EMPLOYMENT TRIBUNALS

Claimant: Joanna Phoenix

Respondent: The Open University

Heard at: Watford Employment Tribunal
On: 2-3 (Tribunal reading days), 4-6, 9-13, 16-18 (19 October Tribunal rest day) & 20 October 2023, deliberations- 30 October- 3 November 2023, 13-15 November 2023 and 7 December 2023 & 4 January 2024 (in Chambers)

Before: Employment Judge Young
Members: Dr B Von- Maydell Koch
Mr C Surrey

Representation
Claimant: Mr B Cooper KC (Counsel)
Respondent: Ms J Mulcahy KC (Counsel) and Mr Z Ansari (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant's claim for indirect discrimination is dismissed upon withdrawal.
2. The complaints of direct discrimination because of the Claimant's gender critical beliefs under issues 2(c) and 2(d) are well founded.
3. The complaint of direct discrimination or harassment under issue 2(b) is out of time and is dismissed.
4. The complaints of direct discrimination or harassment under issues 2(f) and (q) and (s) are not well founded and are dismissed.
5. The complaints of harassment related to the Claimant's gender critical beliefs under issues 2 (a), (e), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (r) are well founded.
6. The Claimant's complaint of constructive unfair dismissal is well founded.
7. The Claimant's claim for wrongful dismissal is well founded.
8. The Claimant's claim for post employment victimisation is well founded.
9. The Claimant's claim for post employment discrimination under issue 2(s) is not well founded and is dismissed.

10. The Claimant's claim for post employment harassment under issue 8 in respect of issue 2(k) is well founded.
11. The parties will be sent a listing stencil requiring their dates to avoid in respect of the listing of a remedies hearing.

REASONS

Introduction

1. The Claimant was employed as a Professor by the Respondent from 1 August 2016 until her resignation on 2 December 2021. Early conciliation started on 27 August 2021 and ended on 5 October 2021. The Claimant presented her first claim form on 3 November 2021 before the termination of her employment. The Claimant then returned to early conciliation on 24 December 2021. Early conciliation ended the same day, and the Claimant then presented her second claim form on 24 December 2021.

2. The claim arises out of the Claimant's stated gender critical beliefs. The Claimant said she was subjected to harassment and direct discrimination on the grounds of those beliefs. The Claimant said that the failure of the Respondent to support and protect her from discrimination and harassment was the reason why she resigned from her employment, and she was constructively dismissed as a result. Even after the Claimant's employment ended, the Claimant said she was subjected to continuing harassment or direct discrimination and/or victimisation. The Respondent said that it did all that could be reasonably expected of it in respect of its obligations to the Claimant. The Respondent said that the Claimant was not subjected to harassment or discrimination, and it did not dismiss the Claimant.

Glossary

'CCJS' -The Centre for Crime and Justice Studies
'EDI'- Equalities, Diversity and Inclusion
'FASS'- Faculty of Arts and Social Sciences
'GCRN'- Gender Critical Network at The Open University.
'GoC1'- the Claimant's first grounds of claim document attached to the ET1 dated 3 November 2021.
'GoC2'- the Claimant's second grounds of claim document attached to the ET1 dated 24 December 2021.
'HERC'- Harm and Evidence Research Collaborative
'HWSRA'- Health and Well being Strategic Research Area
'KMi'- Knowledge Media Institute
'LSE'- London School of Economics
'OU'- The Open University
'REF'- Research Excellence Framework
'RSSH'- Reproduction, Sexualities and Sexual Health Research Group
'SIG'- Special Interest Group
'SPC'- Social Policy and Criminology
'SRA'- Strategic Research Area
'VCE'- Vice Chancellor's Executive
'WELS'- Wellbeing, Education and Language Studies

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Hearing

3. The hearing was listed for 15 days. However, we reserved judgment and added 10 days for the deliberations of the Tribunal. The Claimant was represented by Mr Ben Cooper KC. The Respondent was represented by Ms Jane Mulcahy KC with the assistance of junior counsel Mr Zafar Ansari. All advocacy on behalf of the Respondent was undertaken by Ms Mulcahy KC.

Public Access to the Hearing

4. This case attracted significant public interest. The case occupied 2 tribunal rooms and the tribunal rooms were full to almost full throughout the hearing, with at least 1 member of the press as well as witnesses and members of the public. A set of the bundle and witness statements were made available in the tribunal room. Permission was given for live tweeting. We had at any one time 40-50 members of the public and some press observing the hearing remotely. The parties' solicitors arranged for bundles and witness statements to be accessed remotely (but not downloaded) for members of the public attending the hearing remotely. For the most part, members of the public in person and remotely behaved acceptably. We had only one incident on day 13 where during the lunchtime break an observer sent one of the Respondent's witnesses an upsetting message whilst that witness was giving evidence. Ms Mulcahy KC explained that the witness, although upset, was over the upsetting effects of the message and was content to continue giving evidence.

Reasonable adjustments

5. The Claimant walked with a walking stick and as a result of an operation on her back experienced some difficulty in sitting for long periods of time. As a reasonable adjustment we engaged a break every 45 minutes for 5 minutes to allow the Claimant to get up and walk around and stretch her legs. On day 4, 5 October 2023 the Claimant was permitted to leave the tribunal room to walk down the corridor for those 5 minutes unaccompanied. No one else was permitted to leave the tribunal room in those 5 minute breaks. The Respondent also told the Employment Tribunal that Professor Westmarland might need ad hoc breaks. Professor Westmarland did not ask for any breaks during her evidence. The Respondent also told the Employment Tribunal that Cath Tomlinson may need a pen and paper when giving

evidence. As it happened, Ms Tomlinson gave evidence via remote video as she was unwell, and this was agreed with the Claimant.

Additional matters

6. On day 1, 2 October 2023, Mr Cooper KC told the Tribunal that the Claimant had withdrawn her indirect sex discrimination claim. The Tribunal had no record of this withdrawal. However, on day 2 the Tribunal received the withdrawal email from the Claimant's solicitor. On day 3 the Claimant's indirect sex discrimination complaint was dismissed upon withdrawal.

7. On day 1, 2 October 2023, the Tribunal timetabled the case and clarified the issues in the case. It was agreed that the Tribunal would only deal with liability in the 15 days. The parties were asked in respect of everyone involved in the hearing the pronouns of their preference in order to ensure that no assumptions were made, and offence was avoided.

8. Day 2, 3 October 2023 was an agreed reading day for the Tribunal.

9. Day 14, 19 October 2023, was an agreed day for counsel to write up closing submissions. The Tribunal did not sit in public. The Tribunal sent the parties a revised agreed list of issues which made reference to the appropriate statutory provisions and removed the issues in relation to the claim for indirect discrimination which had been dismissed upon withdrawal.

Evidence

10. We received an electronic bundle and hard copy bundles of 5552 pages. We were provided with a witness statement bundle of 351 pages. We were also provided with an agreed chronology and a cast list. The Tribunal requested the Savage Minds podcast which we listened to in full. When referring to pages in the witness statement bundle, the page number of the bundle in this judgment will be preceded by the letters ws. We also heard evidence from the following witnesses in the order below:

Claimant's Witnesses	**Job title**
Professor Joanna Phoenix (ws1-131)	Professor in Criminology, University of Reading
Professor Sarah Earle (ws132-161)	Professor of Medical Sociology, former Director of the Health and Well Being Strategic Research Area from 2016-2022

Respondent's witnesses	**Job title**
Dr Paraskevi "Avi" Boukli (ws244-255)	Former Senior Lecturer in Criminology at the Respondent
Professor Ian William Fribbance (ws162-180)	Executive Dean for the Faculty of Arts and Social Sciences (FASS), member of the Vice-Chancellor's Executive (VCE)

Professor Marcia Anne Wilson (ws256-266)	Former Dean of Equality, Diversity and Inclusion December 2020- 25 July 2023, former member of VCE
Caragh Jane Molloy (ws282-298)	Former Group People Director of Respondent between 01/09/19-07/02/23, former member of the VCE
Dr Leigh Downes (ws225-244) (formerly referred to as Dr Julia Downes)	Senior Lecturer in Criminology in the department of Social Policy and Criminology ("SPC") and FASS Academic Lead for EDI
Professor Peter Gerald Keogh (ws304-314)	Former Professor of Health and Society in the School of Health, Wellbeing and Social Care (HWSC) in the Faculty of Wellbeing, Education and Language Studies (WELS) at the OU
Dr Nicola Snarey (ws333-337)	Associate Lecturer in English Language for the School of Languages and Applied Linguistics in WELS.
Dr Christopher Andrew Williams (ws315-320)	Senior Lecturer in History in FASS and University and College Union ("UCU") representative
Professor Kevin Morris Shakesheff (ws267-281)	Pro Vice-Chancellor for Research, Enterprise and Scholarship, member of VCE
Natalie Adele Starkey (ws338-339)	Outreach and Public Engagement Officer in the School of Physical Sciences from March 2019-25 August 2022
Dr Helen Talitha Bowes-Catton (ws328-332)	Lecturer in Social Research Methods in the Graduate School
Professor John Bruno Gerard Desire Domingue (ws299-303)	Professor of Computing Science in the Respondent's Knowledge Media Institute ("KMi") and Director of KMi
Professor Louise Westmarland (ws208-224)	Professor of Criminology, Deputy Head of department of Social Policy and Criminology ("SPC") from 01/08/18-31/07/21, Head of SPC from 01/08/21
Professor Richard Michael Holliman (ws349-351)	Professor of Engaged Research in the School of Environment, Earth & Ecosystem Sciences, in the Faculty of Science, Technology, Engineering and Mathematics (STEM), Head of the School of Environment, Earth & Ecosystem Sciences from July 2019-July 2022, member of investigation panel for Claimant's grievance
Cath Tomlinson (ws3440-342)	Senior Student Advisor in FASS from 2019

Dr Deborah Drake (ws181-207)	Senior Lecturer in Criminology, Head of department of Social Policy and Criminology ("SPC") from 01/08/18-31/07/21
Shaun Dermot Daly (ws321-327)	Head of Strategic Resources in the People Services unit and Co Chair of the University's LGBT+ Staff Network
Samantha Jacobson (ws343-348)	Employee Relations Case Manager since 2020

11. On day 4, 4 October 2023 at approximately noon, during the Claimant's cross examination the Claimant became visibly upset. The Claimant was content to continue, and we took a five minute break at 12:20-12:25.

12. On day 5, 5 October 2023 at approximately 12:53 the Claimant was again visibly upset, hyperventilating her answers and crying with tears. We took an early break for lunch for the Claimant to be able to gather herself together. The Tribunal sat until 17:00.

13. On day 9, 12 October 2023, Ms Molloy gave evidence that suggested that the Respondent had been influenced in their decision to suspend the Claimant's grievance investigation because the Respondent had received 2 other grievances from other members of the GCRN. We invited counsel of both parties to address us on the relevance of the documents as they had not been provided by the Respondent and were not contained in the bundle. Mr Cooper KC on behalf of the Claimant indicated to the Tribunal that the Claimant did not want to see the documentation and it was not part of their case. The Respondent indicated that they did not want to provide the documents voluntarily and would take instructions on whether the complainants who were still employed by the Respondent would give their consent for the relevant documents to be disclosed. Ms Mulcahy KC asked for time to consider the documents and their relevance as neither she nor her junior had seen them. The Tribunal asked the Respondent to consider disclosing the documents voluntarily and would make an order if they considered that the documents were relevant. Both Mr Cooper KC and Ms Mulcahy KC were asked to address the Tribunal on the issue the following day.

14. On day 10, 13 October 2023, Ms Mulcahy KC explained that only one of the grievances concerned the same matters that the Claimant complained of in her grievance and that formed the basis of the Claimant's claim before the Tribunal. Ms Mulcahy KC explained that the outcome of that grievance was that it was not upheld. The complainant's appeal was dealt with by an external barrister who found that the original grievance panel had not dealt with a complaint of discrimination in the grievance. The discrimination grievance was then sent back to the investigation panel to determine. The discrimination grievance was not upheld. That decision was appealed, but that appeal was also not upheld. Following submissions from Mr Cooper KC, the timetable was adjusted to allow for a day off for counsel to prepare submissions.

15. On day 13, 18 October 2023, following the lunch break, Ms Mulcahy KC informed the Employment Tribunal that a person on the remote link had sent Dr Drake an inappropriate email. Employment Judge Young was given the name of the person in writing but did not disclose the name in public. Employment Judge Young asked that the person be removed from the remote link. Following enquiry, no one with the name disclosed was on the link and the vigilant and helpful HMCTS kept an eye out for the person's name in case they tried to join the hearing by remote link again. There were no further reports for the rest of the hearing.

16. Towards the end of the day at around 16:00, following questions from Employment Judge Young to Dr Drake, Employment Judge Young asked Dr Drake "when did you know the Claimant's views about the Claimant's gender critical beliefs, that is the belief that sex is immutable?" Following that question, Mr Cooper KC wanted to ask a question about when Dr Drake knew about the Claimant's gender critical belief i.e. trans women are not women. Employment Judge Young asked Mr Cooper KC why it was necessary to ask that question when he had an opportunity in cross examination to ask that question. Ms Mulcahy KC said that to be fair both parties had agreed that if there were additional questions arising then counsel would be able to ask the question. Mr Cooper KC said that Dr Drake was not being truthful as her answer contradicted the second paragraph of Dr Drake's email to David Scott dated 7 March 2019 [423], as Dr Drake says in that paragraph that the Claimant does not see trans women as women. Mr Cooper KC then said that he did not need to ask the question if he could address it in closing submissions. He said he was only trying to be fair to the witness. Ms Mulcahy KC did not dispute this approach.

17. During deliberations it became apparent issue 2(o) in the agreed list of issues did not reflect the Claimant's pleaded case and put before the Tribunal. Issue 2(o) says *"on various dates between 12.06.21 and 18.06.21, Julia Downes, Nik Snarey, Chris Williamson, Helen Bowes-Catton and Natalie Starkey tweeting/retweeting, as set out at 47-63 GoC1 (73(n) GoC1)". "*GoC1" refers to the Claimant's first grounds of claim contained in her claim form dated 3 November 2021. However, GoC1 specifically refers to all the tweets/retweets between the period of 12/06/21- 09/08/21 by Dr Downes, Dr Snarey, Dr Bowes-Catton and Natalie Starkey and someone called Chris Williamson. The Tribunal invited the parties to present to us the reasons why we should expand the period of time from 12/06/21-18/06/21 from Dr Downes, Dr Bowes-Catton, Dr Snarey and Natalie Starkey to 12/06/21-09/08/21.

18. The parties provided a joint response on 1 December 2023. The parties agreed that issue 2(o) refers to an incorrect date range and that the reference to Chris Williamson was an error. The reference to Chris Williamson was supposed to be a reference to Dr Williams at paragraph 60 of GoC1, for retweeting a tweet by Dr Nicola Snarey. Mr Cooper KC agreed that the Claimant was no longer pursuing that retweet by Dr Williams as a distinct act of harassment/discrimination. The only area of disagreement in respect of issue 2(o) was that the Respondent's position was that the Tribunal should not consider 9 August 2021 tweet by Dr Downes because it was not put to the relevant witness nor were any submissions made about

it by the Claimant. The Claimant's position was that the tweet is part of the pleaded case before the Tribunal and should be considered alongside the other tweets/ retweets on the basis of the evidence of Dr Downes as a whole, including their evidence about that tweet at paragraphs 132-133 of their witness statement. The Claimant accepted that the Claimant's closing submissions do not refer to the 9 August 2021 tweet (pleaded at paragraph 56 of GoC1). The reference to 9 August 2021 at paragraph 107.15 of the Claimant's closing submissions is an error. The tweet referred to there is in fact alleged to have been tweeted by Dr Downes on 21 June 2021 (see paragraph 55 of GoC1). It was accepted that Dr Downes was not cross-examined on that evidence. The Employment Tribunal took the view that if the parties agreed that the date range was a mistake which we consider to be correct, then it could not be in the interests of justice to ignore one of the tweets because the evidence was not challenged by the Claimant. We determined that this meant that the 9 August 2021 tweet fell within the normal process of weighing evidence and making findings on a balance of probabilities in respect of that tweet.

Agreed List of Issues

19. The issues in the claim were agreed by the parties and the Tribunal provided a copy to the parties of the revised agreed list of issues that had removed the indirect discrimination claim on 19 October 2023. This resulted in the change to numbering of the issues. To ensure that the original list of issues [160-167] could be crossed referenced against the revised agreed list of issues, after the end of the issue the original numbering is retained in brackets. The revised agreed list of issues is as follows:

Protected Belief

1. Do C's beliefs (summarised at 5-8 of the First Grounds of Claim[1] ("GoC1") 1) constitute protected beliefs within the scope of the Equality Act? It is agreed that C held these beliefs at all material times. The R's position is that:

    (a) C's beliefs as set out in paragraph 5 of GoC1 are protected beliefs under the Equality Act, in light of the EAT decision in Forstater.

    (b) the first sentence in paragraph 6 of GoC1 is not understood to be part of the gender critical beliefs relied on (it is not in itself a gender critical belief)

    (c) in the second sentence in paragraph 6 of GoC1, the R accepts that the words "The Claimant also believes that there are occasions when a person's biological sex is more important that their gender identity" are a protected belief in light of Forstater. The remainder of that sentence is understood by the R to be an

[1] The "First Grounds of Claim" and "GoCl" are references to the Grounds of Claim which were presented with the ET1 in case number 3322700/2021. The "Second Grounds of Claim" and "GoC2" are references to the Grounds of Claim which were presented with the ETl in case number 3323841/2021

example of the circumstances in which the C believes that biological sex is more important than gender identity.

(d) the final sentence in paragraph 6 of GoC1 is understood by the R to be an example of what the C believes to be important as a result of her gender critical beliefs (as set out in paragraph 5 and in the words cited above from the second sentence of paragraph 6 of GoC1).

(e) paragraphs 7 and 8 of GoC1 are not understood as setting out any protected beliefs.

Harassment relating to belief: sections 26 and 40 Equality Act 2010

2. Did the following occur?:

(a) in around late 2019, Louise Westmarland making comments to C in a face-to-face conversation, including comparing C to the racist uncle at the Christmas dinner table, as set out in 20 GoC1 (73(a) GoC1);

(b) during a departmental meeting on 12.12.19, Louise Westmarland admonishing C in a for swearing during the meeting, as set out in 22 GoC1 (73(b) GoC1);

(c) during a departmental meeting on 12.12.19, Deborah Drake interacting with C, Julia Downes and the other meeting participants, as set out in 23 GoC1 (73(e) GoC1;

(d) in or around December 2019 or January 2020 in a telephone conversation, Deborah Drake instructing C not to speak to the Department about C's research, C's treatment by Essex University or accusation that C was a *"transphobe"*, as set out in 24 GoC1 (73(d) GoC1);

(e) on 11.06.21 in a telephone conversation, Deborah Drake making comments to C including comparing C to Charles Murray, as set out at 25 GoC1 (73(e) GoC1);

(f) since 2018, R, including Deborah Drake, withholding work and opportunities from C, as set out at 27 GoC1 (73(f) GoC1;

(g) on around 17.06.21, members of OU staff including Julia Downes and Avi Boukli signing and/or publishing online (and/or contributing to the publication on line of) the Open Letter, as set out at 28-34 GoC1 (73(g) GoC1)

(h) on 18.06.21, Shaun Daly on behalf of the OU's LGBT+ Staff Network Committee, issuing a statement by publication on Yammer, as set out at 35 GoC1 (73(h) GoC1);

(i) on 18.06.21, R, particularly an individual(s) acting on behalf of the OU Sociology Department, retweeting the LSE Statement, as set out at 37 GoC1 (73(i) GoC1);

(j) on or around 24.06.21, members of OU staff from within the OU's Health and Wellbeing SRA signing and/or publishing on line (and/or contributing to the publication on line of) the WELS Statement, as set out at 39-41 GoC1 (73(j) GoC1);

(k) since 24.06.21, R continuing to publish the WELS Statement on the OU's website and, on various dates since 24.06.21, R, including David Hall deciding and/or informing C that they have decided not to remove the WELS Statement, as set out at 65-66,70 GoC1 and 12 GoC2 (13(e) GoC2)

(l) on 24.06.21, the Knowledge Media Institute publishing the KMI Statement on the OU website, as set out al 42 GoC1 (73(k) GoC1);

(m) on or around 24.06.21, Cath Tomlinson posting a written message on Yammer, and/or failure by R, particularly R's moderators of Yammer, to remove that message, as set out at 44-45 GoC1 (73(1) GoC1);

(n) on 24.06.21, Peter Keogh sending an email to the LGBT Network email list about the Vice Chancellor's proposed statement, as set out at 46 GoC1 (73(m) GoC1);

(o) on various dates between 12.06.21 and 09.08.21, Julia Downes, Nik Snarey, Helen Bowes-Catton and Natalie Starkey tweeting/retweeting, as set out at 47-63 GoC1 (73(n) GoC1);

(p) from 24.06.21 onwards, R's response (and/or lack of response) to the above acts and to C's grievance, as set out at 64-71 GoC1 and 6-9 GoC2, including failing to produce an outcome to C's grievance while she was still employed and failing to set a date for the grievance decision (73(o) GoC1; 13(b) GoC2);

(q) on 10.11.21, R publishing a public statement on the OU News sections of the OU website, as set out at 3-4 GoC2 (13(a) GoC2);

(r) constructively dismissing C with effect from 02.12.21 (see 'Constructive Dismissal' below) (13(c) GoC2);

(s) on or around 08.12.21, R suspending the grievance process, as set out at 11-12 GoC2 (13(d) GoC2).

3. If so, was such conduct related to the protected beliefs held by the C?

4. R admits that R is responsible for such of the alleged conduct set out at paragraph 2 as the Tribunal finds to have occurred. R does not rely upon the statutory defence under section 109(4) of the Equality Act 2010 in relation to any of the alleged conduct set out at paragraph 2.

5. It is common ground that such of the alleged conduct set out at paragraph 2 as the Tribunal finds to have occurred was unwanted by C.

6. Did such conduct as occurred have the purpose of violating C's dignity or creating an intimidating, hostile, humiliating or offensive environment for C?

7. Did such conduct as occurred have the effect of violating C's dignity or creating an intimidating, hostile, humiliating or offensive environment for C, taking into account the factors set out at section 26(4) Equality Act 2010?

8. In relation to the conduct set out at paragraphs 2(k) and 2(s) above:

   (a) did the conduct arise out of the employment relationship between C and R;
   (b) was the conduct closely connected with the employment relationship between C and R; and
   (c) would the conduct, if it occurred during the employment relationship, contravene the Equality Act 2010?

   <u>Direct discrimination because of belief: sections 13 and 39, Equality Act 2010</u>

9. Did the C receive the following treatment from the R?: the treatment listed at paragraph 2 above.

10. R admits that R is responsible for such of the alleged treatment as the Tribunal finds to have occurred. R does not rely upon the statutory defence under section 109(4) of the Equality Act 2010.

11. If so, was such treatment detrimental to the C?

12. If so, was the C treated less favourably than the way in which R treated, treats or would treat people who do not share her protected beliefs? (C relies upon a hypothetical comparator.)

13. Was any such less favourable treatment because of C’s protected beliefs?

14. In relation to the treatment set out at paragraph 2(k) and 2(s) above:

   (a) did the treatment arise out of the employment relationship between C and R;
   (b) was the treatment closely connected with the employment relationship between C and R; and

(c) would the treatment, if it occurred during the employment relationship, contravene the Equality Act 2010?

Victimisation: sections 27 & 39 Equality Act 2010

15. It is agreed C's presentation of the First Claim on 03.11.21 was a protected act within the meaning of section 27 Equality Act 2010. (22)

16. It is agreed that following C's resignation, R suspended the investigation into C's grievance (and see paragraph 2(s) above). (23)

17. Was that treatment detrimental to C? (24)

18. Was C subjected to such detriment because she had done that protected act? (25)

19. R admits that R is responsible for such of the alleged treatment as the Tribunal finds to have occurred. R does not rely upon the statutory defence under section 109(4) of the Equality Act 2010. (26)

Constructive discriminatory dismissal: section 39 Equality Act 2010

20. Did any or all of R's conduct referred to above (either individually or collectively, including by way of a 'last straw' breach) constitute repudiatory breach(es) of either or both of the following terms of her employment contract with R: (27)
    (a) the implied term of mutual trust and confidence; and/or
    (b) the implied duty to provide a suitable working environment?

21. Did C resign (on 02. 12.21 with immediate effect) in response to any such repudiatory breach(es)? (28)

Constructive unfair dismissal: section 94 & 98 Employment Rights Act 1996

22. Was C constructively dismissed with effect from 02.12.21 (see 'Constructive Dismissal')? (29)

23. What was the reason for the dismissal? Was the reason a potentially fair reason for dismissal? (30)

    (a) C asserts that the reasons for the dismissal were acts of harassment relating to gender critical belief and/or acts of direct belief discrimination, which are not potentially fair reasons for dismissal.

    (b) R asserts that the reason for dismissal (if there was a dismissal, which is denied) was the R's need to act with due consideration of its legal duties to ensure free speech and academic freedom within the law and its obligations under the Equality Act to all concerned, which was a potentially fair reason for dismissal because it was

'some other substantial reason' within the meaning of section 98 Employment Rights Act 1996.

24. If there was a potentially fair reason for dismissal, did R act reasonably in treating it as a sufficient reason for dismissing C? (31)

Wrongful dismissal

25. Was C dismissed (see 'Constructive Dismissal)? (32)

26. It is common ground that, if C was dismissed, C was dismissed without notice and without PILON. (33)

Jurisdiction- Limitation

27. In relation to the discrimination and harassment claims: (34)

(a) Have any or all of the claims been presented within the primary time limit(s) (as extended by the Early Conciliation provisions)? R avers that any complaints in relation to matters prior to 28.05.21 are out of time.

(b) Do any or all of the relevant acts/omissions constitute conduct extending over a period (within the meaning of section 123(3) Equality Act 2010) and, if so, have the relevant claims been presented within the primary time limit(s) (as extended by the Early Conciliation provisions) of the end of that period(s)?

(c) Have any or all of the claims been presented within such period as the Tribunal thinks just and equitable?

Remedy

28. Should the Tribunal make a declaration(s) and, if so, in what terms? (35)

29. Should the Tribunal make a recommendation(s) and, if so, in what terms? (36)

30. What compensation should be awarded to C, including considering the following: (37)

(a) what loss has C suffered as a result of R's wrongdoing;

(b) has C suffered physical or psychiatric injury as a result of R's wrongdoing (C asserts that R's wrongdoing has caused her to have to become ill, take time off work, and develop acute PTSD);

(c) what is the appropriate award in respect of injury to feelings;

(d) has C failed to act reasonably in mitigating her losses?

31. Should any of the awards be adjusted by up to 25% because of a failure to comply with the ACAS Code of Practice for Disciplinary and Grievance Procedures? (38)

32. What is the appropriate amount of the basic award? (39)

33. What, if any, award should the Tribunal make in respect of interest? (40)

34. What, in any, adjustments should be made in respect of 'grossing up' any award? (41)

35. Should the Tribunal make an award for aggravated damages? C relies on the fact and manner of the suspension of her grievance at paragraphs 2(s) and 23 above, the continued publication of the WELS statement on R's website at paragraph 2(k), and R's conduct of the tribunal proceedings in so far as it is averring that C's beliefs may reasonably be considered to be transphobic. (42)

Findings of Fact

20. This judgment is of some interest to members of the public and this has been reflected in the large number of members of the public who attended the hearing via online remote link. We as the Tribunal recognised our role as the arbiters of fact, designated to make its findings on the evidence heard. To this end, the Non Legal Members drew on their extensive experience in the working world to appropriately contextualise the evidence.

21. We were of course conscious that whilst there have been significant and indeed helpful cases recently on this topic, some of which we will refer to, the subject of this case concerns challenging and controversial societal issues of which there were strong views on the topic which can generate intemperate language.

22. We had in mind that the majority of the witnesses we heard from were academics. These were professionals who had been trained in the methodology of research and presentation of fact and analysis producing argument. We expected a certain basic level of rigour in presenting the evidence before the Employment Tribunal. There were some witnesses who we address below in our findings who did not meet this standard.

23. All references to numbers in square brackets only, are a reference to the page numbers in the bundle. When quoting from written witness evidence, the location of the quote will be indicated by the witness' initial followed by the @ sign next to the paragraph number in the witness statement. The Employment Tribunal makes its findings on a balance of probabilities.

Background

24. The Claimant is a Professor of Criminology who has spent 30 years in the world of academia. The Claimant started her academic career at the Open University (the "OU") whilst studying for her PhD working as an associate

lecturer at the Open University. The Claimant went on to hold tenure at Middlesex University as Lecturer, then at the University of Bath as both a Lecturer and Senior Lecturer, then at Durham University first as a Reader, then as Professor of Criminology as well as being Deputy Head of the Faculty of Social Sciences and Health. From Durham University, in 2013 the Claimant went to the University of Leicester as Professor of Criminology, whilst holding the post of Deputy Head of the Department of Criminology from 2014-2015 and then Head of Department from 2015-2016. It is from the University of Leicester, that the Claimant came to the Open University as Chair in Criminology in 2016.

25. The Claimant described obtaining the role as a Professor at the OU towards the end of her career as a "coming home" in paragraph 13 of her witness statement. The Claimant said that she wanted to see out her working days and retire there. The Claimant took a £18k pay cut to take the role at the OU. [See JP@16]. The Claimant believed on joining the OU in 2016 that she would be working in a place with people like herself, in a department with shared values and the best criminology module. In May 2019 the Claimant gave a lecture at the OU's 50th Anniversary Inaugural Lecture Series having turned down the opportunity to give inaugural lectures at both Durham and Leicester Universities. The Claimant said at the start of her inaugural lecture, *"Before I start, I want to thank the Open University for giving me this opportunity. As Ian said I turned down previous opportunities and I can't think of a better place to be giving an Inaugural Lecture than a place that I feel so at home with…"* [488]

26. The Respondent is the Open University (the "OU"). The OU is an academic institution set up initially for the purpose of distance learning. It has a reputation for having a largely mature and diverse student populace. As there are no on-site campus taught classes as such, it is the associate lecturers who carry out the majority of the teaching who have contact (remote though it is) with the students. Professors including the Claimant, create and write the syllabuses for their particular specialist field in which they teach and do not have any significant contact with the students. The particulars of the role, the Claimant applied for [240-246] says "The Chair will play a key leadership role in the planning and development of new Criminology Curriculum". [241] The Claimant was expected to *"shape and develop a strategically important area for the Faculty. This includes all aspects of curriculum design, authoring and developing teaching materials, developing multi-media resources, and enhancing teaching and learning through a Virtual Learning Environment in ways suitable for students from a wide range of backgrounds"* [241]

27. The job specification for the role of Chair of Criminology expected the holder of the role to do research including *"Contribute significantly to the Faculty's research profile through a strong record of high quality publications, alongside the effective dissemination and application of research by other routes"*. As well as carrying out supervisory duties of students, the holder of the role should also provide research leadership within Criminology, HERC, the School and Faculty. The job specification stated, "*As a senior member of staff, you would be expected to contribute fully to the work of the*

discipline, School and the Faculty, as well as providing leadership for, and support to, colleagues across both." [241]

28. When the Claimant joined the Respondent, she knew that she was coming into an environment where she already knew a number of her colleagues. The Claimant had met Professor Louise Westmarland when at Durham University. Professor Westmarland's daughter and the Claimant worked together and the Claimant frequented family parties. There was some tension between the Claimant and Professor Westmarland when the Claimant first joined the OU as both had applied for the Chair in Criminology role for which the Claimant was successful. Dr Downes recalled that they remembered the Claimant from their time at Durham University.

29. Dr Drake recalled some friction between the Claimant and Dr Downes at an early stage of the Claimant's employment at the OU. In 2016 or 2017 Dr Downes was upset at the Claimant over the appropriateness of a film being screened which had been directed by an academic who had been convicted of gender based violence. The Claimant and Dr Downes had conflicting views as Dr Downes opposed the screening and the Claimant was against having the film "cancelled".

The Claimant's gender critical beliefs

30. The Claimant believes in the immutability and importance of biological sex which comes from the fact that being female is something the Claimant has always believed and is core to who she is. The Claimant believes that biological sex is real, that it is important, that a person cannot change their biological sex, and that sex is not to be conflated with gender identity. We had no doubt, and it is our finding that the Claimant genuinely holds this belief and has done so for all of her adult life.

Guardian Newspaper Letter

31. On 3 July 2018 the government opened consultation on reform of the Gender Recognition Act 2004 ("GRA"). There were proposals to change the process for acquiring a gender recognition certificate. Part of the public debate on this reform was about gender self identification ("gender ID")/self determination. The extent and definition of what is gender ID remains controversial. Stonewall, a well known national lesbian, gay, bisexual and trans (LGBTQ+) charity, view on the proposed reforms was to ask the government to commit to removing the requirement to provide medical evidence in order to obtain a legal change of gender and to request the definition of gender reassignment (which is used in the GRA) be replaced with a self determination process of legal gender recognition [765-766]

32. On 16 October 2018 [384-387] the Guardian newspaper published a letter signed by the Claimant and 53 other academics, "Guardian Letter". The Guardian Letter raised concerns about the introduction of self identification for gender reassignment. Prior to the publication of the letter, on 14 October 2018, Dr Downes sent an email entitled "Gender Recognition Act – Public consultation" [380] to all staff in the SPC and the Head of Equality, Diversity and Inclusion Academic Policy & Governance at that time. The email asked

for involvement in putting together a collective response that was positive of trans rights, be it from a department/discipline, research cluster or other special interest group of academics. Dr Downes asked recipients of the email to get in touch if they wanted to be involved in a joint response.

33. The email contained guidance for academics responding to the GRA provided by Dr Ruth Pearce, known for campaigning for trans rights. In that guidance, Dr Ruth Pearce says, *"There has been a large backlash from people hostile to trans rights*" [381], *"Since the GRA consultation was announced, numerous single-issue anti-trans groups have emerged to oppose amendments to the GRA and argue for a wider push back against the social recognition of trans people's genders and access to sexed/gendered spaces*".[381]

"These groups have access to significant funding that trans groups do not. Tens of thousands of pounds have been spent on billboards and newspaper adverts opposing trans rights. Anti-abortion American fundamentalist groups such as 'Hands Across the Aisle' and far-right publications such as Breitbart and The Federalist have extensively promoted the work of 'feminist' anti-trans groups and shared crowdfunding pages." [381]

"These groups claim to represent feminism" [382].

"Responses from organisations are given more weight by the government" [382].

34. On 15 October 2018, the Claimant responded to Dr Downes' 14 October 2018 email [380] by sending an email to Dr Drake. The Claimant interpreted Dr Downes' email as requesting an institutional response to the public consultation and advised against it. In the email dated 15 October 2018 the Claimant stated her position that "*opposition to the GRA not being the equivalent of transphobia or that GRA is ONLY way to correct the injustices experienced by trans people"* [380]

35. The Claimant asserted that Dr Downes' email portrayed opposition to the GRA as "anti-trans" and "hostile to trans rights" and associated those who objected to self-ID with anti-abortion American fundamentalist groups and the far right. We agree with the Claimant's assertion.

36. Dr Boukli's response to Dr Downes' 14 October 2018 email was consistent with Dr Downes's email being perceived in this way. Dr Boukli's email response said *"It is really concerning to see this wider anti-trans movement"* [392].

37. We find that the Claimant's gender critical beliefs were not publicly known until the Claimant signed the open letter dated 16 October 2018.

38. However, we do not find that at this time there was hostility in the department. Dr Downes was not yet academic lead on EDI, they didn't become so until October 2019. It is not evident that everyone in the Claimant's department was aware at the time that the Claimant signed the

Guardian Letter and was therefore aware of the Claimant's gender critical beliefs.

39. Dr Williams' response to the Claimant signing the Guardian Letter was to send an email to Helen Bowes-Catton on 19 October 2018 [389] expressing deep concern about the Claimant obtaining consent to do research on children and transgenderism v Lesbian erasure, to the extent that Dr Williams stated that he would talk to the LGBT centre with a view to getting an injunction to stop the Claimant undertaking such research. [389] When cross examined about the email, Dr Williams said he was unsure whether the Claimant had ever said that she would be doing research into transgenderism in children. We find that there was no evidence that the Claimant was doing or planning to do any research into transgenderism in children and that Dr Williams was displaying an irrational fear and was hostile to the Claimant because she had gender critical beliefs.

Cancellation of the HERC/CCJS Prison Abolition in the UK conference

40. On 6 March 2019 the Claimant saw a statement from CCJS (The Centre for Crime and Justice Studies) stating that one of their partners had pulled out of the Prison Abolition in the UK conference ("the Conference") planned for 24-25 May 2019 and so it was cancelled [415-416]. The Claimant sent an email dated 7 March 2019 to Steve Tombs, David Scott, Victoria Cooper copied to Dr Drake asking for more details as to why the Conference was cancelled.[416]

41. By email dated 7 March 2019 Dr Drake wrote in an email to David Scott "*Interestingly, though, I was able to tease out and she said explicitly she does not see trans women as women. At all. She also does not accept that they are a vulnerable group. Basically, she sees them as men full stop."* [423] We find Dr Drake was by 7 March 2019 aware that the Claimant had gender critical views. We heard no evidence on whether the Claimant sees trans women as a vulnerable group and make no finding on this point because it is not necessary to do so to decide the issues in this case.

42. On 11 March 2019 the organisers within HERC (Harm and Evidence Research Collaborative) Dr Drake, David Scott and Professor Steve Tombs at the OU sent a statement ("cancellation statement") to the SPC stating that the Conference due to take place on 23-24 May 2019 [406] was cancelled [421-422]. Professor Tombs, Dr Drake and David Scott had taken the decision to cancel the Conference by 6 March 2019 [413]. The Conference had been organised with CCJS and the Director of CCJS, Richard Garside was due to speak at the Conference. The purpose of the Conference was to pay tribute to Professor Joe Sim, an eminent criminologist academic, who worked mostly from the University of Liverpool and to celebrate his work and legacy. It was to be held on the 40th anniversary of the publication of his seminal book "British Prisons". Professor Sim had had a long-term relationship with the OU, where he had worked as a research assistant and completed his doctorate. He had also acted as an external examiner for Criminology teaching at the OU. We accept that this was one of the intended purposes of the Conference.

43. The cancellation statement said that the reason for the cancellation was because *"..the event had been hijacked into being about one kind of controversy, transgender issues, prison reform, CCJS, and so on, when what we had planned was to focus upon another kind of controversy: abolishing prisons and developing alternative forms of justice."* [422] This was because the relationship with CCJS had attracted some controversy because of an article written by Richard Garside published in September 2018 where he expressed gender critical views in the context of trans gender prisoners in female prisons [363-365].

44. The cancellation statement said that a *"negative boycott*" developed into a situation where *"direct action"* (by those opposing Richard Garside's participation in the conference) would be taken. The other reason for the cancellation was cited as "*Our specific motivations for planning the event - in honour of and to acknowledge the work of Joe Sim - had been subsumed, lost, irretrievably tainted*" [422]

45. The Respondent had a code of practice on events at the OU (reviewed in March 2020 but there was no dispute that the contents of the document were applicable to the Conference and would have been the same in the version that was in force at the time). The code of practice has specific provisions to deal with cancelling conferences [2765-2778]. Point 4.7 said *"A controlled event is one where there is a risk of the event subject, speaker or audience causing offence, complaint, damage to OU property or reputation, promotion of violence, harm, or unlawful activity, including terrorism. This includes topics of extreme ideology, including for example, those motivated by religion, politics, nationalism, environmentalism or animal welfare A standard event is one where none of the above risks apply. See the Checklist for OU Events in Appendix A to help decide if an event is controlled or standard."[2766]*

46. Point 4.8 says "*The presumption is that, whenever practicable, a controlled event will be able to take place. However, the OU reserves the right to cancel the event if,* ***despite mitigating actions*** *[emphasis in the document], the conditions outlined in Section 4.1 still apply*" [2766]

47. Point 4.1. says *"So far as is reasonably practicable, the University will ensure that freedom of speech and Academic Freedom can be exercised by enabling OU events (online and face-to-face) to take place unless, even with mitigating actions:*
    a. *The OU cannot reasonably guarantee the health, safety or welfare of the individuals involved in an event (whether they are speakers, students, staff or visitors);*
    b. *The University has reasonable cause to believe that the event may lead to damage to property, violence or other unlawful activity;*
    c. *The event may lead to the encouragement of terrorism or inviting support for a proscribed terrorist organisation." [2765]*

48. In section 5 part C of the Code of Practice for Events [2767] it states under point 5.5 that the Event Organiser must carry out a risk assessment and identify mitigating actions. It deals with controlled events such as the Conference and how to assess the risk in running such events. Dr Drake

confirmed that whilst they considered the reasonableness of continuing the Conference they did not carry out a risk assessment as referred to in the Code of Practice for Events.

49. In cross examination Dr Drake agreed 4.7 of the code of practice applied to the Conference, but she said that she did not look at the 3 points under 4.1. She said they had to make a decision quickly because the longer the Conference was advertised, the more reputational risk and they wanted to cancel the Conference before extra work was put in. The reputational risk was avoiding reputational damage before there was a public perception of who would be at the Conference. One speaker had already pulled out and 2 others had said that they were considering pulling out. Dr Drake said that they could not replace the speaker who pulled out because the speakers who were asked to speak, were asked because of their relationship with Professor Sim. But Professor Sim did not know who the individual speakers would be and that was to be a surprise for Professor Sim. Professor Sim was opposed in principle to cancelling the conference although his views on the cancellation of the Conference were not sought.

50. We find that the reason why there was no risk assessment carried out was because the organisers did not want to continue with the Conference where there was controversy.

