our determinations above, all three heads, belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism in our judgment are incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals.

198. Dr Mackereth accepted in his witness statement that transgender individuals ***"42. … may find my beliefs to be offensive"*** and he repeated that in his oral evidence, although he made it clear, that was not his intention. Set against the background relayed by Dr Ahmed, Mrs Harrison and Dr Mackereth (43-53), for the reasons we give above at (141-151) we found that his beliefs [ET1/5a-c] were likely to cause offence and have the effect of violating a transgender person's dignity or creating a proscribed environment, or subjecting a transgender person to less favourable treatment. They may also have breached the GDA.

199. The GMC Guidelines were subject of much debate before us. They include a conscientious objection provision. Mr Phillips repeatedly asserted on behalf of Dr Mackereth an analogy between Dr Mackereth's position and the position of a doctor who had a conscientious objection to abortion and that a doctor in such circumstances

would be able to refer a service user patient to another doctor at any stage of the process. It was accepted Dr Mackereth had never practised as a GP and had no direct experience of dealing with such cases. No expert evidence was led before us that a doctor was entitled to exercise the right of conscientious objection prior to the termination procedure itself.

200. It is not for us to determine if the GMC guidelines have been followed but insofar as they are advanced to inform our understanding of the position our reading of them is that the right of conscientious objection is limited to the right to refuse to participate in the procedure(s) itself and not to pre-or post-treatment care advice or management [130]. Further, they provide that a practitioner is required to ***"… follow the law relevant to their work. For example, the Equality Act 2010 … prohibit doctors from discriminating directly or indirectly, against others, or from harassing them, on grounds of a protected characteristic."*** (paragraph 5 [126]) and to ***"48. … treat patients with respect whatever their life choices and beliefs".***

201. In our judgment, refusing to refer to a transgender person by his/her/their birth sex, or relevant pronouns, titles or styles would constitute unlawful discrimination or harassment under the EqA.

202. For those reasons in our judgment the beliefs relayed in [ET1/5] fall foul of *Grainger.*

203. We have thus considered if our conclusions above are compatible with the Convention. We conclude they are because for the reasons we give above, the right to manifest a religion or belief is subject to art. 9(2) which includes ***"the protection of the rights and freedoms of others."***

204. Dr Mackereth's direct discrimination and harassment complaints as were put at the conclusion of this claim are dependent on the beliefs set out in [ET1/5] satisfying *Grainger* and thus fall away as does the indirect discrimination complaint insofar as it is put on the basis of the beliefs at [ET1/5] alone or in combination with his Christian faith [ET1/4].

205. Notwithstanding those defemination and for the sake of completeness we address the harassment and direct discrimination complaints and indirect discrimination complaints that rely in whole or part on the beliefs in [ET1/5].

Harassment

206. Given Dr Mackereth expressly confirmed no issue was taken in relation to Mrs Harrison's behaviour four heads of unwanted conduct were pursued [ET1/20 & 21 & 11-15 & 17]:-

    a. Mr Owen calling Dr Mackereth out of his work on Wednesday 13 June 2018 for an urgent meeting to 'interrogate' him about my beliefs in relation to the use of pronouns; and he felt pressure to renounce beliefs [DM/53]

    b. Dr Mackereth's 'suspension' on 14 June

    c. Mr Owen's letter of 25 June 2018 [156] asking Dr Mackereth if he would refer to service users by their chosen sexuality and name which Dr Mackereth argues was pressure being applied to him to renounce beliefs? And/or

    d. Dr Mackereth's 'dismissal' on 27 June

207. In his witness statement Dr Mackereth does not set out any facts concerning what was said or done by the individuals concerned from which harassment could be inferred.

That was directly put to him and he expressly confirmed no issue was taken with the manner those things were said or done. Further, he commendably accepted the individuals concerned were courteous and professional to him at all times. Essentially the issue he raises is that he was asked if he would refer to service users by their chosen sexuality, and thus their chosen style or title, relevant pronouns and their name, and that equated to the respondent applying pressure upon him to renounce his beliefs.