51. Dr Drake admitted in oral evidence that she did not think it was worth putting in effort into keeping the Conference going when they no longer wanted the Conference to go ahead. She admitted that she did not look for any replacement speakers and had no knowledge if David Scott and or Professor Steve Tombs looked for alternative speakers either. The intention was Dr Drake said, to rearrange the Conference at a later date when the controversy had faded. Furthermore, Dr Drake sent an email dated 8 March 2019 to David Scott on the subject of the cancellation stating, "*Interestingly, I had a chat with Gerry on the phone yesterday about the cancelling of the conference and he thought 100% we'd done the right thing. He was very concerned that The Open University would look like it wasn't inclusive of trans people. He thought the reputational risk was enormous. This was his knee jerk reaction. He thought we had no choice. Just sharing that with you for reassurance, but it's without Gerry's consent."* [431]

52. We find that Dr Drake's evidence was inconsistent, and we do not accept that the organisers had to make a decision quickly, the Conference wasn't to take place for another 2 months. We accept that there were a number of factors that the organisers took into account before cancelling the conference which had some influence on the organisers decision for example the pulling out or the threat to pull out of speakers and the reason for the conference being to honour Professor Sim. However, there was no evidence that any effort was made to find alternative speakers where there would have been time to. Professor Sim was aware that the conference was intended to be in his honour but did not know who the individual speakers would be. Professor Sim was known to the organisers to hold the view that no conference should be cancelled because of protests. It appeared to us that the organisers were concerned less with what Professor Sim would have wanted and what would have been a gift to him than reputational

damage as they did not ask him about cancelling the Conference. We find that the decision to cancel the Conference and Dr Drake's view as one of the organisers was to avoid association with Richard Garside's gender critical views and the reputational risk that the organisers of the Conference at the OU thought that the Conference would bring because Richard Garside was a speaker.

53. On 14 March 2019, the Claimant resigned from HERC via email [451-52] in protest at the cancellation of the Conference and expressed in her resignation there was "*very little transparency about the nature of the threatened protest and disruption and or who was making these threats".* She said she was resigning because of the *"lack of governance and process and accountability of the actions of a research collaborative that my name is connected with"*. [451] The Claimant's view was the Conference should not have been cancelled. The Claimant's oral evidence was that she regarded the cancellation of the Conference as an absolutely pivotal moment in everything that happened thereafter. She regarded the cancellation as an absolute breach of academic freedom. She said that colleagues at HERC were being disingenuous, and it was clear there would be a push against academics speaking out against gender self identity, that it was a moment of clarity and hostility and silence and the ability to open a discussion was absolutely not there.

HERC relationship with CCJS

54. In March 2019, Victoria Cooper a Co- director of HERC wrote to her fellow HERC members *"CCJS's position on this issue has been challenged by some of the wider trans and prison abolition community, which has resulted in some conflict regarding the prison abolition event co-organised by HERC and CCJS, 23rd-24th May (to be held at the OU) and also HERC's standing relationship with CCJS. I should also say we've received two complaints from HERC members regarding CCJS's position on these issues, which we take seriously."* [461]

55. At this time the Claimant said there were approximately 30 people in HERC, and we accept this evidence. Dr Downes and Dr Williams were members of HERC. We accept Dr Drake's oral evidence that those who expressed concern was likely a reference to Dr Downes and Dr Williams. This is supported by Dr Downes' comment on the cancellation of the Conference in the chatbox during a SPC departmental meeting on 14 March 2019 "*My position on this is that the continuing relationship between HERC/SPC/OU and CCJS without some accountability from CCJS could also lead to reputational harm esp. considering Abi and I are trying to develop a project with trans prisoners."* [449] Dr Downes' tweet on 21 March 2019 also supports this: *"IMO the conference was not cancelled due to a fictional 'trans lobby' at all but the potential reputational risk of continuing with the conference with a partner who demonstrates a pattern of disrespect towards trans issues. Punch up not down"* [5465].

56. We accept that the cancellation of the Conference was a breach of academic freedom. We do not accept that all members of HERC were disingenuous, we find that there was a vocal and active section of HERC

which included Dr Downes and Dr Williams who were against Richard Garside and his gender critical beliefs. There was hostility to gender critical beliefs from that section within HERC.

57. A full member meeting of HERC was held on 16 April 2019 at the request of several members of HERC following a decision by the HERC board. [479]. At that meeting on 16 April, the notes of the meeting recorded at point 3 *"HERC will continue with the CCJS partnership until June 2020 (official date of contract end), but it will be under review during this time and may well terminate before 2020. However not all members agreed that the contract should continue and, for reasons above, think that the contract should be suspended. It was agreed that HERC will explore the possibility of renewing the contract or commencing a new contractual partnership in 2020. This will be discussed and reviewed in full consideration of the benefits of the HERC/CCJS partnership in next HERC meetings*" [479]

58. On 27 May 2019, Professor Fribbance sent an email to Professor Steve Tombs to share with the HERC board specifically commenting on points in the notes of HERC members meeting on 16 April 2019 and in particular point 3 [507-509]. Professor Fribbance explained that he was concerned about the sentiment expressed at the meeting that the contract between HERC and CCJS should be reviewed and terminated. Professor Fribbance took the decision to put the review into the hands of Professor John Wolffe for the following year rather than review the relationship in 2019 as some members of HERC had wanted.

59. Professor Fribbance's evidence in cross examination was that there was more of a gender affirmative culture in the OU though he recognised that there were lots who were neutral or disinterested. We found Professor Fribbance to be an honest and straight forward witness. We accept Professor Fribbance's evidence on this point.

60. Professor Fribbance instructed Professor Wolffe that the disagreement with Richard Garside should not be part of the decision of HERC to continue or end the relationship with CCJS. However, when the review into the relationship between HERC and CCJS was completed in 2020 and a report was produced dated 17 April 2020 by the co directors of HERC Vicky Cooper and Steve Tombs [5538-5539], Professor Fribbance formed the view that contrary to his instructions, the disagreement with Richard Garside did play a part in the decision to terminate the relationship. There was a majority of HERC members who did not want to collaborate with CCJS. The reasons put forward for ending the relationship were that there were not many previous collaborations, and those collaborations were not judged a success and initially there had been 3 contacts within CCJS, but this had been reduced to just Richard Garside "*which narrowed possibilities and presented its own challenges"* [5538]. In cross examination, Professor Westmarland said that concern about Richard Garside was one of the 3 reasons indicated in the report. We find that the reference to *"challenges*" as one of the reasons for terminating the relationship is a reference to Richard Garside.

61. On termination of the HERC/CCJS relationship, Victoria Cooper emailed Dr Downes on 15 May 2020 in confidence to say *"the review outcome is not to continue HERC partnership with CCJS. Which we are pleased about!"* [708] Dr Downes responded by email to Victoria Cooper the same day saying *"I'll raise a glass to that. Thanks for letting me know and I'll keep it confidential. Thanks for trusting me with this."* [708].

62. Following the Claimant's resignation from HERC, the Claimant tried to engage in email correspondence with Dr Downes about research in to trans gender prisoners in September 2019. The Claimant wrote to Dr Downes on 4 September 2019 [4675]. However, the Claimant had to chase Dr Downes for a response to her email on 17 and 25 September 2019 [4676]. In an email to Dr Downes dated 10 September 2019, Victoria Cooper, (who as well as a Co-Director of HERC was at that time Co-Deputy Head of SPC) advised Dr Downes to ignore the Claimant's approaches [578]. By October 2019, Dr Downes had become Academic EDI lead in FASS. Dr Downes said the reason they did not engage with the Claimant in discussing their research was because they did not like the Claimant's strident approach in her emails and felt the email interaction was uncomfortable. Dr Downes said in oral evidence that they felt that the expression of the Claimant's gender critical beliefs made them feel palpably uncomfortable. When it was put to Dr Downes that they were frosty to the Claimant, Dr Downes said that they and the Claimant were not close and did not work on the same modules. Dr Downes did delay their response to the Claimant's emails and responded on 26 September 2019. We find that this delayed response to the Claimant was an example of the coldness that the Claimant felt from Dr Downes since March 2019.

Women's Place UK talk

63. On 15 April 2019, the Claimant gave a talk at an event called 'A Woman's Place is made to last', run by an organisation called Woman's Place UK (WPUK) on the topic of trans rights, sex based rights and the curtailing of academic freedom [466-478]. In that talk, the Claimant mentioned the fact that the CCJS conference had been cancelled and how she considered that this was a curtailing of academic freedom. The Claimant also mentions that she supports trans rights [472]. There were various reactions to the Claimant's talk by members of the Claimant's faculty and the SPC department.

64. On 22 May 2019, Dr Downes emailed Professor Westmarland a link of the Claimant's WPUK talk [466-478]. Before Professor Westmarland had watched the video she emailed Dr Downes the following morning to say *"I'll watch it later, I can hardly bear to open it"* [489]. Professor Westmarland then watched some of the video later that day. Professor Westmarland's evidence was that the Claimant had made the following comments in the talk:

> "*two months ago when a conference at the university where I work was cancelled… just to remind you I work for The Open University… a university open to ideas, people and methodology, a university that is based on social justice… a conference we were organising was about prison abolitionism, that conference was cancelled because*

> *[one of the organisers] Richard Garside, was deemed to be too dangerous and … the irony might be obvious, it was effectively shut down by activists, to make a point based on a slogan…."* [LW@31]

65. Professor Westmarland was annoyed and upset about the comments the Claimant made. However, we find that this quote is a compendium of selective quotes and are taken out of context and edited. For example the quote *a conference we were organising was about prison abolitionism," is* not contained in the talk at all, the words are in the talk, but in different places.

66. Dr Downes' reaction to the talk was to set it out in an email to Professor Westmarland on 23 May 2019 as *"I watched it yesterday and had to take a walk. I found it very upsetting. Been a while since I cried at work."* [489]

67. We considered the transcript of the talk at pages 466-478 and there is nothing in the talk that we find that would be upsetting.

Claimant's signing of Sunday Times Letter

68. On 16 June 2019, the Sunday Times newspaper published a letter signed by the Claimant and other academics [352-358]. The published letter was to register disquiet over a perceived inappropriately close relationship between the LGBTQ+ charity Stonewall and UK universities, via the Stonewall Diversity Champions programme [536].

69. On 17 June 2019, Dr Downes' sent an email to Professor Westmarland and Dr Drake [550] where they informed Professor Westmarland and Dr Drake that *"Jo has signed a letter to the editor in The Times that was published yesterday (16 June 2019) about Stonewall stifling academia ... I am, of course raising concern as this contradicts our institutional commitment to equality and diversity ..."*

70. Professor Westmarland's reply to Dr Downes raising of concerns about the Claimant signing the Sunday Times Letter was to send an email the following morning on 18 June stating "*she [meaning the Claimant] doesn't even use our proper title i.e. The Open University"* [550].

71. Dr Drake acknowledged Dr Downes' email on 18 June 2019 [554] after receiving it on 17 June 2019 [554-555]. On the morning of 19 June 2019, Dr Drake spoke to Professor Fribbance about the Claimant's signing of the letter and agreed with him that the issues were complex. However, on the same day Dr Drake sent an email to Dr Chris Williams noting "*I wanted to say I think it's problematic/scary/interesting that the 2 OU members of staff who signed the Times letter are in departments where there is a non-binary person (my dept) and a trans woman (Philosophy) and they're both in FASS. It is just so embarrassing and unsettling. Many in my team are upset…… It just feels so wrong and nothing whatsoever to do with academic freedom"* [562]. When challenged in cross examination about this statement, Dr Drake said that saying that the Claimant signing the Sunday Times Letter was wrong and nothing to do with academic freedom was just her way of saying that it was not the best way to seek common ground of those issues.

72. We don't accept Dr Drake's explanation. We find by writing *"problematic/scary/interesting";* Dr Drake regarded the Claimant's gender critical beliefs as problematic and scary and that it was interesting that the Claimant signed the Sunday Times Letter as it was not something that she thought the Claimant would have done.

73. Dr Drake said in another email to Dr Williams on 19 June 2019 on the topic of the Sunday Times Letter *"As HoD I would like to try and find a non-punitive path through all of this. And almost everyone else in the dept. (not Julia) also want a non-punitive way forward"* [561]. We find that Dr Downes had asked Dr Drake to take punitive measures against the Claimant for signing the Sunday Times Letter.

74. Following the Claimant's signing of the letter in the Sunday Times, Professor Westmarland said in oral evidence that she recognised a disharmony in the department and considered that there was a whole atmosphere of people feeling hurt.

Allegation of "Racist Uncle" comment by Professor Westmarland

75. On 30 May 2019 [504] Professor Westmarland emailed the Claimant to ask her for a "quick chat". However, the Claimant responded that she was about to go on annual leave [504]. Professor Westmarland was unable to have the meeting before the Claimant went on annual leave [503] and emailed on 30 May 2019 in response that she would get back to the Claimant. The reason Professor Westmarland put forward as to why she wanted a "quick chat" was because of what the Claimant had said in her WPUK talk.

76. Professor Westmarland was concerned by the Claimant's reference to the OU and the use of the word irony in the talk, which she took to mean the irony of the OU not being Open. The context of the use of the word irony in the talk was at "00:08:17:06-00:08:48:18 JPh of the talk. The Claimant said "*The offence was simple. His organisation, he and his organisation that he worked for supported separate provision for trans women in prisons or in the prison of women's prison estate. Now, the irony ought to be obvious to all of you in here. Reluctant academics and prison abolitionists oh sorry prison abolitionist activists effectively shut the conference down to make a point based on a slogan; trans women are women."* [470]. In cross examination, the Claimant explained that when using the word irony in that context she meant that it was ironic that the subject matter i.e. abolition of prisons resulted in the speaker being abolished as well.

77. We do not accept Professor Westmarland's reason for wanting to speak to the Claimant was about her use of the word irony in the Claimant's WPUK talk. We find that the comment was not about the irony of the OU not being open at all. We accept the Claimant's explanation that when using the word irony in that context she was saying that it was the subject matter that was ironic, when the speaker was being abolished. We find that Professor Westmarland's reference to irony in respect of the OU was just an excuse to express disapproval of the Claimant without actually saying that it was because the Claimant signed the Sunday Times Letter. Professor Westmarland believed that the Claimant's views caused divisiveness.

78. Professor Westmarland said that she wanted to talk to the Claimant about her WPUK talk because she had been asked by HERC members to speak to the Claimant. Professor Westmarland said she was motivated to speak to the Claimant because it was going to be an upsetting issue for the SPC department, and that people had told her that it was difficult and by that she meant divisive. She said she was speaking to the Claimant peer to peer and trying to keep the department friendly. She denied that the divisiveness was because of the Claimant's views. Professor Westmarland also said that she thought it was better to tell the Claimant that people had resentment and it was a friendly and helpful decision. However, she did not mention this reason in her witness statement, but did mention that on 23 May 2019,14:51, she sent an email to Dr Drake, David Scott & Victoria Cooper, where she wrote "Hi *everyone, sorry to rake stuff up again. A bit concerned about what Jo is saying early on in this video about the prison abolitionist conference being cancelled and the 'irony' that it was going to be held at the OU. I haven't watched it all yet but I don't feel very comfortable as this wasn't the whole truth of the situation -i.e. that the original event had been about Jo Sim -and she is inferring that the OU blocks freedom of speech when claiming to be 'open'. She's obviously entitled to her opinion about the trans debate, but needs to tell the whole story if she's going to make accusations about the OU's motivations to cancel a conference. I'm happy to tackle her about it in person, and I know people are upset about the whole thing, and I don't want to open up wounds again, but I can't really ignore this."* [498]

79. We find that the divisiveness in the department referred to by Professor Westmarland was because of the Claimant's gender critical beliefs and it was these beliefs that Professor Westmarland wanted to talk to the Claimant about. There was no evidence that Professor Westmarland told the Claimant that she was speaking to the Claimant peer to peer rather than as deputy head of SPC.

80. The Claimant told us that there were approximately 30 people in HERC. But when we looked at the emails provided in the bundle in or around May 2019, there were no emails from HERC members that predated Professor Westmarland's 23 May 2019 email indicating that she was going to speak to the Claimant. We find the 23 May 2019 email indicates that it is Professor Westmarland who wants to speak to the Claimant about her WPUK talk not the members of HERC who the email was sent to. We find that Professor Westmarland's oral evidence on this point is inconsistent with her written witness statement [LW@33] and the aforementioned email in the bundle. We find that Professor Westmarland was motivated to speak to the Claimant not because someone told her to, but because she didn't like the Claimant speaking about her gender critical views.

81. Following Professor Westmarland's email at 14:51 on 23 May 2019, Dr Drake emailed Steve Tombs, who was at that time Co-Director of HERC and Professor Westmarland at 16:58 on 23 May 2019. Dr Drake proposed setting up a meeting to discuss the Claimant's WPUK talk [495]. The outcome of that meeting was that Professor Westmarland was to speak to the Claimant.

82. The meeting to have a "quick chat" did not take place until 23 October 2019 because the Claimant was on annual leave and then from 12 June- 27 August 2019 on sick leave [4333]. The meeting took place in person in Professor Westmarland's office in the morning. The meeting was scheduled to take place at 9am but the Claimant was delayed a few minutes. At the meeting, the Claimant alleged that Professor Westmarland likened her to a racist uncle using words such as "*having me in the Department was like having a racist uncle at the Christmas dinner table.*" The Claimant said in her evidence that when she heard this she became extremely upset started crying and told Professor Westmarland that she had been ostracised. She said that when she started crying, Professor Westmarland's response was to say that she could put the Claimant in touch with the OU's counselling service. [See JP@167].

83. The Claimant sent a text on 23 October 2019 at 16:51 to a friend that said, *"The bit I objected to was when I was likened to the racist uncle in the family that everyone just has to tolerate."* [623]. Following that text the Claimant sent an email to Professor Westmarland which did not mention the comment likening her to a racist uncle [620]. The Claimant's evidence was at that point she was trying to smooth things over and if she had mentioned the comment there may have been no way back in terms of repairing the professional relationship [see JP@ 172].

84. Professor Westmarland produced a note of the meeting the following day which also did not mention the comment [624]. But the note does say *"I explained we had colleagues in the past (I mentioned Jane Donoghue) with diametrically opposed opinions to most of the Department, but that we accommodated her views, although, obviously we challenged them."* Professor Westmarland denied making the comment in her oral evidence, she classified it as an Americanism and had not heard of this expression and definitely did not say it. Nonetheless Professor Westmarland could not explain why the Claimant would have sent a text about the comment later the same day as the meeting. Furthermore she did not completely deny it when asked about it in her written response to the Claimant's grievance [2619]. Professor Westmarland said in that response "*if Jo had thought that I had said such words and had come to me afterwards I'd have been happy to discuss it."* There was no reference to the alleged comment in the Claimant's email to Professor Westmarland sent after the meeting on 23 October 2019 [620]. In the email the Claimant asked for clarification of *"being likened to Jane Donoghue."*

85. We considered whether the Claimant was interpreting the comment about Jane Donoghue and translating it into being likened to a racist uncle by whoever she sent the text to. However, we are persuaded by the contemporaneous nature of the text [623] and we accept the Claimant's explanation of why she did not mention it to Professor Westmarland at the time or in her email. We also consider that it was not mutually exclusive for Professor Westmarland to have likened the Claimant to Jane Donoghue and a racist uncle. We find that Professor Westmarland said to the Claimant on 23 October 2020 at the meeting at approximately 09:00-10:15 that "having you in the department was like having a racist uncle at the Christmas dinner table." Professor Westmarland was effectively telling the

Claimant off for expressing her gender critical beliefs. We accept that the Claimant was extremely upset at this comment and Professor Westmarland knew this as she saw the Claimant crying and recommended counselling.

Allegation that Professor Westmarland admonished the Claimant for swearing at the departmental meeting on 12 December 2019

86. Before the start of a departmental meeting held on 12 December 2019; the Claimant says that Professor Westmarland publicly admonished her for swearing. In the minutes of a departmental meeting held on 11 October 2018 [4621-4625], it is noted that Dr Drake told the attendees of which the Claimant was one, "…*to remind the department of the language they use outside of the SPC department meetings. As a department we can tolerate a certain type of language, but it's not acceptable in meetings outside the SPC so we need to be mindful of our conduct in other meetings as to how we may come across to others."* [4622-4623]. Professor Westmarland's evidence was that it was her recollection that there had previously been a message from the senior management team in the School about swearing in front of support staff.

87. Professor Westmarland's evidence on this point was somewhat inconsistent. In her written evidence [LW@69] she said that she did not recall telling the Claimant off. But in her oral evidence Professor Westmarland said she could not remember telling the Claimant off, but she may have quietly reminded someone. This version is consistent with what Professor Westmarland said in interview about the Claimant's grievance [5138]. Dr Drake was also at the meeting and in her written evidence she said that she did not recall the incident at all [DD@90]. The Claimant admitted in evidence that she did have a potty mouth and did swear a lot [JP@177]. The Claimant said that she witnessed other colleagues swear in front of Professor Westmarland. However, the Claimant did not say that she witnessed other colleagues swear in other departmental meetings. We find that Professor Westmarland did tell the Claimant off when there were other members of the department there. We also recognise that the 11 October 2018 meeting minutes do not say that Dr Drake said swearing is prohibited in departmental meetings. But we find that Professor Westmarland told the Claimant off because she was swearing and thought that the Claimant should not swear in departmental meetings. We find that there were no incidents of other academics swearing in front of Professor Westmarland in departmental meetings.

Discussion in the Departmental Meeting on 12 December 2019

88. On 5 December 2019, the Claimant was due to give a talk on the topic of trans rights, imprisonment and the criminal justice system at the University of Essex. However, the talk was cancelled because students threatened to barricade the room where the talk was to be held in protest. The Claimant was informed that the University of Essex had decided to cancel the talk because they had learned of plans by students to block the entrance to the seminar room. The Claimant was told initially that day or the next day that the talk would be rescheduled. However, the Claimant was later told on 11

December 2019 that she would not be invited back to speak at the University of Essex.

89. The University of Essex commissioned a review into the cancellation of the Claimant's talk as well as another event that was cancelled where Professor Rosa Freedman, a Professor of Law at the University of Reading with gender critical views was due to contribute to a panel discussion. The review was to understand the aforementioned events and their impact on the University community. Akua Reindorf KC (as she is now) completed the review in March 2020. The report was published 17 May 2021. The Claimant was sent a redacted version of the report which she shared with her department on 19 May 2021. The Reindorf report as it has come to be known recommended that the Claimant be given an apology, and that the Claimant should be invited back to give a seminar at the University of Essex centre for criminology. [4559]

90. In the departmental meeting on 12 December 2019, the Claimant told her colleagues about being cancelled by the University of Essex following protests and accusations that the Claimant was transphobic. Following the Claimant's report of her cancellation, a colleague asked the Claimant the question of whether the Claimant had been cancelled by the County of Essex or the University. Other than those facts, what transpired at the meeting was hotly contested by the parties.

91. The Claimant said immediately after mentioning her cancellation, there was silence. The Claimant said the silence was cavernous and that after making her comments about being cancelled, Dr Drake turned to Dr Downes and asked them about their research and when Dr Downes told the department that they were close to completing their grant application, Dr Downes was praised in the meeting for this. However, when the Claimant spoke about her involvement in having won a $1 Million (Canadian dollars) grant to do research on trans prisoners, the Claimant was not commended by anyone in the meeting. There are minutes of the 12 December departmental meeting [4790-4794]. Pages 4793- 4794 are where the discussion of research updates is recorded. However, the minutes do not record that either Dr Downes spoke about their grant application immediately after the Claimant talked about her grant or that Dr Downes was praised. The notes record someone else speaking about their research after the Claimant and then after that person, Dr Downes is recorded as speaking about their research [4794]. Professor Westmarland gave evidence [see LW@70] that she explained in her interview in respect of the Claimant's grievance that she did not think that the minutes reflected what was said at the departmental meeting [2379].

92. Dr Drake's oral evidence was she did not recall silence and that other people spoke quickly after the Claimant's comments. In cross examination, Dr Drake said that she believed some member said it was awful, but it was not captured in the minutes. Professor Westmarland said in oral evidence that there probably was silence as she said we were wondering what would come next which was consistent with her written evidence. Professor Westmarland also said that she did not know that cancellation was such a big deal and did not realise the significance of it for the Claimant and that

seminars get cancelled all the time. Professor Westmarland said that the research update section of the meeting *"..tends to be a 'good news' update and people have the opportunity to share what they want to share with the group"* [See LW@72] but that it was not usual to give a round of applause in this section.

93. Dr Downes stated in their written evidence [see LD@65] that if there was a degree of silence in response to the Claimant's update this was because news like this is not really shared in a celebratory space and people were unsure how to react.

94. Dr Drake in her witness statement did not accept that Dr Downes had been praised for writing a grant application in relation to trans prisoners. But in cross examination she said that she could not recall. Professor Westmarland accepted in cross examination that it was possible that Dr Downes was congratulated. Dr Downes said she could not remember whether they had been congratulated but admitted that people were supportive.

95. Dr Drake's evidence was that the Claimant did make positive contributions and positive contributions were made about her in meetings after 12 December 2019 and that the Claimant was commended in her absence. Dr Drake does admit that in the positive contributions that she refers to, none of them were about the Claimant's research. [See DD@60].

96. We do not accept Professor Westmarland's explanation that she did not realise the significance of the Claimant being cancelled, we find that Professor Westmarland was trying to minimise the significance of being cancelled in academia which is known and was known in 2019 to be a big deal. Neither Dr Downes, Dr Drake nor Professor Westmarland provided an explanation of why they didn't praise the Claimant for her success of winning a large grant. We find $1m is a large grant to win and in academia, would be regarded as a success. We find that as such, the Claimant would have expected praise from her colleagues in a space that was referred to by Dr Downes as a celebratory space particularly when someone else was praised for their grant. We do not find it credible that Professor Westmarland did not recognise the difference between a seminar being cancelled and an academic being cancelled.

97. We looked at the notes that were taken at the meeting and there is no specific section dealing with members of the department speaking about their personal experiences, and there is no record of silence. However, we would not expect silence to be recorded in the notes of a meeting. The notes also do not record the comment about whether the Claimant was cancelled by the county or university. We noted that the minutes were not entirely accurate not least because it said that the Claimant gave her apologies for her absence [4790] but it was accepted by both parties that she was at the meeting. In light of this, we accept Professor Westmarland's evidence on the accuracy of the minutes and find that the minutes do not record everything that was said in the meeting and are not entirely accurate. We do not consider that the fact that Dr Downes' congratulations are not in the minutes means it was not said. Whilst the notes record that Dr Drake did

not ask Dr Downes about their research immediately after the Claimant gave her comments, we do not consider that the fact that this part of the Claimant's version of events is inconsistent with the minutes mean that Dr Drake did not turn to Dr Downes shortly after the Claimant spoke about her research grant as the rest of the Claimant's version of the meeting was consistent.

98. We considered that the 3 Respondent witnesses gave tentative evidence, giving us the impression that they did not want to admit that Dr Downes had been praised and the Claimant had not. The Claimant's evidence on the other hand was clear. We prefer the Claimant's evidence on this point and find that Dr Downes was congratulated on their research grant application about trans prisoners.

99. We find that by this time Dr Downes' influence in the SPC department in EDI issues was significant. They were Academic Lead for EDI from October 2019 and had a close relationship with the head of department, Dr Drake at that time. The department looked to Dr Downes as the lead for EDI for a steer as to how they were to treat gender issues. Even though they were junior to Dr Drake, they had an influence on Dr Drake, and they would be someone who Dr Drake would listen to. Dr Downes admitted in evidence that they considered that gender critical beliefs were inherently potentially transphobic. We find that Dr Downes believed that gender critical beliefs were harmful to trans and non binary people and considered such beliefs transphobic. We find that the use of the term transphobic in respect of gender critical views is being used as a term of insult by Dr Downes. We find that throughout this case where the term is referenced, that is how it is being used.

100. At the meeting, there were 15 members of SPC present, some of whom attended via Skype [4690]. We were not told of the attendees' position on gender critical beliefs. However, we do find that Dr Downes, Professor Westmarland and Dr Drake were supportive and or sympathetic to gender identity views rather than gender critical views.

101. We find gender identity views in this context to mean those who did not consider sex as immutable and consider that one version of that view is whether trans women are women.[2] During the hearing the use of the phrase gender identity views and gender affirmative were used interchangeably, and we understood that they meant essentially the same thing. We find the attendees of the meeting were well aware that the Claimant's research was in respect of gender critical beliefs and there was a majority of gender affirmative supporters in SPC. But those who were neutral in the department would be more likely to take their steer from Dr Drake as Head of Department and or Professor Westmarland as deputy head who were both on the gender affirmative side.

102. We find that the other members of the department in attendance at the meeting would have looked to Dr Downes, Professor Westmarland and Dr

[2] The absence of the mention of whether trans men are men is not to suggest this is not part of gender critical beliefs and or is supported by gender identity beliefs. But it was not raised as an issue in this case and so unnecessary to refer to it.

Drake to follow their reaction to the Claimant's news of her research grant and her cancellation at the University of Essex. Dr Downes, Professor Westmarland and Dr Drake were initially silent and did not commend the Claimant on her research and so the rest of the attendees of the meeting followed them. We find that Dr Drake and Professor Westmarland's silence was an example of their cooling towards the Claimant.

Allegation of telephone conversation in December 2019/January 2020 where Dr Drake instructs the Claimant not to speak to the department about her research, treatment by Essex University or accusation that the Claimant was a transphobe.

103. On 5 December 2019, Dr Drake received an email from a Professor Reece Walters who was based at Deakin University in Australia, but was at that time visiting the UK. In that email, Professor Walters obliquely references the Claimant's cancellation by the University of Essex [631-632]. Dr Drake responds to Professor Walter's mention of the Claimant's cancellation by expressing a sense of frustration with the Claimant saying *"…what she keeps failing to see the impact the decisions she makes has on her colleagues. Especially when this isn't really her research area."* [631]

104. On 13 December 2019, Dr Drake had a conversation with the Claimant on the telephone. The purpose and content of that conversation is contested. The Claimant says Dr Drake told her not to speak about her research, treatment by Essex University or the accusation that she was a transphobe because it was too challenging for members of the department. The Claimant's evidence was this made her angry and upset because her colleagues were able to chat freely about their research and political initiatives or developments that interested them, while she was told that she couldn't speak about her current research on trans prisoner placement. In oral evidence the Claimant said that she was forbidden to speak about her experiences concerning the University of Essex. Dr Drake denied telling the Claimant this. Dr Drake said that she had called the Claimant on 13 December 2019 for a routine welfare call and the Claimant expressed extreme disappointment to her in what she called a lack of solidarity with her at the departmental meeting. Dr Drake's evidence was that the Claimant wanted to debate her experiences in the meeting and that the departmental meeting was not an appropriate arena to have a debate about the Claimant's cancellation.

105. By email dated 13 December 2019 to Dr Downes, Dr Drake wrote *"Hi Julia, Just wanted to say thank you for the support yesterday. Sorry for so spontaneously descending upon you and off-loading. I hope it didn't feel too burdensome or like I was asking you to 'carry' anything. I just thought you would really understand, especially since we'd talked about such issues before. You actually really helped me, I was able to regain balance again soon after we spoke. But, as I say, I hope you didn't feel burdened yourself after. It is my lot to carry, not yours!"* [642]

106. When Dr Drake was asked in cross examination what she had spoken to Dr Downes about the day before and what she needed to unburden /off load about [642-643], she said that what the Claimant talked about in the 12

December meeting wasn't anything that she would want to unload about. She said she could not remember what she spoke to Dr Downes about after the departmental meeting on 12 December 2019 that she would want to off load about. In her witness statement, Dr Drake said that she spoke to Dr Downes after the departmental meeting on 12 December 2019 to try help her better understand why the general 'debate' between gender critical and gender affirmative positions was so intractable. [See DD@100].

107. Dr Drake said in her written evidence that she believed that she said to the Claimant that some members of the department might find hearing about research that begins from a gender critical premise, 'challenging' [DD@103]. Dr Drake said, "*I thought it was unfortunate that she did not let me know this in advance of the SPC meeting, since had she done so, I would have suggested that after the business part of the meeting was concluded she could have had some space with colleagues who wanted to discuss the situation*". [DD@100]. The space that Dr Drake referred to was called a "thinking about session". In oral evidence, Dr Drake was unable to explain why the "thinking about session" was an appropriate arena for the Claimant to discuss the award of her research grant and her being cancelled. Dr Drake said that the thinking about session did take place after the meeting. Dr Boukli said that it was a space where colleagues could present to one another about their research. [See AB@73]. We find, the thinking about session was an arena to discuss research and ideas, but it would not be appropriate for the Claimant to talk about the award of her research grant and her being cancelled in such an arena.

108. We do not find Dr Drake's version of events credible about the telephone conversation. We find it unlikely that Dr Drake called the Claimant for a welfare call. We find that the Claimant did not say she wanted to debate her research or experience at Essex but that she wanted to speak about them. We find that Dr Drake had been upset by the Claimant talking about her gender critical research and cancellation at the University of Essex and being called a transphobe because of gender critical views in the departmental meeting the day before and that is why Dr Drake went to speak to Dr Downes to unburden her frustration. This is what Dr Drake is talking about in the email dated 13 December 2019 [642-643]. We were persuaded by the proximity of the conversation between Dr Drake and Dr Downes to the meeting the day before and the early morning email from Dr Drake the following day, which must have been before she had the telephone conversation with the Claimant on 13 December 2019. Furthermore when asked in cross examination what else happened on 12 December 2019, Dr Downes was unable to provide another example of what else would have made Dr Drake want to off load but accepted that what Dr Drake wanted to talk about was how difficult she was finding it, and about how to bring disagreement from both sides together.

109. We do find that there was a telephone conversation that took place on 13 December 2019 in which Dr Drake did say to the Claimant that she was not permitted to speak to the department about her research, treatment by Essex University or the accusation that the Claimant was a transphobe.

LGBT+ History month FASS email

110. On 9 February 2021, at 9:56 [783], Dr Downes as EDI lead for FASS sent an email publicising week two of LGBT+ History Month to FASS Academics on the group list "LGBT+ History Month Email". Dr Downes was not the author of the email, the information contained in the email was provided by the LGBT+ Staff Network. The email explained that week two of LGBT+ History Month was focussing on trans and gender diverse inclusion. There were references to a new OU Trans Staff Network, a pronouns campaign due to be launched on OU Life on 15 February 2021, "*which aimed to explain how adding pronouns to email signatures could help colleagues across the OU "feel included and supported"* and a reference to *"The impact of pandemic has been exacerbated for the trans community by a series of blows during 2020. One of which, the Bel vs Tavistock court ruling, already devastating to trans youth, may have far reaching consequences even outside the community"*.

111. Having received the LGBT+ History Month email, the Claimant emailed Professor Fribbance at 15:27 on 9 February 2021 explaining that there were a few people who were *"quite, quite upset*" by the LGBT+ History Month Email [807]. In her email, the Claimant referred to receiving private messages about various aspects of the email. Professor Fribbance accepted that the LGBT newsletter in February 2021 was sent to all the academics in the FASS faculty [783-785] did contain matters of current controversy i.e. gender affirmative views.

112. Prior to sending the email to Professor Fribbance at 15:27, the Claimant was part of a WhatsApp chat which included Laura McGrath and Jon Pike and an unnamed person between 13:46- 15:27 on 9 February 2021. The WhatsApps between the 3 complain about the Pronoun drive and the Bell v Tavistock matter which they agree the report in the newsletter is inaccurate and the Claimant suggests that they should make a complaint about the inaccuracies and at 13:51 *"representations to Ian [Fribbance]? Might be fun…".* [5373] The Claimant said that when she wrote this it was a bitter dose of irony. We accept the Claimant's evidence on this point. We found the Claimant to be an honest and impressive witness who was measured in her tone and responses. It was clear to us that by that time the Claimant was isolated so it would not be fun to discuss the issue. She was being ironic.

113. The Claimant wrote *"I'm transpeaking or having a stroke…Everything about how this network is operating is wrong. Everything. I think what is boiling my piss (pardon my language) is that as a lesbian, I have been written out of history and…of acceptable politics. Grrrrr…Yup. Mind broke."* The Claimant went on to send an email on 10 February 2021 to the LGBT Chair complaining about the lack of lesbian visibility in LGBT+ History Month [808]. There were further WhatsApps that discussed making further complaints to Professor Fribbance and Professor Wilson and when Jessica Evans joined the group on 10 February 2021, she suggested also contacting HR and the Vice- Chancellor about the alleged Bell v Tavistock inaccuracies. In response the Claimant wrote *"I like the choreography here"* [5379]. Jon Pike also wrote on at 22:06 "*We'll be accused of being an*

'organised campaign' tomorrow, which we should ignore, though it's half true. I reckon (privately) hell, yeah, of course we are" [5387]

114. We find that the Claimant was not backward in raising complaints about issues that she considered important. We find that the Claimant was particularly annoyed about the LGBT+ History Month Email particularly the lack of reference to lesbians rather than it appears anything else in the LGBT+ History Month Email. The Claimant by this point felt isolated in her department and she sought support from those that agreed with her position regarding gender critical views. Whilst we note that, at that stage Jon Pike considered them an organised campaign, the Claimant neither responds nor agrees with Jon Pike. We find that whatever Jon Pike's view, the Claimant was not a campaigner of gender critical beliefs but was more focused on what issues that were personal to her as they arose.

Savage Minds Podcast [1005-1049]

115. On 21 May 2021, the Claimant was interviewed on a podcast called Savage Minds by the presenter Julian Vigo. We listened to the entirety of the podcast which was approximately 1 hour 12 minutes and 56 seconds. On the podcast, the Claimant is asked about and talks about a wide range of issues, but predominately the podcast is about the Claimant's experience as a lesbian in London, her cancellation by the University of Essex and the subsequent Reindorf report. Additionally, the Claimant speaks about Stonewall's representation of lesbians over the years compared to the current rainbow community of Stonewall. In explaining these issues, we find that the Claimant speaks about her gender critical beliefs on the podcast.

7 June 2021 FASS Newsletter [906-913]

116. In his role as LGBT+ champion, Professor Fribbance included the podcast as a news item in the FASS Newsletter published on 7 June 2021 [911]. Before doing so, he invited comments from the LGBT+ Network co-chairs and Professor Wilson. Notwithstanding, they raised no objections [1102-1103].

117. Following the publication of the FASS newsletter; on 7 June 2021, Dr Boukli wrote an email complaining about the Savage Minds podcast in the newsletter to Dr Drake [1132]. Dr Boukli's complaint was that the following statements in the podcast were prejudicial to trans and non binary people – "*Stonewall brought in a no discussion policy around trans rights, I think that was the biggest single tactical folly of any campaign group ever"* [1039]*, what is the T - hahahaha what that has to do with us . . . Diva is now trans-central - haha ... I had to stop going to certain events because they became a hotbed of queerness . . . and ... men in dresses",* [1041] *"and the Claimant's response of 'I am totally with you about this ...' both podcasters laugh about trans visibility, and they agree that 'for two millennia' there were only two sexes",* [1043] *"you tell a woman who has been a victim of rape by a man that bodies don't matter"* [1044].

118. Dr Downes complained about the "discriminatory content "[1155] of the Savage Minds podcast in an email to Professor Wilson dated 8 June 2021

[1155-1156]. In an email to Shaun Daly and Professor Fribbance, Dr Downes wrote that before including the Savage Minds podcast in the newsletter it should have been given *"some more careful consideration of how media items on this 'debate' are communicated"* [4709].

Dr Drake's "Charles Murray" comment

119. The Claimant called Dr Drake on 11 June 2021 on the telephone because the Forstater decision had just been published and the Claimant felt that the decision confirmed that her gender critical beliefs were protected in law and so she wanted to discuss the treatment that she believed she had been subjected to by the SPC department because of her gender critical beliefs. In the call when talking about how people in the Department saw the Claimant and her views, Dr Drake said the Claimant was like Charles Murray, a highly controversial Sociologist who has argued that racial inequality is partly attributable to biological differences between the races. Dr Drake explained the reason she compared the Claimant to Charles Murray was because it was an attempt to try to invite the Claimant into a thought experiment of how his colleagues might have felt about his research, and to stimulate discussion and alternative thought. Dr Drake said that she was not seeking to draw an analogy between the views of Charles Murray and the Claimant's gender critical beliefs. Dr Drake said that she gave an immediate *"unequivocal and heartfelt apology for what was a clumsy analogy. I genuinely and honestly thought at the time that Jo had fully accepted this apology"* [DD@140]. The Claimant accepted that Dr Drake did apologise, but only after the Claimant pushed back saying that Dr Drake was equating the Claimant's views with racism [JP@188]. The Claimant said that Dr Drake said it was a poor attempt to express what she was trying to say. [JP@188]. The Claimant said in cross examination she found the comment unbelievably upsetting.

120. After the call, the Claimant sent an email setting out what she believed had been discussed in the call. [1170-1171]. The Claimant did not mention the Charles Murray comment in the email. What the Claimant does record is Dr Drake's comment that the position was an 'either/or' one. That is to say either the workplace would be toxic for people who judged the Claimant as transphobic/ unsafe, or it would be toxic for her because she was not welcome to talk about her research and experiences. The Claimant believed that the position that was taken was she had been excluded [1171]. Dr Drake forwarded the Claimant's email to Tasha Read, a senior hub advisor in HR. We note that Dr Drake does not contest the content of the Claimant's email to Ms Read. We find that the content of the Claimant's email reflected the truth of the situation in the Claimant's department over the previous 2 years.

121. We find that the Claimant did not accept the apology. The Claimant complained about it in her grievance dated 24 June 2021 [1638] only 13 days later. The Claimant said in cross examination she found the comment unbelievably upsetting and we believe her. We find that Dr Drake's apology was not unequivocal and heartfelt as she only apologised when the Claimant pushed back, and she then went on to say that the Claimant was the cause of toxicity in the department.

Launch of the OU Gender Critical Research Network

122. On 16 June 2021, the OU Gender Critical Research Network ('GCRN') was launched with a YouTube podcast [4158] which was a discussion with 3 of the founding members (the Claimant, Dr Jon Pike and Laura McGrath) and Rosa Freeman about the network. There was also a link to the Savage Minds podcast on the GCRN website. A Twitter (as it was known then) account for the 'OUGCRN' was set up so that the launch could be announced. The GCRN podcast was linked to a tweet [1201] and on the first page of the network's website [4108]. The Savage Minds podcast was not on the first page of the GCRN website, it was some pages later [4121].

123. The OU logo was used on the 'OUGCRN' Twitter profile. The Claimant and her co convenor Dr Jon Pike's photos were on the opening page of the 'OUGCRN' twitter profile. The Claimant did not know that to obtain permission to use the OU logo there was a process to undertake. Initially the OU logo was removed but eventually having undergone the process, permission was granted, and the OU logo was re applied to the 'OUGCRN' Twitter page.

124. We were not provided with the launch podcast and did not see it. Only Professor Shakesheff in his oral evidence mentioned watching the GCRN podcast. He did not say that the launch podcast contained anything controversial or offensive.

125. The history to the launch of the GCRN is partially reflected in chatter on the group WhatsApp of gender critical academics at the OU. The start of a network of gender critical people at the OU on 11 February 2021 [5378] was an idea by Jon Pike. The Claimant was supportive of the idea, writing *"now is the time Jon, lets do this!"* [5395]. However, at that point it was agreed to just mull over the idea. On 1 March 2021 there was a proposal to set up the first gender critical network meeting [5407]. By 4 March 2021, the Claimant had asked Professor Sarah Earle if she could host the gender critical network on the Health and Wellbeing Strategic Research Area ('HWSRA') [871]. Professor Earle's evidence was that she did not think that the Claimant knew that what happened, would happen on the launch and she certainly didn't. We found Professor Earle's evidence on this point to be clear and unequivocal and we found Professor Earle to be a truthful witness. We accept Professor Earle's evidence on this point.

126. By 24 May 2021, Jon Pike explained in his WhatsApp chat that the network had been set up on the Health & Wellbeing website hosted by the Knowledge Media institute (KMi) [5424]. In March 2021, the Claimant had asked other academics outside the OU about setting up the GCRN and specifically said that it was not so much an activist group but a proper research group that promotes research into sex, gender and sexualities from a gender critical perspective [5552]. The Claimant wrote in the WhatsApp *group "So, back to being dry and dusty academics rather than activists re OU. The long prize is the centre and the more credibility we give to us being 'serious academics' the more we make 'them' appear as extreme. After all - I am serious when I say I just want to discuss and research....."* [5426]. On 4 May 2021, when Jon Pike emailed the Claimant

about formal positions in the GCRN, the Claimant wrote in response *"We all need to chat about this. I am a firm believer that we need to be above reproach, so we probably need to talk about ToRs etc (just outline stuff)."* [948] In May 2021, the GCRN was looking at a launch in October 2021 [949], and on 4 June 2021, the Claimant emailed her fellow GCRN colleagues to say that she would like to "*kick start*" the GCRN in the next couple of weeks [1165]. However, when the EAT decision in Forstater was published on 10 June 2021, the Claimant considered that it gave her protection in respect of her gender critical beliefs and so it was agreed to accelerate the launch to June 2021.

127. A couple of weeks before 6 June 2021, the Claimant spoke to Professor Fribbance about the setting up of a network for academics researching from a gender critical perspective [1127]. On 4 June 2021, the Claimant had a meeting with Professor Wilson where she said that she felt that there was a culture of fear in the University for those with gender critical perspectives, as opposition from colleagues to their views was making them afraid to speak about their views. The Claimant told Professor Wilson that she was setting up a gender critical research network and apologised to Professor Wilson in advance for what would happen. [1121] Professor Wilson admitted in cross examination she did not appreciate there would be such a "furore" in response to the GCRN when she was told by the Claimant about the GCRN.

128. The Claimant acknowledged that she knew that there would be pushback from colleagues at the OU when she launched the GCRN but she *"… thought it would be a continuation of the type of treatment I had already received: complaints behind our backs, cold shoulders, whispering campaigns, silence in Departmental meetings. I thought that there would be written complaints to the Dean in the same way as when Jon Pike and I signed the letter to the Times. I was steeled for those internal complaints….The way many of my colleagues actually reacted when we launched was never on my radar."* [See JP@230]. When put to her in cross examination, the Claimant didn't agree that the setting up of the GCRN was a controversial decision. She did not think that colleagues would sign public letters and she didn't expect it to get so personal, which was a shock to her. The personal nature of the attacks was in respect of the Savage Minds podcast of which only the Claimant in the GCRN was part of.

129. The Claimant's evidence is consistent with Professor Earle's evidence and Professor Wilson's assessment of what the Claimant told her about setting up the GCRN. We accept the Claimant's evidence that she was genuinely shocked at the amount and the nature of push back she received in response to the setting up of the GCRN.

130. Following the Forstater decision on 12 June 2021, Dr Downes tweeted a quote, from a tweet, from Sally Hines, Professor of Gender Studies and Sociology at Sheffield University, in which Professor Hines wrote, "*Anyone celebrating the Forstater ruling is basically (and mistakenly) celebrating the right to be a bigot. These things just show people as they really are."* Above the embedded Professor Hines' tweet, Dr Downes wrote, *"Well done you have protected your rights to say dehumanising things. Such an important*

contribution to what us diversity workers are trying to do in creating a non-hostile workplace and culture that respects difference [eye-rolling emoji].” [1650]

131. We find that neither Dr Downes’ tweet nor their retweet of Professor Hines tweet was directed at the Claimant. The retweet was directed at the world at large, whilst it is probable that Dr Downes would have guessed that the Claimant would have celebrated the Forstater appellate ruling, we were not presented with any evidence that Dr Downes knew that the Claimant did.

132. Professor Fribbance and Professor Earle both agreed in oral evidence that there was no process for setting up a specialist research area (‘SRA’) like the GCRN, and both said that there was no requirement for groups of researchers to consult with others. Professor Fribbance said that you might consult to avoid stepping on other people’s toes. The Claimant didn’t consult with anyone else other than those already mentioned before the launch of the GCRN. We accept Professor Fribbance and Professor Earle’s evidence on these matters.

133. The Claimant’s evidence was the reason she set up the GCRN was because no other university in the country had created such a network. It was an opportunity to bring together some of the best critical thinkers in this area to ask questions about how and why does sex matter in today’s social policies and social life, especially in relation to new social norms including transgender individuals. For the Claimant getting academics together as a research network to discuss these questions meant they could become more than the sum of their individual parts. [See JP@206]

134. The Claimant considered that she was doing her job both as a senior Professor and as Strategic Co-Chair of the criminology module she was responsible for as research networks are necessary for a good research environment, and new, active research networks are a sign of a healthy and vibrant research environment. [See JP@207]

135. The Claimant believes it was important to create and protect a space for gender critical research because the theoretical perspectives that sex is a social construct which is mutable is sometimes presented as truth and the Claimant believes that others should be free to challenge that perspective without censure.

136. The Claimant’s reasons for setting up the GCRN were consistent with her WhatsApp chat. There was no cogent evidence to suggest another contrary reason why the Claimant set up the GCRN. We accept that these were the Claimant’s reasons for setting up the GCRN.

137. Dr Boukli [AB@46], Dr Downes [LD@ 98-99], Professor Keogh [PK@17-18], Dr Bowes-Catton [HBC@15 &17], and Dr Nicola Snarey [NS@ 8-9] all criticised the manner of the launch of the GCRN on the basis that there had not been consultation in advance with appropriate people and because the use of the words “gender critical” in the name of the network was provocative. Dr Chris Williams [CW@22] and Shaun Daly [SD@21] only objected to lack of

consultation of the launch but not the name. The Claimant was accused of not being collegiate in failing to consult in advance of the launch of the GCRN.

138. We find it was not accurate to say there had been no consultation, we note that the Claimant did speak to Professor Fribbance, Professor Wilson and Professor Earle before the launch of the GCRN [see SE@23-25]. Laura McGrath also notified her manager [1128]. There was no formal process that required consultation with others. We considered the WhatsApp between the GCRN members prior to the launch of the GCRN on pages 871, 948-949, 5394-5395, 5407, 5419, 5551-5552, which suggested that the launch was secretive, but we find there was nothing untoward about not consulting with a wider group of people. It was completely understandable why the Claimant and her colleagues would want to keep a low profile of the GCRN before launch as the Claimant was aware she would be launching into an existing majority gender affirmative environment at the OU. The Tribunal does not find that it was not collegiate that others were not consulted.

Reaction to launch of the GCRN

139. Following the launch of the GCRN on 16 June 2021, the Claimant, Professor Earle and others in the GCRN were informed there were several complaints from students regarding the GCRN. At that time there were only 6 members of the GCRN including the Claimant. The Claimant responded to a request on the LGBT+ staff network Yammer account of how to make a formal complaint about the establishment of the GCRN [1317]. The principal complaint was about things said on the Savage Minds podcast.

140. Dr Boukli said in evidence that the Savage Minds podcast was discussing legitimate issues, but also said that the Savage Minds podcast was offensive and trans-hostile. In particular, the presenter stated in the podcast that, *"…why are we here talking about something that is in no biology textbook written in the last 200 years? Men are not women. Women are not men*." [1043] The Claimant then replied "*Oh, two millennia*". [1044] Dr Boukli took this to mean that for two millennia, trans people did not exist.

141. The presenter then said: *"I think we should have another trans day of visibility. I don't think 15 are enough this year. I think. In a leap year too."* [1043]

142. We find that the reference to for two millennia there were only 2 sexes or men are not women are expressions of gender critical beliefs. We find that the Claimant did not say I am totally with you on that in response to the use of the phrase men in dresses.

143. We do not find that the podcast was trans hostile. At no point does the Claimant or the interviewer say they are hostile to trans and non binary people or that they do not exist. We did not consider that the reference to trans visibility days was being hostile to trans people, but was a complaint about the constant reminders of trans visibility (in the interviewer's opinion), though we accept that this was a moment in the podcast that lacked sensitivity to trans people.

144. Dr Bowes-Catton said in oral evidence that she understood that the podcast appeared to be laughing at trans people and the organisation seeking to represent them (Stonewall). She considered that the podcast was not respectful and sensitive at a time when the media was hostile to trans people. She said she was appalled by the lack of sensitivity. However, Dr Bowes-Catton had not listened to the podcast recently and was not able to confirm that she had listened to it in full at the time it came out.

145. Professor Shakesheff listened to the full podcast and agreed in oral evidence that nothing in the Savage Minds podcast crossed the line. He accepted that some of the language could be off-putting to someone new in the area but at the same time the Claimant exhibited an openness and understanding. Having listened to the whole podcast, we agreed with Professor Shakesheff's assessment of the Savage Minds podcast.

146. Professor Keogh considered that the Claimant behaved in a demeaning and belittling way on the Savage Minds podcast. He said that the Savage Minds podcast blamed trans people for everything that has gone wrong.

147. Professor Wilson listened to 30-40 minutes of the podcast but only heard of the objectionable comments which come after 40 minutes through other individuals. Professor Wilson said she could understand why the podcast caused upset.

148. On 24 June 2021, Professor Earle emailed Professor Shakesheff explaining that people had raised concerns with her about the Savage Minds podcast and whether she should do anything about the podcast being on the GCRN website [1733]. Professor Shakesheff took Professor Earle's request to the working group "the Working Group" (set up to deal with the impact of the set up of the GCRN, which we will deal with later in this judgment) who considered whether any action needed to be taken in relation to the Savage Minds podcast. By email dated 28 June 2021, Professor Shakesheff told Professor Earle that the Working Group had decided on balance that the Savage Minds podcast link did not need to be removed [1732].

149. We find that the Savage Minds podcast neither blamed trans people for everything nor was the Claimant demeaning and belittling on it. We find that the Claimant does not laugh after the statement of men in dresses is said or when speaking about Stonewall's policy of non debate regarding trans women are women. The Claimant does chortle at the 'suck female cock' comment, but the Claimant sounds more embarrassed than entertained. Overall we find that the Claimant was not laughing at the comments referred to by Dr Boukli. We do not find that the Claimant chortling at a comment meant the Claimant was agreeing with those statements.

<u>Open Letter on google. docs</u>

150. On or around 17 June 2019 a document called 'Open Letter from OU staff-Response to the launch of the Gender Critical Research Network' ("Open Letter") was published on google. docs [4755, 1318-1320]. The Open Letter

was signed by 368 OU staff members & postgraduate researchers [4726-4735].

151. The Claimant alleged that a WhatsApp group was set up to create the Open Letter in 2021 by a number of gender affirmative academics in FASS which included Dr Boukli, Dr Downes, Dr Williams and Dr Bowes-Catton. In cross examination, Dr Downes was referred to a reference to the WhatsApp group in an email dated 7 June 2021 which stated *"I think this must be the newsletter Julia is talking about on WhatsApp"* [1134], Dr Downes said in cross examination they thought it was to do with a union debate. In oral evidence Dr Boukli denied knowing of any one setting up the Open Letter as part of a WhatsApp group and they denied they were part of such a WhatsApp group.

152. There was an email on 19 June 2019 from Dr Williams stating that there was a WhatsApp group set up to discuss the Claimant's signing of the Sunday Times Letter [561]. None of the witnesses asked (Dr Bowes-Catton, Dr Chris Williams or Dr Downes) who were part of the WhatsApp group were able to say why the group was set up and how long the group lasted for. Dr Williams did accept in cross examination that the WhatsApp group was around in June 2021 when there was a discussion about drafting the Open Letter, but Dr Williams was not able to tell the Tribunal who was in the WhatsApp group discussing the issue. We considered all the Respondent's witnesses' evidence who were asked about this point and found all the witnesses to be evasive and resistant to providing the truth to the Tribunal. We simply did not believe Dr Downes, Dr Boukli, Dr Bowes-Catton or Dr Williams' evidence on this point and find that the WhatsApp group was set up to counter gender critical beliefs at the OU and was being used to set up the Open Letter.

153. The Claimant said that when she found out about the Open Letter being signed by her colleagues she was shocked that the letter was public and that it was *"deeply humiliating, both personally and professionally, to be condemned by colleagues in this public way."* [See JP@236].

154. We found the Claimant's expression of how she felt about the Open Letter to be consistent with what the Claimant was telling the Respondent at the time. Furthermore, we find it would be humiliating to be condemned publicly by your colleagues as the Open Letter did to the Claimant. We accept that the Claimant found the Open Letter humiliating and was shocked by it.

Contributors to the Open Letter

155. Dr Williams and Dr Bowes-Catton were involved in the drafting of the Open Letter but accepted that there were others involved in the drafting too. Initially when asked at her interview in respect of the Claimant's grievance, Dr Bowes-Catton did not admit to being involved in the drafting of the Open Letter [5179]. But under cross examination, Dr Bowes-Catton stated that her contribution to the Open Letter was the adding of the Savage Minds podcast quotes. Dr Bowes-Catton admitted in cross examination that she did not want to tell her employer who wrote the Open Letter as she did not want to 'throw her colleagues under the bus'. We accept Dr Bowes-Catton's

evidence that she did contribute to the Open Letter by providing the quotes from the Savage Minds podcast.

156. In their witness statement evidence, Dr Downes stated that they added the section that allowed others to sign the Open Letter and set up the signature page in the Open Letter on google. docs but said they were not involved in drafting the content of the Open Letter [see LD@105]. Dr Downes said they contributed to the Open Letter because they had tried to write letters, but they didn't get anything back, (21 June 2019, [568], 11 February 2021 [819], 7 June 2021 [1129 & 4709]). The response to Dr Downes' joint letter dated 21 June 2019 is on page 566-567 dated 26 June 2021. Professor Fribbance spoke to Dr Downes about their 11 February 2021 correspondence on 16 February 2021 [LD@82] and Professor Fribbance responded by email dated 7 June 2021 [4709] to Dr Downes' 7 June 2021 email. Dr Downes also said they couldn't remember how they received the letter; they thought it was sent from someone anonymous, they didn't know who was involved in drafting the letter, what the WhatsApp group was for and whether it had anything to do with the Open Letter. Dr Williams said he contributed to the Open Letter although he did not give any evidence on what his contribution was. Neither Dr Bowes-Catton nor Dr Williams explained why they contributed to the Open Letter. We find that Dr Wiliams, Dr Bowes-Catton and Dr Downes contributed to the content of the Open Letter ("the contributors").

157. We considered that the coyness of the contributors in admitting who wrote the Open Letter was suspicious. We don't accept Dr Downes' stated reason for contributing to the Open Letter as the genuine reason why they contributed to the Open Letter. We do not accept Dr Downes' evidence on this because Dr Downes did receive responses to their correspondence. We find when Dr Downes gave evidence, they were trying to hide their views on gender critical beliefs because they did not accept the core gender critical belief that sex is immutable and did not want to say gender critical beliefs caused harm to trans people.

158. Only Dr Downes out of the contributors explained why they contributed to the Open Letter. However, we infer from Dr Bowes-Catton's email dated 18 June 2018 [1334] that as she signed the letter and that her signing of the Open Letter was directed at the Claimant, that was also the reason for her contribution to the creation of the Open Letter. We don't accept that academic freedom could have anything to do with Dr Bowes-Catton's reason for contributing to the Open Letter as she said that she did not want to throw her colleagues under the bus regarding their contribution. If Dr Bowes-Catton considered creating the Open Letter was an exercise of academic freedom, she would have had little difficulty explaining who the contributors were as they would be protected by academic freedom. Dr Williams was fearful of the Claimant researching from a gender critical perspective and so we find the reason why he contributed to the Open Letter was to impede the Claimant in some way from researching from a gender critical perspective.

159. The contributors all said that they could not remember who wrote the Open Letter with them. We accept that this took place some years ago, however,

we consider that as there is a specific allegation in the Claimant's claim form alleging contribution to the Open Letter amounts to harassment/direct discrimination, that the contributors would have been required to address this as part of drafting their witness statements. So, on a balance of probabilities, it is unlikely that they did not know the names of the other contributors. We find that the creation of the Open Letter was a co-ordinated activity. The motivation of any one of the contributors can be attributed to the motivation of the others, the names of which we are unaware of.

Content of the Open Letter

160. The Open Letter stated "*We call on the OU Vice Chancellor's Executive Team to take the following actions:*

> *1. To withdraw its public support for and affiliation with the Gender Critical Research Network*
> *2. To affirm their position as a trans inclusive employer*
> *3. To commit to developing a concrete plan of action for supporting and affirming trans students and staff in this trans-hostile external and internal environment"* [1319]

161. The Respondent's trans gender staff policy dated August 2019 states "*2. Policy aims- The University aims to create an inclusive trans-friendly environment in all Open University contexts, including all aspects of the workplace, the learning environment, research settings and online activities. For the workplace this means*:
•A workplace that is responsive to the needs of gender variant, transsexual and transgender staff that enables transgender staff to live in their preferred gender role, and to work effectively.

1. *A workplace that is free from discrimination, harassment, and victimisation, where everyone is treated with dignity and respect, including transgender people, people associated with transgender people and people perceived to be trans.*
2. *A workplace where transgender people are retained as valuable members of staff and can access opportunities for development and advancement."* [4282]

162. We find that the OU's policy already affirmed the OU's commitment to a trans inclusive workplace.

163. The Open Letter said, *"We stand opposed to the backing of the GCRN by the OU.*" [1319] We find that this was a call for the withdrawal of support by the OU which would include the availability of facilities that would be available to other research networks within the OU. It was a call to treat the GCRN differently from other OU networks. The point of a network within a university is to draw in other academics within the university and without. We find that means that the Open Letter called for no link or connection to the OU. We find that the Open Letter was calling for the disaffiliation of the GCRN and in turn the disaffiliation of the Claimant in so far as her research from a gender critical perspective was concerned. The disaffiliation would not have closed down the GCRN as they could have existed as an independent entity but would have removed any opportunities to use OU

facilities to further their research which would have been available to other research networks within the OU.

164. The Open Letter said, *"We do not believe that freedom of speech or academic freedom should come at the expense of marginalized groups such as those possessing with protected characteristics under the law"*. [1319] We find that the reference to marginalized groups in the Open Letter was a reference to the trans/ non binary community and that the Open Letter was saying that the existence of the GCRN was coming at the expense of trans gender people and by allowing the GCRN, the OU was not exercising their duty of care to the trans/ non binary community at the OU.

165. The Open Letter said that *"Gender critical' feminism is a strand of thought and a belief that is fundamentally hostile to the rights of trans, non-binary, and genderqueer people"* [1318]. We find that this statement was directed at the Claimant. Dr Bowes-Catton said in her grievance meeting interview [5182] "*In feminism, calling yourself gender critical means you are against the extension of the rights towards trans and non-binary people and at the extreme end of things, you would like for those rights to be rolled back*". Both Dr Downes and Dr Bowes-Catton in evidence did not make any distinction between the use of the term gender critical and gender critical feminism.

166. We find that this statement was not true, the Claimant was not hostile to trans rights. The Claimant said in her WPUK talk in April 2019 at entry 00:11:05:21-00:11:38:22, that she supported trans rights [472] and tweeted 30 August 2021 that she supported trans rights. [4193]

167. The Open Letter stated that *"We are concerned that the OU's decision to approve and promote this network is in conflict with its obligations under the Equality Act 2010, and particularly the Public Sector Equality Duty regarding gender reassignment."* We accept the Claimant's evidence was this particular statement was directed at the GCRN rather than her.

168. The Open Letter states that "*We are concerned to see that the Gender Critical Research Network is already using OU platforms to circulate prejudicial statements. For example, the Savage Minds podcast episode linked to from its Open University homepage, and via the FASS academics newsletter (Issue 36: 7 June 2021), contains references to trans women as 'men in dresses' (00:58:41); explicitly argues against trans rights (00:55 22); and incorrectly claims that the LGBT rights organisation Stonewall is suggesting that lesbians should 'suck female cock' (00:57:03)."* [1318]

169. We find the reference to the FASS academics newsletter was a reference to the news item on 7 June 2021 about the Claimant giving an interview on the Savage Minds podcast and the link to the podcast which predated the launch of the GCRN.

170. Dr Downes summarised the content of the Savage Minds podcast as *"discriminatory content"* in their email dated 8 June 2021 to Professor Wilson [1155]. They explained in evidence that they considered the Savage Minds podcast was harmful and receiving it was harmful.

171. The reference to the Savage Minds podcast arguing against trans rights is a reference to the Claimant saying at 00:55:14:17-00:55:40:16:

"Yeah, but something happened. And it was the point at which they, they, they brought in a no discussion policy around trans rights. I think that was the biggest single tactical folly of any campaigning group ever, because at that point they no longer represented their constituencies. And I'll put a plural there because you know, anyone I'm a lesbian, I've been out since 1979, right." [1039]

172. In oral evidence Dr Boukli said that this quote was singling out trans gender and non binary people, but also admitted that it was fine to disagree with Stonewall.

173. When in cross examination, the Claimant was asked to explain what she was referring to at 00:55:14:17-00:55:40:16 of the podcast, the Claimant said that she was saying that she was not allowed to debate that trans women are women, and she was not debating trans rights. We accept the Claimant's evidence on this point and find it was not accurate to say that the Claimant was explicitly arguing against trans rights. The Claimant was commenting on the Stonewall policy that trans women are women and that in her view the policy excluded her as a lesbian.

174. The Open Letter also said the Savage Minds podcast says at 00:57:03 that *"I think there's something really disdainful and vile about an organisation telling women to suck female cock…."* [1040]. This is what the interviewer of the Claimant, Julian Vigo says not the Claimant.

175. The Claimant accepted in an email to an unnamed person on 6 July 2021, that the language used that lesbians should *"suck female cock"* was "*very florid"* and accepted *"that some people may well take offence because it is graphic and explicit"* [1693]. The Claimant wrote in that email that *"It was Stonewall's position that lesbians and gay men are same GENDER attracted and that to refuse to have sex with a transwoman because she still had a penis is/was transphobic"* [1693]. The Claimant did not present evidence that Stonewall did say that lesbians should 'suck female cock'.

176. We do not accept the Claimant's interpretations of Stonewall's campaign of trans women are women as Stonewall suggesting lesbians should 'suck female cock' or the CEO of Stonewall comments about lesbian refusing to date trans women as Stonewall suggesting lesbians should 'suck female cock'. [3295-3298] We find that it was legitimate for the Open Letter to say that the Savage Minds podcast incorrectly claims that the LGBT rights organisation Stonewall is suggesting that lesbians should 'suck female cock'.

177. We find that the language is graphic and florid which many may find offensive, but the comment is a criticism of Stonewall's policy not an explicit argument against trans rights. The podcast did not contain discriminatory content.

178. The Open Letter also says that there is a reference to trans women as 'men in dresses'. We have heard the podcast, and the recording is unclear as to what Julian Vigo says. The transcript does not record that the presenter says trans women are 'men in dresses'. Whatever Julian Vigo says, we find the Claimant does not laugh after Julian Vigo says, "men in dresses". The Claimant said she understood Julian Vigo to be talking about the drag-queens and cross-dressers on the London scene in the 1980s and 90s and we accept her evidence on this point.

179. We find that the reference to men in dresses was a reference to the historical understanding of men in dresses in the 80's and 90's not to trans people. In any event, trans women as 'men in dresses' cannot be heard on the podcast so we find there is no reference to trans women as "men in dresses" on the Savage Minds podcast.

180. The Open Letter also stated, *"We are concerned to see that the Gender Critical Research Network is already using OU platforms to circulate prejudicial statements."* [1318] We find that the GCRN was not circulating prejudicial statements. The Open Letter painted the Claimant as circulating prejudicial statements when she was not. The inaccuracy of this statement was bound to have a detrimental effect on the Claimant's reputation.

181. Professor Fribbance said he checked some of the contents of the Savage Minds podcast and listened to the relevant bits, but did not think what he heard breached academic freedom or freedom of speech. Professor Fribbance said that whilst there were previous examples of controversy that he could remember i.e. Turkish vs Greek culture and boycotting Israel, neither of those examples included calls to shut down research. Professor Fribbance understood that the Open Letter was saying that the very existence of the GCRN has a deleterious effect on the trans community and that it was an explicit call to unlawfully discriminate against the members of the GCRN, the signatures were attempting to apply pressure through numbers. He agreed in cross examination that the Open Letter asked the OU to unlawfully discriminate against the GCRN and that the signatures on the letter were bound to make the members of the GCRN feel unwelcome to an extent. He said it was difficult to draw the line between academic freedom and discrimination.

182. We find that controversy in academia was not unusual. The nature of research in academia means pushing boundaries and venturing in to areas that would challenge received wisdom, particularly when courting funding for research.

183. Professor Fribbance also said having 350 of your colleagues sign a public letter that you are part of a group that is fundamentally transphobic is upsetting and potentially stigmatising and damaging. Professor Fribbance agreed that to say that the Open Letter and WELS/RSSH Statement were not about individuals in the GCRN was a non starter, although the letters referred to the GCRN as a group. We accept Professor Fribbance's evidence on this. The Open Letter & WELS/RSSH Statement was about the individuals in the GCRN including the Claimant.

184. Ms Molloy agreed broadly that the Open Letter was calling for the disaffiliation of the GCRN from the OU because of the gender critical beliefs of the members of the GCRN. Ms Molloy's evidence was that legal advice was sought on the contents of the Open Letter, but not on the fact of the Open Letter's publication on the website, having a signature page where 368 of the Claimant's colleagues sign [4726] or tweeting links to the Open Letter. The OU did not have any means by which to take down the Open Letter as it was not on an OU website. The OU did not take action to ask those with control of the Open Letter to take it down, after having received legal advice. Ms Molloy admitted in cross examination that she did not balance the harm experienced by the Claimant and GCRN against the harm experienced by the trans staff and students in making the decision not to take action to take down the Open Letter. We do not interpret the Respondent having received legal advice on the content of the Open Letter that covers anything about the publication of the Open Letter and the fact that it has signatures. We find whatever the legal advice received by the Respondent it did not advise the Respondent on the full status of the Open Letter.

185. Professor Wilson maintained in oral evidence that the Open Letter was an exercise in academic freedom.

Signing & Publication of the Open Letter

186. Although the Open Letter was addressed to the OU VCE it was published as a google. docs which was publicly available. None of the contributors explained why the Open Letter was published in a google. docs form so that it was publicly available. In any event various people including some of the known contributors Dr Bowes-Catton and Dr Downes tweeted links to the Open Letter.

187. We find there was no reason to address the Open Letter to the OU VCE if actually it was to be published to the world. We find that it was put on google docs so that it could be seen by the widest number of people as possible to obtain as many signatures as possible. The nature of the letter would have been different if the section for signature had not been signed.

188. On 18 June 2018, Dr Bowes-Catton tweeted the link to the Open Letter to her own twitter handle and invited OU staff and postgraduate researchers to sign the open letter which she said expressed concern about the impact of the GCRN on trans/Non Binary staff and students [2124].

189. In an email on 18 June 2021, subject titled "consider adding your name to letter to OU VCE" Dr Bowes-Catton as one of the authors of the Open Letter and one of the first people we heard evidence from to publicize the Open Letter wrote , "*my signing the letter has nothing to do with her personally- not so with Jo though, in particular- 1 was appalled by the Savage Minds podcast in particular, but you don't have to go far to find other examples of her saying/endorsing other really problematic stuff, or aligning herself publicly with the likes of Julie Bindel."* [1334]

190. Dr Bowes-Catton told the Tribunal in evidence that the person who she was talking about that her signing of the Open Letter had nothing to do with her personally was Laura McGrath who was also a member of the GCRN. The reference to "Jo" was a reference to the Claimant.

191. Dr Bowes-Catton agreed in cross examination that she signed the Open Letter as she wanted to create a loud voice. She said she signed it in support of trans and non binary people and others at the OU who are gender affirmative. She admitted that she was aware of the social media activity of the GCRN but said she did not see anything on social media that was harassing. We do not accept Dr Bowes-Catton's explanation for signing the Open Letter. We find it is clear from Dr Bowes-Catton's 18 June 2021 email [1334] that she signed the Open Letter because of the Claimant. Her signing was directed at the Claimant as she says in her email. Dr Bowes-Catton's reference to the Claimant on the Savage Minds podcast also indicates to us that on a balance of probabilities the Claimant was also the reason why Dr Bowes-Catton contributed the quotes from the Savage Minds podcast to the Open Letter.

192. Also on 18 June 2021, Shaun Daly on behalf of the LGBT+ staff network pinned the link of the Open Letter to the Yammer website for the OU LGBT+ staff network.

193. On 24 June 2021, Dr Downes on their twitter account [1650] put a link to the Open Letter with a message calling for OU staff & postgraduate research students who are concerned about the impact of the GCRN on trans colleagues and students to read and add their support in the Open Letter.

194. Dr Boukli said that they received the Open Letter by email from a colleague. The reason they signed the Open Letter was because they believed that gender critical beliefs try to undermine trans people and harass trans and non binary people, which is why they agreed with the call to withdraw support and disaffiliation. They considered the GCRN harmful because they said it affected services to trans and non binary people. They believed that the OU would stop providing the facilities at that time, i.e. toilet and changing rooms because they were endorsing one view and accepting the gender critical view and they would see no point in introducing pronouns.

195. We find what Dr Boukli referred to as harm was a possible threat. We find there was no evidence of a threat to the removal of facilities referred to by the Respondent. Neither was there a call by the GCRN nor any members of the GCRN for the removal of facilities. But Dr Boukli believed that the existence of the GCRN was causing harm to the trans and non binary community. We do not accept Dr Boukli's reason for signing the letter as a genuine reason. Their reason was the withdrawal of facilities but there was no evidence of this at all. We find that Dr Boukli signed the Open Letter because they did not agree with gender critical beliefs and believed them harmful to trans and non binary people and did not want the Claimant to express her gender critical beliefs at the OU and in particular in a research network or through research. They agreed with the disaffiliation of the

GCRN and knew their signing the Open Letter would add to the pile on, increasing the hostility towards the Claimant.

196. Dr Downes explained that the reason they signed the letter was because they had concerns, and those concerns were about creating an inclusive environment for trans and non binary colleagues. By concerns they meant harm to the trans and non binary community and by harm they agreed that included offence. They agreed with the contents of the Open Letter and the concerns it expressed. Dr Downes said they signed the Open Letter in solidarity and tried to support the issue. We find Dr Downes made no distinction in this context between offence and harm, something offensive could cause harm. We find that in this case what Dr Downes referred to as harm was offence. We find Dr Downes believed that the existence of the GCRN was causing harm to the trans and non binary community. We find the reason why Dr Downes signed the Open Letter was because they saw gender critical beliefs as harmful to trans and non binary people and did not want the GCRN at the OU and for the Claimant to express her gender critical beliefs at the OU. They agreed with deplatforming the GCRN and wanted to add to the 'pile on' to create a hostile environment for the Claimant.

197. Professor Keogh also considered that the existence of the GCRN was harmful to trans people, but he said that he wasn't against gender critical views but just how they were expressed. He said that as he was not involved with drafting the Open Letter he only signed it as an act of solidarity with his trans and non binary colleagues and he did not agree with every word of the Open Letter. But he did think it was unreasonable for the Open Letter to call for the withdrawal of support by the OU. In particular we note that Professor Keogh said he did consider that the purpose of the letter was to deplatform the GCRN then went on to author with other people the WELS/RHSS letter which says, *"request that all university support for the network is withdrawn; and that GCRN are removed from the Health and Wellbeing Strategic Research Area (HWSRA) and all other Open University websites."* [1624]

198. Professor Keogh said that if the Savage Minds podcast had not been put on the GCRN site he probably would not have signed the letter but would have still taken action in respect of the GCRN. We did not accept Professor Keogh's distinction between gender critical beliefs and how they were expressed. We find Professor Keogh did not agree with gender critical beliefs however they were expressed and did not want them at the OU. We also find that when Professor Keogh signed the Open Letter he agreed with the content of the Open Letter and its call for the OU to withdraw its support of the GCRN and deplatform the GCRN. Professor Keogh wanted to create a hostile environment for the Claimant and her gender critical beliefs at the OU.

199. Dr Snarey considered that the existence of the GCRN had caused a number of students distress who were reconsidering continuing their courses at the OU and signed the Open Letter in solidarity. She admitted in cross examination that she considered that the ideology of gender critical beliefs as fundamentally transphobic but not necessarily gender critical believing individuals. She said nothing in the letter was against the GCRN itself, but

the letter was calling for improving trans inclusion. That the letter was not calling for deplatforming but the removal of institutional approval of the OU. Dr Snarey admitted that she did not have students contact her about the GCRN, but she went looking for them online. We noted Dr Snarey's social media that said in reference to the GCRN "*I am part of a group of staff who are pushing the university to break all ties and better support the staff and students who have been negatively affected."* [1772]. In cross examination Dr Snarey accepted that she would have said something like that.

200. We find that Dr Snarey was not being entirely forthright about how she regarded gender critical individuals, we did not accept her distinction between the gender critical ideology and how she saw individuals with gender critical beliefs as she accepted that she was part of a group calling for action against the GCRN at the OU. We find that Dr Snarey's objection is not an objection to an ideology alone but to people manifesting that ideology. We accept that students were distressed by the GCRN, but find that this was mostly based upon the existence of the GCRN, not anything the GCRN had done. Dr Snarey signed the Open Letter because she did not want the GCRN to exist at the OU. There was no discernible difference between the express of an ideology and the people manifesting that ideology in the context of the existence of the GCRN. It is simply the case she did not want the Claimant expressing gender critical belief through the GCRN. She wanted to add to the 'pile on' to create a hostile environment for the Claimant that her views were not wanted at the OU.

201. Shaun Daly said he did not sign the Open Letter initially but did eventually and that he signed it for 2 reasons. The first reason was because he felt that the GCRN had not engaged with LGBT+ Staff Network about their plans to form their network which was a point in the letter, and he did not agree with the way they had gone about this. Secondly, he considered it a visible act of solidarity with his colleagues in the network who were upset by the formation of the GCRN. We accept Shaun Daly's evidence on this point, we found Mr Daly to be an honest witness and his evidence on this point to be consistent with the evidence that was presented to us in the form of emails and his written evidence.

202. Natalie Starkey said under cross examination she signed the Open Letter to calm the situation about the creation of the GCRN but in her written evidence that she signed it to encourage debate. She said that she was not saying that the GCRN should not exist but that the name gender critical should not be attached to it. She agreed that she signed the letter because she agreed with it. She was encouraging more to add to the uproar against the GCRN but not in a hostile way.

203. We find Ms Starkey signed the Open Letter because she did not want the GCRN at the OU and wanted to pressure the OU to deplatform the GCRN and get rid of the GCRN altogether at the OU. She was adding her name to the 'pile on' and whilst she said she did not want to do it in a negative way she didn't say how that was possible. We find that she knew her signature would add to a hostile atmosphere for the members of the GCRN including the Claimant.

204. Cath Tomlinson said in her written evidence it was the association between the University and the network and the impact this was having on trans staff and students which concerned her and motivated her to sign the Open Letter. The idea of signing was to support students. We accept that Ms Tomlinson did have concern for her students but that was not the predominate reason she signed the Open Letter. The Open Letter accorded with her own gender affirmative views regardless of the views of the OU students and she wanted to pressure the OU to deplatform the GCRN and get rid of the GCRN.

205. Dr Williams said that he signed the letter to promote trans people and did not object to the existence of the GCRN. He was concerned that the University was, as an institution, appearing to endorse this network and give it official OU status. He was concerned especially, that there was in his view no prior debate or discussion and the potential impact of gender critical politics on trans and non-binary rights.

206. We find that Dr Williams' reason for signing the Open Letter is consistent with his explanation that he did want to remove the OU support from the GCRN. Dr Williams wanted to deplatform the GCRN. He did not want the Claimant researching from a gender critical perspective at all at the OU. He wanted to add to the 'pile on' to create a hostile environment for the Claimant and her views at the OU.

207. Professor Domingue said he read the Open Letter before he signed the Open Letter. That he signed it in his personal capacity to support a member of staff in his department who was transitioning. He said he could not remember if it asked for dissociation with the OU. We find that Professor Domingue was not concerned about the GCRN but was concerned with supporting his member of staff. We find that he did not sign the Open Letter in his personal capacity as he signed it as Director of KMi at entry 288. [4733]

208. Every witness who signed the letter agreed they had read the letter. Some witnesses, Dr Boukli, Dr Williams, Dr Bowes-Catton, Shaun Daly, Dr Downes, (Dr Natalie Starkey as far as the letter called for disaffiliation the GCRN) did admit to agreeing with the contents of the Open Letter.

209. Many of the academics who gave evidence said they only signed the Open Letter as a show of solidarity (which includes Dr Bowes-Catton, Dr Snarey, Natalie Starkey, Professor Keogh, Professor Domingue [4733]) and said they did not believe in the disaffiliation of the GCRN. We find this indicates to the Tribunal that actually there was a gender identity culture where academics in the Claimant's faculty felt obliged to support the gender identity position. Furthermore, none of those same witnesses said they disagreed with the contents of the Open Letter.

210. All the signatories of the Open Letter we heard evidence from denied their signing was adding to the weight of numbers against the GCRN except Dr Bowes-Catton. Everyone we heard evidence from who signed the Open Letter agreed that they had read the letter before signing. So even though some of the witnesses said they did not agree with the entire contents of

the Open Letter, none signed the Open Letter in ignorance, they were not forced to sign the Open Letter. We find that if an employee of the Respondent signed the Open Letter they were agreeing to the contents of that Open Letter. The point of adding one's signature was to signify agreement with the contents of the Open Letter. We find that the reason for the Open Letter having signatures was to put pressure on the OU to submit to the demands in the Open Letter. And one of the demands of the Open Letter was disaffiliation. Professor Fribbance agreed that was the purpose. In the context of the public nature of the open letter we did not see a distinction between deplatforming the GCRN and disaffiliating the GCRN. We find that with the exception of Professor Domingue & Mr Daly, all the other signatories we heard evidence from signed the Open Letter to put pressure on the OU to impede the Claimant carrying out research from a gender critical perspective. They did not want the OU to support a network with members who had gender critical beliefs including the Claimant.

211. None of the witnesses who were signatories to the Open Letter gave evidence as to why the Open Letter was published. Many of the signatories (Dr Downes, Dr Bowes-Catton, Shaun Daly, Dr Snarey) published the Open Letter via their Twitter pages or on Yammer by adding a link to the Open Letter. No witness took ownership for publishing the Open Letter on google. docs. Publishing a document on google. docs means that anyone with access to google. docs could see and access the document, which made it a public document.

212. Dr Downes' oral evidence was that they could not remember who sent them the Open Letter or by what means and said that they got the Open Letter anonymously and they think it was by WhatsApp/text. Dr Downes added the signature page and admitted in evidence no one told her to add the signature page. Dr Downes' was the first signature on the Open Letter [1320]. Dr Downes said that the document was already in google. docs when they received it via WhatsApp.

213. We considered Dr Downes' oral evidence on the publication of the Open Letter as evasive and not credible. We considered that Dr Downes did not want to admit who they received the Open Letter from as it might suggest a co-ordinated activity to publish the Open Letter. It makes no sense they could not remember who they got the Open Letter from, but would of their own volition add the signature page.

214. We find Dr Downes' published the Open Letter when she received it by putting it on google. docs in order that others could sign the document too, as google. docs allows one to share the document with others and allows them to edit the document too. That is why Dr Downes' signature is the first signature on the Open Letter.

215. Professor Wilson's evidence in cross examination was that she considered that the Open Letter was published in order to pressure the OU to accede to the 3 requests and that the reason for the request for disaffiliation was because of a belief that gender critical beliefs cause harm to trans people. Professor Fribbance accepted in evidence that actually what the Open Letter was calling for was to close down the GCRN. Caragh Molloy also

agreed that the Open Letter was calling for the disaffiliation of the GCRN from the OU because of the gender critical beliefs of the members of the GCRN. Both Professor Fribbance and Professor Wilson perceived that the Open Letter was asking the OU to discriminate against the GCRN. We find the effect of a large number of signatures on the Open Letter was to pressure the OU to accede to the 3 requests including the request to disaffiliate the GCRN.

216. Professor Shakesheff did not see the Open Letter as discrimination on the basis of Gender critical beliefs. In oral evidence Professor Shakesheff pointed to the published aims of the GCRN and said that it signified that the GCRN was open to all and not just those with gender critical beliefs. It was put to Professor Shakesheff that his view was not recorded anywhere at the time and was not in the senate minutes on the 24 June 2021. Professor Shakesheff said that he did not mention this view to his colleagues because he thought it was obvious.

217. We considered Professor Shakesheff's reasoning that the aims of the GCRN signified that the GCRN was open to all and not just those with gender critical beliefs, and we rejected it. It was clear at the time that objections to the GCRN were based upon the real or perceived gender critical views of the members and in particular the Claimant. Ms Tomlinson confirmed this in her evidence as did Dr Snarey and Professor Keogh. We also considered Professor Shakesheff's view that there was no potential harm to a member of the GCRN with gender critical views. We find Professor Shakesheff's position on the harm to the Claimant is inexplicable as the Claimant had told the Respondent in her correspondence on 17, 18 & 29 June 2021 repeatedly of the harm she was experiencing.