208. We accept that from the outset when Dr Mackereth told Dr Ahmed of the issues the DWP's policy would cause fir him that Dr Mackereth felt his job and career were on the line. Whilst that is so, having indicated that he could not comply with the DWP's policy, that issue needed to be addressed

209. In our judgment this was not an instance as in ***Wasteney*** [45] where the unwanted conduct complained about related to the respondents' attempt to discipline the claimant for harassment of a co-worker. Instead we find that the treatment afforded to Dr Mackereth was related to his protected characteristic, because he told the respondents that he had a conscientious objection to those complying with their procedures that stemmed from his beliefs.

210. Mr Phillips put to several of the respondent's witnesses paragraph 11 of the GMC guidance [127] namely a conscientious objection issue having arisen, that the medical professional was required to be open with employers and explore with them how he/she could practise in accordance with his/her beliefs without compromising them.

211. That, as we say, is a duty on the medical professional. At no point can we discern any attempt by Dr Mackereth to explore with the respondents how he could practise in accordance with his beliefs without compromising them. We expressly asked to be taken to where that was first suggested by Dr Mackereth and were taken to the opening skeleton relied upon by Dr Mackereth. Indeed, when Dr Mackereth was asked why he did not respond to APM's offer of help and support he stated there was no scientific evidence a person can change sex and that the respondent's had nothing to offer as he needed absolute proof a person could change sex. He accepted he did not relay that to them at the time.

212. We found above that Dr Mackereth's perception of events was in the absence of supporting evidence not to be preferred. We found he was not called out of a meeting on 13 June 2018 nor was he interrogated about his beliefs. As to the 'suspension' we find that Dr Mackereth sought to be excused from providing assessments in the circumstances. Contrary to Dr Mackereth's account we find that when he met Mrs Harrison on the stairwell at the start of the day, contrary to sending him home, she sought to persuade him to stay at work that day.

213. Absent a complaint about the way the respondents spoke to him, what Dr Mackereth complains about is that the respondents sought to clarify with him, via Mr Owen, what his position was. He accepts that was done in a professional way and politely. Whilst the respondents were considering how to address Dr Mackereth's concerns we find they had taken no decision on that at that time; indeed, we find they were still, from their perspective, at the information gathering stage, as both the meeting on 13 June and subsequent events demonstrate. Dr Mackereth's complaint is that essentially a ***"sword of Damocles"*** was suspended above him and both his role and career were on the line. He suggests that by asking him to clarify his position the respondents sought to ***"interrogate [him] about his beliefs"*** [DM/53] and "***renounce his beliefs"*** [ET1/20]. Given he takes no issue with the manner in which that was done Dr Mackereth's complaint essentially is that this was done at all.

214. In our judgment the respondents were doing exactly what paragraph 11 of the GMC guidance [127] required Dr Mackereth to do namely to be ***"open with employers, partners or colleagues about your conscientious objection. You should explore with them how you can practice in accordance with your beliefs without compromising patient care and without overburdening colleagues."***. Further we find, as indeed Dr Mackereth accepted, that it was only right that Mr Owen address those matters with him. In our judgment that is what good practice and natural justice required, namely, to explore what Dr Mackereth's position was and the consequences this could give rise to and as we state at (109) above we find Mr Owen relayed the DWP's view of the alternatives to him.

215. At no point did Dr Mackereth make any suggestions as to accommodations that could be made. When we sought to explore when this done the first instance made on behalf of Dr Mackereth was in the skeleton argument lodged at the start of the trial. Indeed when Dr Mackereth was asked in the context of what support could be offered to him he replied as we set out above at (211).

216. Whilst we find the conduct we refer to at (206) was unwanted by Dr Mackereth and that was related to his beliefs we find the respondent was duty bound to explore options with Dr Mackereth and that is what they did. In our judgment the purpose of those enquiries was not to violate Dr Mackereth's dignity or create an adverse environment for him nor viewed objectively did it have that effect.

Direct Discrimination

217. As we say above Dr Mackereth's direct discrimination complaint as now put is dependent on the beliefs in [ET1/5] satisfying *Grainger* and thus falls away. Notwithstanding our determinations above and for the sake of completeness we address his direct discrimination complaints.

218. As we highlight above, if the criterion is indissociable from the protected characteristic then the treatment will be directly discriminatory. As the Supreme Court said in *Lee v Ashers Baking Company Ltd* [46]:-

> ***"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 Borough Council [1990] 2 AC 751, the criterion used for allowing free entry to the council's swimming pool was not sex but statutory retirement age. There was, however, an exact correspondence between the criterion of statutory retirement age and sex, because the retirement age for women was 60 and the retirement age for men was 65. Hence any woman aged 60 to 64 could enter free but no man aged 60 to 64 could do so. Again, in Preddy v Bull [2013] UKSC 73; [2013] 1 WLR 3741, letting double-bedded rooms to married couples but not to civil partners was directly discriminatory because marriage was (at that time) indissociable from hetero-sexual orientation. There is no need to consider that question in this case, as the criterion was quite clear. …"***

and where the indissociability of the criterion is being considered ***"The motive for discriminating according to that criterion is not relevant."*** [47],.

219. In another case, *Rodriguez v Minister of Housing*, the eligibility for joint tenancies of public housing in Gibraltar was limited to couples who were married or had children together. Same sex couples could not marry so the effect of the rule was that whilst opposite sex couples could qualify no same sex couples could. That was held to be indirect discrimination but as Lady Hale stated, it ***"[19] comes as close as it can to direct discrimination".*** The rationale there was neither the same sex childless complainants nor the opposite sex childless comparators would qualify and undertaking the comparison demonstrated this. Putting it another way, if the treatment is meted out to other groups there is no "exact correspondence". *Rodriguez* was a claim bought under the Convention and thus the question whether it was direct or indirect discrimination was an entirely technical one because the issue of justification was at play irrespective.

220. Nor will the correspondence be exact where the treatment is meted out to a sub-group of those protected, for example see *Taiwo v Olaigbe* [48] where the Supreme Court having at [26] contrasted the way British, non-British nationals and Nigerians would have been treated, determined the treatment was not because of the person's race, ethnicity or nationality but because of their immigration status.

221. This claim was initially argued at least in part on the basis of indissociability stemming from both his religion and/or his beliefs [ET1/5]. Dr Mackereth having been taken to his email of 15 June where he stated that ***nearly all*** Christians felt the same way as he, as did ***"most of the non-Christian population of the world"*** [140], we sought to clarify, if an indissociably argument was pursued on the basis of his religion. It was confirmed at the conclusion of the hearing that argument was not pursued and this head was solely argued on the basis of Dr Mackereth's beliefs as relayed at [ET1/5] (see (6)) and not his religion [ET1/4].

222. Having stepped back and considered matters in the round, we make a positive determination that the reason for the treatment of Dr Mackereth was that the DWP (and thus APM) wanted to treat its service users in the manner (using the style, titles and/or pronouns) of their choosing. We find any person holding Dr Mackereth's beliefs would have been treated in the same way as a person not holding those beliefs who refused to refer to a service user using the service user's preferred pronoun(s), style and/or title of choosing. In our judgment Dr Mackereth's treatment was not indissociable from his beliefs, because other persons who did not hold those beliefs would have been treated in the same way.

223. We have no hesitation in concluding that the consequences of that policy were that the DWP not only complied with the Public Sector Equality Duty, reduced the risk of harassment and other forms of discrimination complaints being made against it (and with that the potential for harm to service users) and the DWP avoiding falling into disrepute. Those matters were not the reason for it acting in the way it did but were consequences of that.

224. Irrespective whether Mrs Harrison or others were not aware of the DWP's internal gender reassignment policy at the time [175.01-175.04] Dr Ahmed was as was shown by his immediate response to the initial question raised during training which led to the subsequent events.

225. Adopting the comparator the European Court [104] stated should have applied to Ms Ladele's case **"*a registrar with no religious objection to same-sex unions*"** and applying it here it does not in our judgment assist the appellant because any individual would have been treated in the same way.