218. We find that the content (labelling the Claimant as hostile to the rights of trans, non binary and gender queer people and demanding disaffiliation of the GCRN from the OU), the signing (having 368 signatures) and the publication of the Open Letter (to the world with the Claimant's colleagues signatures) had a chilling effect on the Claimant expressing her gender critical beliefs and carrying out gender critical research.

219. On 18 June 2021 in WhatsApp chats, the Claimant said in conversation with her GCRN colleagues *"[18/06/2021, 16:10:26] Jon P: Can I suggest, this is time to go quiet? (This is note to self-stuff, btw). I think we should be in evidence-collecting mode, nothing more. The fact that there is a targeted campaign against us, is not a problem for us, but for senior management at the OU. People way beyond us will be watching. [18/06/2021, 16:14:57] Jo Phoenix: Couldn't put it better myself! [18/06/2021, 16:16:03] Jo Phoenix: The more signatures the easier it is to demand disciplinary action against the instigators and the more the public defamation grows. [18/06/2021, 16:16:20] Jo Phoenix: Heads down and Twitter off comrades*." [5431]

220. The Claimant's explanation of the WhatsApp chats was it was to defend the GCRN's position and that she considered herself as a leader. In cross examination the Claimant denied that the WhatsApps show she was gleeful. We considered the fact that the Claimant had been signed off sick at this point and we find on a balance of probabilities that it was more likely that

the Claimant was putting on a brave face for her colleagues and trying to be a leader as she said.

LGBT+ staff network statement issued on Yammer on 18 June 2021 [1626-1627]

221. Following the launch of the GCRN, Shaun Daly as the Co-Chair of LGBT+ staff network said *"Trans staff and allies within the network expressed disappointment, shock and hurt that the GCRN had been formed"* [SD@19]. Mr Daly said that as the GCRN had come out of the blue, he decided to find out more about it by writing to the Claimant on 17 June 2021 and Professor Fribbance on 18 June 2021 in his role as champion of LGBT+ on the Vice Chancellor's Executive not in his role as Executive Dean of FASS.

222. Mr Daly's email to the Claimant on 17 June 2021 at 12:14 asked for the Claimant's perspective *"on why so many trans and non-binary colleagues feel threatened by the Gender Critical research area and your new external network, which looks like an OU endorsed (including logo) initiative"* [1324]. The Claimant responded minutes later at 12:27 making it clear that the University did not endorse the GCRN or their research and that the research group was not a campaigning group. [1324]

223. Mr Daly's email dated 18 June 2021 to Professor Fribbance contained questions about the funding, timing (because the GCRN was launched during Pride month) and the OU branding of the GCRN. [1299-1300]

224. Mr Daly received a response to his 18 June 2021 letter from Professor Fribbance [1352] on 18 June 2021. Professor Fribbance was unable to answer all of Mr Daly's questions, so Mr Daly wrote to Professor Shakesheff & Fary Cachellin on 18 June 2021 [1296]. Neither Professor Shakesheff nor Fary Cachellin responded directly to Mr Daly's email to answer all his questions.

225. On 17 June 2021, the LGBT+ staff network met to discuss the formation of the GCRN. The outcome of that meeting was the LGBT+ staff network decided to publish a statement ("LGBT+ staff network Statement") on the LGBT+ staff network site on Yammer [1352]. The LGBT+ staff network Statement was also sent to members of the LGBT+ staff network by email.

226. Our findings in respect of the LGBT+ staff network Statement are as follows:

227. We find that the phrase in the LGBT+ staff network Statement *"The OU LGBT+ Staff Network Committee wishes it to be known that the announcement of 'The Open University Gender Critical Research Network' is not associated with the LGBT+ Staff network or its aims,"* did not imply that there was something wrong with being associated with the OU whether by virtue of its launch without warning or any other unsaid reason.

228. We find that the passage that states *"the announcement of such a network without warning, as well as its presence on OU websites and implied association with the OU brand, has caused significant concern and distress for trans, non-binary and gender non-conforming staff and students."* [1352]

This sentence was a reflection of what was going on at that time in the LGBT+ staff network.

229. We find the following passage *"In collaboration with the OU Pride Student Network and OU Trans Staff Network, it is the main focus of the LGBT+ Staff Network to foster a working environment which is supportive to our LGBT+ staff. We will therefore, in the interests of this, be asking the university to review the process which was in place for establishing and promotion of the Gender Critical Research Network and what support is being put into place for our trans, non-binary and gender non-conforming colleagues and students"* was a legitimate request in light of the concerns raised by trans and non binary staff and students that there was no warning of the GCRN.

230. The LGBT+ staff network Statement said, *"For those who wish to join other staff and students in expressing their concerns there are also the following 2 open letters in creation;"* and there followed a link to the Open Letter. The Claimant said that she considered that the LGBT+ staff network was supposed to offer support to her as a lesbian, and that by signposting the Open Letter in a way that endorsed it meant that the LGBT+ staff network was now officially hostile to her and her beliefs. We accept that that is how the Claimant felt.

231. In the Claimant's email dated 15 July 2021 to the Respondent [2156-2158] the Claimant had asked for the LGBT+ staff network Statement to be removed [2156].

232. We find by putting a link to the Open Letter on the Yammer page with the LGBT+ staff network Statement and asking those who had concerns to express their concerns by pointing to the Open Letter, Mr Daly encouraged a 'pile on' to call for the disaffiliation of the GCRN increasing the hostility to the Claimant as a member of the GCRN.

<u>OU reaction to GCRN</u>

233. On 17 June 2021, the Claimant emailed Professor Fribbance and Professor Wilson that she had been contacted by the student casework office about student complaints concerning the GCRN [1325-1326]. The Claimant suggested that a statement be published that said the OU was not endorsing any particular research or researchers. The OU communications team incorporated the Claimant's suggestion, and Professor Wilson informed the Claimant of this [1325]. We find that by making the non endorsement suggestion, the Claimant recognised that the OU could not be seen to endorse the GCRN, and she was not looking for endorsement.

234. Later on at 18:16 on 17 June 2021 [1327], the Claimant sent a further email informing Professor Fribbance and Professor Wilson that she considered those in the GCRN were being publicly defamed by several academics within the University and that a targeted campaign was being set up by a private Facebook group. The Claimant asked if the campaign she highlighted fell within the bullying and harassment policies and whether the Respondent might take action. In her email at 18:18 on 17 June 2021 to

Professor Wilson and Professor Fribbance [1325] the Claimant said that the OU had a legal obligation to stop the campaigns of complaints against her and the GCRN. [1325]

235. We find that by 17 June 2021, the Claimant was looking for the Respondent to stop what she considered harassment and a targeted campaign against the GCRN, against her as part of the GCRN and her colleagues in the GCRN.

236. The Respondent's bullying and harassment policy states:

"The purpose of this Policy is to assist in developing and encouraging a working environment and culture in which harassment and bullying are unacceptable. [4203]

237. The Respondent's Bullying and Harassment Policy states under paragraph 2.1 "*examples of unacceptable behaviour"* that:

"*Verbal and written harassment (e.g. via offensive letters, telephone or e-mail) through jokes, racist remarks, taunts, offensive language, gossip and slander, threats, derogatory name calling or ridicule for physical or cultural difference, physical impairment, or religious belief, electronic transmission of pornographic, racist, degrading or indecent material…..*

Cyberbullying on external social network environments (e.g. Facebook, blogs, Twitter) should be reported to the social network platform owner. See Social Networking Guidance." [4205]

238. Paragraph 3.2 states *"Managers and supervisors should: …■ Understand and implement the Policy and make every effort to ensure that harassment and bullying do not occur, particularly in work areas for which they are responsible. ■ Resolve any incidents of bullying or harassment of which they are aware. If bullying or harassment does occur, they must deal effectively with the situation. ….■ Act if they observe bullying and harassment occurring. Be alert to unacceptable behaviour and take appropriate action: managers do not have to wait until complaints are brought to their attention if they are aware of behaviour of other managers or individuals which might cause offence. If the incident is not serious, then calling the individual aside and carrying out some 'awareness-raising' may be sufficient to stop the behaviour. In more serious cases, disciplinary action may be appropriate."* [4205]

239. Professor Fribbance accepted in cross examination that the bullying and harassment policy at paragraph 3.2 [4205] was applicable to the Claimant.

240. Professor Wilson responded to the Claimant's email on 17 June 2021 a few minutes later. The Claimant's email dated 17 June 2021 had referred to defamatory material and Professor Wilson's response asked for the defamatory material the Claimant had referred to [1327].

241. On 18 June 2021, the Claimant provided the alleged defamatory material as screenshots [1341-1345] with an email where she stated that Dr Downes

was tweeting defamatory material, and that Dr Downes, Dr Boukli and Dr Bowes-Catton as original signatories to the Open Letter were fomenting a targeted campaign against the GCRN. The screenshots included a tweet by Dr Downes of a link to the Open Letter [1345] and the LGBT+ staff network Statement by Mr Daly [1352]. In cross examination, Professor Wilson said that the reaction to the GCRN was covered by academic freedom. However, Professor Wilson's evidence in cross examination was that she did not know where to draw the line between discrimination and the exercise of academic freedom and was not prepared to draw that line. Professor Wilson told us in her written evidence that she had previously held a role of Dean of Institutional Equity before her role at the OU. [MW@2] We find that Professor Wilson as the Dean of Equality and Diversity should have at least been prepared to draw the line based upon her experience and knowledge. The fact that she did not, conveyed to us, that she was not confident that the Open Letter and LGBT+ staff network Statement and screenshots were covered by academic freedom.

242. In the 18 June 2021 email the Claimant stated that she had already received death threats. The Claimant said that she had experienced 2 sleepless nights and a major bereavement. The Claimant said that she would be pursuing a formal grievance and expected to produce the grievance the following week. The Claimant indicated that she wanted to lodge a grievance on behalf of the GCRN as well. [1339-1340]

243. The Claimant wrote a later email at 14:35 on 18 June 2021 stating that *"I have also had an anonymous email saying that people are watching me and out to get me."* The Claimant signed off the email stating *"The situation is now, in my mind, officially out of control."* [1337]

244. Following receipt of the Claimant's emails, Professor Wilson wrote to Professor Fribbance and Dave Hall (University Secretary) and Ceri Rose (Director of Marketing and Communications) at 17:44 on 18 June 2021, *"I am concerned about the unprofessional dialogue on social media in relation to the Gender Critical Research Network"* …. "*I believe we need to take action if they are OU staff as they are in breach of our Social Media Policy".* [1389]

245. Mr Hall responded to Professor Wilson's email query on 21 June 2021, stating *"I assume it's the role of the line manager to speak to their line report(s) if they've breached an institutional policy or are behaving inappropriately"* [1388].

246. We received no evidence that any disciplinary action had been taken. We would have expected to see or hear evidence of action taken, as well as an explanation if no action was taken. We were not led to any such evidence in the bundle, and no Respondent witness gave evidence of any disciplinary action taken, or why no action was taken. As a result, we find that no action was taken against OU employees who violated the Respondent's social media policy.

247. On 21 June 2023, Caragh Molloy, [1385] emailed Dave Hall, Ceri Rose, Professor Shakesheff, Professor Fribbance, Professor Wilson, Fary

Cachelin (Executive Dean to the Faculty of Well Being, Education, Language Studies) to suggest that a working group be set up. It was also suggested that Ali Neary (Head of Internal Communications) be part of the Working Group. The sender and recipients of that email (and Ali Neary) made up the Working Group.

248. Professor Wilson passed on the information about death threats to the Claimant on to HR. As the lead for the Working Group, Dave Hall followed up on the death threats and reported them to security on 21 June 2021 who were then asked to report them to the police [1405]. Sam Jacobson in HR confirmed in cross examination that security was aware of the death threats and the Claimant received advice at the time, but she only found that out later and did not know what was done about the death threats at the time. We find by this time the screenshots provided by the Claimant to the Respondent and the Open Letter demonstrate that there was a targeted campaign against the Claimant as a member of the GCRN by 18 June 2021. We find that the Respondent did not take the Claimant's death threats at the time as seriously as we would have expected an employer to take them. There was no evidence of any follow up regarding Mr Hall asking security to report the threats to the police. There was no evidence whether the threats were reported or not and Ms Jacobson did not follow up at the time either.

249. On 21 June, Mr Hall emailed the Claimant to offer her the auspices of the OU's central communications team to monitor her twitter account which the Claimant accepted the following day [1451]. Professor Wilson said in oral evidence that there was a number of emails about the launch, but few of those emails were supportive of the launch. Professor Shakesheff said in oral evidence that he did not agree there was potential harm to a member of the GCRN with gender critical views and not to those in the OU with gender affirmative views. We find that by this time the Respondent must have known that there was real harm being experienced by the Claimant and the members of the GCRN as the Claimant had told the Respondent in her correspondence on 17 & 18 June 2021.

250. The University Senate (which included most of the members of the Working Group and the Vice Chancellor) met on teams on 23 June 2021. The minutes of that meeting set out what action the Respondent decided to take in relation to the launch of the GCRN. [1538-1545]

251. The minutes state: *"3.6 The Vice-Chancellor acknowledged the concerns from different standpoints generated by the recent launch of the Gender Critical Research Network. He reminded members of the University's Statement of Principles on Academic Freedom, the Transgender guidance for staff and students, the social media guidelines, the University's responsibilities under the Equality Act and the Student Charter. He noted that the University was striving to be a diverse and Inclusive community within which everyone could feel safe and valued. There would not always be agreement, and it would sometimes be a considerable challenge to find an acceptable balance between the tolerable and Intolerable, but that was what we must all try to achieve.*

3.7 Members echoed the need to robustly defend academic freedom for both Gender Critical perspectives and Transgender perspectives, as well as issuing clear guidance on acceptable ways for debate and contestation to take place. It was noted that the University's Statement of Principles on Academic Freedom recognised that some academic arguments may cause offence but requires these to be presented in ways that were not hostile or degrading. It was suggested that the public version of the Reindorf report be shared with all members of Senate.

3.8 Concerns were raised around the use of the OU logo, and the risk of associating the OU brand with specific issues or linking the University with external resources, materials or channels which may not be in line with the OU's values. The Issue of the timing of the launch of the Network was also raised. The Vice-Chancellor explained that in light of recent developments, VCE would be reviewing the University's policies, including those on brand, media and the use of the OU logo for staff and student networks, to ensure they were fit for purpose. There would be an opportunity at the next Senate meeting to review any actions taken." [1541]

252. We considered the support that the Respondent said that they provided to the Claimant, and we find that there was no real effective support for the Claimant following the launch of the GCRN before 21 June 2021. We find that on and after 21 June 2021, there was limited support in the form of vetting the Claimant's emails. We find that in light of the Respondent's bullying and harassment policy the Claimant had a legitimate expectation that the Respondent would take action to stop the targeted campaign against the Claimant as part of the GCRN.

OU Position statements

253. On 18 June 2021, the OU, posted a statement on the OU intranet [3547], that said that the OU did not endorse the GCRN and that the GCRN was operating within the terms of academic freedom.

254. The Claimant said that publicly she tweeted support for the OU's 18 June 2021 statement on 19 June 2021, because it was important for the future of the GCRN to project a positive front and to emphasise that universities can't discriminate against gender critical research networks like ours [1397].

255. The OU's statement on academic freedom [1621-1622] includes *"'By being places of debate universities are one of our most important pillars of civil society, and represent a safeguard against forces that divide and undermine society. If universities are to be the innovative and dynamic organisations that push back the boundaries of knowledge in areas of science, social sciences and the humanities, they must also be places where differing and difficult views can be brought forward, listened to and challenged' Universities UK 2011*

All members of the Open University's academic community, both students and staff, have freedom within the law to:
· hold and express opinions;
· question and test established ideas or received wisdom;

· develop and advance new ideas or innovative proposals;
· present controversial or unpopular points of view."

256. Further relevant extracts from the OU's statement on academic freedom include: *"In the exercise of this freedom we acknowledge, in line with our Student Charter, that as members of a welcoming and inclusive community we have responsibilities to each other…. This means that:*
· ***We will be academically rigorous, justify our views with evidence and academic argument and be willing to recognise the gaps and weaknesses in our own arguments.*** *[Tribunals' emphasis]*
· In promoting our ideas, we will make every reasonable effort to minimise the risks of any harm, either physical or psychological, arising for any person, institution or community.
· We will be aware that some academic opinions and arguments may cause offence to some people but that this is not, of itself, a sufficient reason not to express those opinions and arguments. We will, nevertheless, be sensitive to the views of others and we will not present or challenge views in a way that is hostile or degrading.
· We respect the right of others to challenge our views, provided that it is based on accurate evidence, facts or reasonable argument and that it is thoughtful and made in appropriate fora." [1621]

257. On 21 June 2021, the Working Group met and decided that a statement should be issued from the OU on the launch of the GCRN in response to the growing complaints and negative response to it. The draft statement was discussed with the Working Group at the VCE meeting on 24 June 2021 and it was agreed that the statement would be issued on behalf of the VCE. Professor Fribbance said in cross examination that he could not think of an occasion when the Working Group did not take a collective view. We find that the Working Group's decisions were unanimous decisions in relation to the Claimant and the GCRN.

258. On 24 June 2021, the Vice Chancellor of the OU, Tim Blackman (VC) posted his statement on the intranet ("24/06/21 VC Statement") [3547-3548]. The statement referred to *"strength of views and level of distress on all sides connected with a new academic initiative, the Gender Critical Research Network"* but also specifically stated that "*the establishment of this network, based on critical scholarship about sex and gender, has caused hurt and a feeling of being abandoned among our trans, non-binary and gender non-conforming staff and students. It has also distressed many others in the wider OU community. This, and the well-being of all colleagues, greatly concerns me."* [3547]

259. We find that the 24/06/21 VC Statement did refer to distress on all sides and the well being of all colleagues, but it did not mention specifically the distress of the members of the GCRN including the Claimant caused by the reaction to the launch via social media and other forms of communication. The 24/06/21 VC Statement did mention the specific hurt of trans, non binary and gender non conforming staff and students. We find that the 24/06/21 VC statement is vague and does not carry weight so as to amount for support for OU GCRN members and in particular the Claimant.

260. Following the 24/06/21 VC Statement, on 10 November 2021 there was an update published again on the intranet ("10/11/21 VC Statement"). The 10/11/21 VC Statement was titled an update [3207-3208]. The 10/11/21 VC Statement reiterated its commitment to academic freedom and spoke about actions taken since the 24/06/21 VC Statement. The 10/11/21 VC Statement talked about continuing "… *to listen to all voices as we make progress in creating an environment where everyone understands their right to speak robustly and candidly, in a way that is consistent with the University's values and standards of behaviour around respect and civility."* [3208] We find that there was nothing in this statement that referred to the messages and social media publications that the Claimant and the GCRN were subjected to, or anything that looked like the action that the Claimant had requested.

261. It was put to Professor Fribbance in cross examination whether he agreed that those whose views are gender critical see the gender affirmative position as inherently wrong and those with gender affirmative views see the gender critical position as harmful. Professor Fribbance responded that it was complicated as the role of the OU was to see academic freedom play out. He accepted in cross examination that some views cause offence but that is not enough to prohibit academic freedom. Professor Fribbance admitted in cross examination that he had not considered whether someone looking at the OU's statements would think that the OU's public statements would protect that person from vitriol. He also admitted that the VC statements were to placate at a time when there was widespread misunderstanding of the use of the OU logo. He agreed that a VC statement could have referred to an explicit statement rejecting any attempt to exclude gender critical colleagues and might have been included in the OU public statement in recognition of the attacks on the gender critical side. Professor Fribbance said that the primary narrative of the students was the GCRN was causing harm to trans people and the VC statements were a response to that.

262. Ms Molloy gave evidence she was involved in contributing to the VC statements of 24 June 2021 & 10 November 2021. In cross examination Ms Molloy accepted that what was missing from the VC statements was the reaction concerning the GCRN. She accepted that there was room for improvement in the statements. In cross examination Professor Wilson disagreed there was a superficial approach to dealing with the reaction to the GCRN, but that the OU reached out to both sides. It wasn't about treading a path to avoid being antagonistic, but trying to be fair to both sides. Professor Wilson was referred to an email from an Anita Pilgrim at the OU (who was dealing with items in the FASS newsletter) to her on 22 June 2021 that said that in relation to an article recently published by the Claimant that she considered was not about gender, "*We feel perhaps given the recent events and staff anxieties, this might not be the best time to highlight Prof Phoenix's work*" [1431]. When asked whether this indicated a culture of fear in the faculty, Professor Wilson said potentially it did.

263. We find that the Respondent was fearful of outwardly being seen in any way to support the members of the GCRN including the Claimant in case it was seen as support for gender critical beliefs. We find that academic freedom

did not prevent the Respondent from saying that there was harm being caused to members of the GCRN including the Claimant. This would have been a balanced approach.

Retweeted LSE Statement

264. Dr Downes [1348-1349] on 18 June 2021 (retweeted twice), Dr Bowes-Catton on 18 June 2021 [2126], Dr Nicola Snarey on 19 June 2021 [2131] and the department of sociology at the OU on 18 June 2021 [1350] tweeted the LSE department of gender studies' *'Statement of Solidarity with Open University Staff and Postgraduate Research Students'*, "LSE Statement". [1346-1347]

265. The OU department of Sociology tweet was a retweet of SOAS' Gender Studies department tweet. It stated, "*Excellent @LSEGenderTweet statement in solidarity with staff and students at the Open University "who are facing an unwelcoming and antagonistic environment because of the newly created Gender Critical Research Network."* [1350] Embedded in the tweet was a link to the LSE Statement.

266. We did not hear evidence from anyone in the OU Sociology department as to why the Gender Studies SOAS' tweet with the LSE Statement was retweeted. However, as the tweet refers to solidarity with the OU, we take it on face value that was the motivation for the OU Sociology department retweeting the SOAS' tweet and LSE Statement.

267. The LSE Statement, referencing the GCRN as the network, specifically asked for the OU to *"rescind its support for this network"*. The LSE unequivocally refers to *"members and affiliated members of the Network*" which would include the Claimant as *"…adamantly and openly opposed to recognising trans people's rightful and valid claims to their gender and their rights."* [1346]

268. The LSE Statement also stated, "*As numerous scholars and activists have documented, those espousing gender critical perspectives routinely make transphobic, discriminatory, inaccurate, and harmful claims about trans people specifically, and gender more broadly, that have profoundly negative effects on social and political life"* [1346].

269. We find that this particular quote from the LSE Statement refers to those with gender critical perspectives which had already been defined in the statement earlier as including the Claimant.

270. All the Respondent witnesses who were retweeters of the LSE Statement said in evidence that the LSE Statement was retweeted in solidarity.

271. Professor Fribbance acknowledged that the LSE Statement was tweeted by the OU Sociology department. [See IF@16].

272. The Claimant emailed Dave Hall, Professor Wilson and Professor Fribbance on 21 June 2021 that the statement was damaging her reputation and amounted to defamation. The Claimant stated in the email that she was

giving the Respondent a chance to remove the OU Sociology department tweet with the link to the LSE Statement [1455].

273. The LSE Statement was taken down from the LSE website by the LSE after the Claimant and other members of the GCRN wrote to the LSE explaining why the statement was defamatory. Professor Freedman of the University of Reading had asked for the removal of the LSE Statement on 21 June 2021 [1678-1679] and the LSE Statement was removed on 23 June 2021 [1677]. On 25 June 2021, a member of the LSE legal team wrote to the members of the GCRN including the Claimant. In that email, the LSE did not admit liability but said that it was out of prudence they removed the LSE Statement from the website. The LSE did commit to an internal review of the use of their website but would not provide a public apology. [1675]

274. We find that the LSE Statement contained untrue statements. In particular, it said that the Claimant as a member of the GCRN was adamantly and openly opposed to recognising trans people's rightful and valid claims to their gender and their rights. That simply was not the Claimant. The Claimant had made public statements (i.e. on the WPUK talk) that she supported trans rights. The LSE was stereotyping the Claimant as a proponent of gender critical beliefs without paying any attention to what the Claimant had actually said and done.

275. The LSE Statement further added that those espousing gender critical perspectives routinely made transphobic, discriminatory, inaccurate, and harmful claims about trans people at that point in time. We find that having regard to the earlier sentence about the GCRN this was a reference to the Claimant and members of the GCRN again. But there was no evidence that the Claimant routinely made transphobic, discriminatory, inaccurate, and harmful claims about trans people at that point in time. Again it was stereotyping. We find the LSE Statement's suggestion that the Claimant was adamantly opposed to trans rights is both incorrect and was likely to lead to vehement attacks of outrage and disrespect towards the Claimant. The LSE Statement provided no evidence or argument to back up their claim. We consider that it is relevant that after the Claimant and her GCRN colleagues' complaint, the LSE Statement was taken down within a few days. We find the Respondent made no effort to ask the OU Sociology department to remove their tweet.

276. We deal individually with the evidence of the retweeters of the LSE Statement under the particular headings of the tweets and retweets.

<u>WELS/RSSH Statement [1624-1625]</u>

277. The Wellbeing, Education and Language Studies Faculty "WELS"/ Reproduction, Sexualities and Sexual Health research group's "RSSH" statement ("WELS/RSSH Statement") was published on 24 June 2021 [1624-1625]. The RSSH was a group within the Wellbeing, Education and Language Studies Faculty at the time. The WELS/RSSH Statement was addressed to the Executive Dean and came about as a result of a vote of members of the RSSH group on 23 June 2021 because of the dismay of the members of RSSH at the launch of the GCRN [1505]. The WELS/RSSH

Statement was written by Professor Keogh and other OU academics in RSSH.

278. The WELS/RSSH Statement stated [1624-1625] "*We question the good faith of this network's aims because:*
(a) The network was launched with no prior notification to colleagues across the OU who are currently working on matters related to health, wellbeing and gender. There was no attempt by the network's founders to engage any of these colleagues in conversations about what purpose such a network would serve, nor any invitation to join it or help set it up. It has been presented as a fait accompli.
(b) Notwithstanding what the network claims to take as its focus, the term 'Gender Critical' is widely perceived as questioning trans-people's self-identity. Language and terminology matter, and we cannot but conclude that this name was chosen as a deliberate provocation to trans communities.
(c) Despite claims otherwise, the network immediately began to share materials containing transphobic comments made by its members. We ask that this network be judged on its immediate and flagrant actions and not on how it describes itself on its webpage.
(d) Neither co-convener currently researches health and wellbeing, and only one member appears to. Only one affiliated member undertakes research on health and wellbeing topics, and not on topics related to gender. Given this, we query why it is appropriate for this group to make its home within the Health and Wellbeing SRA."

279. The stated aims of the GCRN on the website are *"We will reflect on the importance of sexed bodies for health and welfare. We will critique the constraining stereotypes of gender. We will provide a hub through which theories and research can be shared and exchanged and will host workshops and an annual one-day conference. Our events will be maximally accessible. We aim to foster evidence-based and rigorous research in this burgeoning field and explore ways to foster maximum knowledge exchange, impact on policy and ideas and dissemination*" [4108].

280. The Claimant said the reason why the term Gender Critical was chosen in the name of the GCRN was *"because that is the expression used to describe a belief in the importance of biological sex as a category for analysis separate from gender identity. The term is widely used and understood to refer to this belief, including by the Employment Appeal Tribunal."* [See JP@251].

281. Under cross examination, Professor Keogh accepted that the aims of the GCRN may have been quite genuine.

282. We find that a network cannot have good or bad faith aims, it is the members who set out the aims that have the good or bad faith when setting out the aims. We find that there was no evidence of bad faith by the Claimant or Jon Pike on behalf of the GCRN. We find that the GCRN was launched with prior notification of a researcher in HWSRA. We find the Claimant did consult Professor Earle who worked in the arena of health, wellbeing and gender but it is the case that she did not consult any other colleagues across

the OU working in health wellbeing and gender before the launch of the GCRN. However, there was no requirement to consult others and the WELS/RSSH statement's suggestion of the lack of prior notification was seeking to imply that the Claimant and the GCRN behaved in a non collegiate way which was not the case. Neither was there a requirement for the GCRN to have engaged in conversation with RSSH about what purpose of the GCRN would serve. It appeared somewhat patronising to us, that the RSSH believed that they should have had a veto over the GCRN because it was in the HWSRA. We accept the Claimant's reason for choosing the name gender critical in the title of the network. It was a name that reflected the true nature of the perspective the GCRN was researching from. It was a reasonable and appropriate name to choose.

283. The WELS/RSSH Statement specifically refers to "co convenor". We find that included a reference to the Claimant.

284. We find that both the Claimant and Jon Pike as co-convenors did do research in health and wellbeing and gender. The Claimant had already undertaken research into transgender issues as is evident from her joint article published in January 2020 "Its complicated': Canadian Correctional Officer recruits' Interpretations of issues relating to the presence of transgender prisoners". Dr Pike did research in transgender athletes in Rugby.

285. Professor Keogh asserted in cross examination that all the reasons (a)-(d) set out in the WELS/RSSH Statement taken in combination amount to a proper basis for alleging bad faith. We do not accept Professor Keogh's evidence on this point. Professor Keogh's evidence that the stated aims of the GCRN may be genuine contradicts that. We find that all the reasons (a)-(d) taken in combination do not amount to a proper basis for alleging bad faith.

286. The WELS/RSSH Statement asked for specific actions, stating: "*We ask:*

• That the HWSRA and the OU more widely withdraws endorsement of this network. We cannot accept the argument made in last Friday's statement on the intranet that OU does not resource nor endorse this network: it funds the SRA and the group's webpage represents OU's investment and endorsement.
• That a full enquiry is made into the process of approving this network for inclusion as part of the HWSRA e.g. whether an equality impact assessment and risk assessment were undertaken.

Failing this, we have voted to disband the Sexuality and Reproduction SIG and will instruct the HWSRA to remove any reference to us or our work from their online presence and other materials." [1625]

287. Professor Keogh's evidence was that RSSH wished to express their dismay and concern about the formation of the GCRN [PK@30]. In his written evidence Professor Keogh said *"the purpose of the letter was to request that they took specific actions. The letter was also intended as a clear and public statement of reassurance to our research collaborators and the*

communities we served that we had no connection with the GCRN". [PK@33]. Professor Keogh's oral evidence was that his problem was with how the GCRN was set up and the people within it, but he did not have a problem with the GCRN. In cross examination Professor Keogh admitted that the WELS/RSSH Statement was saying do not give anyone a platform based upon their beliefs.

288. The WELS/RSSH Statement also added *"…trans people are the target of media-generated hatred in this UK. The Times has published, on average, two articles per day in the last two years on trans people, the vast majority of which actively question their right to exist. Internationally the picture is worse. States across the USA are actively rolling back trans rights while violence, including rape and murder against trans people, particularly trans women, remains endemic. Researchers at the OU recently highlighted the case of trans women fleeing violence in their home countries being burnt to death in their beds in Kakuma refugee camp in Kenya.*

The current environment is compounding longstanding societal stigma to contribute towards a health crisis among trans people in the UK. It is very disappointing that in the midst of this crisis, with human lives at stake, and while colleagues are working so hard to counter these trends, the OU's Health and Wellbeing SRA should choose to create and support a Gender Critical Research Network," [1624]

289. Professor Earle stated in her witness statement that the WELS/RSSH Statement said "…*the most appalling things, associating the OUGCRN with an environment where trans people are raped and murdered, and suggesting that the OUGCRN contributed to an environment which harms trans people's health.*" [SE@31] She accepted in cross examination that the WELS/RSSH Statement did not refer to the GCRN causing rape and murder.

290. When it was put to Professor Keogh in cross examination that these sentences implied that the GCRN contributed to putting human lives at risk, Professor Keogh responded that at this point and to this day, trans gender people are in a parlous position and that the Savage Minds podcast blamed trans people for everything that has gone wrong. Professor Keogh argued that he could call out the environment without calling out people and that people needed to be accountable. He said that he was not saying they were killing people, just that they need more accountability.

291. We considered that the statement about putting human lives at stake was somewhat hyperbolic. If Professor Keogh wanted to draw attention to accountability he could have just put this in the letter. There is no mention of accountability. We do not accept Professor Keogh's explanation of what the sentence about putting human lives at stake was supposed to be saying. It clearly implied that the GCRN put human lives at risk when at that point the GCRN had not done anything that could be construed as putting human lives at risk. We find that the WELS/RSSH Statement did not associate the GCRN with rape and murder as that was a reference to the environment in the USA, but it did associate the GCRN with causing human lives to be at stake. We find that the contents of the WELS/RSSH Statement were not

entirely true, yet because the WELS/RSSH statement was written by academics this would have given it a veneer of credibility in spite of its content.

292. In March 2020, Tom Doyle of Yorkshire MESMAC Group of Services who are a sexual health organisation and research partner to academics at the OU wrote to Richard Holti at the OU, expressing his unhappiness about Dr Jon Pike's article published on 20 December 2020 called *"Safety, fairness, and inclusion: transgender athletes and the essence of Rugby* [767-781]. Mr Doyle wanted clarification and reassurances. On 15 March 2020, Dave Hall wrote back to Mr Doyle providing clarification and reassurances [5481].

293. Professor Keogh said that it was this exchange of correspondence that he was referring to in the WELS/RSSH letter when he wrote "…*it risks fatally undermining our and the university's reputation with the communities we serve"* and "*This makes our position with current and future funders extremely difficult"* [1625] Professor Keogh said that the response from Dave Hall helped him and his colleagues and that "they managed to weather that in March."

294. In re examination Professor Keogh was taken to an email dated 24 June 2021 from Professor Earle to Professor Shakesheff about an academic Dr Liz Tilley who following the launch of the GCRN was concerned about funding [1628]. In that same email Professor Earle refers to Dr Tilley raising *"concern from funders about the gender critical research network, probably in relation to risks to projects."* Professor Keogh never mentioned in evidence whether he knew about this individual. Professor Earle accepted in oral evidence that she had not seen anything about funders withdrawing because of the establishment of the GCRN. Professor Keogh said that Dr Tilley's concerns of funding were to do with ICTA. However, we were not provided with any evidence that Dr Tilley was involved in ICTA. The email on page 5484 from the ICTA team does not mention her name as part of the ICTA team.

295. We find there was no evidence of real funding concerns following the launch of the GCRN, concerns raised about gender critical views in March 2020 appeared to be allayed as there was no further reference to them. We were not convinced that there was a real concern from Dr Tilley otherwise Professor Earle would have heard more about the concern, and we would have been referred to documentary evidence from the funders (which there was none) since the launch of the GCRN.

296. The WELS/RSSH Statement said that any real or perceived connection to the GCRN *"….runs directly counter to the values of our most valuable research collaborators in the areas of gender and health, who are committed to trans health and serving the needs of trans people e.g. the LGBT Foundation, Frontline Aids, the International Planned Parenthood Federation, MESMAC and The Bisexual Index."* [1625]. Professor Keogh accepted that the RSSH were not on the same website as the GCRN but said in oral evidence that the reason why the WELS/RSSH Statement was to be published to the world was because the GCRN was public.

297. We do not accept Professor Keogh's evidence on this point. The WELS/RSSH Statement was addressed to the Executive Dean, it was asking the OU to cede to the RSSH's requests in the letter, it did not need public input to do that. It seemed that Professor Keogh's reason for publication was almost retaliatory. The public nature of the WELS/RSSH Statement was to paint the GCRN and its members as transphobic and put pressure on the OU to deplatform the GCRN.

298. Professor Keogh said that the RSSH had to distance itself in everyway possible from the GCRN. Professor Keogh initially said in cross examination that the GCRN should not have a platform within the OU, but then later said he misspoke when he said that.

299. We do not accept Professor Keogh's evidence that he had no problem with the GCRN. Professor Keogh admitted that the WELS/RSSH Statement was saying do not give anyone a platform based upon their beliefs and in this case gender critical beliefs. We find that Professor Keogh did not misspeak, everything about how he gave evidence, the distain he expressed in respect of the GCRN, in how Jon Pike referred to trans woman as one word rather than 2 and the use of language like tawdry, indicated to us that he did not want the GCRN to have a platform and that he had a problem not only with the members of the GCRN which he admitted but also the existence of the GCRN. We find that as Professor Keogh had a problem with the people in the GCRN it meant that he had a problem with the Claimant.

300. Professor Keogh confirmed in evidence that when he wrote in the WELS/RHSS letter *"that the network immediately began to share materials containing transphobic comments made by its members"* [1624]; he was referring to the Savage Minds podcast.

301. Professor Keogh's evidence was that his concern about the podcast was a reference to "men in dresses" and the statement that Stonewall was suggesting that lesbians should "suck female cock". Professor Keogh set out in his witness statement *"The podcast included comments that I considered to add to or exacerbate prevalent negative societal attitudes against trans people and perpetuated transphobic social tropes for example referring to 'men in dresses' and stating that Stonewall was suggesting that lesbians should 'suck female cock'"* [PK@ 25]. As one of the authors of the WELS/RSSH Statement we had no reason to believe that his fellow authors did not share his concerns about these statements. We note the comments of concern were not made by the Claimant or any of the members of the GCRN but by the interviewer Julian Vigo. We find there was nothing that the Claimant said on the podcast that could be construed as transphobic.

302. As well as being a co-author of the WELS/RSSH Statement and publishing it, Professor Keogh wrote a letter to the University [1757] dated 29 June 2021 which was signed by other members of RSSH but not published, in this letter he stated *"We therefore object, in the strongest possible terms, to the university's institutional promotion of the GCRN and disagree with the university's public statement that "The views of the GCRN have not been endorsed by the university, nor are they receiving any institutional investment." This is patently not the case. The Open University is giving*

reputational and in-kind resources to this network by allowing it space on its websites, to use the OU plaque, and to be the 'home' of gender critical research, as well as staff time." [1757]. We find this letter put in the clearest terms Professor Keogh's desire to see the deplatforming of the GCRN and to put pressure on the OU to deplatform the GCRN.

303. When Professor Keogh was interviewed in respect of the Claimant's grievance, Professor Keogh said at entry 98 that he thought that in the case of Forstater his *"understanding to that case is that the organisation that the employer has been given leave to appeal and we know that many legal judgments are found to be unsound, and I would say it's a bit precipitous to be claiming that the law says it's a protected belief"* .[5287] When it was put to Professor Keogh in cross examination that he had thought that Forstater was wrong, he said he was happy with Forstater. However, when he was challenged on his answer as being inconsistent with what he told the interviewer, he said it was neither here nor there. We found Professor Keogh's evidence insincere. We find that Professor Keogh was not concerned with what the law said and did not accept that gender critical beliefs were protected.

304. Professor Fribbance accepted in cross examination that the WELS/RSSH Statement was objecting to the existence of the GCRN. The WELS/RSSH Statement was asking for the removal of the GCRN which was less favourable treatment. But he thought that it was a legitimate argument that the co convenors were not researchers in health and well being.

305. Ms Molloy accepted in cross examination that the WELS/RSSH Statement called for the disaffiliation of the GCRN from the OU.

306. Professor Wilson accepted in cross examination that some of the contents of the WELS/RSSH Statement did not stand up to scrutiny, though she believed that the WELS/RSSH Statement was an exercise of academic freedom. She accepted that the WELS/RSSH Statement alleged bad faith but did not consider that gender critical beliefs were transphobic. She didn't feel comfortable with saying the WELS/RSSH Statement was discriminatory but accepted that the WELS/RSSH Statement was calling for differential treatment. She agreed that the WELS/RSSH Statement affected the treatment of the six people who were in the GCRN and that if the OU had conceded to the WELS/RSSH Statement demands that would have been discrimination.

307. Ms Molloy agreed that broadly the WELS/RSSH Statement was calling for the disaffiliation of the GCRN.

308. The Claimant said at paragraph 262 of her witness statement she felt that *"…the WELS Statement was deliberately hostile and intimidating with its threats of boycotts and encouraging action to destroy a Strategic Research Area, which was a research endeavour that colleagues had spent years developing and running. I felt, and still feel, so upset for Sarah Earle and the impact this statement had on her and the Health and Wellbeing SRA. The statement was also deeply offensive."* We consider that the contents of the WELS/RSSH statement speaks to the offensive stereotyping of the

Claimant as saying 'transphobic comments' on the Savage Minds podcast which was not the case. We accept the Claimant's evidence that she found the WELS/RSSH statement offensive.

Professor Keogh's email dated 24 June 2021 [2019]

309. On 24 June 2021, Professor Keogh sent an email to Shaun Daly and the LGBT+ staff network email list referencing the GCRN as the network and stating *"The issue is that the network are actually sharing transphobic views and materials on their website"* [2019]. Professor Keogh also stated, *"when the network was launched it had immediately begun to share "materials containing transphobic comments made by its members".* [PK@60] *"The reference to transphobic comments were a* reference to the Savage Minds podcast. [PK@61] Professor Keogh's evidence about his email was *"I was not saying that Professor Phoenix (or other members of the GCRN) were transphobic but referring to comments made on the podcast which I considered to be transphobic. It was a comment on the language that had been used, rather than a comment about individuals."* [PK@ 61]

310. We find Professor Keogh's evidence inconsistent and contradictory. Whilst we accept that a reference to transphobic comments was a reference to the Savage Minds podcast, we find it is irreconcilable to say that the reference to transphobic comments were not directed at the Claimant, but transphobic comments were made by members of the network. The Claimant was the only member of the GCRN on the podcast and so we find that Professor Keogh's reference to transphobic comments was directed at her.

311. As a member of the LGBT+ staff network, the Claimant was on their email list and so received Professor Keogh's email. The Claimant responded to the email on the same day at 17:48 implying that she considered Professor Keogh's email unlawful discrimination on the grounds of her gender critical beliefs [2019]. The Claimant said that she "cracked" on receiving the email [JP@280]. We accept that Professor Keogh's email upset the Claimant.

The KMi's statement published 24 June 2021 [1607]

312. On 16 June 2021, staff within the knowledge media institute ("KMi") which was part of the computing department in the OU, received a number of negative messages concerning the KMi's perceived role in establishing or supporting the GCRN and perceived association with the GCRN because KMi was contained in the URL of the OU GCRN's website address. GCRN has KMi in their URL because the GCRN was hosted on the Health and Wellbeing Strategic Research Area (HWSRA) website as a special interest group which was hosted on the KMi server. Professor Domingue, Director of KMi at the time received complaints from students [1203-1205] from colleagues in KMi and the Faculty of STEM in which KMi sat [1197-1200] and others [1252].

313. Professor Domingue entered into correspondence with Professor Earle on 17 June 2021 [1410-1411] to inform Professor Earle that he proposed to remove the GCRN from the KMi servers so that KMi would no longer be in the URL. Professor Earle responded explaining she did not agree with

Professor Domingue's decision and informed Professor Domingue that she was *"seeking advice and support from the University with respect to some of the negative interest as colleagues within the network have been subject to harassment and have received threats of violence* [1410]. In response on 18 June 2021, Professor Domingue replied "*I am really sorry to hear that colleagues in your network have been the target of harassment and threats. That is truly appalling."*

314. On 24 June 2021, Professor Domingue published the following statement ("the KMi Statement") which he wrote and approved before publication.

"We are aware that this research network appears on our domain. KMi's involvement with the Health & Wellbeing Research Networks is in a parallel Special Interest Group (SIG) on the topic of Digital Health & Wellbeing. We are disassociating ourselves from the new Gender Critical Research Network because KMi do not condone or support the views of that SIG. This will not limit the free speech or academic freedom of this group. We are working with the Health & Wellbeing Research Strategic Research Area to move the content onto non-KMi servers. This may take a few weeks. We aim to have removed 'kmi' from the GCRN research network URL soon.

Especially, but not only in this Pride month, we believe that the health, wellbeing and inclusion of trans and non-binary staff, students and people across the globe is paramount." [1942 & 1607]

315. Professor Domingue accepted in oral evidence that he wrote the KMi Statement and that he was not trying to be neutral but was balancing different concerns in particular that he had one trans staff member and the use of the word "condone" was to support that trans staff member. Professor Domingue denied in cross examination that he sought to refuse to host the GCRN. He was just moving the GCRN to another server that was not KMi. Professor Domingue said that the KMi logo didn't add any value to the SRA. He did not think that the removal of the KMi logo would be detrimental to anyone, it was of benefit to KMi not the GCRN. He said that KMi did not want to be in the middle of a controversy, he said removing the KMi from the GCRN's URL was not discriminatory, but actually put the GCRN in a better position.

316. We find that the reason why Professor Domingue wrote the KMi Statement and published it was predominately to support his transitioning staff member. The KMi Statement was not directed at the Claimant.

317. It was put to Professor Shakesheff in cross examination that Professor Domingue's email dated 21 June 2021 in which he proposed to stop hosting the GCRN as soon as possible and that Professor Earle should let him know by 5 July where to move the content to [1383] was discriminatory. Professor Shakesheff said in his witness statement that he spoke to Professor Domingue about the KMi who asked him for comments on it. Professor Shakesheff did not accept that the statement was discriminatory. Professor Domingue said that he was giving a deadline in so that the content would be moved, he never intended on following up on it.

318. The Claimant wrote to Ms Jacobson on 2 July 2021 in an email titled *"bullying and harassment complaint"* to ask for the KMi Statement to be included in her grievance [1884]. In the Claimant's interview on 19 August 2021 [2419-2435], the Claimant said when asked about the KMi Statement *"All three letters are unwanted attention and unwanted conduct relevant to JPs gender critical belief. They violate JPs dignity by trading in pernicious stereotypes. They create an intimidating and hostile working environment for JP. JP notes that she cannot even talk about being the co- founder of the GCRN without expecting to receive a negative/odd reaction"* [2422]

319. The Claimant in correspondence with Professor Domingue told him that she found his proposal to remove the GCRN from KMi servers "disappointing" [1244].

320. By letter dated 13 July 2021 [2101-2111], the Claimant's Solicitors Leigh and Day asked the Respondent to remove the KMi Statement as the Claimant considered the KMi Statement harassment. [2108]

321. The Claimant's evidence was that the KMi Statement with its reference to not condoning the views of the network and the GCRN being antithetical to the health, wellbeing and inclusion of trans and non-binary staff and students, compounded the feeling that the Claimant had that every corner of the University was hostile to her and her beliefs; and that nowhere was safe. [JP@267]. We accept the Claimant's evidence as her honest appraisal of how the KMi Statement affected her.

322. Professor Domingue gave evidence that the KMi Statement was removed because once the URL changed and content moved, the GCRN no longer looked associated with KMi.

323. We find the use of the term "condone" is not a neutral term and expresses a view that there was something wrong with the GCRN. If it had been Professor Domingue's intention to just disassociate KMi from the GCRN there would have been no need to use this term.

324. We find that the KMi Statement was not specifically directed at the Claimant. But we find that as Professor Earle told Professor Domingue about the harassment of members of the GCRN on 17 June 2021, Professor Domingue was aware of the hostile environment in which the Claimant was being subjected to. We find that the inclusion of the term 'condone' in the KMi Statement was bound to increase the hostility towards the GCRN and in turn the Claimant.

Cath Tomlinson's written message on Yammer on 24 June 2021 [1626]

325. On 24 June 2021, Mr Daly posted an advance copy of the VCE statement on the GCRN on Yammer and asked members of the LGBT+ staff network what views they wanted Mr Daly (as chair of the LGBT+ staff network) to represent. In response to that public message Cath Tomlinson posted on 28 June 2021 on Yammer a written message saying amongst other things that her feedback was "*I fundamentally disagree that hate groups fall under academic freedom. The University cannot on one hand claim to be open*

and supportive to trans and gender non conforming staff and students, then sanction research networks like this that attack the basic rights of those same individuals by amplifying and legitimising hostile and degrading transphobic content". [1626].

326. Ms Tomlinson's post asked for the GCRN to be *"removed from any Open University servers or hosting and be asked to remove the OU from any descriptors (such as their twitter account) I don't disagree that academics have the freedom to believe whatever they wish, but we as an organization should not be providing a platform for pseudo- science or hate."* [1626]

327. Ms Tomlinson was not a member of the LGBT+ staff network but joined following the reaction to the GCRN and considered that she was asked to comment on the VCE statement by Mr Daly's post. Ms Tomlinson admitted that she knew nothing about gender critical beliefs prior to the launch of the GCRN and investigated gender critical beliefs via the internet. Ms Tomlinson's post does not mention the content of the VCE statement nor any of the members. However, the post does mention the GCRN though Ms Tomlinson said that the post was against the gender critical movement in general. Ms Tomlinson admitted in cross examination that she knew who the members of the GCRN were and that the Claimant was a member, and that the Claimant was also a member of LGBT+ staff network but she said that the post was not personal. She said that she was calling the gender critical movement a hate movement and that the GCRN falls under the Southern Poverty Law Group's definition of a hate group. On 25 July 2021 via yammer, the Claimant requested that Ms Tomlinson remove the post [5128]. Ms Tomlinson refused [5128]. After submitting her grievance on 24 June 2021, the Claimant requested that the Respondent remove the post and added this complaint to her grievance on 17 September 2021. [2659-2660]. We find that the Respondent did not request that Ms Tomlinson's post be removed by the moderators of Yammer.

328. We find that Mr Daly's post did not ask anyone including Ms Tomlinson to comment on the VCE statement but asked if individuals wanted their views represented by the LGBT+ staff network. Ms Tomlinson's post was clearly directed at the GCRN not the gender critical movement in general. The post refers to the association of the OU with the research network. Ms Tomlinson admitted she knew nothing about gender critical beliefs until the furore. The post makes generalised stereotypes regarding gender critical beliefs, i.e. "research networks like this that attack the basic rights of those same individuals by amplifying and legitimising hostile and degrading transphobic content". We find that the GCRN was not a hate group and there was no evidence for this assertion by Ms Tomlinson. It seems to us considering the manner in which Ms Tomlinson gave evidence that she was not concerned about academic debate at all. She disagreed with gender critical views, and she wanted her view to be known. On a balance of probabilities she knew that the Claimant would see her post and Ms Tomlinson was reckless as to what effect her post had on the Claimant.

The Tweets

329. The Respondent's social media policy specifically states that it covers *"private use of social media by staff"* [4241].

330. The Respondent's social media policy states under responsibilities:

"The University must also ensure that the University's confidentiality and reputation are maintained, and that staff do not subject others to online abuse. Employees are reminded of their obligations under the statement of principles on Academic Freedom and University employment policies and standards when using social media sites generally, of their duty not to bring the University into disrepute and to behave professionally and respectfully to colleagues, students or other University contacts" [4242]

331. At bullet point 3 on page 4243 under the heading *"When using social media, whether professionally or personally, employees are advised:" "not to post or share defamatory comments, content and images (i.e. something which is untrue and causes or is likely to cause harm to a person's reputation)"* [4243].

332. The Claimant said that she received hundreds of tweets, but there were 14 from colleagues that she relied upon as amounting to harassment or direct discrimination. The Claimant said that the tweets were hostile, intimidating and offensive to her. We accept the Claimant was subjected to hundreds of tweets following the launch of the GCRN.

333. Dr Downes stated in evidence that their tweets and retweets in paragraph 47-63 GoC1 were personal tweets. Dr Downes gave oral evidence that there was a disclaimer on their twitter profile at the time saying that the tweets do not mean endorsement. Dr Downes stated that they no longer had a twitter account. We did not see any disclaimer in the bundle.

334. On 17 June 2021, Dr Downes retweeted a tweet from someone else of a screenshot of the Claimant's photo and Twitter handle as well as photos and twitter handles of other members of the GCRN (Dr Pike & Rosa Freedman) and a tweet from another person which had been posted on 16 June 2021 saying, *"Just a heads up that the @OpenUniversity have just launched their own transphobic/TERF/GC campaign network."* [1651 & 1186]

335. The same tweet *"Just a heads up that the @OpenUniversity have just launched their own transphobic/TERF/GC campaign network."* was also retweeted by Dr Snarey [2128]. Although the document in the bundle displaying the retweet did not show the photo and twitter handle of the Claimant and other members of the GCRN as mentioned above, we find that the retweet by Dr Snarey did have the screenshot photos and twitter handles as it is clear that it is exactly the same tweet that has been retweeted, but we cannot see the screenshot which may have not shown up for technical reasons in the document.

336. Professor Fribbance agreed that one type of discrimination was to label everyone as having the same traits and stereotyping and that Dr Downes' retweet did contain such abusive terms and stereotyping.

337. We find that the tweets on pages 1651/1186 & 2128 were directed at the Claimant, and we find that the reference to transphobic and TERF is associating the Claimant directly with a transphobic and TERF network both of which are terms of insult about gender critical beliefs. Whilst we accept that the historical use of TERF was not inherently an insult, the term used by Dr Downes and Dr Snarey by their retweets is a term of insult. We find that when this term was used by the Respondent's witnesses, that it was used as a term of insult. We find that this tweet was in breach of the Respondent's bullying & harassment policy, under 2.1 where it refers to written harassment as *derogatory name calling.*

338. Dr Downes stated in their written evidence that *"I may not even have been aware of the comments made in the original tweet and it was not my intention or purpose to label the GCRN as transphobic, or specifically endorse that comment, and I don't think that that is a fair reading of my retweet"*. [LD@23] Dr Downes' oral evidence was that it was regrettable that the retweet had the terms of insults.

339. The Claimant said that she found the tweet on page 1651 particularly alarming because it associated her name and photograph with the term TERF, with all its undertones of violence against women. [See JP@284]

340. We find that Dr Downes' regret was at the time they gave evidence not at the time they tweeted. We don't accept that they were only intending to retweet the 17 June 2021 tweet not the embedded 16 June 2021 tweet. The 17 June 2021 was integral to the 16 June 2021 tweet.

341. On or around 17 June 2021, Dr Downes tweeted a link to the Open Letter and commented in the tweet, *"Open University staff (including PGRS) who are concerned about the new gender critical research network and its impact on our trans colleagues and students assemble. Read and add your support in this open letter."* [1650]

342. Dr Downes did not deny that they posted the link and tweeted the comment "*read and add your support in this open letter"*. We find that Dr Downes did tweet the link to the Open Letter. Dr Downes tweeted the link to encourage more people to sign the letter which would in turn add pressure on the OU to comply with the demands of the Open Letter and increase hostility to the GCRN and Claimant's gender critical beliefs in the OU.

343. On 17 June 2021, Dr Downes retweeted a tweet by Fiona Robertson, National Equalities Convener for the SNP, which said, *"I stand in total solidarity with the other OU students and staff who are demanding action regarding GCs…"* [1654].

344. Dr Downes' oral evidence was that by retweeting the Fiona Robertson tweet, they were tweeting a range of opinions. Dr Downes said in written

evidence [LD@124] that the reason they retweeted Fiona Robertson's tweet was to amplify the support and solidarity being received.

345. We do not accept Dr Downes' oral evidence that by retweeting the Fiona Robertson tweet that they were tweeting a range of opinions. It is clear from Fiona Robertson's tweet that Fiona Robertson holds the same views as Dr Downes who said in their oral evidence that they stood in solidarity with OU staff and students when they signed the Open Letter. We find this is not a range of views. We find the reference to GCs is a reference to those at the OU with gender critical beliefs which included the Claimant.

346. On 17 June 2021, Dr Downes retweeted a tweet which said, *"Seeing UK University research networks approved & set up working against the rights of marginalised communities in this case Trans & non binary people is another shocking milestone in 2021."* [1323]

347. We find that the embedded tweet was referring to the GCRN as there was a screenshot of the OUGCRN twitter page attached to the tweet below.

348. Dr Downes' evidence was that the reason why they retweeted the tweet on page 1323 was because they thought that the manifestations of the GCRN were over the line. Dr Downes didn't say what those manifestations were.

349. We find the GCRN was not set up working against the rights of marginalized communities i.e. Trans & non binary people and in this way this tweet was untrue. We find that this sentence in the retweet would increase a hostile environment for those associated with the GCRN including the Claimant. We find that the retweet was a breach of bullet point 3 on page 4243 of the bundle (the Respondent's social media policy).

350. We do not accept Dr Downes' evidence that the reason why they retweeted the tweet on page 1323 was because they thought that the manifestations of the GCRN were over the line. They didn't say what those manifestations were, but in so far as Dr Downes had already given evidence that one problem with the GCRN launch was the Savage Minds podcast, we find that it was the Savage Minds podcast Dr Downes was referring to when they mentioned manifestations. However, the retweet did not mention anything about the Savage Minds podcast and so we do not see what the manifestations as Dr Downes put it, had to do with the retweeting of the tweet on page 1323. We find Dr Downes retweeted the tweet on page 1323 because they wanted to add to the 'pile on' effect on the GCRN and the Claimant.

351. On 18 June 2021, Dr Downes retweeted a tweet by Dr Ruth Pearce, which said, *"To commemorate the launch of the openly transphobic @openuniversity Gender Critical Research Network, why not read our rigorously peer-reviewed essay collection "TERF Wars: Feminism and the fight for transgender futures"?"* [1654].

352. Dr Downes' evidence was the reason they tweeted this was because they were tweeting a range of opinions. Dr Downes admitted in evidence that gender critical beliefs can be expressed to and manifested to be harmful to

trans people and that gender critical beliefs are potentially transphobic. Dr Downes stated that the gender critical belief that trans women have male bodies is a denial of who trans women are. When Dr Downes was asked questions about their views on gender critical beliefs they were evasive and did not answer a number of questions trying to tease out their view. For example Dr Downes was asked what words could be used by gender critical academics to explain trans people with male bodies. Dr Downes could not provide any words that they said were not offensive. We therefore find that Dr Downes was not being genuine, Dr Downes was an expert in trans issues, and it is therefore not credible that they would not be able to give a clear answer on whether they accepted gender critical beliefs and the extent to which they accepted them or not or how to debate gender critical views without being offensive and or harmful. We find this tweet's reference to the GCRN as "the openly transphobic network" was name calling and offensive to members of the GCRN including the Claimant.

353. On 18 June 2021, Dr Downes tweeted a link to the LSE Statement and wrote, *"Thank you for your solidarity and support @LSEGenderTweet."* [1349]

354. Dr Downes stated in their witness statement at paragraph 128 *"I can't recall whether I read the statement in full. The purpose of my tweet was just to acknowledge the support and solidarity from a team that had great experience and expertise in gender studies."*

355. Dr Downes then changed their reasoning for tweeting in their oral evidence that they tweeted page 1349 because they thought that the LSE Statement was within the LSE's academic freedom to describe the GCRN as "*routinely transphobic*" [1346]. They said the LSE Statement was making a critique of gender critical issues. They said that they did not see the LSE Statement as calling for deplatforming and that they respect the people of LSE.

356. We find that Dr Downes tweeted the tweet with the link to the LSE Statement on 1349 to amplify the untrue LSE Statement because Dr Downes was hostile to gender critical beliefs and considered that the GCRN and the Claimant caused harm to trans people in expressing their gender critical beliefs by setting up the GCRN. The LSE Statement clearly called for deplatforming the GCRN and Dr Downes supported that.

357. On 18 June 2021, Dr Helen Bowes-Catton, also tweeted a link to the LSE Statement with the comment, *"Solidarity from LSE"* [2126]

358. Dr Bowes-Catton's evidence was that she tweeted the LSE Statement because she said it was nice to express solidarity and she thought it was important that staff and students knew that she stood by them in solidarity. Dr Bowes-Catton denied in oral evidence that she retweeted the LSE Statement to add to the attacking voice.

359. We accept Dr Bowes-Catton's evidence that she tweeted the link because she thought it was nice to show support. However, we find that Dr Bowes-Catton was adding to the 'pile on' by tweeting support for the LSE Statement and she knew it.

360. On 18 June 2021, Dr Helen Bowes-Catton tweeted *"…If you are OU staff or a PGR, perhaps you'd consider signing this open letter, which expresses concern about the impact of the new Gender Critical Research Network on trans/NB staff and students."* [2124]

361. A link to the open letter was part of the tweet on page 2124. In Dr Bowes-Catton's oral evidence she said the reason why she tweeted the link to the open letter and the tweet on page 2124 was to maximise the loudness of voice. Dr Bowes-Catton said she circulated the link so people could see it and sign it.

362. We find that Dr Bowes-Catton saying she tweeted to maximise the loudness of the voice and circulated the link was an invitation to pile on to the Claimant by another name. Dr Bowes-Catton tweeted the link to the Open Letter to encourage a pile on, which would increase the hostility to the GCRN. Dr Bowes-Catton hoped that her tweet would add to the pressure on the OU to act in support of the gender affirmative side.

363. On 18 June 2021, Dr Natalie Starkey, tweeted a link to the Open Letter and said, *"Many of us wrote emails yesterday complaining about this 'gender critical' network and now there's an open letter to sign too…I feel we must do all we can to support our trans and non-binary colleagues"* [1351]

364. Natalie Starkey said she retweeted the Open Letter link as an ally and to bring the Open Letter to the attention of others who might want to sign it. She said in evidence that she wanted to raise university debate and if the university decided members thought the GCRN was fine she would have been comfortable with that. We didn't find Ms Starkey's evidence credible; the Open Letter did not make any reference to a debate and neither did Ms Starkey's tweet. Furthermore, support of trans people did not require complaints about the GCRN. We find that Ms Starkey did not want to admit that she tweeted the link because she wanted more people to join the complaints about the GCRN to put pressure on the OU to act in accordance with the demands of the Open Letter.

365. On 19 June 2021, Julia Downes retweeted a tweet *"The point of the OU's transphobic research network, the point of giving LGBA [LGB Alliance] charitable status, is to slowly erect a set of establishment institutions on which the gov't can lean as they seek to sacrifice trans and nonbinary people to their culture war"* [1654].

366. Dr Downes said that they retweeted a range of opinions when they posted the tweet on page 1654. Dr Downes denied they were tweeting name calling. We do not accept Dr Downes' explanation. The tweet did include name calling. We find that Dr Downes did not tweet a range of opinions, the only opinion that they tweeted were gender affirmative views and we do not consider that on any reading that falls within the ordinary meaning of a range of opinions. Although the GCRN is not specifically named, it is obvious the tweet was about the GCRN. The tweet was implying that members of the GCRN were transphobic as the network was being called transphobic. In

this way, the Claimant as a member of the GCRN was being called transphobic by her association with the GCRN by this tweet.

367. We noted that Dr Downes was the Equality Diversity and Inclusion lead for FASS when they tweeted that the GCRN was the OU's transphobic network. We consider that Dr Downes' role placed a duty upon them to consider all the beliefs of the members of FASS including the Claimant and represent them in allowing diversity of opinion and inclusion.

368. On 19 June 2021, Dr Nicola Snarey, tweeted the link to the LSE Statement writing *"I'm extremely grateful for the solidarity shown here. This is a very well explained statement, so please do read it if you want to know why staff/ students at the OU you feel so let down.*" [2131 & 2028]

369. Dr Snarey said in her oral evidence that she retweeted the LSE Statement because she thought that they expressed things well. She admitted that she had a problem with people who held gender critical beliefs.

370. We find Dr Snarey's tweet perpetuated the view held in the LSE Statement that members of the GCRN routinely made transphobic, discriminatory, inaccurate, and harmful claims about trans people. We find Dr Snarey was asking the world to read the statement to encourage people to pile on to the GCRN and to gain support for the negative view held in the LSE Statement (that she shared) about gender critical beliefs.

371. On or around 21 June 2021, Julia Downes tweeted a link to an article about the GCRN purportedly written by an OU student, writing "*What is really at stake from a student perspective."* [1655]. The Claimant said that the article in question describes gender critical beliefs as *"transphobic"* and "*bigotry*", uses the word *"TERF*", and states that *"gender critical adherents…. can fuck right off with all this transphobic bullshit."*

372. The Tribunal considered the contents of the article [1656-1664]. It is a 9 page article that we will not reproduce in this judgment. However, there are extracts from the article that we consider are worth reproducing in our judgment in order to give context to the terms referred to in the Claimant's claim.

373. The article does refer to TERF twice, where it states "*Once, in simpler times, those who cared about keeping trans women out of feminism were referred to as TERFs"* and *"…Then, as trans people gained more support and more rights, transphobes began to object to being called out for their outmoded beliefs, and TERF was declared a slur, rather than an acronym that fulfilled a need"* [1657].

374. The use of the term bigotry in the article is in the following context: *"Transgender identities are a protected characteristic, and if you are contributing to an environment where my trans, non-binary and gender non-conforming siblings no longer feel safe, supported or welcome, you can get the hell out of my university, because it's Open to everything but bigotry, no matter how you try and disguise it."* [1664]

375. The use of the word 'transphobic' arises on page 1664, where the article states, *"We have robust laws about hate speech and freedom of speech, that allow people to speak freely, but not without consequence. And we have the Equality Act 2010, which means you can fuck right off with all this transphobic bullshit."* [1664]

376. Dr Downes stated that the reason they tweeted the article was because *"I thought that the article captured some of the concerns of students and how the launch of the GCRN was affecting them and how the term "gender critical" can be used by that movement as a cover for transphobic views"* [LD@131]. When Dr Downes tweeted *"What is really at stake from a student perspective"*. They were referring to its content generally, not specifically the elements that the Claimant refers to in her tribunal claim (i.e. the terms transphobic, TERF and bigotry). Dr Downes said that they were sharing a perspective not endorsing the article but asserting their academic freedom.

377. The Claimant said that this was one of many tweets that she regarded as an *"onslaught". [See JP@300]*

378. We find that this article is not calling for action against the GCRN and we consider that is significant. However, the tweet does have a screenshot of the OU GCRN and it is that tweet that is amplifying the connection between the existence of the GCRN and student's views. The article does not refer to any harm that the existence of the GCRN is causing the author personally.

379. We consider that the article in which the quote is contained needs to be looked at a whole and it is clear that the article shares the author's personal experience which is why the article is being published and to explain why the author doesn't want to be part of a university that provides a home to the GCRN. We find that the article is not directed at the GCRN or its members including the Claimant. Although there are references to transphobic and TERF in the article these are not references to the GCRN directly but in respect of TERF, an explanation of the history of the term and in respect of transphobic, any one who holds gender critical beliefs. Whilst this would include the Claimant we do not consider that it is specifically directed at the Claimant or the GCRN, although both are considered to be included in the category of anyone who holds gender critical beliefs. The article seems to be addressing the world at large. We find that the article is not an invitation to pile on the GCRN.

380. We considered whether it was an exercise in academic freedom as Dr Downes' suggested, but we could not see how this would operate. Firstly because Dr Downes said that the tweets were posted by them in a personal capacity and secondly, the article is not written by them, they are just drawing attention to it. We find that Dr Downes' tweet was not an exercise in academic freedom.

381. On 22 June 2021, Dr Snarey tweeted "*the @ Open University should be extremely concerned about what effect this gender critical research network will have on their academic credibility." [2028]*

382. Dr Snarey said that she tweeted the 22/06/21 tweet on page 2028 because as an academic she is expected to raise a concern when she sees injustice. Her concern was that the GCRN affected the OU's credibility. When it was put to her in cross examination that she did not know the work of the members of the GCRN, she said that she looked on the GCRN website, but accepted that it was not her area of expertise. She said that she was not associating the OU's credibility with the GCRN's because as far as she knew, the GCRN had not at that point done anything academic yet.

383. We find that Dr Snarey is expressing her opinion about the effect of the GCRN on the OU. We find that her opinion is fair comment. The tweet is not directed at the Claimant, nor do we consider that the tweet encourages a 'pile on'. After the morning of 22 June 2021 the university communications team was vetting the OU GCRN twitter feed, but the Claimant stated in her witness statement that it was hard to stay away from twitter and that she read this tweet at the time, and it felt like an onslaught. We find that Dr Snarey was not in the Claimant's department and so we do not accept that this tweet was an onslaught from a colleague in the same way as tweets from Dr Downes for example. Dr Snarey had no previous professional relationship with the Claimant and there was no reason why eithers research would have anything to do with the other.

384. On 24 June 2021, Dr Snarey tweeted a link to the WELS/RSSH Statement and wrote *"the Reproduction, Sexualities and Sexual Health Research Group at @Open University has written a detailed letter to request that all university support for the gender critical network is withdrawn, and that they are removed from all Open University websites*." [1704/2030] This tweet was retweeted by Dr Williams and other unnamed colleagues of the Claimant. Dr Snarey said she tweeted the WELS/RSSH Statement, but it was not to give institutional support, she considered that individuals in the GCRN already had a platform, and it wasn't her decision to make whether to disaffiliate the GCRN or not. She said she didn't expect the OU to do what she told it. Dr Snarey denied that she tweeted the WELS/RSSH Statement to put on pressure. She said that she was entering into academic debate and was expecting the university to come back and there would be robust debate.

385. We don't accept Dr Snarey's evidence about the tweet being academic debate as if she wanted academic debate she would have used an OU academic forum which twitter is not. We considered the fact that Dr Snarey had aligned herself with all the people that are against the GCRN. We find that once Dr Snarey was part of that group taking action against the GCRN, by asking for disaffiliation then she was attacking individuals in the GCRN.

386. On 9 August 2021, Dr Downes tweeted a link about a podcast in which Dr Jon Pike was interviewed. Jon Pike co-founded the GCRN with the Claimant. He is a Senior Lecturer at the OU in Philosophy, specialising in the philosophy of sport. Julia Downes wrote about the podcast, "*Not at all shocked that GCRN members don't have time for content warnings or consider student safety, mental health or wellbeing in what they do."* [2239].

387. Dr Downes' evidence [LD@132-133] was that the tweet was a response to a post linked to a critique of a Jon Pike interview, in which Dr Pike, a founding member of the GCRN, was dismissive of the use of content warnings. Dr Downes' explanation as to why they posted the tweet and article was because they were annoyed about this comment and what this said about an attitude towards protecting student health and well-being. It was something that they cared a lot about. We accept Dr Downes' evidence is that it was Dr Pike's comments that they directed their ire at.

Allegation work opportunities withheld from the Claimant since 2018

388. Dr Drake became the head of SPC in August 2018. It was Dr Drake's role as head of SPC to allocate work to the Claimant [968-969]. The Claimant admitted in her witness statement that she had said to Dr Drake in 2020 that she did not want a career in university senior management by which she meant Dean or above [see JP@200]. In her witness statement the Claimant identifies 8 leadership roles within the University [see JP@192]. The Claimant did not point to any specific roles that she said that she applied for or should have been offered that she was not offered.

389. In the Claimant's appraisal documents 2019 [4858-4870], 2020 [4871-4480] there is no reference to the Claimant stating that she had aspirations to undertake more leadership roles or specific leadership roles. In both appraisal documents, the Claimant set out in the personal development section where you would expect her to say what her aspirations are for the year moving forward, the Claimant set out the UoA co-chair role that she was already undertaking. The Claimant said that she told Professor Earle and another colleague that she was not getting enough work from the OU. Professor Earle did not mention being told this in her witness statement and was not asked about it.

390. The Open University's particulars of the Chair in Criminology role [240-246] only refers to being involved in recruitment of research students not staff. Dr Drake's evidence on this was that sometimes people of the Claimant's experience are invited to participate in recruitment exercises but sometimes they are not. The Claimant said that it did not make sense not to use her when she had a huge amount of experience at other universities [see JP@197]. Dr Drake's oral evidence was that 4 of the people (Tony Murphy, Lystra Hagley- Dickinson, Stephen Conway and Matthew Cole) the Claimant referred to in her claim form at paragraph 27 (a) [78] were either not appointed by academic staff or that the Claimant was off on sick leave when the interview panels were chosen. Additionally in cross examination the name of Carly Speed was mentioned, and Dr Drake said that the Claimant contributed to an advert that led to her recruitment. The Claimant said that even if she was on sick leave, she still could have been involved in the recruitment processes.

391. There was no evidence to contradict Dr Drake's evidence on the recruitment process of the various aforementioned staff members and on this point, we found Dr Drake's evidence to be credible. We accept Dr Drake's evidence that the Claimant had contributed to the advert that led to the recruitment of Carly Speed. Also David Turner was mentioned, and we accept Dr Drake's

evidence that he was a staff tutor and so recruited by a different line manager.

392. In the period of 2018-2021, the Claimant had successfully applied to be promoted from professor band 1 to band 2 in September 2019 and had received a pay increase.

393. We find that there was no evidence that the Claimant had asked for or expressed in an explicit or implicit way that she was interested in any particular leadership roles within her department or else where at the OU. Whilst we accept the Claimant's evidence that she did tell Professor Earle that she was not getting enough work, we consider this is not the same as the Claimant saying she was not getting enough work opportunities of the type described by the Claimant in her written evidence. We find the Claimant did not have any work opportunities withheld from her.

Alleged Hostile environment from 2019- December 2021

394. The Claimant had an office at the Respondent site that she worked from. Her office was next to Professor Westmarland, she spent most of the time in her office in meetings with colleagues with her door closed. The Claimant attended the monthly departmental meetings regularly most of which took place over zoom. The Claimant was on sick leave from 12 June 2019- 27 August 2019 [4333], 3 February 2020- 10 March 2020 and from 2 July 2020- 8 September 2020. No one was in the workplace during the pandemic in March 2020. However, throughout periods of sickness it is clear from the correspondence that the Claimant was having contact with her colleagues through emails and WhatsApps and attendance at departmental meetings.

395. From when it became known that the Claimant had signed the Sunday Times Letter in 2019, the Claimant said in her evidence that she was subjected to a cooling of attitudes towards her specifically from Dr Downes, Dr Drake and Professor Westmarland. Dr Downes, Dr Drake and Professor Westmarland all deny this.

396. After the cancellation of the prison abolition conference on 6 March 2019 [415], the Claimant said she felt like she was being frozen out because she had defended Richard Garside. The Claimant said that Dr Drake who was the Head of Department at the time was cold and would avoid speaking to her and people became frosty. Dr Downes denied that they were frosty toward the Claimant from this time onwards and said they tried to keep a collegiate relationship, but they and the Claimant were not close. Whilst Dr Drake denied having deep hostility to the Claimant, at this time. Dr Drake was writing as early as March 2019 that "*there are two camps of 'group-think' at work here in the most polarised forms of debate and that he is in one of them*" in response to an email from Dave Scott to Steve Tombs and Dr Drake with a link to Richard Garside's article "what it means to be an abolitionist"[431]. In the same email in response to the Claimant's interventions regarding the cancellation of the Conference, Dr Drake wrote *"Sooooo tired of this. I've just been emailing back and forth a little with Jo P. again. I sent her an email on the reasons I felt it necessary for us to*

*cancel. I *think* she understands better the reasoning now." …I am sick to the back teeth of it." [430]*

397. We find that at that time Dr Downes was cold towards the Claimant. However, at that stage we do not find that Dr Drake was cold towards the Claimant and would avoid speaking to her in March 2019. Dr Drake at that time, recognised that there were 2 camps of gender affirmative and gender critical, but was still communicating with the Claimant and so we do not find that she would have avoided the Claimant at that stage.

398. Dr Drake accepted in evidence that there were a number of flare ups in the department in 2019 and that there was tension and hand wringing for Dr Drake to show support for Dr Downes. Dr Drake said it was brief and involved 3 people. Whilst we accept that the flare up was brief as is their nature, we do not accept that the tension was. At that time Dr Downes wanted the Claimant to be punished in someway for signing the Sunday Times Letter [561] and Dr Drake is recorded as writing in an email to Dr Williams dated 19 June 2019 that *"everyone wants 'something' to happen that makes the department more able to handle all of this and ensures that no one is further damaged/harmed by it all."* [461] and Dr Drake considered it "*problematic/scary/interesting*" and "*so embarrassing and unsettling*" [5535] that the Claimant had signed the Sunday Times Letter in June 2019. Dr Drake said in evidence that it was Dr Boukli and Dr Downes who were offended by the Sunday Times Letter, and she had difficulties with the Claimant signing it.

399. We find that it was after the Sunday Times Letter, that Dr Drake became frosty towards the Claimant. She had difficulties with the Claimant's gender critical position and considered that it was the Claimant causing the problems of tension in the department.

400. The Claimant's evidence was that it was after the conversation with Professor Westmarland on 23 October 2019 where Professor Westmarland likened the Claimant to the racist Uncle at the dinner table, that led to the Claimant feeling ostracised and experiencing a sense of isolation.

401. Professor Fribbance explained that the Claimant came to him and said that during the pandemic she was isolated and combative about her own position. In an email to Professor Fribbance on 10 February 2021 [805], the Claimant told Professor Fribbance that her emotional reserves weren't what they were because of family pressures, in particular the Claimant's mother was very poorly. Subsequently, the Claimant's mother passed away in April 2021.

402. On 11 May 2021, the Claimant had spinal surgery, and so before the launch of the GCRN was coping with the long term effects of her spinal surgery. On 31 May 2021, she told Tim Blackman VC that she had good days and bad days but that her body was healing well [959]. By 11 June 2021, the Claimant's spinal surgery wound was healing well. [4003]

403. Once the GCRN was launched on 16 June 2021, in the form of tweets from the Claimant's colleagues, the Claimant said that she was being subjected

to attack by employees of the Respondent. On 17 June 2021, the Claimant visited her GP and obtained a sick note signing her off for work for 2 weeks due to "*acute stress due to recent events and a bereavement"* [1427]. The Claimant told her GP on her visit she was *"..currently dealing with the stress caused by media currently having difficulty having to go back to work because of the situation feels being bullied at work to get out of the job because of this, got a lawyer to help feels safe at home not at work said the university made it clear she is currently not safe at campus currently still working from home upset and crying during consultation-consoled patient not sleeping well at times on low dose of amitriptyline has low mood at times"* [3993]. The Claimant said in evidence that she visited her GP because she was stressed resulting from her bereavement and the lack of support that she felt from the Respondent.

404. The Claimant said at paragraph 307 of her witness statement, that following the publication of the Open Letter her mental health deteriorated. The Claimant said that she had a feeling of drowning and a real sense of danger. The Claimant stated that it caused trauma from 40 years ago to reemerge. The Claimant's GP notes record, on 29 July 2021, *"Positive screening for PTSD Feeling positive about the future. Mood better. No suicidal thoughts."* [3991].

405. After being signed off sick on 17 June 2021, the Claimant went back to her GP on 1 July 2021. The Claimant said that she was not sleeping and drinking too much [3992]. The Claimant said that things got worse and revisited her GP on 29 July 2021.

406. On 11 August 2021, the Claimant had a call with a mental health nurse from North Wiltshire PCL [4001-4002]. The Claimant reported to the mental health nurse that she was coping with the grief of her mother's death; that she was not sleeping, she was struggling with bad dreams and intrusive thoughts. The Claimant felt traumatized and was still being traumatized at that stage and the trauma had not gone away. The Claimant could not divert her thoughts from what was going on (the Claimant had referred to being subjected to a hate campaign by a colleague saying she was transphobic and people she worked with were tweeting hate against her, there was an unresolved and on going grievance process). The Claimant said to the nurse that she was drinking to cope and restarted smoking. The Claimant said to the mental health nurse that she was short tempered, fearful and tearful and struggling with low mood.

407. On 29 September 2021, the Claimant's GP assessed her as fit for work with restrictions of "RESEARCH DUTIES ONLY" and "*No contact with named respondents in grievance process please."* [3989]

408. The Claimant said at paragraph 312 of her witness statement that although by the end of September 2021 her PTSD symptoms were less severe, she said that she experienced "visceral, intense reactions to events at work, often fuelled by fear, then afterwards feeling bad for reacting in that way and overcompensating for it." and that she "swung back and forth between intense distress and anger."

409. We find that the Claimant was working in a stressful atmosphere. The Claimant was experiencing sleepless nights she was struggling with bad dreams, intrusive thoughts and symptoms of PTSD. The Claimant's mother's death and the ensuing grief made the Claimant less resilient than she might otherwise have been to the negative reaction to the launch of the GCRN.

410. Professor Fribbance said he was surprised by the Claimant's reaction to the opposition to the GCRN and he described her as less resilient. He offered the Claimant his personal support but admitted that there was no plan as how to deal with the situation before 18 June 2021. He said there were contingencies for various situations. Between 18-24 June 2021 the Working Group was set up to deal with the consequences of the GCRN launch.

411. Professor Wilson confirmed other than the usual support referrals to employee assistance programme, there was no support put in place for the Claimant from 16 June 2021 but also said there was no support either for the gender affirmative contingent. She said various things were offered to some individuals later, but didn't say what was offered. She said counselling sessions were offered to both sides.

412. By 24 June 2021, there had been the Open Letter, LGBT+ staff network yammer statement with the link to the Open Letter, the LSE Statement, a number of tweets by colleagues of the Claimant referring to the GCRN and or the Claimant as transphobic, calls to disaffiliate the GCRN from the OU and allegations that the GCRN was causing harm to the trans community. These things happened in the space of 9 days. We find that in combination these things amounted to a targeted campaign against the Claimant as part of the GCRN.

413. We find that since May 2019 the Claimant had been working in a hostile environment. From 16 June 2021, the hostile environment intensified.

414. The Claimant said that she was provided with no protection at all by the Respondent during the six months from lodging her grievance, despite the ongoing effects on her, when explaining her reasons for resigning [3506]. The Claimant had asked for the WELS/RSSH Statement and Cath Tomlinson's post to be removed not least on an interim basis. The Claimant asked for a clear public statement from the OU to stop those in the OU targeting the GCRN and its members.

415. We find the Claimant's request for protection was not provided by the Respondent.

Claimant's grievance [1632-1649]

416. As expressed in her email dated 18 June 2021 [1339], the Claimant sent her grievance by email dated 24 June 2021 [1630]. The Claimant's grievance amounted to an 18 page letter [1632-1649] attaching a 20 page appendix [1650-1670] containing evidence supporting the grievance and addressing the grievance to Ms Molloy.

417. The Claimant said in her grievance (in summary) that because of her gender critical beliefs, over the last few years she had been ostracised, silenced, bullied and harassed because of her beliefs and/ or her colleagues' perceptions of her beliefs. The Claimant referred to a targeted campaign of harassment against her and other members of the GCRN, that there were false allegations that she and her GCRN colleagues were fundamentally hostile to trans rights contained in the Open Letter. The Claimant said she had been subjected to a death threat and feared more, there was enormous damage being done to her professional reputation and mental health because of the Open Letter.

418. The Claimant wrote about some of the allegations she brings in this Employment Tribunal claim [1635] dating back to March 2019 in her grievance. The Claimant complained that she did not receive any support from anyone in her department when her mother passed away (April 2021) and when she had spinal surgery on 11 May 2021 [1636 & 3994]. The Claimant mentioned that following a union debate there was a letter signed by Dr Bowes-Catton, Dr Boukli and Dr Downes (that she knew of in her department) to have her disciplined. The Claimant requested as outcomes to the grievance that there be a finding of direct discrimination and harassment, that the perpetrators of the direct discrimination and harassment be subject to disciplinary action, action be taken to stop the defamatory and discriminatory public campaign against her, confirmation that the GCRN will not be treated less favourably than other academics in other research networks, removal of Dr Downes as EDI lead, a written apology from Professor Westmarland and a decision that the cancellation of the Conference was a breach of freedom of speech [1647- 1649].

419. Following submission of her grievance, the Claimant added to her grievance on 25 June 2021 about the WELS/RSSH Statement being left up on the website and Professor Keogh's email dated 24 June 2021 [1680 & 1709]. Then the Claimant added more to her grievance on 29 June 2021, tweets by Dr Snarey [1770], on 2 July 2021, the KMi Statement and a tweet by Dr Bowes-Catton [1884 & 2069]; on 5 July 2021, the actions of KMi moving the GCRN website [1941]; on 12 July 2021, a post by Dr Snarey [2040]; on 10 August 2021, a tweet by Dr Downes [2257] and on 17 September 2021, Cath Tomlinson's post on Yammer [2659-2660].

420. Ms Molloy gave evidence that although she did not read the Claimant's grievance she was involved in the decision of who should sit on an impartial panel to hear the grievance. In cross examination Ms Molloy said that with the Head of Employee Relations she chose the panel to hear the grievance. It was the same panel that was to hear another member of the GCRN's grievance. However, Ms Molloy was not able to explain the rationale for why there was a panel of 2 people to hear the Claimant's grievance. The panel's members were Professor Holliman and Dr Sally Hayes (Director of Students). Ms Molloy admitted that one of the reasons for choosing Professor Holliman was for his ability to deal with the grievance quickly.

421. In cross examination, Ms Molloy's attention was drawn to an email from Professor Holliman to Sam Jacobson dated 6 July 2021. Professor Holliman's email was a response to an earlier email from Ms Jacobson

asking him if he was available to attend some training as a grievance panel member. Professor Holliman wrote in response, "*I don't have this kind of flexibility in my diary at short notice.*" [5498]

422. Ms Molloy responded that she could not remember the specifics, but it was Professor Holliman's and Dr Hayes's understanding of academic freedom and academic background that was what made them most suitable to hear the Claimant's grievance. Ms Molloy said that she did speak to her colleagues in the casework team and her Head of Employee Relations, Rob Macy about ensuring that there were people who were not actively involved in any of the relevant issues in the grievance so that there was impartiality in the panel.