226. In our judgment whilst Dr Mackereth's complaint is like that of Ms Ladele's namely "***… not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been***". Thus, her complaint was as Elias J put it (EAT [52]) "***about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference***" and the evidence was that rather than being influenced by Ms Ladele's beliefs, Islington were influenced by what she refused to do as a result of those beliefs (CA at [40]). The Supreme Court summarised the position thus in *Ashers* :-

> ***"23. … The reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way. In Islington Borough Council v Ladele [2009] EWCA Civ 1357; [2010] 1 WLR 955, para 29, Lord Neuberger of Abbotsbury MR adopted the words of Elias J in the EAT: "It cannot constitute direct discrimination to treat all employees in precisely the same way". By definition, direct discrimination is treating people differently."***

Indirect Discrimination

227. It is accepted that the first of the three PCPs relied upon by Dr Mackereth (see (23)) was applied, the respondents accept that the DWP requires all staff, contractors and their agents to address its transgender service users in their presenting sex.

228. As to the second PCP relied upon, we find that whilst this was not a practice but a response to a set of circumstances that emanated out an individual wishing to opt out of compliance with the first PCP, the respondents would have undertaken that response whenever that issue arose and thus it too constitutes a PCP. As a result, the same justification arguments apply as with the first PCP.

229. As to the third PCP relied upon, we find that this was not applied, this was in no sense whatsoever the necessary consequence of events nor was the claimant suspended nor dismissed. Instead the respondents sought as we say above to accommodate the claimant's position and to clarify his position before taking any further steps.

Individual disadvantage

230. We concluded for the reasons we give above that Dr Mackereth's beliefs [ET1/5] do not satisfy the test in *Grainger.*

231. We accept Dr Mackereth's account that his beliefs [ET1/5] are inherent to his wider faith [ET1/4]. In so far as those beliefs form part of his wider faith, his wider faith also does not satisfy *Grainger*.

232. For the sake of completeness if our conclusions as to *Grainger* are wrong, we find that he could not comply with the PCP and thus could not undertake the role of HDA. We find that a person whose material circumstances were the same save for his beliefs (and his faith) would have been able to comply. We form that view because that comparator would have been able to refer to service users using the style and pronouns of their choosing. It follows Dr Mackereth did suffer an individual disadvantage.

Group disadvantage

233. In our judgment any group that hold the beliefs Dr Mackereth relies upon [ET1/5] would

for the reasons we give above do not satisfy the test in *Grainger.*

234. Mr Phillips refers us to *Mba v London Borough of Merton [2013] EWCA Civ 1562, [2014] ICR 357, [2014] IRLR 145*. Thus, even though Article 9 rights are not directly enforceable in the Employment Tribunal, he states that is authority for the proposition that primary and secondary legislation **"*must be read and given effect in a way which is compatible with Convention rights*"** by virtue of s.3(1) Human Rights Act 1998. Secondly, he states that group disadvantage can be inferred from the general evidence of the religious doctrine. He appears there to be alluding to the decision of Maurice Kay LJ [17] that it was not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage. In his view that was opening the door to a quantitative test on far too wide a basis.

235. Thus, Mr Phillips expressly did not argue that group disadvantage was not required and thus that forms no part of this claim. For the avoidance of doubt had he done so we would have agreed with Vos LJ [41] namely ***"there is no reason why [section 19(2)(b)] cannot be equally well read to exclude such a consideration on the ground that Article 9 does not require any test of group disadvantage, and concentrates only on the religious freedom of the individual concerned."***

236. As to the second point he draws upon we agree with Maurice Kay that it is not for us to consider if that is a core element of the Christian faith. Dr Mackereth accepted that not all individuals who describe themselves as Christians have the same beliefs as he. His email of 15 June acknowledges as much (see (221)). We find the material he relied upon Transformed [p.16] makes it clear Christian views differ, some preferring to use preferred names but not pronouns, whereas for others courtesy leads them to use the name and preferred pronoun. It goes on to state that Christians ***"… must stand up and defend those being bullied or abused for being different. It does not matter whether we agree with someone's way of life; we must defend every human's intrinsic worth."*** [p.15]. The CMF report makes clear that the Christian response is to "… ***strongly endorse the human rights of transgender people, affirming their dignity and guarding them from discrimination."*** [fifth unnumbered page]

237. What flows from that is that insofar as those individuals did not hold those beliefs [ET1/5], they would have been able to comply with the PCP and thus not put to a disadvantage. Those that did hold those beliefs, in our view did not satisfy the test in *Grainger*.