423. In an email dated 18 June 2021, Professor Holliman expressed a view about the Open Letter [5496-5497]. Ms Molloy's response to this in cross examination, was she said that she did not see that email and disagreed that she did not pay attention to impartiality or how quickly the grievance would be dealt with. Ms Molloy said that it was Ms Jacobson who was running the Claimant's grievance from a case work perspective and would make recommendations to her but not strategic decisions.

424. Ms Jacobson told the Claimant on 1 July 2021 that her grievance would be dealt with under the bullying and harassment policy [see SJ@14] and included a proposed timetable [1923-1924]. Ms Jacobson gave oral evidence that she thought that the other grievance (which she handled as well) which came in around August 2021 took quite a while, in her estimation a number of months. Ms Jacobson stated that she went to the Working Group to request that Professor Holliman's manager release him with a view to reducing timescales. Ms Jacobson explained that the reason why the Claimant was not invited to attend an interview for her grievance until 10 August 2021 [2261] was because the Respondent was asking those involved in dealing with the grievance to attend training with Shoosmiths solicitors before they did the interview with the Claimant.

425. We find that the bullying and harassment policy was the grievance process that was used by the Respondent in respect of the Claimant's grievance.

426. The Claimant's grievance interview took place on 19 August 2021. Ms Jacobson added in cross examination she had to go with the availability of the panel when setting the interview date. Ms Jacobson's evidence was that she dealt with scheduling the Claimant's interview as soon as possible. She accepted that it took 4 weeks to produce Dr Drake's notes, but that was because they had to wait for the notetaker to get back to her and then 1-3 days to check the notes and then send them to the panel to check then and in that instance she was on leave and so was a panel member. Ms Jacobson also said in oral evidence that there were 22 people to interview, and they all wanted union representation, it was unusual in complexity. She did not want to give a date of the outcome of the grievance to the Claimant to manage the Claimant's expectations and that the Respondent was dealing with the grievance as quickly as they could.

427. In part 2, paragraph 1 of the bullying and harassment policy it states "*Informal and formal complaints will be dealt with as quickly as possible. A timescale for dealing with each complaint will be agreed. Normally this will comply with the timescales stated throughout the procedures. Where this is not possible the parties involved will be advised of revised timescales. Bullying and harassment issues, either informal or formal, should be raised within 3 months of the most recent incident or incidents giving rise to the complaint. It is advisable to do so as soon as possible after an incident has occurred, as memories of an incident may fade. A lapse of time may mean it is unreasonable for a complaint to be pursued." [4207]*

428. The Claimant regularly complained that the resolution of her grievance was not moving fast enough, e.g. on 13 August 2021 [2272-2273] & 27 August 2021 [2499]. The Claimant said she was not given a definitive date for the conclusion of the grievance and on 12 November 2021 she was told the best estimate was before Christmas. Neither Ms Molloy nor Ms Jacobson disputed this, we accept the Claimant's evidence on this point. The Claimant accepted in oral evidence that the grievance would take time to complete as it was complex, and it referenced a lot of people. The Claimant was informed that the Open Letter was taken down in September 2021 [2559] and the KMi Statement on 13 October 2021.

429. We find that the process of determining who was appropriate to sit on the panel would have required Ms Molloy to have an understanding of what the Claimant's gender critical beliefs were and what her grievance involved. We find that Ms Molloy did not have such an understanding, but Ms Jacobson as part of the case work team would have, and Ms Molloy consulted with the case work team. We find that the Claimant's grievance was complex and there were a large number of people to interview. Both the panel members and Ms Jacobson were dealing with 2 grievances at the same time. We accept Ms Jacobson's evidence that she did not give a date for the outcome of the grievance to manage the Claimant's expectations and that she was dealing with the grievance as quickly as she could. We find that the Respondent did not fail to respond regarding the Claimant's grievance. Given the size and complexity of the Claimant's grievance, as well as the panel's and HR's workload, it was reasonable for the Respondent not to provide a date for the grievance outcome.

<u>The Respondent's decision to continue to publish the WELS/RSSH Statement</u>

430. On 28 June 2021, the Claimant emailed Dave Hall to take down the WELS/RSSH Statement and the KMi Statement from the OU websites. Mr Hall responded by email on 30 June 2021 saying that the WELS/RSSH Statement and KMi Statement wouldn't be taken down because the Respondent had a duty to uphold academic freedom. [1767]

431. The ECHR Freedom of expression: a guide for higher education providers and students' unions in England and Wales, 2019, provides some guidance on what academic freedom is, under the heading *"Academic freedom*". It states *"Freedom of expression is relevant to, but should not be confused with, the important principle of academic freedom. Academic freedom*

relates to the intellectual independence of academics in respect of their work, including the freedom to undertake research activities, express their views, organise conferences and determine course content without interference." [page 15 of the document]

432. On 19 August 2021, Professor Holliman emailed his Co-Chair Sally Hayes to suggest that as the grievance panel, they make a recommendation to the Working Group that the WELS/RSSH Statement be taken down on an interim basis [2359-2360].

433. Professor Holliman recommended that the WELS/RSSH Statement should be taken down because of the harm to the Claimant. The Working Group rejected Professor Holliman's & Sally Hayes' recommendation and asserted that it must remain because of their duty to uphold academic freedom. Professor Holliman told us in oral evidence that he believed that this decision to reject his recommendation took place shortly after 19 August 2021 email. Professor Shakesheff's evidence was that in August 2021 the Working Group considered the request by the grievance panel to take down the WELS/RSSH Statement from the OU website, but the decision taken was to leave the WELS/RSSH Statement up based upon the reasoning set out in Mr Hall's 30 June 2021 email [1767].

434. In cross examination, Professor Fribbance denied that the Working Group felt under pressure from the gender affirmative side in the OU, he said that the OU was robust in their statement of absolute commitment to academic freedom. He admitted that the 4 points set out in Laura McGrath's experience of the response the School of Psychology had to her gender critical research and her well being as "*1. Unequivocal support of my academic freedom 2. Prioritising my wellbeing, 3. No implication that I was at fault or responsible for the reaction to the network or to gender, critical thinking more broadly, 4. Active steps taken to ensure that I remained integrated into the life of the School*" [3830] were good practice. In cross examination, Professor Shakesheff did not agree that the Working Group's focus was on the reputational damage to the GCRN.

435. Professor Shakesheff could not recall if he expressed a view about the WELS/RSSH Statement to the Working Group, but he thought he took the decision to the Working Group.

436. The Claimant continued to complain to the Respondent about continued publication of the WELS/RSSH Statement in her solicitors, Leigh Day letter dated 13 July 2021[2106]. The Claimant repeatedly asked HR to take down the statements as an interim measure pending an outcome to her grievance. The Claimant stressed the ongoing damage that statements including the WELS/RSSH Statement were doing to her mental health, her reputation and her ability to do her job. [See JP@318]

437. However, the decision to leave the WELS/RSSH Statement up was confirmed to the Claimant by email from a Ms Swann in HR on 2 September 2021 [2551].

438. We accept the Claimant's evidence [JP@363] that the WELS/RSSH Statement remained on the website as of the signing of her witness statement dated 4 October 2023.

439. We find the decision to leave the WELS/RSSH Statement on the website took place after 19 August but no later than 31 August 2021. This was confirmed to the Claimant on 2 September 2021 [2551]. We find that this was a continuing state of affairs at least until the presentation of the Claimant's claim form but there was no further decision to leave up the WELS/RSSH Statement after August 2021.

440. We do not accept that the reason why the Respondent decided to leave the WELS/RSSH Statement on the website was for reasons of academic freedom. We find that the reason the WELS/RSSH Statement was left up on the website was because of the pressure the Respondent felt from gender identity culture within the OU. It was clear from Professor Fribbance evidence on the public VC statements the OU was focused and concerned with the students and trying to placate them and Professor Wilson admitted that potentially there was a culture of fear about drawing attention to the Claimant and her research following the launch of the GCRN regardless of what her research was about. We find that the Respondent felt pressured by the loud voices speaking up for gender identity culture within the OU to publicly appease the students and staff.

441. We find that the continued publication of WELS/RSSH Statement continued to affect the Claimant's reputational credibility.

Claimant's resignation

442. Following sight of the VCE statement dated 10 November 2021 [3207-3208], the Claimant said that *"it triggered off a severe episode of PTSD – I could not think straight"*. [3504]

443. The Claimant said that she spoke to Rosa Freedman as Professor of Law at the University of Reading who she had been introduced to after the publication of the Reindorf report. The Claimant said that she told Professor Freedman *"about the hellish situation"* [JP@361] she was facing at the OU. The Claimant said that she thought after the publication of the Reindorf report, things would improve. It was then that Professor Freedman told the Claimant about an opportunity to set up a Criminology degree within the University of Reading's School of Law. On 16 July 2021, the Claimant emailed Professor Freedman with detailed information about setting up a Criminology department at Reading. In that email the Claimant expressed the view *"for what it is worth, I would prefer a 2023 start as it gives me/Law School a chance to also develop a student and staff recruitment strategy"* [2163]

444. We find that by 16 July 2021, the Claimant was already thinking of leaving the OU, but at that point not until 2023.

445. The Claimant applied for the role of Professor of Criminology at the University of Reading on 11 November 2021 [3271]. The Claimant had

registered her interest in job opportunities at the University of Reading on 20 October [3121]. On 30 November 2021, the Claimant attended an interview at the University of Reading [3292] and was offered the role of Professor of Criminology on 1 December 2021. We find that the Claimant's registration of interest was not an indication that the Claimant wanted to leave in October 2021. We considered it significant that it was immediately after the publication of 10/11/21 VC Statement that the Claimant applied for a role. It said to us that the Claimant had had enough.

446. By email dated 2 December 2021, the Claimant sent her letter of resignation as an attachment to the VC, Tim Blackman copying Professor Fribbance and Ms Molloy in to the email. [3504-3508] In that letter the Claimant resigned with immediate effect.

447. In her resignation letter, the Claimant said that the reason for her resignation was her treatment over the last 2 years and in summary *"being made to feel like a pariah*" [3507] and that specifically the last 6 months made her position untenable. The Claimant said the treatment she experienced gave her PTSD, and referred to the failure of the Respondent to give her a specific date for the outcome of her grievance, the failure of the Respondent to speed up the grievance process, the Respondent's refusal to take down the public statements pending an outcome to the grievance. The Claimant also complained about the OU's 10/11/21 VC Statement because it said nothing about the targeted campaign against the Claimant nor did it condemn the targeted campaign, but 10/11/21 VC Statement referred to concern for those who found the GCRN work challenging. The Claimant did not mention her offer of employment with the University of Reading in her resignation letter.

448. We find there was evident disparity in the treatment of the gender affirmative side and the GCRN. The previous 24/06/21 VC Statement referred to the specific hurt of trans, non binary and gender non conforming staff and students but there was nothing in that statement referring to the distress of the GCRN members including the Claimant and there was nothing in the 10/11/21 VC Statement either. There is nothing in the 10/11/21 VC Statement that was likely to discourage further harassment.

449. Whilst the Claimant had publicly supported the 24/06/21 VC Statement, the Claimant said that this was because "*it was important for the future of our network to try to project a positive front and to emphasise that universities can't discriminate against gender critical research networks like ours"* [JP@326].

450. On 29 June 2021 at 15:14, the Claimant sent an email titled "Ongoing effects of campaigns against OUGCN" to the VC, Professor Shakesheff, David Hall and Professor Wilson copying in Professor Earle ('29/06/21 Email') [1760-1762 & 1752-1754]. In the 29/06/21 Email the Claimant explained the severe impact on the members of the GCRN including herself were experiencing since the launch of the GCRN because of what she termed as a co-ordinated campaign of discrimination and harassment. In 29/06/21 Email, the Claimant explicitly asked the VC to take action that

would indicate recognition of and efforts to end the co-ordinated campaign [1760-1762]. The Claimant said the following in 29/06/21 Email:

"…*However, I thought it responsible to tell you what the effect of the attacks on us have been as they go beyond merely debate, protest or registering an alternative viewpoint with us.*

1. For most members, including those outside the OU, there has been a general feeling that the OU has offered little by way of support (and by that I do not mean counselling, but rather a sense that the OU will not tolerate particular types of behaviour) in face of OU staff who have made scurrilous accusations of transphobia and encouraged others within and outside the OU to discriminate against us, through distancing themselves from our network, requesting that the OU treat the members of this network differently than others and so on. We are most concerned that for the last two weeks every single member of this network has sustained some serious damage to our reputations and careers by the actions and behaviours of OU staff and students - including some using OU official handles and webpages." [1760]

451. The Claimant also added later in that same email under her point 4:

"Several members - and people emailing me from well outside the university - felt that the VC's statement whilst upholding academic freedom also misrepresented the nature of the open letters, open statements and social media reactions and campaigning. We do not see this as hurt feelings. We see these as a coordinated campaign of discrimination and harassment, as well as being a concerted attack on academic freedom." [1761]

452. The Claimant said under her point 6 & 7 of 29/06/21 Email:

6. It is hardly surprising that when members of a research network are subjected to unfounded accusations of transphobia and prejudicial behaviour as part of a sustained social media campaign, people will be deterred from participating in that research network. This is particularly the case when that campaign of harassment is supported by hundreds of members of OU staff and when the OU tacitly endorses the campaign by failing to condemn it, taking no action (to date) in respect of the perpetrators and by talking about "distress on all sides". This suggests some sort of equivalence between the conduct of the network and those directing a campaign of harassment and discrimination against us. What has in fact happened is that one "side" has set up a research group about the sexed body. The other "side" has engaged in a discriminatory and defamatory campaign aimed at discrediting their colleagues and stifling academic freedom.

7. The OU has a legal obligation to protect freedom of expression and academic freedom. The campaign directed against the Gender Critical Research Network has already had a chilling affect on academic freedom and this will only get worse the longer the OU fails to take position action to protect the academic freedom of its staff." [1761]

453. In the final paragraph of 29/06/21 Email the Claimant says:

> *I wanted all this noted because the damage that is being done by OU staff and students started two weeks ago and is ongoing.* ***There is urgent need for action in respect of the open letters, statements and Tweets to prevent further harm****. [Tribunal emphasis] We welcome the VC's Statement and the fact that it states clearly that the existence of our network is consistent with the University's legal obligations…****framing the public denunciations, the defamations, the accusations and the encouragement of all to discriminate against the members of this network as 'hurt on both sides' we feel has left us unsupported and exposed"*** *[Tribunal emphasis]* [1762]

454. On 30 June 2021 [1767] Mr Hall responded to the Claimant's emails on 28 June 2021 13:59 [1737] and 29 June 2021 14:46 [1768] that had called for the removal of the Open Letter and other statements and tweets she regarded as discriminatory, saying in essence that the Respondent was taking legal advice and regarded the material objected to by the Claimant as exercises in academic freedom. Professor Shakesheff confirms in his evidence that 30 June 2021 email from Mr Hall is the Respondent's response to the Claimant's 29/06/21 Email.

455. We consider that 29/06/21 Email put the Respondent on notice that the VC's previous 24/06/21 VC Statement was insufficient to protect the Claimant. There was no direct and substantive response to the Claimant's 29/06/21 Email calling for support from the Respondent.

456. We find that the Respondent did not publicly acknowledge the toll on the members of the GCRN who were at the OU and that it was not acceptable to attack GCRN members and that the OU would not tolerate such attacks. Neither did the 10/11/21 VC Statement say that those carrying out acts of discrimination and or harassment would be disciplined. But there were such statements in the VCE statement that were saying that trans people would be supported. The effect of not mentioning these things was likely to have a detrimental effect. And it is for that reason we accept that the Claimant did experience symptoms of PTSD when she received 10 November 2021 VC statement. We have not found that the Claimant did or didn't have PTSD but that she had symptoms of PTSD.

457. The Claimant said in evidence that the final straw that led to her resignation was 10/11/21 VC Statement [3198]. The Claimant was on a flight to the US to attend her mother's funeral, having not been able to get a visa at the time her mother passed away in Easter 2021 and saw the 10/11/21 VC Statement on her laptop. On the Claimant's return the Claimant received an offer of employment from the University of Reading on 1 December 2021. The Claimant then sent her resignation letter [3504-3508] in which she claims constructive unfair dismissal and states that she "*cannot remain here for the sake of my mental health"* [3505] as a reason contributing to her resignation.

458. The Claimant states in the resignation letter that the treatment she had experienced had broken her heart. We can understand that is how the

Claimant felt and accept that is how the Claimant felt at the point of resignation.

459. We find the timing of the Claimant's resignation, leads us to infer that the Claimant did not want to resign before she had a job to go to. The Claimant was predominantly concerned about her mental health and the Claimant's deterioration in mental health would not have been enhanced if she had no job to go to. The Claimant wanted to stay at the OU as it was her dream job and only looked for another job because of her deteriorating mental health and the hostile environment she was in. The 10/11/21 VC Statement was another opportunity for the Respondent to support her but when they failed the Claimant had enough.

460. We find that the reason the Claimant resigned when she did was because 10/11/21 VC Statement did not mention anything about the targeted campaign against the Claimant as part of the GCRN. Neither did 10/11/21 VC Statement condemn the targeted campaign but only spoke of concern for those who found the GCRN work challenging and concerning. The Claimant resigned in response to the hostile environment over a period of 2 years, culminating in an increased toll on the Claimant's mental health in the last 6 months of her employment from the launch of the GCRN with attacks on the Claimant directly or by virtue of her association with the GCRN. We accept that the lack of resolution of the Claimant's grievance added to the mental toll of the Claimant, but we do not consider that it was determinative.

461. Following the Claimant's resignation, the Claimant presented her first claim form to the Employment Tribunal on 3 December 2021. In the Claimant's first claim form she raises harassment and discrimination claims that date back to December 2020. The Claimant said it wasn't until 21 May 2021 when the Claimant received the Reindorf report that the Claimant began to understand whether having gender critical beliefs meant you had a legal right to protection. It was when the Forstater decision was published, that the Claimant said she understood that her gender critical beliefs were protected in law under the Equality Act 2010. The Claimant obtained legal advice on her rights in June 2021. The Claimant was advised on time limits at the beginning of July 2021. The reason why the Claimant did not bring a claim in July 2021 once advised about the time limits was because she was focused on her grievance and thought that the OU would do something to ensure her protection from discrimination and or harassment. We accept the Claimant's evidence on these points.

Suspension of Grievance

462. By letter dated 8 December 2021 the Claimant was informed that the Respondent would be suspending the investigation in to her grievance [3562-3563]. The letter said "*As you are aware the University has been investigating a grievance that you submitted. As you have now left your employment and submitted a claim to the Employment Tribunal we have made the decision to suspend this investigation until the Tribunal has made a determination on your claim"*.

463. However, before the 8 December 2021 letter was produced, Ms Molloy had a meeting on 6 December 2021 of which there is a note of the outcome of the meeting. The note of the meeting says the rationale for suspending the process was:

"*The purpose of the internal processes is to address the employment matters and to repair/mediate relationships, improve understanding and behaviours. As Jo is no longer an employee this purpose can no longer be achieved.*

1. *The investigating panel are no longer in a position to pursue the investigation as the complainant cannot be required to respond to any further questions or clarifications.*
2. *These are complex legal judgements that have not actually been tested in law yet and therefore anything that a panel reached a decision on could be overturned at tribunal, so even if we tried to conclude the investigation, nothing is actually concluded until the tribunal.*
3. *Suspending the investigation enables us to speak more freely about our position, in a way we could not when the investigation is active" [3544]*

464. Ms Molloy said as a senior person, it was her decision to suspend the Claimant's grievance investigation. We noted however, that Ms Molloy's answer contradicted her witness statement at paragraph 128 which said, *"it was our working group that decided to suspend the investigation pending the outcome of Professor Phoenix's Employment Tribunal claim*". When Professor Fribbance was asked about the decision to suspend the investigation in evidence, he said he did not know. We find that if the decision has been made by the Working Group, Professor Fribbance would have known. Professor Fribbance nor Professor Wilson addressed the issue in their witness statements although both were members of the Working Group. There is no evidence of any Working Group meetings having taken place between 2-8 December 2021. The letter informing the Claimant of the suspension is signed by one of Ms Molloy's subordinates Mr Martin Falcon, People Services Team Manager. Ms Jacobson told us that the Working Group wanted to remain separate from the grievance and so we can find no reason why the Working Group would have made this decision.

465. Finally the note stating the rationale for suspension has the investigation panel present at the meeting with Ms Molloy. There is no mention of the Working Group, and no member of the Working Group are in attendance other than Ms Molloy.

466. There was no reference in the bullying and harassment policy [4200-4215] that referred to how to deal with complaints of harassment and or bullying raised before the termination of employment but still ongoing after the termination of employment.

467. In cross examination, Ms Molloy was challenged as to whether the Claimant was asked if she would co-operate with the grievance panel once she left the Respondent. Ms Molloy admitted that the Claimant had not been asked.

468. We find it is clear that both Professor Holliman and Sally Hayes as the investigating panel are only at the meeting on 6 December 2021 to be told of the rationale as the decision has been made. Taking into account the way that Ms Molloy gave oral evidence, (which on this point was very clear), we find on a balance of probabilities, Ms Molloy made the decision to suspend the Claimant's grievance investigation and not the Working Group.

469. We find that the rationale for the decision to suspend is not a decision to suspend but Ms Molloy's decision not to provide an outcome to the Claimant. The rationale refers to the Respondent being able to speak more freely, but also says that any decision made could be overturned, thus, to speak freely is meaningless unless the Respondent had no intention of resuming the grievance, otherwise what is said "freely" could have implications for the grievance. The Respondent did not provide any evidence that the grievance process automatically suspended or terminated on termination of employment. We find that it did not. We find the Respondent had no intention of ever resuming the Claimant's grievance investigation to give her an outcome. The Respondent outsourced the grievance to the Employment Tribunal.

470. We do not accept that the rationale provided explains the real reasons why the Claimant's grievance was suspended. We find Ms Molloy's reference to "*anything that a panel reached a decision on could be overturned at tribunal"* was an indication of her fear that any decision on the grievance could be challenged by the Employment Tribunal. We therefore consider that Ms Molloy terminated the grievance because of her fears of reputational damage to the Respondent resulting from the Claimant's claim. We find Ms Molloy's decision to suspend the grievance process was influenced by the fact that the Claimant had brought Employment Tribunal proceedings.

Relevant Law

Time limits

471. Section 123 EqA contains the provision on time limits applicable to discrimination claims, it states:

> *"(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable [……]*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

472. Section 140B EqA states:

"(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

….

(2) In this section—

- *(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
- *(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section*

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.]"

473. When exercising their discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in Section 33 of the Limitation Act 1980 (as adapted by the Employment Appeal Tribunal ('EAT') in British Coal Corporation v Keeble and ors [1997] IRLR 336.

474. Keeble takes the Section 33 factors listed as: considering the prejudice that each party would suffer if the claim were allowed or not, and to have regard to all the circumstances of the case — in particular, (a). the length of, and reasons for, the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued as cooperated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the

cause of action; and (e) the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

475. In Department of Constitutional Affairs v Jones [2008] IRLR 128, the Court of Appeal ('CA') emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case.

476. Although a tribunal is not obliged to go through every factor in the Keeble list, a tribunal will make an error of law if a significant factor is left out of account: London Borough of Southwark v Afolabi [2003] ICR 800, CA.

477. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the Claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the Respondent on the one hand and to the Claimant on the other.

478. In the more recent decision of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal warned tribunals not to take the Keeble factors as the starting point for the tribunal's approach to the just & equitable extension. The best approach for a tribunal in exercising the discretion is to assess all the factors in the particular case that it considers relevant including in particular the length of and the reasons for the delay.

Continuing Acts

479. Barclays Bank plc v Kapur and ors 1991 ICR 208, HL establishes where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has continuing consequences which extend over a period of time.

480. Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA: Tribunals should not get caught up on discerning whether there is a policy, regime, practice, rule, practice etc. In determining whether there is a continuing act, Tribunals should look at the substance of the allegations and where there are a series of connected acts that may suggest a continuing state of affairs, that continuing state of affairs may amount to a continuing act.

481. Aziz v FDA [2010] EWCA Civ 304, CA: In deciding whether separate incidents constitute part of a continuous act, "one has regard to whether the same individuals or different individuals were involved. This a relevant factor but not conclusive" [see paragraph 43, per Jackson LJ]

482. The EAT in South Western Ambulance Service NHS Foundation Trust v King IRLR 168 EAT, establishes that where a Claimant wishes to assert that there is a continuing act or an act extending over a period of time, there

must be findings made that there have been discriminatory acts committed by the Respondent in order to form part of an act to extend over a period of time or a continuing state of affairs.

Discrimination/harassment on the grounds of a philosophical belief

483. Section 10(2) Equality Act 2010 (EqA) sets out the definition of a belief that is a protected characteristic, it explains:
"… (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

484. The parties have accepted that most of what the Claimant claims as her belief falls within section 10(2) EqA, in so far as it is analogous to the gender critical beliefs expressed to be protected by Choudhury P in Forstater v CGD Europe [2022] ICR 1

485. It is worth rehearsing Choudhury P's sentiment in Forstater that, protection of gender critical belief "*does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person."* (see paragraph 4)

486. To qualify as a "philosophical belief" under section 10 EqA, the belief must satisfy the five criteria set out in paragraph 24 of the judgment of Grainger plc v Nicholson [2010] ICR 360 ("the Granger Criteria"):
    (i) the belief must be genuinely held;
    (ii) it must be a belief and not an opinion or viewpoint based on the present state of information available;
    (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour;
    (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and
    (v) it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

487. In Forstater, Choudhury P says at paragraph 45, "*we do not consider it incorrect for a tribunal to seek to identify the "core" elements of a belief in order to determine whether it falls within section 10 of the EqA. There may be aspects of a belief that are peripheral or merely practical instances of its main tenets, which need not form part of the definition of the belief that falls to be tested against the Grainger criteria".*

488. Elements of the Claimant's gender critical beliefs that do not fall within the Forstater definition of gender critical belief are (the Respondent says) to be regarded as opinion. We have dealt with that aspect of the Claimant's stated beliefs in our conclusions.

489. Whilst the freedom to hold gender critical belief is protected under section 10(2) as set out in Forstater, the freedom to express or manifest one's belief even if protected by section 10(2) is qualified under Article 9 of The

European Convention on Human Rights (the "Convention") as contained in "schedule 1- The Articles" to the Human Rights Act 1998". Article 9 states:

"Freedom of thought, conscience and religion: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

490. And Section 3, of the Human Right Act 1998 requires the Employment Tribunals to:
"(1) so far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the convention rights.
(2) This section applies -
(a) to primary legislation and subordinate legislation whenever enacted"

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

492. Article 8 states (in so far as it is relevant)*: "Right to respect for private and family life: 1. everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others.*

493. In determining whether the act in question is a manifestation of the Claimant's belief, guidance is provided in *Eweida v United Kingdom* (2013) 57 EHRR 8. There it was established that where there is "a sufficiently close and direct nexus" between the act of the employee and the underlying belief

then there can be a manifestation of a belief. What counts as a manifestation of belief within the meaning of article 9(2) must be determined on the facts of each case. (See paragraph 82).

494. Chondol v Liverpool City Council UKEAT/0298/08 was one of the first appellant decisions to consider the question of the extent of the limitation of article 9(2) to the manifestation of a religion or belief. In Chondol Underhill J distinguishes between the expression of the appellant's religious belief and the inappropriate promotion of that belief.

495. Wasteney v East London NHS Foundation Trust [2016] ICR 643 followed Chondol and also concerned the application of article 9(2) of the Convention. HHJ Eady QC (as she was then), giving judgment, clarified that there was no freestanding right in respect of article 9 of the Convention, but when a Tribunal is considering section 13, direct discrimination and section 26, harassment under the Equality Act 2010, the limitation contained in article 9(2) in respect of the manifestation of that belief acts as to import a defence of justification to direct discrimination and harassment; even though such defences are not provided for under the Equality Act 2010. As HHJ Eady QC puts it in paragraph 55:

" If the case is one of direct discrimination then the focus on the reason why the less favourable treatment occurred should permit an employment tribunal to identify those cases where the treatment is not because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is "inappropriate" may be tested by reference to article 9.2 and the case law in that respect): see Chondol v Liverpool City Council and Grace v Places for Children. Similarly, whilst the definition of harassment permits the looser test of "related to", a clear sense of what the conduct did in fact relate to should permit the employment tribunal to reach a conclusion as to whether it is the manifestation of religion or belief that is in issue or whether it is in fact the complainant's own inappropriate conduct (and that must be right, otherwise an employer's attempt to discipline an employee for the harassment of a co-worker related to, eg, the co-worker's religion or belief could itself be characterised as harassment related to that protected characteristic)."

496. In the Court of Appeal decision of Page v NHS Trust Development Authority [2021] ICR 941, Underhill LJ, approved Wasteney & Chondol and held that *"relevant protections under the Convention and the 2010 Act must be intended to be co-extensive."* (see paragraph 67). Page established when considering a direct discrimination claim where article 9(2) is engaged *"it is thus necessary in every case properly to characterise the putative discriminator's reason for acting"* (see paragraph 68).

497. Choudhury P in Forstater says at paragraph 67 *"In many article 9 cases, that two-stage analysis will not arise because it will be obvious that the religion or belief is one which falls within scope of the protection afforded by that article, and the analysis will move swiftly to whether there was an interference with the right and, if so, whether that was justified".*

498. Forstater provides some insight into the extent to which a person may or not refer to a trans woman as a woman. Choudhury P says *"The second error was in imposing a requirement on the claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the claimant's right to freedom of expression in so far as they relate to her beliefs. However, that right applies to the expression of views that might "offend, shock or disturb". The extent to which the state can impose restrictions on the exercise of that right is determined by the factors set out in article 10(2), i e restrictions that are "prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others". It seems that the tribunal's justification for this blanket restriction was that the claimant's belief "necessarily harms the rights of others". As discussed above, that is not correct: whilst the claimant's beliefs, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. In our judgment, it is not open to the tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances" (see paragraph 103).*

499. We rely upon Choudhury P's definition of "gender identity belief as *"everyone has a gender which may be different to their sex at birth, and which effectively trumps sex so that trans men are men and trans women are women*" throughout this judgment. (See paragraphs 107 & 108 of Forstater).

500. Furthermore, Choudhury P makes the point at paragraph 116 in Forstater, that just as there are other beliefs that contradict recognition of the rights of certain groups in law, as those with gender critical beliefs may not recognise a GRC as changing the sex of an individual, *"Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society*"

501. In the most recent case of Higgs v Farmor's School [2023] ICR 1072, Eady P in the EAT provides guidance as to the approach to be adopted when article 9(2) is engaged, when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression. Eady P provides at paragraph 94 that *"Whether a restriction/limitation is objectively justified will be context specific."* She further states in paragraph 94 *"…It will always be necessary to ask (per Bank Mellat): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question;*
(ii) whether the limitation is rationally connected to that objective;
(iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and
(iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.
(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervener are likely to be

relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer."

Harassment

502. Section 26, EQA 2010 sets out the legislative framework for harassment:

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

503. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

504. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant herself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

505. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation

of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

506. Mrs Justice Slade's comments on how a Tribunal should approach the words "related to the protected characteristic" are helpful in the EAT decision of Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906, [2018] ICR 1481 (EAT). She says, whilst it is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant – "related to" such a characteristic includes a wider category of conduct and as such requires a broader enquiry when making a decision. (See paragraph 31 (Slade J presiding)

507. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

508. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA 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 having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

509. Section 212(1) EqA says "*detriment does not, subject to subsection (5) include conduct which amounts to harassment."*

510. Section 212(5) EqA says "*Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."*

511. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Burden of Proof provisions

512. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
(5) This Section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to – (a) An Employment Tribunal."

513. Pre- Equality Act 2010 House of Lords decision of Igen v Wong [2005] IRLR 258 set out a two stage test tribunals must apply when deciding discrimination claims. This two stage approach was discussed in the Court of Appeal decision of Madarassy v Normura International plc [2007] EWCA 33, with guidance being provided by Mummery LJ. Since the Equality Act 2010 (although the burden of proof provisions differs in wording to the test set out in Igen), the Appellant Courts and EAT have repeatedly approved the application of the guidance set out by Mummery LJ in Madrassy. In summary the first stage is where the burden of proof first lies with the Claimant who must prove on a balance of probabilities facts from which a Tribunal could conclude, in the absence of any other (non discriminatory) explanation that the Respondent had discriminated against him. If the Claimant meets the burden and establishes a prima facie case (which will require the Tribunal to hear evidence from the Claimant and the Respondent, to see what proper inferences may be drawn), then the burden shifts and the Respondent must prove that it did not commit the act disproving the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The Respondent will have to show a non-discriminatory reason for the difference in treatment.

514. Tribunals must be careful, and the burden of proof provisions should not be applied in an overly mechanistic manner: see Khan v The Home Office [2008] EWCA Civ 578 (per Maurice Kay LJ at paragraph 12).

515. The approach laid down by section136 EqA requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of section136 does not come into the equation: see Martin v Devonshires Solicitors [2011] ICR 352 (per Underhill J at paragraph 39), approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 (per Lord Hope at paragraph 32).

516. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal ("EAT") pointed out in Laing v Manchester City Council [2006] IRLR 748 "*If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever*".

Direct discrimination

517. Section 13 EQA 2010 sets out the statutory position in respect of claims for direct discrimination because of philosophical belief.

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

Section 39 (2) applies to employers and states:

"An employer (A) must not discriminate against and employee of (A)'s (B)…
(c) by dismissing B
(d) by subjecting B to any other detriment."

518. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider: (a) Was there less favourable treatment? (b) The comparator question; and (c) Was the treatment 'because of' a protected characteristic?

519. The test for unfavourable treatment was formulated in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 in that case the House of Lords as it was then, said that unfavourable treatment arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

520. Lord Hope's judgment in Shamoon clarifies that a sense of grievance which is not justified will not be sufficient to constitute a detriment.

521. Section 23 EQA 2010 deals with comparators and states that:

"There must be no material difference between the circumstances relating to each case."

522. Shamoon held that the relevant circumstances must not be materially different between the Claimant and the comparators, so the comparator must be in the same position as the Claimant save in relation to the protected characteristic.

Victimisation

523. Section 27 EqA sets out as follows:
"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- *(a) B does a protected act, or*
- *(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act—
- *(c) bringing proceedings under this Act;*
- *(d) giving evidence or information in connection with proceedings under this Act;*
- *(e) doing any other thing for the purposes of or in connection with this Act;*

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given all the allegation is made, in bad faith. …"

524. Section 39 (4) applies to employers and states:

"An employer (A) must not victimise against an employee of (A)'s (B) ….
(d) by subjecting B to any other detriment."

525. The issue of causation is fundamental to proving victimisation. In the seminal case of *Nagarajan v London Regional Transport [1999] ICR 877, HL:* The House of Lords ruled that victimisation will be made out, even if the discriminator did not consciously realise that he or she was prejudiced against the complainant because the latter had done a protected act.

526. Lord Nicholls put it like this in Nagarajan *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."*

527. The Equality and Human Rights Commission Code of Practice on Employment 2011 (the "Code") explains that at paragraph 9.11- 9.12.

"9.11 Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12 There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act."

528. Ministry of Defence v Jeremiah [1979] IRLR 436, [1980] ICR 13, (CA): established that a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'.

529. Notwithstanding, Lord Neuberger in the House of Lords in *Derbyshire and ors v St Helens Metropolitan Borough Council and ors* [2007] ICR 841 noted *"An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances."* (see paragraph 68, page 863).

530. Cornelius v University College of Swansea [1987] IRLR 141 is a case under the old provisions of victimisation in the Sex Discrimination Act 1975. The question on appeal to the Court of Appeal was whether the Tribunal's finding of no victimisation could stand where the Tribunal found that the

decision maker was influenced by the existence of a claim brought by the Claimant to refuse to continue the Claimant's grievance process. Bingham LJ giving judgment concluded at paragraph 33: "*There is no reason whatever to suppose that the decisions of the registrar and his senior assistant on the applicant's requests for a transfer and a hearing under the grievance procedure were influenced in any way by the facts that the appellant had brought proceedings or that those proceedings were under the Act. The existence of proceedings plainly did influence their decisions. No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over. But that had … nothing whatever to do with the appellant's conduct in bringing proceedings under the Act…"*

531. The House of Lords in Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 [2001] 1 WLR 1947 approved Cornelius, saying that *"Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation."*

532. Deer v University of Oxford [2015] ICR 1213 concerned a victimisation claim on the grounds of having previously brought proceedings the Claimant was refused a reference. Elias LJ said at paragraph 26 *"In fact it seems to me- as it did to Underhill LJ as he said when granting permission to appeal- that, although the concepts of less favourable treatment and detriment are distinct, there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences".* The Court of Appeal concluded that the conduct of internal procedures can amount to a detriment even if proper conduct would not have altered the outcome.

Post employment discrimination & victimisation

533. Section 108 states that

"*(1) A person (A) must not discriminate against another (B) if—*

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

(3) It does not matter whether the relationship ends before or after the commencement of this section…..

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.
(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A"

534. S108(7) EqA on the face of it reads as post employment harassment or direct discrimination cannot amount to post employment victimisation. However, in the Court of Appeal decision of Rowstock *Ltd and anor v Jessemey 2014 ICR 550*, Underhill LJ giving lead judgment in Jessemey, took the view that s108(7) is a drafting error and that post-employment victimisation is not proscribed under the Equality Act 2010. The House of Lords decision of Rhys-Harper v Relaxion Group plc (conjoined appeals) [2003] ICR 867 had found that post-employment victimisation was unlawful under the pre Equality Act 2010 legislation. (Rhys-Harper was decided under the Sex Discrimination Act 1975).

535. Underhill LJ provides an analysis at paragraph 45 of Jessemey that the Equality Act 2010 could not have intended to remove the right recognised by Rhys-Harper. In those circumstances, the words in s108(7) could be interpreted in line with rights conferred by EU legislation in respect of post employment victimisation, and this must have been what the drafters of s108 intended. Thus to treat post victimisation claims as being dealt with elsewhere in the Equality Act 2010, (which the explanatory notes of the Equality Act 2010 suggest), can be ignored. Underhill LJ concluded that at the end of section 108(1) the words "in this subsection discrimination includes victimisation" can be read in to the subsection to give effect to the intention of parliament to provide a right to post employment victimisation.

536. Aston v The Martlet Group UKEAT/0274/18 (21 May 2019), unreported, HHJ Auerbach in the EAT provides some guidance as to how Tribunals are to apply the words "*arises out of and is closely connected to a relationship which used to exist between them". Auerbach says "It is the words of the statute which must always be applied in every case, and my observations should not be treated as substituting for them or qualifying them in any away. But it is clear that both "arises out of" and "is closely connected with" must be satisfied. It is also, I think, clear, that those tests will not by themselves be satisfied merely by a "but for" test being passed, nor by a finding that the impugned conduct was done, as it were, in the capacity of ex-employer. Those are necessary, but not sufficient findings. In particular, the "closely connected" test requires something more. Mere passage of time is also, plainly, not a determinative consideration (either way), though it may be a relevant one to go into the mix."*

Constructive unfair dismissal- section 94 Employment Rights Act 1996 (ERA)

537. Section 95 ERA states: *"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –(c) the employee terminates the contract under which he is employed (with or*

without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

538. Section 95(1) (c) ERA is colloquially referred to as constructive unfair dismissal or constructive dismissal. Lord Denning in the authoritative Court of Appeal decision of Western Excavation Limited v Sharp [1978] IRLR 27 best summarises the test for constructive dismissal as *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed." (See paragraph 15).* Thus the question is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.

539. The House of Lords in the case of Malik v Bank of Credit and Commerce International [1998] AC 20 established that it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (See Malik at paragraphs 34h -35d and 45c-46e).

540. At paragraph 35c of Malik, Lord Nicolls sets out that the test of whether there has been a breach of the implied term of trust and confidence is objective) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer. A breach occurs when the proscribed conduct takes place.

541. Nottinghamshire County Council v Meikle [2004] IRLR 703: In that case the Court of Appeal held that what was necessary was that the employee resigned in response, *at least in part*, to the fundamental breach by the employer; as Keene LJ put it: *"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."*

542. Building on Meikle, Elias P in *Abbeycars (West Horndon) Ltd v Ford UKEAT/0472/07 (23 May 2008, unreported)* said that the true question is whether the breach 'played a part in the dismissal' and this means that if the employee resigns in response to several complaints about the conduct of the employer (some of which were not contractual breaches) it will *not* be necessary for the Tribunal to consider which was the principal reason for leaving.

543. Langstaff J sitting in the Scottish division of EAT in Wright v North Ayrshire Council [2014] ICR 77 provides further clarity on the Meikle point, where he says *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause"* (see paragraph 20)

544. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal (at paragraph 15-16) approved the guidance given in Waltham Forest LBC v Omilaju [2005] ICR 481. Both authorities give the following guidance on the "last straw" doctrine: -

"The repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorword Garages Ltd [1986] IRLR 157 (per Neil LJ p167C). In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied term?

Although the final straw may be relatively insignificant it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term.

The act does not have to have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

The "final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

The last straw must contribute, however, slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract s/he cannot subsequently rely on these acts to justify a constructive dismissal unless s/he can point to a later act

which enables her to do so. If the later act on which s/he seeks to rely is entirely innocuous, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have cross the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the Malik term.

Even when correctly used in the context of a cumulative breach, there are two distinct legal effects to which the "last straw" label can be applied. The first is the legal significance of the final act in the series that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed threshold at an earlier stage, but the employee has soldiered no until the later act which triggers her/his resignation: in this case by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

The affirmation point discussed in Omilaju will not arise in every cumulative breach case: "There will be such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed, in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

545. In considering whether the passage of time means that the employee has affirmed the repudiatory breach or breaches, Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported) Lanstaff P in the EAT suggests that time in of itself is not the only matter to consider. *"The principle is whether the employee has demonstrated that his made the choice"* that is between accepting the breach e.g. continuing to work or whether he acts to as to demonstrate to the employer he regards himself as being discharged from his obligations under the contract of employment. (See paragraph 25). Lanstaff P goes on to say an employee *"may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time"* (See paragraph 26).

546. In *Kaur v Leeds Teaching Hospitals NHS Trust* (already mentioned) it was decided that a later episode can be relied upon, if necessary, reviving the earlier affirmed breaches.

547. New Southern Railway v Quinn [2006] IRLR 276 (EAT): in that case the Claimant did not affirm her contract of employment or waive her right to treat it as discharged by reason of her demotion and reduction in salary by continuing to accept pay and holiday pay until her resignation some six months later. The breach of contract was not a once and for all breach by reason of demotion. The employer continued from month to month to make unlawful deductions. This failure to pay the Claimant's salary at the correct level constituted a continuing breach of contract, which the Claimant was entitled to treat as a repudiation at the time she resigned.

548. Walton & Morse v Dorrington [1997] IRLR 489: demonstrates that having regard to the employee's length of service and an employee may not be taken to have affirmed a repudiatory breach, when they delay resigning until they have another employment. (See President Morison J, paragraph 36).

549. If an employee resigns both in order to commence new employment and in response to a repudiatory breach, then the existence of the concurrent reasons will not prevent a constructive dismissal arising: Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.

550. It is not impermissible for a Tribunal to find that an employee puts up with discrimination for a period of time due to circumstances: (See paragraph 23 of Langstaff J's judgment Munchkins Restaurant Ltd & Moss v Karmazyn, Kuylle, Rivas, Kralova UK EAT/0359/09/LA & UKEAT/0481/09/LA)

Discriminatory constructive dismissal

551. Section 39(7) EqA says:
"In subsections 2(c) in (4) (c) the reference to dismissing B includes a reference to the termination of B's employment …..
(b) by an act of B's including giving notice in circumstances such that B is entitled because of A's conduct to terminate the employment without notice."

552. Section 40 EqA states:

"(1) an employer (A) must not, in relation to employment by A, harass a person (B)
(c) Who is an employee of A's"

553. Driscoll (née Cobbing) v V&P Global Ltd and anor [2021] IRLR 891, EAT resolved the vexed question of whether a constructive dismissal could amount to harassment with a positive answer. The EAT found that the EqA had to be construed purposively to conform with the EU Equal Treatment directives and that as the directives referred to harassment as constituting discrimination and as dismissal is included in the definition of discrimination conferred the right to claim constructive dismissal as harassment then the Tribunal should read sections 26 & 40 EqA as conferring that same right. (See paragraphs 69 & 71). Ellenbogen J giving judgment at paragraph 73 stated *"In my judgment, as a matter of law, where an employee (as defined by the EqA) resigns in response to repudiatory conduct which constitutes or includes unlawful harassment, his or her constructive dismissal is itself*

capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA. Whether or not it does so in the particular case will be a matter for the tribunal to determine."

554. Williams v Alderman Davies Church in Wales Primary School (EAT): assesses the test for discriminatory constructive dismissal as whether discriminatory conduct materially influenced the overall repudiatory breach in response to which the employee resigned. (See paragraph 89, HHJ Auerbach)

Submissions

555. The Tribunal was provided with written opening submissions at the start of the case by both parties, which we read and found helpful and considered in the writing of this judgment. The Tribunal granted Counsel a day to draft written closing submissions. To this end, the Tribunal did not sit on day 14, 19 October 2023. On day 15, 20 October 2023, we were provided with detailed written submissions by both Mr Cooper KC and Ms Mulcahy KC & Mr Anzari which we found very helpful and thorough. Both parties were granted 30 minutes of oral submissions before the Tribunal, which we considered and took into account in our judgment. We were also provided with a bundle of authorities from the Claimant and a bundle of authorities from the Respondent. Whilst we read all the authorities that were referred to in the parties' written submissions, we only read other cases in the authorities bundles to the extent that we considered them relevant to the issues we had to decide.

Analysis and Conclusions

556. It is worth remembering that the role of the Employment Tribunal is to determine the case before it. The Employment Tribunal is neutral and does not take any side in the "trans gender debate". We are to make findings on a balance of probabilities having heard the evidence. It is not our role nor responsibility to make findings on other philosophical beliefs that may contradict the Claimant's beliefs. We have tried as much as is possible not to do so for that very good reason. Where we have had to make findings on the views of specific individuals who were witnesses before us we have done so knowing that those views were conveyed in response to questions asked and in the context of the events and acts that took place (or not as the case may be) in relation to the Claimant.

557. The Tribunal has carefully considered all of the evidence, submissions and the relevant authorities. The Tribunal has striven to explain in as unambiguous terms as we can as to why one party has succeeded or lost in respect of a claim, however if the Tribunal has not referred to a matter in these reasons it does not follow that it has failed to take it properly into account.

Issue 1: is the Claimant's belief a protected belief?

558. At paragraph 5-8 of the grounds of claim attached to the claim form dated 3 November 2021 ("GoC1") the Claimant sets out her gender critical beliefs.

The Claimant gave evidence on the extent of those beliefs at paragraph 34, 50 and 51 of her witness statement. The Respondent disputed the Claimant's belief that *"trans people should be able to live their lives with dignity and in safety, and free from unlawful discrimination and harassment"* [72] was part of the Claimant's gender critical beliefs.

559. The Claimant's beliefs are that biological sex is real, that it is important, that a person cannot change their biological sex, and that sex is not to be conflated with gender identity. Sex is immutable and biological sex and gender identity are entirely different things and that there are occasions when biological sex is more important than gender identity, particularly where women are vulnerable to male violence and / or have been subjected to male violence. For example, she believes that male people should not be housed in female prisons, irrespective of how they identify.

560. Applying Grainger to the parts of the Claimant's belief that the Respondent disputes, the Employment Tribunal concludes that the part of paragraph 6 of GoC1 that says *"that trans people should be able to live their lives with dignity and in safety, and free from unlawful discrimination and harassment"* is not a belief but an opinion as it is likely that should it conflict with the Claimant's actual belief that sex is immutable, the Claimant's belief that sex is immutable would take priority as she says in the rest of paragraph 6 of GoC1. The Tribunal also concludes that paragraph 7 of GoC1 is not the Claimant's belief but an explanation of why the Claimant believes what she believes. Paragraph 8 of GoC1 also does not state the Claimant's beliefs but explains how those beliefs impact on her life.

561. We consider that the Claimant's beliefs fall within the Grainger criteria.

562. The Respondent argued that it was possible that the Claimant's gender critical beliefs might amount to harassment or discrimination but did not say any specific act of the Claimant that did so. In any event, we conclude that there was nothing about the Claimant's gender critical beliefs that amounted to harassment or discrimination on the facts of this case.

Liability of Respondent for acts of harassment/ direct discrimination/ victimisation by employees

563. The Respondent accepted that they were liable for all and any acts of harassment and or discrimination carried out by employees of the Respondent at the relevant time.

Time issues

Issue 27(a): Have any or all of the claims been presented within the primary time limit(s) (as extended by the Early Conciliation provisions)?

564. In relation to the discrimination and harassment claims we conclude that any complaints in relation to matters prior to 28 May 2021 are out of time.

Issue 27 (b) Do any or all of the relevant acts/omissions constitute conduct extending over a period (within the meaning of section 123(3) Equality Act

2010) and, if so, have the relevant claims been presented within the primary time limit(s) (as extended by the Early Conciliation provisions) of the end of that period(s)?

565. In relation to issues 2(c) and (d) we consider that they constitute a continuing state of affairs. The actions of Dr Drake from 12 December 2019 at the meeting coupled with instruction of Dr Drake amounted to a continuing state of affairs. Dr Drake's behaviour at the meeting was in keeping with Dr Drake not wanting the Claimant to speak about her research or her treatment by Essex University as when the Claimant did mention those things at the departmental meeting she received the silent treatment. Dr Drake's instruction to the Claimant was conduct extending over a period of time within the meaning of section 123(3) EqA. Dr Drake who was at the time the head of department instructed the Claimant not to speak about her research and treatment by Essex University or the accusation the Claimant was a transphobe. It is clear that the expectation when Dr Drake gave this instruction was that the Claimant was expected to abide by it at all times. We conclude that it was a continuing state of affairs until the end of the Claimant's employment that was a principle in action within the meaning of Barclays Bank v Kapur.

566. Dr Drake was head of department from August 2018 until 2021. So we consider also that issue 2(f) amounts to a continuous state of affairs over the 3 year period within the meaning of Hendricks, as it is the same person making decisions about who does what work in the Claimant's department and it is conduct of the same character on the same issue.

567. We considered the Claimant's submissions that the comment by Professor Westmarland comparing the Claimant to a racist uncle at the Christmas table amount to an act extending over a period, we find that it was not. Unlike the course of conduct of Dr Drake which was of the same kind of character at the meeting on 12 December 2019 and the instruction later, Professor Westmarland's comment was a one off comment. There was nothing about it nor are there any later acts by Professor Westmarland that would suggest a continuing state of affairs or an act extending over a period of time. We conclude that detriment/ act of harassment under issue 2(a) is out of time.

Issue 27(c): Have any or all of the claims been presented within such period as the Tribunal thinks just and equitable?

568. The burden of proof is on the Claimant to establish it is just and equitable for the Tribunal to exercise its discretion. There is no presumption in favour of an extension of time and we have to weigh up all the relevant factors within a wide discretion. We have found that Professor Westmarland did compare the Claimant to a racist uncle at the Christmas table and that during a departmental meeting the Claimant was given the silent treatment whilst another staff member was praised. The Claimant believed that she was being discriminated against because of her gender critical beliefs at the time, but at that time the Claimant did not know that her gender critical beliefs were protected. The Claimant did not begin to understand her legal rights until the publication of the Forstater judgment on 10 June 2021 and it

was then that the Claimant understood that her gender critical beliefs could amount to a philosophical belief protected by the law. The Claimant did not bring her first Employment Tribunal claim until 3 November 2021.

569. Taking into account the fact that the Claimant did not know about her claim until June 2021 and the balance of prejudice applying Afolabi, we consider that there is little prejudice to the Respondent in respect of the comment by Professor Westmarland that the Claimant was like a racist uncle. Professor Westmarland gave evidence about her recollection of the matter. She was adamant that she did not say it and did not have difficulty with recollection about the matter due to the passage of time. She was able to respond to the text that the Claimant sent at the time in her evidence. Furthermore, Professor Westmarland wrote her own contemporaneous note of her version of the conversation which she relied upon. Notwithstanding the passage of time, the Respondent did not argue how the passage of 18 months since the incident was prejudicial to them if time was extended to allow the claim. On the other hand, we consider that the prejudice to the Claimant is more than to the Respondent, the comment clearly happened any it would not be just if the tribunal were prevented from adjudicating on the comment because of the passage of time, which did not appear to create problems for the Respondent's witness. We conclude that the claim under issue 2(a) has been presented within a period we consider is just and equitable. We allow the Claimant's claim under issue 2(a). We do not extend time in respect of issue 2(b) as it does not amount to an act of discrimination or harassment.

Harassment and/ or Direct Discrimination

570. We have considered firstly whether an alleged act amounted to harassment and then if it did not then whether it amounted to direct discrimination. We considered each act according to the different tests that applied.

Issues 2(a): in around late 2019, did Professor Louise Westmarland make comments to the Claimant in a face-to-face conversation, including comparing the Claimant to the racist uncle at the Christmas dinner table as set out in paragraph 20 GoC1?

571. When Professor Westmarland told the Claimant on 23 October 2019 that having the Claimant in the department was like having a racist uncle at the Christmas dinner table, we consider that this was unwanted conduct and related to the Claimant's gender critical beliefs. This is because the reason why Professor Westmarland made this comment, was because she was unhappy about the Claimant signing the Sunday Times Letter and expressing her gender critical beliefs at the WPUK talk in April 2019. Professor Westmarland believed that the Claimant's views caused divisiveness and she was effectively telling the Claimant off for having expressed gender critical beliefs. Professor Westmarland knew that likening the Claimant to a racist was upsetting for the Claimant. We conclude that its purpose was to violate the Claimant's dignity because inherent in the comment is an insult of being put in the same category as racists. In those circumstances we did not need to consider the effect of the comment on the

Claimant. We find the Claimant's complaint of harassment under issue 2(a) well founded.

Issue 2(b): during a departmental meeting on 12.12.19, did Professor Louise Westmarland admonish the Claimant for swearing during the meeting as set out in paragraph 22 GoC1?

572. This complaint is out of time, however, even if the complaint was in time we would not consider that it was either harassment or direct discrimination. We accept that Professor Westmarland did admonish the Claimant for swearing in the meeting and this was unwanted conduct. However, we do not find that it was related to the Claimant's gender critical beliefs. Professor Westmarland was admonishing the Claimant because she thought that the Claimant should not swear in departmental meetings because she thought that Dr Drake had advised this in a previous meeting, and that was the rule. It follows that we conclude that the purpose or the effect in Professor Westmarland's telling the Claimant to stop swearing was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and was not direct discrimination. We consider that it was not unfavourable treatment, and we accept that Professor Westmarland told the Claimant off because she considered that it was the rule not to swear. The Employment Tribunal has no jurisdiction to consider the Claimant's complaint under issue 2(b) and the complaint is dismissed.

Issue 2(c): during a departmental meeting on 12 December 2019, did Deborah Drake interacting with the Claimant, Julia Downes and the other meeting participants: -

(i) meet the Claimant's report that she had been due to give a seminar on prisoner officer recruits and trans prisoner placement but following protests had the seminar cancelled with a cavernous silence as set out in paragraph 23 GoC1?

(ii) fail to praise the Claimant when she reported being included in a Canadian medical board research grant of $1M but praise Dr Downes in the meeting for writing a grant application as set out in paragraph 23 GoC1.

Harassment

573. We consider that neither issue 2(c) (i) or (ii) amounted to harassment. Whilst it must have been unwanted conduct for the Claimant to have experienced silence from Dr Drake and her departmental colleagues, in the context of a group meeting regardless of what the Claimant was speaking about, we do not infer from silence or not commending the Claimant for her grant that the purpose or effect of the unwanted conduct was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Direct discrimination

574. However, we conclude that the silence and the lack of praise where a colleague has achieved something as substantial of securing access to a $ 1 million (Canadian dollars) grant experienced by the Claimant amounted to a detriment particularly in the face of seeing another colleague being praised for their grant application and where the Claimant was disappointed by the lack of solidarity.

575. We do consider that having regard to our findings, that the Claimant has established a prima facie case of direct discrimination. We did not accept that Dr Downes was the appropriate comparator. Dr Downes was more junior than the Claimant which is a material fact when it comes to public praise. But we do consider that the appropriate hypothetical comparator is an OU Professor who espoused controversial views which were not gender critical beliefs. We consider that the Claimant was treated less favourably than a professor at the OU with controversial views who did not have gender critical beliefs as a hypothetical comparator. Controversial views are in themselves not unusual in academia where courting attention to research, which is often necessary to obtain funding, usually requires research into new areas not ventured into before or challenging the received wisdom of a particular area.

576. By December 2021 Dr Downes had significant influence in the department as EDI lead and a close relationship with Dr Drake. Dr Drake was sympathetic to gender affirmative views. The SPC was majority gender affirmative, and those who were neutral, would likely take a steer from Dr Drake in the meeting. The Claimant was talking about her cancellation from the University of Essex which was because of her gender critical beliefs confirmed by the Reindorf report. It was the Claimant saying this that led to the silence. We conclude that the fact that Dr Downes was congratulated when it was known their research also dealt with trans issues but from a gender identity perspective, but the Claimant's was not praised was because her research was from a gender critical perspective.

577. Having applied the comparator we look to whether the Respondent's explanation for the act was for a non discriminatory reason. The Respondent denies there was silence, and that Dr Downes was praised, and that it was not usual for there to be a round of applause for research updates. We did not accept the Respondent's explanation for why there was silence and why the Claimant was not commended for her research grant. Being cancelled is a big deal in academia and achieving something as substantial of securing access to a $ 1 million (Canadian dollars) grant seems to us praiseworthy if not more so than completing a grant application. The nature of the department as majority gender affirmative and (since the Claimant's signing of the Sunday Times Letter) the awareness of the Claimant's gender critical belief, coupled with Dr Downes' and Dr Drake's influential views on the department lead us to interpret the silence as motivated by the Claimant's gender critical beliefs and the praise of Dr Downes' to signal disapproval of the Claimant's gender critical beliefs. We find the Claimant's claim for direct discrimination under issue 2(c) well founded.

Issue 2(d): in or around December 2019 or January 2020 in a telephone conversation, did Deborah Drake instruct the Claimant not to speak to the Department about the Claimant's research, Claimant's treatment by Essex University or accusation that the Claimant was a "transphobe" as set out in paragraph 24 GoC1?

Harassment

578. Dr Drake did instruct the Claimant not to speak about her research and treatment by the University of Essex and that she was accused of being a transphobe. We consider that this was unwanted conduct. However, we consider that this instruction was not harassment as the departmental meetings did not have a specific mandate to speak about personal experiences and that was not the purpose of the departmental meeting. Therefore we do not consider that the purpose or effect of the conduct was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Direct discrimination

579. However, we do consider that the instruction was less favourable treatment. Dr Drake did not want to hear anything about how the Claimant had been treated in a detrimental way because of her gender critical beliefs or hear her speak about her gender critical research. The Claimant wanted to be able to speak about her experiences with her departmental colleagues in an area where she thought that she would receive sympathy, and speak about her research and she was upset and angered by Dr Drake's prohibition on this. Others were allowed to speak about their research in subsequent meetings (and this evidence was not challenged by the Respondent), and research updates were part of the agenda for departmental meetings. We conclude it was a detriment for the Claimant to be prohibited from speaking about her experiences and research.

580. The Claimant relied upon a hypothetical comparator, who would be a professor who was materially no different to the Claimant except that the hypothetical comparator did not have gender critical beliefs but controversial beliefs. We consider that Dr Drake treated the Claimant less favourably than the hypothetical comparator. There was nothing about what Dr Drake said to the Claimant even on her own version of events that indicated that she was trying to bring two sides together, as asserted by Dr Downes. In fact in the email that Dr Drake had sent Dr Williams on 19 June 2019 where she had said that the Claimant signing the Sunday Times Letter was problematic and scary indicates the opposite. We do not accept Dr Drake's explanation of her words as having the meaning she attributed to them. Dr Drake said that her words were her way of saying it was not the best way to seek common ground. We consider that was Dr Drake's explanation post the Claimant's claim and is an excuse not an explanation. We find that Dr Drake considered that the Claimant's signing of the Sunday Times Letter as wrong and did not consider it an exercise in academic freedom because she did not agree with the Claimant's gender critical beliefs as a valid position.

581. Dr Drake said the Claimant should be talking about these topics in a thinking about session as it was more appropriate to have a debate. The Claimant did not say she wanted to have a debate, she wanted to speak about her research and experiences. Rather, the real reason why Dr Drake didn't want the Claimant to speak about her research and treatment by the University of Essex and that she was accused of being a transphobe was because it upset Dr Drake to hear the Claimant speak about her gender critical beliefs. Coupled with our earlier findings, it is this that leads us to conclude that it was not the controversial nature of the Claimant's topic of choice or the inappropriateness of the topic (since others were permitted to speak about their research in departmental meetings), but the reason why Dr Drake instructed the Claimant not to speak about Essex and her gender critical research was because of the Claimant's gender critical beliefs. We find this complaint of direct discrimination under issue 2(d) is well founded.

Issue 2(e): on 11 June 2021 in a telephone conversation, did Deborah Drake make comments to the Claimant including comparing the Claimant to Charles Murray as set out in paragraph 25 GoC1?

582. Dr Drake accepted that she did compare the Claimant to Charles Murray. We consider that it was unwanted conduct on the part of the Claimant and that was clear to Dr Drake as the Claimant did not accept Dr Drake's apology. The comment was related to the Claimant's gender critical beliefs because again similar to Professor Westmarland racist uncle comment it was about the Claimant holding and espousing unpopular gender critical beliefs in a department that had a culture of the opposite position. We consider that the purpose of Dr Drake making the comment was to violate the Claimant's dignity and or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We consider that the effect of the comment was objectively to violate the Claimant's dignity as she was being compared to a public figure who is perceived as a racist and subjectively upsetting as she said so and made a grievance about it 13 days later. We conclude that the Claimant was harassed within the meaning of section 26 EqA by virtue of the comment. We find the Claimant's complaint of harassment under issue 2(e) is well founded.

Issue 2(f) since 2018, did the Respondent, including Deborah Drake, withhold work and opportunities from the Claimant as set out in paragraph 27 GoC1?

583. It is understandable that the Claimant's prior experience at other universities may have led her to expect that she would be involved in the recruitment of academic staff, however, we found there was no evidence that the Respondent gave the Claimant the expectation she would be involved in recruitment exercises. We accepted Dr Drake's evidence in respect of the specific recruitment exercises that were undertaken during the Claimant's tenure and why the Claimant was not involved in those exercises.

584. Based upon our findings we conclude no work opportunities were withheld from the Claimant and that the reason the Claimant was not offered work opportunities was because she did not ask for any. In those circumstances the Claimant was not subjected to harassment or direct discrimination and

the Claimant's complaint under issue 2(f) for harassment and or direct discrimination is unfounded and fails.

Issue 2(g) on around 17 June 2021, did members of OU staff including Julia Downes and Avi Boukli sign and/or publish online (and/or contribute to the publication on line of) the Open Letter as set out in paragraphs 28-34 GoC1?

585. In considering whether the Claimant had been subjected to unlawful harassment we had regard to the Respondent's position that the Open Letter was a reaction to the setting up of the GCRN and amounted to an exercise of academic freedom which is in essence a subset of the article 10 right to Freedom of Expression. Taking the approach advocated by the EAT in Higgs, the Tribunal must determine whether the matters that the Open Letter complains of directly or indirectly i.e. the manner in which the Claimant's set up of the GCRN with her colleagues, her participation in the Savage Minds podcast and its presence on the GCRN website/ twitter profile and her association with the GCRN is her belief or a manifestation of her gender critical beliefs. As the ECHR code of practice on Employment 2011 "ECHR Code", so aptly states *"There is not always a clear line between holding a religion, or belief and the manifestation of that religion or belief"* [paragraph 2.61]

586. Mr Cooper KC argued that we should make a distinction between the fact of the Claimant having a belief and the manifestation of that belief. We do consider that this distinction is pertinent. Eweida suggests that expressing one's belief is no different to manifesting it.

587. In the specific facts of this case, we consider the setting up of the GCRN and the Claimant's consequent association with the GCRN was part of the Claimant's gender critical belief. The Claimant was one of the convenors and anyone who looked up the network would know that the Claimant was one of the co-convenors, see her picture and her name. Furthermore, the Claimant's reason for setting up the GCRN with her colleagues was to essentially challenge what she regarded as the new social norms in respect of trans gender individuals particularly that sex is a social construct. We conclude that this reason is within the core of the Claimant's gender critical beliefs i.e. sex is immutable and not a social construct. We note that the aims of the GCRN do not require that to research issues from a gender critical perspective mean that you hold those beliefs, but that you have an interest to understand and know more about gender critical research [4108] However, we considered in accordance with Eweida there is a sufficient and direct nexus between the setting up of the GCRN and her consequent association with it to fall within a manifestation of her beliefs.

588. Equally, we needed to consider whether the statements in the Savage Minds podcast which formed the greatest objection to the GCRN on the basis that they were discriminatory and offensive statements in respect of trans gender and non binary people was a manifestation of the Claimant's gender critical beliefs.

589. The statement referring to trans women as “men in dresses” was not in the podcast and the Claimant did not agree that that was what was being said. We accepted that it was a reference to cross dressers and drag queens. It is difficult to say that this statement was a manifestation of the Claimant’s beliefs as the Claimant herself did not say it and it was not said as those who objected to it interpreted it. We conclude that this statement was not a manifestation of the Claimant’s gender critical beliefs. We also conclude the case that it is not part of the Claimant’s gender critical beliefs either.

590. Neither do we consider that the statement: Stonewall is suggesting that lesbians should ‘suck female cock” was a manifestation of the Claimant’s gender critical beliefs. The Claimant explained it as it being an expression of sexual preference of lesbians. We consider that the Claimant’s belief in it had more to do with her sexual orientation than her gender critical beliefs. We do not consider there was a sufficient and direct nexus between the statement and the Claimant’s gender critical beliefs.

591. However, we do consider that there is merit in Mr Cooper KC’s argument that in objecting to these statements, Dr Downes, Dr Bowes-Catton and Professor Keogh were stereotyping the Claimant as holding these views, as it is clear from the context of the discussion on the podcast it was referring to the historical understanding of men in dresses.

592. Whilst we accept that that Dr Boukli objected to these statements from the Savage Minds podcast in the Open Letter as they complained about them in their email dated 7 June 2021. We don’t consider that the reason for the objection to the Open Letter was solely because of the Savage Minds podcast. As much as all the witnesses who were signatories to the Open Letter protested (with the exception of Professor Keogh who agreed he did agree to its objection) said that they did not object to the existence of the GCRN with the OU, they did. Witnesses who were signatories to the Open Letter said that the Savage Minds podcast contained prejudicial statements and that by having those prejudicial statements on the website the GCRN was causing harm to trans gender and non binary colleagues. However, it seemed to us if that was the objection, it is more likely the demand would have been to take down the Savage Minds podcast link rather than make arguments about whether the decision of the OU to approve and promote the GCRN was in conflict with its obligations under the Equality Act 2010.

593. The Claimant was on the podcast and those objecting to the statements were not concerned that the Claimant did not say the statements. Dr Downes, Dr Boukli and Dr Bowes-Catton who signed the Open Letter said that the Claimant laughed at the statements, which we found that the Claimant did not. They considered gender critical beliefs transphobic and harmful and so did not want a network of academics in their university researching from a gender critical perspective, disaffiliation by the University was just one way to achieve this. If the University had complied with the demands in the letter it would have been the OU sending a clear message of disapproval of such research saying that they did not want to be associated with such a network. It was calling on the OU to discriminate against the GCRN. We conclude that the objections to these statements by Dr Bowes-Catton including them in the Open Letter and by signing the Open

Letter the signatories were stereotyping the Claimant as transphobic and harmful to trans and non binary people.

594. However, the aforementioned statements were not the only statements the Open Letter objected to. The statement in the Savage Minds podcast explicitly arguing against trans rights was referring to where the Claimant said, *"Yeah, but something happened. And it was the point at which they, they, they brought in a no discussion policy around trans rights. I think that was the biggest single tactical folly of any campaigning group ever, because at that point they no longer represented their constituencies. And I'll put a plural there because you know, anyone I'm a lesbian, I've been out since 1979, right."*

595. In this statement the Claimant was objecting to Stonewall's policy that there was no discussion around whether trans women are women. We consider that this statement was a manifestation of the Claimant's gender critical beliefs as the Claimant's belief that biological sex is real, that it is important, that a person cannot change their biological sex, and that sex is not to be conflated with gender identity is intrinsic to the Claimant's objection to Stonewall's policy of no discussion that trans women are women. It is here where the distinction between the belief and the manifestation of the belief in the Eweida sense is relevant. The Claimant was simply expressing her actual gender critical beliefs in complaining about Stonewall's policy and so we conclude that it is not qualified by article 9(2).

596. We considered whether the Open Letter was proscribed by law. It was the Respondent's case that the Open Letter was in pursuit of a legitimate aim, that is freedom of expression and academic freedom. Ms Mulcahy KC argued that the Open Letter raised legitimate concerns.

597. But like the freedom of expression of religion and belief, the freedom of expression also has limitations and if the Open Letter amounts to harassment then it is not enough to say that the Open Letter was an exercise in academic freedom and freedom of expression. In a case of harassment, the circumstances in which the alleged harassment takes place is a relevant consideration and we were considering not only whether the content of the Open Letter was harassment but also whether its public publication and the fact it had a significant number of signatories (368 when the screenshot was taken, although no one told us how many signatories there were by the time the Open Letter was taken down) amounted to harassment as well.

598. We could not understand why the alleged legitimate concerns around the GCRN needed to be published to the world at large if it was about the raising of concerns with the OU and furthermore, why demands were being made of disaffiliation rather than a discussion of how concerns could be allayed. But we do consider that it amounted to harassment which we will explain later in our conclusions.

599. We were not convinced that the objection was in respect of the Claimant's manifestation of her beliefs and not just because of her beliefs. Applying the factors suggested in Higgs we looked first at the content of the Open Letter.

600. We agree with Mr Cooper KC's written submissions that the content and value of the Open Letter contains mostly emotionally charged value judgments with little evidence to no academic argument. The only part of the Open Letter with any evidence is the reference to the Savage Minds podcast quotes. For the Open Letter to have any protection of academic freedom it ought in some way be a contribution to the debate on sex and gender, we conclude that it has none. None of the witnesses asked about the Open Letter suggested what the contribution to the debate was. Witnesses either expressed their concern of the offence of Savage Minds podcast and their distain for the words gender critical in the name of the network and the disrespect at not having been given notice of the launch of the GCRN or at all as some or one of the above reasons for the legitimacy of the Open Letter. The only statement in the Open Letter we considered was a manifestation related to the Claimant's objection to Stonewall's policy of no discussion trans women are women and it was not correct to say this was explicitly arguing against trans rights.

601. Furthermore, the inclusion of the statement *"Gender critical' feminism is a strand of thought and a belief that is fundamentally hostile to the rights of trans, non-binary, and genderqueer people"* [1318] seemed to only be included to give the impression that those in the GCRN including the Claimant, were anti trans and transphobic, which was not the case in respect of the Claimant.

602. The tone of the Open Letter was not one that suggested academic debate but was demanding the OU carry out the wishes of the contributors to the letter and the signatories.

603. Some of the motivation for the reason for the creation of the letter could be inferred from the reluctance of any one who gave evidence to admit to being the creator. However, our findings demonstrate Dr Bowes-Catton as one of the creators of the Open Letter and that the Open Letter was clearly directed at the Claimant.

604. In evidence none of the other witnesses who gave evidence who signed the letter said they had anything to do with the authorship of the Open Letter. This was typified by Dr Downes' evidence. When asked directly who they received the Open Letter from, they couldn't remember, and they said they thought it was anonymous or they didn't know who was involved in writing the letter. They said it didn't include them even though they added the signature section to the letter which turned the letter into a petition.

605. There were clearly statements in the Open Letter that we found not to be true. But it is also the case that Dr Downes, Dr Boukli, Professor Keogh, Dr Bowes-Catton certainly believed that gender critical beliefs caused harm to the trans community. The general consensus of witnesses who signed the Open Letter was that the harm referred to was either in the existence of the GCRN or in the Savage Minds podcast link on the website when launched. We found that what was referred to as harm in respect of the existence of the GCRN was not harm in the colloquial use of the word but other things such as offence of things said on the Savage Minds podcast and fear of the

loss of facilities. There was nothing about the setting up or the existence of the GCRN that could lead someone based upon fact or evidence to believe that there would be a loss of facilities. Statements in the Open Letter that referred to harm and hostility of the GCRN were not evidence based. Even though we recognise that association of the GCRN with the OU and the Savage Minds podcast caused distress to some, this was in effect resulting from florid language used and the offence taken of the expression of gender critical views in the Savage Minds podcast. We do not consider that the offence caused was sufficient to justify the content, public publication or nature of the Open Letter as a petition.

606. In respect of the harm caused by the Savage Minds podcast, the Open Letter referred to referring to trans women as "men in dresses" which was not in the podcast at all. We therefore give little weight to the alleged harm caused to the trans community in the Open Letter in respect of the existence of the GCRN. We give more weight to the harm caused in respect of the Savage Minds podcast which was mostly offence which we accept can have a psychological effect. However, we consider that such offence was not sufficient to annul the Claimant of her right to manifest her belief. The Open Letter was clearly planned and there was a WhatsApp group discussion before the Open Letter was drafted and published. Views were considered before publication and so we consider the Open Letter as a deliberately planned and reflected upon document. We do not accept that at the time of the publication and signing of the Open Letter that the Claimant was a campaigner, she was an academic.

607. It is important to note in the cases of Higgs & Page these were cases where the role of the Claimant seeking protection in respect of their belief was in a public facing role with contact with either members of the public or decisions which directly impacted upon members of the public. The Claimant here is an academic and whilst her work could have public impact, that is not the primary point of it. The Claimant's primary purpose is research.

608. The setting up of a research network was not remotely unconventional for someone in the role of the Claimant. Research was a significant part of the Claimant's role which anticipated the dissemination and application of research by other routes. Neither it is unusual that academics research controversial subjects and challenge societal norms in their research. We acknowledge that the professional reputation of an academic is significant, and it is through their research that their reputation is often judged. The Claimant's association with the GCRN which was being labelled in the Open Letter as hostile and harmful to trans people was damaging for the Claimant. There seemed to us no need for the Open Letter to be published to the world at large unless it was to encourage a 'pile on' of the public to put pressure on the OU. The Open Letter was only calling for signatures from academics at the OU and was not seeking signatures from general members of the public or students. The demands in the Open Letter were a call to the OU to act, not members of the public. A large number of the witnesses who signed the Open Letter said that they signed it to show solidarity although that was not a request of the letter.

609. We agree with Mr Cooper KC's submissions that worldwide publication was an unnecessary and disproportionate action. The consequences of the Open Letter for the Claimant were significant. There was a 'pile on', with the Claimant feeling that things were broken for her, and she was being expelled from the OU community. Many of the Claimant's colleagues in her department and faculty whom she knew signed the Open Letter, which condemned the Claimant's gender critical approach to research in a very public way. We did not ignore the fact that the Claimant was not prevented at any time from doing research and the network was not disaffiliated as the Open Letter had asked for, but the Open Letter encouraged a hostile environment for the Claimant to express gender critical beliefs and carry out gender critical research.

610. There was already a culture of 'gender affirmative' in the university and so there was an imbalance of power in terms of popularity of view, it is relevant that the OU did not give into the imbalance in granting the demands of the letter, but we did consider it decisive that when the OU referenced harm in statements to the university population, they include both trans staff and students. The statements were clearly only one way and there was never explicit reference to those with gender critical beliefs being entitled to protection from harassment and or discrimination but there were explicit references to those in the trans community.

611. We also looked at the action that the Open Letter wanted to the OU to take, in particular, asking for withdrawal of support and disaffiliation from the GCRN. That appeared to us, had it happened, to be a clear example of calling the OU to discriminate on the grounds of gender critical beliefs. Professor Fribbance and Professor Wilson also held this position, and both were in the Working Group and considered whether the Open Letter should remain up.

612. We did not ignore the fact that the Open Letter was not on an OU website, but what was in issue was the OU requesting that the Open Letter be taken down and making it clear that its calls to discriminate were not ok. It therefore seemed to us that the Respondent couldn't have regarded the Open Letter as a legitimate aim of pursuing freedom of speech and academic freedom because that was not what it was all about. For example its call to discriminate was not in pursuit of a legitimate aim. We must make it clear that the OU did not of course comply with the call to discriminate by disaffiliating the GCRN.

613. The Claimant was entitled to set up a network with other academic colleagues at the OU, to be able to research from a gender critical perspective in accordance with her academic freedom, the Claimant was entitled to expect the OU to uphold its obligation and duty to ensure academic freedom. It is not the Employment Tribunal's role to make findings as to whether academic freedom has been adhered to and we do not do so. What we do find is the Open Letter was not an exercise in academic freedom. There is nothing scholastic about the Open Letter, it stigmatised the Claimant and damaged her reputation. The Respondent presented no evidence that there had been a call for other networks to be disaffiliated from the OU.

614. We therefore conclude that the balance lies in favour of the Claimant's exercise of her right to manifest her gender critical beliefs in the setting up and association with the GCRN.

Is the signing, publishing, and contribution to the Open Letter harassment?

615. The Respondent accepted that the signing, publishing and contribution of the Open Letter was unwanted conduct. The creation of the Open Letter was a coordinated activity. The contributors' motivation for the creation of the Open Letter was directed at the Claimant and with the intention of stopping the expression of gender critical views at the OU and the content of the Open Letter was indicative of this motivation. On multiple occasions, whenever gender critical views were expressed at the OU, Dr Downes complained or tried to get the view suppressed, for example, her reaction to the opposition to the GRA and her response to Richard Garside's involvement in the collaborative relationship between the CCJS & HERC. The Claimant's gender critical beliefs made Dr Downes feel palpably uncomfortable.

616. We therefore determine that the reason for Dr Downes', Dr Bowes-Catton's and Dr Williams' contribution to the Open Letter was related to the Claimant's gender critical beliefs. The call to have the OU withdraw support from the GCRN was humiliating for the Claimant and created a hostile atmosphere for the Claimant to carry out research in. It is therefore our conclusion that the purpose of their contribution was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

617. We conclude that everyone who signed the Open Letter with the exception of Professor Domingue & Mr Daly was signing the Open Letter to put pressure on the OU to impede the Claimant carrying out research from a gender critical perspective. They did not want the OU to support a network with members who had gender critical beliefs including the Claimant. Additionally all were signing to add weight to the numbers against the GCRN. That is the point of a petition and all the academics and staff who signed the Open Letter knew it. We conclude that the signing of the Open Letter was unwanted conduct related to the Claimant's gender critical beliefs. The purpose of signing the Open Letter was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Notwithstanding, we do consider that the effect of the signing of the Open Letter was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant said that finding out the Open Letter was signed by her colleagues was devastating. The Claimant was humiliated both professionally and personally by the publication and signing of the letter. We conclude that having 368 of your colleagues sign a public letter saying that you are part of a group that is fundamentally transphobic, is stigmatising and damaging and objectively was conduct that had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

618. We considered why Dr Downes' published the Open Letter. The publication of the Open Letter was unwanted conduct, as the Claimant found the publication of the Open Letter humiliating. We considered Dr Downes' previous conduct in asking for punitive measures against the Claimant, and their expression of happiness in HERC ending its relationship with CCJS; coupled with Dr Downes' reason for signing and contributing to the Open Letter. Dr Downes signed and contributed to the Open Letter because they considered that the GCRN and the Claimant's gender critical belief caused harm. All these reasons demonstrate that Dr Downes' reason for publishing the Open Letter related to the Claimant's gender critical beliefs.

619. Although we heard no direct evidence from Dr Downes as to whether the purpose of the publication of the Open Letter was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, we infer from Dr Downes' motivations in respect of her contribution and signing of the letter and the content of the Open Letter, that they were motivated to create a hostile environment for the Claimant. There was certainly no need to publish the document online, it just contributed to the pile on. We therefore consider that publication of the Open Letter was conduct that created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If we are wrong about that, we consider that the effect of the publication was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant complained that the publication of the Open Letter was deeply humiliating, both personally and professionally, to be condemned by colleagues in a public way. We consider having regard to all the circumstances, that the content of the Open Letter painted the Claimant as saying prejudicial statements against trans gender people when the Claimant did not say any statements that were prejudicial to trans gender people and publishing that to the world, would objectively have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We find the Claimant's complaint under issue 2(g) is well founded.

Issue 2(h): on 18 June 2021, did Shaun Daly on behalf of the OU's LGBT+ Staff Network Committee, issue a statement by publication on Yammer as set out in paragraph 35 GoC1?

620. We conclude that the content of the LGBT+ staff network Statement was unwanted conduct, although the content (barring the link to the Open Letter) was not directed at the Claimant. We considered that it was reasonable for the LGBT+ staff network Statement to disassociate itself from the GCRN as they were not connected in any way. Dissociation in this context did not imply any negativity. As a member of the GCRN the Claimant regarded the statement as affecting her. Notwithstanding, the statement contained a link to the Open Letter and the Open Letter was related to the Claimant's gender critical beliefs. This is because as previously mentioned the contents of the Open Letter painted the Claimant as anti trans because of her gender critical beliefs. We have already considered whether the Open Letter was a proportionate exercise of academic freedom in response to the GCRN and considered that it was not. However, we do not consider that the purpose of the LGBT+ staff network Statement was a violation of the Claimant's dignity

or was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The link to the Open Letter was added so individuals could express their concerns. But we accept the Claimant's sense that the LGBT+ staff network was hostile to her which she did not expect, coming from an LGBT+ staff network that she was a member of and was supposed to support her. By adding the link to the statement it did encourage hostility to the GCRN and the Claimant. We therefore conclude the effect of the statement with the link to the open letter objectively did create an intimidating, hostile, degrading, humiliating or offensive environment. We find the Claimant's complaint of harassment under issue 2(h) is well founded.

Issue 2(i): on 18 June 2021, did the Respondent, particularly an individual(s) acting on behalf of the OU Sociology Department, retweet the LSE Statement as set out in paragraph 37 GoC1?

621. A link to the LSE Statement was retweeted by the OU Sociology Department. The Respondent could have removed the tweet and link from the OU Sociology department, but they did not.

622. We considered that the retweeting of the LSE Statement was unwanted conduct. The references to the Claimant as a member of the GCRN being adamantly and openly opposed to recognising trans rights and routinely making transphobic comments demonstrate that the retweet was related to the Claimant's gender critical beliefs. The purpose of the retweeting of the LSE Statement was not to violate the Claimant's dignity as we accept that the OU Sociology retweeter wanted to show by retweeting the SOAS' tweet and LSE Statement that there was solidarity with their cause. However, stating that the Claimant routinely made transphobic claims about trans people in the LSE Statement was objectively bound to lead to an increased intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant had raised a complaint with the LSE about the letter and considered it defamatory. The Claimant had asked the Respondent to remove the OU Sociology department tweet which they did not do. This indicated to us that the Claimant was not happy about the LSE Statement. We therefore conclude that objectively the effect of the retweeting was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We find the Claimant's complaint of harassment under issue 2(i) is well founded.

Issues 2 (j): on or around 24 June 2021, did members of OU staff from within the OU's Health and Wellbeing SRA sign and/or publish online (and/or contribute to the publication online of) the WELS Statement as set out in paragraphs 39-41 GoC1?

623. The WELS/RSSH Statement was directly attacking the existence of the GCRN, and we consider the setting up of the GCRN having sufficient and direct nexus to the Claimant's gender critical beliefs to amount to a manifestation of the Claimant's belief. We undertook the same balancing exercise required in considering whether the Claimant's manifestation of gender critical beliefs was curtailed by the contributing members of the

WELS/RSSH Statement as well as Professor Keogh's exercise of freedom of speech and academic freedom.

624. We considered the content of the WELS/RSSH Statement first. The WELS/RSSH Statement said that the GCRN was sharing transphobic materials containing transphobic comments by its members. Professor Keogh's reference to members of the network's sharing of transphobic views was without foundation. None of the comments on the podcast he and the rest of RSSH had a problem with were said by the Claimant. The Claimant did not say anything transphobic on the podcast.