Legitimate aims

238. Despite the concession by the DWP that the first PCP was applied neither Mrs Harrison nor Mr Medlycott was actually aware of the DWP's gender reassignment policy. Notwithstanding that, we find that that the first (and as a consequence the second) PCP was applied. We say that because the issue from which this claim arose was as a result of the discussion during training and Dr Ahmed, who was aware of the DWP's position and alerted both Mrs Harrison and Mr Medlycott to the issue. As we state above the third PCP was not applied.

239. For the reasons we give above at (141 to 142) a service user's wish to be identified other than by their birth sex would only become apparent during an assessment and we address the likely consequences if that had arisen at an assessment carried out by Dr Mackereth (143 to 147).

240. The DWP's policy of addressing its transgender service users in their presented sex, in our view was to ensure that the consequences we refer to at (239) did not ensue

and so that its transgender service users were treated with respect, in accordance with their rights under the EqA and in accordance with the DWP's duties as a public authority to promotion equal opportunities and not to discriminate. For those reasons we conclude that those legitimate aims underlay and were the basis for the application of the PCPs.

Proportionality

241. Accordingly, having concluded the DWP (and AMP) has shown it had a legitimate aim, we have gone on to consider whether the PCPs were relevant and necessary, and proportionate.

242. We found (109) that the DWP considered alternatives in the week following this issue first arising and concluded for the reasons we gave above that no alternatives were available that would have prevented offence or the potential for offence to be caused to a transgender service user.

243. As to the two alternatives the DWP considered (see [AM/4]) (1) desk work; and (2) Dr Mackereth only assessing non-transgender service users; Dr Mackereth commendably accepted the former was not an option as he did not have the necessary experience to undertake that role and for the following reasons neither was Dr Mackereth assessing only non-transgender service users.

244. Of the two alternatives advanced for the first time in the skeleton lodged on behalf of Dr Mackereth, only [50a] - referring the service user onto a colleague is now pursued. The suggestion at [50b] - not using pronouns at all - is not. Dr Mackereth states he would have been happy to undertake [50a] but also complains the respondents did not sit down and discuss the possibilities with him [DM/77]. We return to the latter below (258).

245. Dr Mackereth told us orally that transgender service users were more likely to suffer from mental health issues (see 52). Given the DWP's procedures did not require service users with mental health issues to give details of their conditions in advance (see 46) we find it was unlikely that the DWP would have been aware that a service user was a transgender person in advance of an assessment. Thus, for Dr Mackereth to assess only non-transgender service users would have necessitated a pre-appointment triage to ascertain if a service user was a transgender person.

246. We find it follows that any such triage appointment would have necessarily necessitated questions to be asked to ascertain the answer to that question. Based on the evidence before us and for the reasons we give above (see 48) we find that transgender service users had a heightened sensitivity to very questions necessitated by a triage appointment, and however carefully those questions were addressed those questions would have either caused offence or the potential for offence to the service user.

247. The potential for offence being caused is highlighted by the complaint from 2017, a redacted version of which was before us.

248. Dr Mackereth repeated on several occasions before us that whilst there was no deliberate desire on his part to offend, he commendably accepted that service users might be offended by his refusal to use pronouns, styles etc. of their choosing and it was offensive.

249. Similarly, in our judgment, once an assessment appointment had commenced a

referral by Dr Mackereth to another HDA, in our judgment would on balance have caused questions to be asked by the service user why that was so however carefully that was addressed and for the reasons we give above again caused either offence or the potential for offence.

250. In addition, triaging or a referral to another HDA would in our judgment have caused a delay, which was one of the matters the DWP sought to avoid by its practice of seeing service users on a first come, first served basis. We find that was to avoid the additional stress, in what was a stressful and lengthy process, caused by having a long wait for an appointment and any such stress would have on balance been a greater issue for service users with mental health issues.

251. We find that the possibility of needing to refer a transgender service user to another HDA is therefore likely to have caused additional anxiety, particularly where if they were seen at the end of a session, that meant they would have to wait until after lunch and of more significance, if that was at the end of the day, the service user would have had to return on another day.

252. As to other factors that impact on our assessment and notwithstanding the length of argument before us concerning the GMC guidance, as we say above it is not for us to determine compliance with that guidance.

253. Other factors that we need to consider include the likelihood Dr Mackereth would have had to assess a transgender service user in a given year. Based on the evidence we heard this was small and would have occurred only a handful of times per year (see 49).

254. It was also the case that not all service users that wished to be referred to by the style and pronouns of their choosing fell with the EqA definition of transgender and fewer individuals still would have been in receipt of full gender recognition certificates.

255. That aside we find that in order for the DWP to have identified which protected category individuals who were being assessed fell within (if any), and thus whether the EqA applied, would have necessitated questions, that, however sensitively they were couched and delicately asked, would have constituted potential harassment or discrimination within the EqA (if it applied), breach by the DWP of its other legal duties, for reputational damage to be caused to it, but also the risk of harm to the service user.

256. Based on the evidence before us, in many instances that would have entailed a repeat of the prejudice that potentially led to the service user having to undergo an assessment in the first place, by one of the bodies, the DWP, charged with supporting that service user, thereby increasing the risk of and aggravating any harm and reputational damage so caused.

257. Yet further support for that proposition arises as a consequence of Dr Mackereth's position was that he could not in conscience refer to individuals who had obtained full gender recognition certificates by their non-birth gender. If that had occurred, in our judgment, that would have constituted a potential breach of the GRA and insofar as either respondent sought to facilitate him not complying with the GRA was also a potential breach by them.

258. We find that DWP had considered those alternatives and concluded [50a] and the other alternatives were not workable. We found they conveyed their conclusions to Dr Mackereth via Mr Owen on 13 June 2018 and ask him to think again. It would have been open for him to raise additional alternatives. He did not and has not before us.

That suggests to us and we find that proportionate alternatives were not available.

259. When we go on to balance those matters the discriminatory effect and harm service users could suffer, the context in which that arose, the lack of means of preventing that by the absence of alternative of triaging (even if the law permitted DWP to assist Dr Mackereth's refusal to comply with the GRA in the sub-set of cases where that obligation potentially could arise) outweighs the effect on Dr Mackereth and his beliefs and the balancing exercise falls to be determined in favour of the respondents.

260. For the reasons we give above we find the DWP's practice was both relevant and necessary to achieving that aim. As we say above the first respondent considered if lesser alternatives were available and concluded for the reasons we give above, that they were not.

FOOTNOTE

261. It is important given the public interest in this case that we make clear this case did not concern whether Dr Mackereth is a Christian and if that qualifies for protection under the Equality Act. That was never in dispute.

262. Nor do we have any doubt that he also genuinely (and fervently) held the beliefs we set out in full at (6) or his entitlement to hold those beliefs.

263. What this case concerned is whether he was entitled to manifest those beliefs in the circumstances that applied here. He accepted that his beliefs meant that insofar as a service user was a transgender individual within the meaning of the EqA, that whilst he did **not** wish them to, his actions would cause offence and potentially breach the EqA. We find that if the service user also held a full gender recognition certificate Dr Mackereth's position was that he would also potentially breach the GRA for the reasons we give above.

264. As a panel we unanimously echo the words of Lady Hale in *Ashers*:-

> ***"35. In reaching the conclusion that there was no discrimination … in this case, I do not seek to minimise or disparage the very real problem of discrimination against [protected groups]. … Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is*** *"born free and equal in dignity and rights****". Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. ...."***

Signed by: Employment Judge Perry
Signed on: 02/10/2019

[44] In *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, the EAT (Langstaff P) set out that, in determining what constituted a belief qualifying for protection, there was no material difference between the domestic approach and that under Article 9 of the Convention, and that, at para 37, "*where a belief has too narrow a focus it may, depending upon the width of that*

focus, not meet the standards at the appropriate level identified in summary by Burton J and explored in greater detail in paragraph 23 of Lord Nicholl's speech in Williamson."

[45] *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 (EAT) per HHJ Eady [54-56]

[46] [2018] UKSC 49, [2018] 3 WLR 1294

[47] Per Lord Phillips in *Governing Body of JFS[2010] 2 AC 728* at [20]

[48] *[2016] UKSC 31, [2016] ICR 756, [2016] WLR 2653, [2016] IRLR 719*