625. There appears to be no basis to the assertion in the WELS/RSSH Statement that the stated aims were not made in good faith. We accepted the Claimant's reasons for why the name gender critical was chosen. We consider that the term gender critical was not chosen as a provocation, but because it expressed the perspective from which the Claimant and other members of the GCRN undertook research.

626. We find that the first reason set out in (a) does not go to good or bad faith. The aims have been publicised and in those circumstances, whether the Claimant's colleagues were told before the launch of the network cannot go to the good or bad faith of it as the aims are not a secret. Furthermore (b) it cannot be said that it was not good faith in respect of their stated aims where one of their stated aims is to attract people who are interested and want to know more about what gender critical research is. It was common ground that the material referenced in the WELS/RSSH Statement was the Savage Minds podcast. We fail to see what good or bad faith of the stated aims has to do with whether either co-convener currently researches health and wellbeing.

627. We find it is significant that the WELS/RSSH Statement was written by and signed by multiple academics which gave the WELS/RSSH Statement the veneer of credibility and truth for those reading the WELS/RSSH Statement when it contained untrue statements. Whilst the tone of the WELS/RSSH Statement had more of an academic debate approach, We agree with Mr Cooper KC's submission that an analysis of the content demonstrated that there were statements within it that did not stand up to the rigour of evidence and accuracy. There was no evidence of bad faith and Professor Keogh accepted this, which of course begged the question why there was a statement that questioned the good faith of the GCRN's aims in the WELS/RSSH Statement. Professor Keogh sought to justify the content of the WELS/RSSH Statement as the RSSH had to demonstrate that they were distancing themselves from the GCRN amid funding concerns. But there was no evidence of actual funding concerns from the funders and so this declared motivation for the WELS/RSSH Statement did not stand up to scrutiny.

628. We consider that Professor Keogh's reason for contributing, signing and publishing the WELS/RSSH Statement was to denounce the GCRN and deplatform it. He made this clear in his private letter 29 June 2021 that this was his desire. He had a problem with the Claimant because of her gender critical views. Professor Keogh's position on Forstater made it clear to us

that there were no circumstances in which Professor Keogh would accept the expression of gender critical beliefs at the OU without considering them harmful or unacceptable.

629. Objections to the way the GCRN was set up equally lacked cogency. No one gave evidence that there was a practice that the founders of a new research network within a special interest group contact all other academics in the OU who worked on health, wellbeing and gender or in the same special interest group before launching the network. The expectation of consultation espoused in the WELS/RSSH Statement appeared to apply only to the GCRN as none of the Respondent witnesses provided any evidence of where this actually took place.

630. Even Professor Wilson was willing to admit that there were statements in the WELS/RSSH Statement that did not stand up to scrutiny. The tone of the letter was overblown in referring to harm to trans gender people where there was no evidence that Professor Keogh as the author could point to that the GCRN caused such harm. The tone of the letter made it seem that disaffiliation was necessary for the WELS SRA to be able to continue with their research when in fact there was no evidence of funders actually pulling out because of association with the GCRN. The WELS/RSSH Statement was not contributing to the academic debate on gender issues, there was no reference to the actual research that any of the members of the GCRN had done from a gender critical perspective, particularly Jon Pike or the Claimant. We would have expected to see either or both the Claimant's and or Dr Pike's research referred to in the WELS/RSSH Statement, particularly since the letter was written by Professor Keogh who admitted that his objection to the GCRN was in part motivated by Jon Pike whose research he was aware of.

631. The Claimant's understanding of the likely audience was that they would not receive the GCRN well, but that is not the same as expecting to be attacked as a targeted campaign from colleagues within her faculty. The Claimant was not a campaigner on gender critical issues, she did not invite consternation and antagonism. The Savage Minds podcast had already been circulated within the faculty to little objection. In so far as the GCRN intruded on other rights we found the florid language in the podcast that might cause offence but not such offence as to amount to harm to public safety, the protection of public order, health or morals for the protection of rights and freedoms of others.

632. The Savage Minds podcast did not breach any rights of any specific individuals and whilst Dr Boukli suggested that it impacted on their rights, we found that it did not.

633. We consider that the WELS/RSSH Statement was targeted at the Claimant. The WELS/RSSH Statement was calling for the GCRN to be disaffiliated from the OU. The Respondent asserted that the WELS/RSSH Statement was an exercise in academic freedom and that they had to allow the WELS/RSSH Statement to remain because of it. If there was any reputational risk the Respondent regarded it only relevant to upholding academic freedom, that is to say the contributors and signatories had a right

to ask the OU to deplatform the GCRN but as there was no chance of that happening then it was upholding academic freedom to allow the WELS/RSSH Statement to say it. Yet the Respondent was prepared to compromise their adherence to academic freedom in respect of the cancellation of the Conference. It appeared to us entirely inconsistent and so we were not convinced that academic freedom was the primary motivation in not taking down the WELS/RSSH Statement. Whilst it was the case that trans students and staff were distressed about the GCRN, and they are a vulnerable group, the Respondent did not rely upon the distress experienced as the reason why the WELS/RSSH Statement needed to remain.

634. The Respondent's own policies under paragraph 3.2 required managers to deal effectively with derogatory name calling by way of an example of written harassment. Considering the power imbalance which Professor Fribbance acknowledged in the university in that it was majority gender affirmative, we consider that there was not a power balance in favour of the GCRN that meant the contributors and signatories of the WELS/RSSH Statement needed protection. The RSSH were not a vulnerable group in need of protection. There was no evidence that the GCRN would impact on a vulnerable group, although the WELS/RSSH Statement was at pains to assert this. Academic freedom did not justify the public nature, contents and signatures of the WELS/RSSH Statement compared to the Claimant's right to manifest her gender critical belief through the setting up of the GCRN. There were alternative ways that the Respondent could have upheld academic freedom without allowing the Claimant to have been harassed, one by challenging Professor Keogh on the factual accuracy of the content of the letter, enquiring into whether there were any funders wanting to pull out. We were not presented with any evidence that the Working Group challenged on any level the content & the publication of the WELS/RSSH Statement. We conclude that academic freedom did not justify the reaction of the WELS/RSSH statement to the Claimant's gender critical beliefs.

Did the WELS/RSSH Statement amount to harassment or direct discrimination?

635. The WELS/RSSH Statement was unwanted conduct towards the Claimant because the Claimant is specifically referred to in the WELS/RSSH Statement as a co convenor. Anyone who looked up the network would know that the Claimant was one of the co-convenors and therefore would attribute the aims to her and her co-convenor. The unwanted conduct related to the Claimant's gender critical beliefs because it questioned the Claimant's credibility in researching trans issues and referred to the GCRN repeating trans phobic tropes.

636. In our judgment the WELS/RSSH Statement had the purpose of violating the Claimant's dignity because it questioned the Claimant's credibility without legitimate foundation. We conclude the WELS/RSSH Statement had the effect of violating the Claimant's dignity because the Claimant found it offensive, it did not tell the truth and in turn besmirched her reputation. If we are wrong about that, in the alternative its purpose was to create an intimidating, hostile, degrading, humiliating or offensive environment for the

Claimant as it called for the deplatforming of the GCRN. For the Claimant the effect was intimidating and hostile and to have colleagues in the same SRA call for deplatforming had the effect objectively of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We find the Claimant's complaint of harassment under issue 2(j) is well founded.

Issue 2(l): on 24 June 2021, did the Knowledge Media Institute publish the KMI Statement on the OU website as set out in paragraph 42 GoC1?

637. The reason why Professor Domingue wrote the KMi Statement and published it was to support his transitioning staff member. The KMi statement only refers to the GCRN as a group, it was not directed at the Claimant and doesn't suggest that the group is to be refused a server but that the content is to be moved to another server.

638. Professor Domingue not only wanted to disassociate KMi from the GCRN, but he wanted to condemn the GCRN. Professor Domingue was aware the Claimant was being subjected to harassment and threats on 18 June 2021, but he still left the KMi statement up until 13 October 2021.

639. We conclude that although the KMi Statement was not directed at the Claimant, it was unwanted conduct. We conclude this because the Claimant had included it in her bullying and harassment grievance, and had her solicitors send a letter to the Respondent where they explained that the Claimant considered the KMi Statement harassment. We consider that the statement was related to gender critical beliefs because there was a connection between being a prominent member of the GCRN and the Claimant holding gender critical beliefs. There was also an express term in the KMi Statement of not condoning gender critical beliefs and associating such beliefs with harm to trans and non binary staff and students' health and well being in the KMI statement.

640. The purpose of the KMi Statement was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment but for Professor Domingue to support his staff member. However, we conclude that the effect of the statement was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because Professor Domingue knew the Claimant was being subjected to harassment but still included terms like condone and referred to the GCRN as affecting the health and well being of trans people in the statement, it was obviously going to increase hostility towards the GCRN and therefore the Claimant. We find the Claimant's complaint of harassment under issue 2(l) is well founded.

Issue 2(m): on or around 24 June 2021, did Cath Tomlinson post a written message on Yammer, and/or did the Respondent, particularly the Respondent's moderators of Yammer, fail to remove that message as set out in paragraph 44-45 GoC1?

641. We found that Ms Tomlinson did post a written message on Yammer that was not taken down. The Claimant asked for the message to be removed

however, the message was not removed. We consider that the post was unwanted conduct which was directed at the GCRN which included the Claimant. The post was related to the Claimant's gender critical beliefs because it referred to the GCRN as a hate group and that was on the basis of the gender critical perspective of the GCRN. The gender critical perspective was the reason why the Claimant set up the GCRN. We therefore conclude that the purpose of the post was to create an intimidating, hostile, degrading, humiliating or offensive environment for the GCRN which included the Claimant as Ms Tomlinson wanted the GCRN removed from the OU. Furthermore, the effect of the post was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant complained about the post by asking for it to be removed and added it to her grievance on 17 September 2021. Ms Tomlinson's post's reference to the GCRN as a hate group on any objective reading would have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We find the Claimant's complaint of harassment under issue 2(m) is well founded.

Issue 2(n): on 24 June 2021, did Peter Keogh send an email to the LGBT Network email list about the Vice Chancellor's proposed statement as set out in paragraph 46 GoC1

642. In our judgment, the statement contained in Professor Keogh's email "*The issue is that the network are actually sharing transphobic views and materials on their website"* was unwanted conduct related to the Claimant's gender critical belief as the use of the term transphobic in relation to gender critical views is being used as a term of insult. We consider that the inherent ad hominem nature of calling someone transphobic as well as Professor Keogh's professed views on gender critical beliefs as harmful meant that the purpose of the conduct was to violate the Claimant's dignity. The Claimant's email response the same day to Professor Keogh's email indicates that Professor Keogh's email affected her deeply. We conclude that the effect of the email objectively had the effect of violating the Claimant's dignity. We find the Claimant's complaint of harassment under issue 2(n) is well founded.

Issue 2(o): on various dates between 12 June 2021 and 9 August 2021, did Julia Downes, Nik Snarey, Helen Bowes-Catton and Natalie Starkey tweet/retweet as set out at paragraph 47-63 GoC1?

643. Following agreement with the parties we amended this issue to include tweets and retweets until 24 June 2021. The Tribunal considered that it was in the interest of justice to consider the 9 August 2021 tweet as well. We therefore considered all the tweets and retweets as set out in paragraph 47-63 GoC1. We considered whether there was any distinction to be made between whether something published on twitter was a tweet or retweet and we considered that there was not a distinction to be made in the context of this case and neither party suggested that there was. None of the retweets were considered contained any specific disclaimers about the content of that specific retweet either.

644. We find that the OU policy did regard personal tweets as falling within the social media policy.

Dr Downes 12/06/21 tweet and retweet- Professor Hines "Anyone celebrating the Forstater ruling is basically (and mistakenly) celebrating the right to be a bigot. These things just show people as they really are." **Above the imbedded Professor Hines' tweet, Dr Downes wrote,** ***"Well done you have protected your rights to say dehumanising things. Such an important contribution to what us diversity workers are trying to do in creating a non-hostile workplace and culture that respects difference [eye-rolling emoji]".***

Harassment

645. We conclude that whilst both tweets were unwanted conduct and related to the Claimant's gender critical beliefs, neither tweet violated the Claimant's dignity nor created an intimidating, hostile, degrading, humiliating or offensive environment as the tweets were not directed at the Claimant. The retweet was directed at the world at large, whilst it is probable that Dr Downes would have guessed that the Claimant would have celebrated the Forstater appellant ruling, we were not presented with any evidence that Dr Downes knew that she did. We consider that Dr Downes' tweet was a legitimate exercise in freedom of speech and did not amount to harassment.

Direct discrimination

646. We then considered whether this was an act of direct discrimination, we considered that the retweet was not because of the Claimant's gender critical beliefs. The retweet was aimed at anyone who celebrated the Forstater ruling and anyone whether they had gender critical beliefs or not, could celebrate the Forstater ruling. We find the Claimant's complaint of harassment and or direct discrimination in respect of this tweet is not well founded.

Tweets and retweets on 17/06/21

"Just a heads up that the @OpenUniversity have just launched their own transphobic/TERF/GC campaign network." **[1651]**

647. Dr Downes and Dr Snarey both tweeted and or retweeted this. We do consider that these tweets were directed at the Claimant, and we find that the reference to transphobic and TERF is associating the Claimant directly with being transphobic. The tweet was in breach of the Respondent's bullying & harassment policy and amounted to *derogatory name calling.*

648. We consider retweeting is an action that means that you want other people your followers and the rest of the world possibly) to see the retweet. But in any event whether Dr Downes was not endorsing the message or not, they were perpetuating the hostile environment within which the Claimant was being subjected to as part of the GCRN by tweeting it.

649. We consider the tweet was unwanted conduct as the Claimant complained about the tweet and it was related to the Claimant's gender critical belief because it contained terms of insult, transphobic and TERF which are inherently related to the Claimant's gender critical beliefs. The purpose of the retweet for both Dr Downes and Dr Snarey was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because of the inherently insulting terms used in the tweet to address the GCRN.

"Open University staff (including PGRS) who are concerned about the new gender critical research network and its impact on our trans colleagues and students assemble. Read and add your support in this open letter." **[1650]**

650. Dr Downes' tweeted this. The tweet was unwanted conduct related to the Claimant's gender critical beliefs as it refers to the GCRN and the Claimant complained about the tweet. Dr Downes tweeted or retweeted 4 times on 17June 2019 the same day about the GCRN in a way that was not positive and in one of those tweets, retweeted insulting terms such as transphobic and TERF.

651. We consider that if the Open Letter was only for the attention of the VCE then there would be no point or need to tweet the link to the Open Letter. We find that the part of the tweet that says, "read and add your support in this open letter" is to put pressure on the OU by encouraging a 'pile on'. Based upon Dr Downes' previous behaviour they wanted the pressure on the OU to impede gender critical views in the OU. Therefore the purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant by getting others to 'pile on'. This tweet was part of an onslaught of tweets the Claimant complained about. We conclude that by Dr Downes tweeting the link and encouraging OU staff to add support to the Open Letter that the effect of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

"I stand in total solidarity with the other OU students and staff who are demanding action regarding GCs…" **[1654]**

652. Dr Downes retweeted this tweet by Fiona Robertson, National Equalities Convener for the SNP. Like a number of other tweets already mentioned, the Claimant complained about this tweet. We take the view that it is unwanted conduct because of the Claimant's complaint. The tweet is related to the Claimant's gender critical beliefs as it specifically refers to GCs which is a well known short hand for gender critical proponents. Dr Downes' was not tweeting a range of opinions but amplifying the support for the gender affirmative side against the gender critical side as it is calling for action against gender critical proponents. We consider therefore that the purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

"Seeing UK University research networks approved & set up working against the rights of marginalised communities in this case Trans & non binary people is another shocking milestone in 2021." **[1323]**

653. We considered that the retweet was unwanted conduct as the Claimant did complain about the tweet. The tweet related to the Claimant's gender critical belief's because although it did not refer to the GCRN by name it was obvious who Dr Downes' was referring to as Dr Downes had been tweeting about the GCRN a number of times that day already. Furthermore at that time there was no other university research network researching from a gender critical perspective and the Claimant was associated with the GCRN. Whilst we are only considering the sentence *Seeing UK University research networks approved & set up working against the rights of marginalised communities in this case Trans & non binary people is another shocking milestone in 2021"* of the retweet we consider that the purpose of the sentence was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because Dr Downes retweeted to create a 'pile on' effect on the GCRN and the Claimant. The Claimant said this tweet formed part of the onslaught of tweets that affected her. Objectively, the effect of that sentence in the tweet did create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Tweets and Retweets on 18/06/21

"To commemorate the launch of the openly transphobic @openuniversity Gender Critical Research Network, why not read our rigorously peer-reviewed essay collection "TERF Wars: Feminism and the fight for transgender futures"?" **[1654]**

654. We find that the calling of the OU GCRN "openly transphobic" is insulting and inherently associated with those with gender critical beliefs. This retweet by Dr Downes was unwanted conduct that related to gender critical beliefs. The purpose of the retweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant as a member of the GCRN. This tweet formed part of the onslaught of tweets the Claimant complained about. We consider that the retweet objectively had the effect of create an intimidating, hostile, degrading, humiliating or offensive environment because of the inherent degradation of being associated with the word transphobic.

"Thank you for your solidarity and support @LSEGenderTweet." **[1349]**

655. Dr Downes tweeted this with a link to the LSE Statement. It is the tweet with the link that is unwanted conduct towards the Claimant. The Claimant regarded the LSE Statement as defamatory complaining to the LSE to take it off their website. The LSE Statement contained statements that referred to the GCRN and those members of the GCRN as routinely making transphobic and discriminatory claims about trans people. It is for that reason we conclude that the tweet with the link was related to the Claimant's gender critical beliefs. Dr Downes' purpose in tweeting the link to the LSE

Statement was to encourage a pile on as they were hostile to gender critical beliefs. We therefore conclude considering all the circumstances that the purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

"Solidarity from LSE" **with link to LSE Statement [2126]**

656. Dr Bowes-Catton tweeted this. We consider that the tweet was unwanted conduct because the Claimant complained about the tweet in her complaint about the onslaught of tweets. The tweet included a link to the LSE Statement, which contained terms of insult about the GCRN and gender critical beliefs, and so the tweet was related to the Claimant's gender critical beliefs. However, we do not conclude that the purpose of Dr Bowes-Catton tweeting the link was to either violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. Dr Bowes-Catton tweeted the link for solidarity. The Claimant considered that the tweeting of the LSE Statement was damaging to her reputation, we consider that this was not trivial, but the Claimant's point was one of substance as the LSE Statement contained sentences that were untrue. We conclude that objectively the effect of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment because the LSE Statement contained untruths that cast aspersions on members of the GCRN including the Claimant.

"…If you are OU staff or a PGR, perhaps you'd consider signing this open letter, which expresses concern about the impact of the new Gender Critical Research Network on trans/NB staff and students." **[2124]**

657. Dr Bowes-Catton tweeted this. We consider that the tweet with the link was unwanted conduct as the Claimant had complained about the tweet. We consider that the content of the tweet with the link related to the Claimant's gender critical beliefs because the Open Letter contained statements that painted the Claimant as hostile to trans people because of her gender critical beliefs. The purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant as it was an invitation to "'pile on'" the Claimant, and other members of the GCRN to increase the hostility to the GCRN and in turn the Claimant.

"Many of us wrote emails yesterday complaining about this 'gender critical' network and now there's an open letter to sign too…I feel we must do all we can to support our trans and non-binary colleagues" **[1351]**

658. Natalie Starkey tweeted this. We didn't accept Ms Starkey's reason for this tweet, there was no evidence that she wanted a debate which is why she said she tweeted the link to the Open Letter. Ms Starkey tweeted the link to add to the 'pile on' against the GCRN and the Claimant. We consider that the tweet with the link was unwanted conduct as the Claimant complained about the tweet and the Open Letter. We consider that the content of the tweet related to the Claimant's gender critical beliefs as it referred to the GCRN. We consider that purpose of the tweet was to create an intimidating,

hostile, degrading, humiliating or offensive environment for the Claimant as it was an invitation to "'pile on'" the Claimant and other members of the GCRN by asking OU staff to sign the Open Letter.

Tweets & Retweets on 19/06/21

Dr Downes Retweet - "The point of the OU's transphobic research network, the point of giving LGBA [LGB Alliance] charitable status, is to slowly erect a set of establishment institutions on which the gov't can lean as they seek to sacrifice trans and nonbinary people to their culture war" **[1654]**

659. In our judgment Dr Downes' retweet was unwanted conduct. The Claimant complained about the tweet and the use of the word transphobic is inherently related to gender critical beliefs in this context. We consider that the purpose of the retweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and objectively the effect of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant as transphobic is a term of insult.

Dr Nicola Snarey, tweeted the link to the LSE Statement and added in the tweet, *"I'm extremely grateful for the solidarity shown here. This is a very well explained statement, so please do read it if you want to know why staff/ students at the OU you feel so let down.* [2131]

660. We have concluded that the LSE Statement contain untrue statements that said that members of the GCRN (including the Claimant) routinely made transphobic, discriminatory, inaccurate, and harmful claims about trans people. Dr Snarey's tweet perpetuated that view. The tweet was unwanted conduct as the Claimant had complained about Dr Snarey's tweet and the LSE Statement. We consider that the tweet related to the Claimant's gender critical beliefs because the LSE Statement contained a critique of gender critical beliefs as being held by members of the GCRN. The purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because it encouraged a pile on.

Dr Downes tweeted a link to an article about the GCRN purportedly written by an OU student, writing "*What is really at stake from a student perspective."* The article in question describes gender critical beliefs as *"transphobic" and "bigotry", uses the word "TERF", and states that "gender critical adherents…. can fuck right off with all this transphobic bullshit."- 21/06/21 [1655]*

Harassment

661. The Claimant complained about this tweet, and we consider that it was unwanted conduct. Although, the tweet was not directed at the Claimant, it was related to the Claimant's gender critical beliefs because the article was about the GCRN and those who hold gender critical beliefs. However, we consider the article does not carry the 'pile on' effect that other tweets and retweets have. We do not consider that by Dr Downes drawing attention to

the article, the purpose of the tweet was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The article was not calling for anything to happen to the GCRN and the tweet was just drawing attention to the article. The Claimant said reading the tweets from her colleagues in general felt like an onslaught. However, the Claimant did not give any specific evidence about how this particular tweet affected her and why. We consider that neither its purpose nor the effect was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Direct discrimination

662. We then considered whether this tweet amounted to direct discrimination. We consider that it did not. The tweet with the article was not about the Claimant's gender critical beliefs but to draw attention to the student's perspective. The tweet and article were not unfavourable treatment of the Claimant but as described by Dr Downes a student's perspective. We conclude that the tweet with the article does not amount to direct discrimination of the Claimant on the grounds of her gender critical beliefs. We find the Claimant's complaint of harassment and or direct discrimination in respect of this tweet is not well founded.

Dr Snarey retweet -22/06/21 [2028]

Dr Snarey retweeted "*the @ Open University should be extremely concerned about what effect this gender critical research network will have on their academic credibility.*"

Harassment

663. We do not accept that this tweet was unwanted conduct as it was not directed at the Claimant. The tweet referenced the GCRN, but it was not about the Claimant's gender critical beliefs. The tweet is not related to the Claimant's gender critical beliefs because the comment was about the OU's position and credibility, it was not directly attacking the Claimant's academic credibility. Dr Snarey was not a close colleague who knew the Claimant personally, the Claimant took it personally when she should not have. We had regard to Dhaliwal and comments by the EAT that in essence not every comment slanted towards a person's personal characteristic constitutes harassment and did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, neither did it objectively have that effect.

Direct discrimination

664. We considered whether this tweet amounted to direct discrimination. We concluded that it did not as it was not less favourable treatment. The tweet was not about the Claimant at all but about the OU. We conclude that the tweet was not direct discrimination on the grounds of the Claimant's gender critical beliefs. We find the Claimant's complaint of harassment and or direct discrimination in respect of this tweet is not well founded.

Dr Snarey tweet -24/06/21[1704/2030]

"the Reproduction, Sexualities and Sexual Health Research Group at @Open University has written a detailed letter to request that all university support for the gender critical network is withdrawn, and that they are removed from all Open University websites".

665. We conclude that the tweet is unwanted conduct related to the Claimant's gender critical belief because it is an attack on the members of the GCRN (of which the Claimant was one) for setting up a network to research from a gender critical perspective. The purpose of the tweet was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant by calling for disaffiliation of the GCRN from the OU.

Dr Downes' tweet "*Not at all shocked that GCRN members don't have time for content warnings or consider student safety, mental health or wellbeing in what they do." 09/08/21*

666. We heard no evidence challenging Dr Downes' explanation for tweeting a link to a critique of a podcast in which Jon Pike was interviewed. We find that the tweet was not directed at the Claimant because although it referred to all GCRN members which would include the Claimant, the link to the article was about Jon Pike. We consider that the tweet was directed at Jon Pike and not the GCRN. Even if we are wrong about that, we consider that the tweet and the link are not related to the Claimant's gender critical beliefs. The tweet is asking for a warning to consider student safety. Dr Downes' purpose in tweeting was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment nor is its effect.

Direct discrimination

667. We considered whether the tweet was unfavourable treatment because of the Claimant's gender critical beliefs. Whilst the tweet included the Claimant as a member of the GCRN not having time to provide a content warning. The tweet was not unfavourable treatment because of the Claimant's gender critical beliefs. The tweet was not about gender critical beliefs but about student safety and the link to the article about Jon Pike made it clear it was about him and not about all members of the GCRN including the Claimant. We find the Claimant's complaint of harassment and or direct discrimination in respect of this tweet is not well founded.

668. We find the Claimant's complaint of harassment under issue 2(o) is well founded.

Issue 2(p): from 24 June 2021 onwards, did the Respondent's response (and/or lack of response) to the acts set out in issues 2(a)-(o) and to the Claimant's grievance, as set out at paragraphs 64-71 GoC1 and paragraph 6-9 GoC2, include failing to produce an outcome to the Claimant's grievance while she was still employed and failed to set a date for the grievance decision?

669. The Respondent's failure to respond to the acts of harassment and discrimination in respect of issues 2(a)- 2(o) was unwanted conduct. The Claimant's 29/06/21 Email made very clear the Claimant's concerns of harassment and the Respondent never responded to them directly. Professor Fribbance and Ms Molloy both accepted that the VC statements did not do enough to protect the members of the GCRN from the negative response to the GCRN, some of that response which we have found to be harassment. There was a failure to balance the harm experienced by the Claimant and the trans staff and students. The legal advice sought by the Working Group did not give consideration to the effect of the publication and the signatures of the Open Letter and WELS/RSSH statement and not just the content of the Open Letter and WELS/RSSH statement. None of the Working Group considered the Savage Minds podcast as hostile to trans people. We considered whether the failure of the Respondent was related to the Claimant's gender critical beliefs, and we consider that it was. The Respondent's motivation for not acting was because of fear of being seen to support gender critical beliefs. Whilst we do not consider that the purpose of the failure to act was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant it was fear of the pro gender identity section of the OU that was the reason for the Respondent's failure to act. It was evident from the 29/06/21 Email and the subsequent additions to the Claimant's grievance that issues 2(a)- 2(o) did have the effect of violating the Claimant's dignity. It is objectively the case that in light of the Respondent's bullying and harassment policy that gave the Claimant the legitimate expectation that the Respondent would act and the effect of the failure of the Respondent to act was to violate the Claimant's dignity.

670. However, the position is different in respect of the Claimant's grievance. The grievance was complex and was continually being added to by the Claimant. The breadth of the grievance meant that it was reasonable for the investigation to take 6 months by the time of the Claimant's resignation. The failure to provide both a date and produce an outcome in relation to the Claimant's grievance was clearly unwanted conduct directed at her. But not providing a date for the resolution of the grievance nor an outcome whilst the Claimant was employed was not related to the Claimant's gender critical belief. The reason why a date for the outcome was not given was to manage expectations. We conclude that the reason for the conduct did not have the purpose or effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Direct discrimination

671. Although we would accept the Claimant not having an outcome to her grievance whilst employed was a detriment, there were no findings upon which we could drawn an inference that the reason for the Respondent's failure to set a date for the outcome and produce an outcome for the Claimant's grievance whilst she was employed was because of the Claimant's gender critical beliefs. The investigating panel and Ms Jacobson had a significant amount to investigate, and they were investigating two large grievances around the same time. There was no evidence before us that would lead us to conclude that a hypothetical comparator making a

grievance about how she was treated in respect of her controversial views would have been treated more favourably. We accept the Respondent's explanation for why it took so long to investigate the grievance and why they couldn't give the Claimant a date for the outcome. We consider it had nothing to do with the Claimant's gender critical beliefs.

672. The Claimant's complaint in respect of issue 2(p) is not dependent on the Claimant being successful in respect of the Respondent's alleged failure to deal with the Claimant's grievance. In those circumstances, the Claimant's complaint of harassment in respect of issue 2(p) is well founded.

Issue 2(q): on 10 November 2021, did the Respondent publish a public statement on the OU News sections of the OU website, as set out at paragraph 3-4 GoC2

Harassment

673. We find that the publication of the statement was unwanted conduct related to the Claimant's gender critical beliefs as it was about the OU's position on the GCRN. However, we do not consider that either the purpose or effect of the 10/11/21 VC Statement was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The purpose was to reassure the trans and non binary community at the OU. Whilst we accept the effect on the Claimant subjectively was to trigger PTSD symptoms we do not consider that objectively the 10/11/21 VC Statement amounted to conduct that violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The effect of the 10/11/21 VCE Statement on the Claimant was less about the content and more about the 10/11/21 VC Statement indicating a lack of support and impetus to tackle the hostile environment the Claimant was being subjected to.

Direct discrimination

674. Neither do we consider that it was direct discrimination. Whilst the failure to mention the targeted campaign against the GCRN was unfavourable treatment. It was not because of the Claimant's gender critical belief, rather it was fear of the repercussions of outwardly appearing to support gender critical beliefs. We accept that the Respondent's saw publishing the statement as providing an update. The Claimant's claim for harassment or direct discrimination under issue 2(q) is unfounded and is dismissed.

Issue 2(k): since 24 June 2021, did the Respondent continue to publish the WELS Statement on the OU's website and, on various dates since 24 June 2021, did the Respondent, including David Hall decide and/or inform the Claimant that they have decided not to remove the WELS Statement?

675. We found that the WELS/RSSH Statement was not an illustration of academics exercising academic freedom. The part of the letter that refers to "good faith" was an emotional reaction rather than a piece of scholarly writing. We had regard to the ECHR Freedom of expression that academic freedom is about the work that an academic does, not their views about

whether the university supports research. We appreciate that they may be some overlap where someone else's research affects the academic relying on academic freedom's research, but the WELS/RSSH Statement only referred to funders as affecting their research and we have found there was no evidence that RSSH funding was affected by the GCRN.

676. The WELS/RSSH Statement was left up on the website because of the pressure the Respondent felt from gender identity culture within the OU. A clear example of this that illustrated our finding, was Anita Pilgrim's email to Professor Wilson on 22 June 2021 [1431] which said, *"perhaps given the recent events and staff anxieties, this might not be the best time to highlight Prof Phoenix's work*".

677. We conclude the decision to leave the WELS/RSSH Statement on 30 June 2021 was unwanted conduct as was the decision in around August 2021 to leave up the WELS/RSSH Statement as the Claimant continually explained the WELS/RSSH Statement was causing her distress and continual damage to her professional reputation.

678. The content of the WELS/RSSH Statement and the 30 June 2021 and August 2021 decisions were related to the Claimant's gender critical beliefs. This was because the August decision was based upon the 30 June 2021 decision and the reason for that decision was to appease the gender identity culture in the University, which was related to the Claimant's gender critical beliefs.

679. However, we do not conclude that the purpose of the decision to leave up the WELS/RSSH Statement was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The Respondent was motivated by fear not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. But we do consider that the effect of leaving the WELS/RSSH Statement on the website violated the Claimant's dignity because of the content of the WELS/RSSH Statement and its publication to the world. We also conclude that the decisions of the 30 June 2021 and August 2021 subjectively had the effect of violating the Claimant's dignity. The Claimant had repeatedly complained about the effect the WELS/RSSH Statement was having on her. The Respondent knew this. The Respondent didn't really believe that the WELS/RSSH Statement was about academic freedom solely and accepted it asking for the removal of the GCRN was less favourable treatment. Professor Holliman who was chosen because of his understanding of academic freedom acknowledged that it was causing harm to the Claimant and said that it should be removed. We therefore conclude that objectively the effect of the decisions to leave up the WELS/RSSH Statement was conduct that violated the Claimant's dignity. The Claimant's complaint under issue 2(k) of harassment is well founded.

Issue 2(s): on or around 8 December 2021, did the Respondent suspend the grievance process, as set out at paragraphs 11-12 GoC2

Harassment

680. We found that Ms Molloy's decision to suspend was really a decision to terminate the investigation of the Claimant's grievance. We therefore do not conclude that the Respondent's decision to terminate the Claimant's grievance process amounted to harassment. Whilst it was unwanted conduct, Ms Molloy's fear of the grievance outcome being overturned by an Employment Tribunal was not related to the Claimant's gender critical beliefs.

Direct discrimination

681. We conclude that suspending the grievance was less favourable treatment because the Claimant was entitled to an outcome having started the grievance when she was an employee. But we could not find any primary facts from which we could infer that Ms Molloy treated the Claimant less favourably than another professor at the OU in similar circumstances to the Claimant who did not have gender critical beliefs. The Claimant's claim for harassment or direct discrimination under issue 2(s) is unfounded and is dismissed.

Post Employment Discrimination under sections 39 & 108 EqA

682. We have found that the decision to leave up the WELS/RSSH Statement was harassment, and that decision took place between 19-31 August 2021. It was a decision that was made during the Claimant's employment that had continuing effects after the Claimant resigned. However, there were no further acts of harassment nor direct discrimination after the end of August 2021 in relation to interim decisions not to take the WELS/RSSH Statement down. Furthermore, we have found that the decision to suspend the Claimant's grievance was neither direct discrimination nor harassment. We found the decision to continue to publish the WELS/RSSH Statement was harassment.

Issue 8 (a) in relation to issue 2(k) did the treatment arise out of the employment relationship between the Claimant and the Respondent?

683. The publication of the WELS/RSSH statement on the OU website did arise out of the employment relationship between the Claimant and Respondent. The WELS/RSSH statement was published in opposition to the GCRN which was set up at the OU because the Claimant was an employee of the OU at the time. The decision not to take down the WELS/RSSH statement also arose out of the employment relationship. The Respondent considered the Claimant's request as set out in her grievance and then in her email dated as an interim measure whilst she was still an employee of the Respondent.

Issue 8 (b): Was the treatment closely connected with the employment relationship between the Claimant and the Respondent?

684. We consider that the treatment the Claimant was subjected to by the continuation of the publication of the WELS/RSSH statement was closely connected to the relationship that use to exist between the Claimant and the Respondent. Although we recognise that the test in section 108 EqA is

not a but for test as established in Aston, there was proximity of time in respect of the continued publication of the WELS/RSSH statement to the end of the Claimant's employment and beyond. However, we concluded that the decision to leave the WELS/RSSH statement up as a specific act of harassment or direct discrimination did not take place after the Claimant's employment ended and so does not amount to post employment treatment.

Issue 8(c): would the treatment, if it occurred during the employment relationship, contravene the Equality Act 2010?

685. We have found the continued publication of the WELS/RSSH statement took place after the Claimant's employment ended and did contravene the Equality Act 2010 as it amounted to harassment. We therefore consider that the treatment was in breach of section 108 (2) EqA.

686. The Claimant's complaint under issues 8, 11, 12, 13 & 14 in relation to issue 2(s) is not well founded and fails. The Claimant's complaint in respect of post employment harassment under issue 8 in respect of issue 2(k) is well founded.

Issue 2(r) Constructive discriminatory dismissal

Issue 20: Did any or all of Respondent's aforementioned conduct (either individually or collectively, including by way of a 'last straw' breach) constitute repudiatory breach(es) of either the implied term of mutual trust and confidence; and/or the implied duty to provide a suitable working environment?

(i) implied term of mutual trust and confidence

687. We consider that the conduct of the Respondent's employees by contributing, signing and publishing the Open Letter, WELS/RSSH Statement, publishing harassing tweets amounts collectively and individually to a breach of the implied term of trust and confidence. The publication of the Open Letter encouraged a 'pile on' to the Claimant in particular as she was on the Savage Minds podcast, creating an atmosphere that made it more difficult for the Claimant to carry out research from a gender critical perspective within a network of other like colleagues. The WELS/RSSH Statement contained untruths that were detrimental to the Claimant's professional reputation. In our judgment the aforementioned matters were likely to seriously damage the trust and confidence between the Claimant and the Respondent. We do not consider that the Respondent had a proper reason for allowing the harassment to continue without publicly taking action to prohibit it. Whilst the Respondent relied upon academic freedom, Ms Molloy and Professor Fribbance's evidence both supported the Tribunal's finding that upholding academic freedom did not prevent the Respondent from taking action to prohibit the harassment.

(ii) Duty to provide a suitable working environment

688. The Claimant was continually having contact with her colleagues through emails and WhatsApps and attendance at departmental meetings throughout her employment.

689. On multiple occasions, the Claimant complained about the effect that the isolating atmosphere was having on her before she raised her grievance on 24 June 2021. We find that Dr Drake disliked the Claimant expressing her gender critical position. This was evident in her efforts to silence the Claimant speaking about her research, comparing her to a prominent sociologist Charles Murray (perceived as being racist), and her frustration in her emails to various members of SPC (in particular Dr Downes) of the Claimant when she expressed her gender critical beliefs. We consider that this was pivotal in creating and maintaining the hostile work environment. Dr Drake's role as head of department meant that she set the tone for the department. Professor Westmarland's behaviour towards the Claimant likening her to a racist uncle also contributed to the hostile atmosphere. Dr Downes' close relationship with Dr Drake and role as academic EDI lead meant they had a significant influence on SPC as well. Furthermore, coupled with Dr Downes' call to have punitive action taken against the Claimant for expressing gender critical beliefs, contribution, publication and signing of the Open Letter and harassing tweets, all meant there were a group of academics in the Claimant's department with significant influence who were hostile to the Claimant because of her gender critical beliefs.

690. The Claimant complained of bullying and harassment and despite the Respondent's obligations under its bullying and harassment policy the Respondent failed to act to protect the Claimant. The Claimant's death threats were not taken seriously at the time they were made, no plan was in place.

691. We find that the Claimant was working in a stressful atmosphere, subject to a negative campaign against her and the GCRN and not getting the support she wanted from the Respondent. The Claimant was experiencing sleepless nights she was struggling with bad dreams and intrusive thoughts and struggling with symptoms of PTSD in the last six months of her employment.

692. The Claimant was provided with insufficient protection from harassment during the six months from launching the GCRN until her resignation on 2 December 2021.

693. We find that the Claimant was not provided with effective protection from the effects of the launch of the GCRN. We find that the Respondent did not provide the Claimant protection particularly in the form of asking staff and students not to launch campaigns to deplatform the GCRN, or make calls to remove support for the Claimant's gender critical research, or use social media to label the Claimant transphobic or TERF. The Respondent failed to protect the Claimant because they did not want to be seen to give any kind of support to academics with gender critical beliefs, including the Claimant.

694. The Claimant had a legitimate expectation that the Respondent would ensure that she worked within a suitable working environment free from discrimination and harassment. We considered Williams as to whether the discriminatory conduct materially influenced the repudiatory breach, and we determine that it did. The Open Letter, WELS/RSSH Statement, the tweets and Yammer posts that amounted to harassment and the discriminatory comment of Dr Drake and Dr Drake's prohibition against speaking about her cancellation and being labelled a transphobe were all breaches that all contributed to the Claimant's reason for resignation as they affected the Claimant's mental health. These were all matters that the Claimant referred to in her resignation letter.

695. It was the Respondent's failure to protect the Claimant from the targeted campaign that ultimately resulted in the 10/11/21 VC Statement being the last straw, which led to the Claimant's resignation.

696. The Respondent failed to provide a suitable working environment by failing to protect the Claimant from those attacks, between 18 June- 2 December 2021 that we found to be harassment. The fact that we found that the Respondent's motivation for not providing protection to the Claimant was the fear of being seen to support the Claimant's gender critical belief further supports our conclusion.

697. We were referred to Ahmed v Amnesty International 2009] ICR 1450 (EAT) but considered that it concerned only direct discrimination and was different from the facts of this case. We consider that the Respondent's failure to provide the Claimant with a suitable working environment did amount to harassment and the Claimant's dismissal was discriminatory by reason of harassment.

Issue 21: Did the Claimant resign (on 02.12.21 with immediate effect) in response to any such repudiatory breach(es)?

698. The Claimant resigned because the 10/11/21 VC Statement failed to mention the public campaign against the Claimant as part of the GCRN or condemn it, but only spoke of concern for those who found the GCRN work challenging. The Claimant had been subjected to a number of repudiatory breaches, in particular the publication of the Open Letter, some of the tweets which were found to have been harassment none of which the Claimant accepted as is evident from the Claimant's email on 18 June 2021 to Professor Wilson and Professor Fribbance and the subsequent grievance lodged on 24 June 2021. These repudiatory breaches contributed to the failure to provide a suitable environment for the Claimant which the Claimant was still being subjected to when she resigned. Wright makes it clear that it is not fatal to the Claimant's claim that at least one of the reasons why the Claimant said she resigned, which was the way the Respondent handled her grievance we did not find to be harassment, direct discrimination or a repudiatory breach.

699. We considered the fact that the Claimant had been interested in looking at other roles outside of the Respondent since July 2021 when she wrote to Professor Freedman about setting up a criminology course at the University

of Reading and whether that suggested that the Claimant did not resign in response to the harassment and direct discrimination found which amounted to repudiatory breaches. We regard the Claimant's statement that she wanted a 2023 start was an indication that she was not willing to leave the Respondent as yet not that the Claimant was content with the hostile environment in which she worked. The Claimant didn't want to leave the OU as it was where she wanted to end her career.

700. We are satisfied that the Claimant was only entertaining leaving the Respondent because of the hostile atmosphere she was experiencing at that time that had intensified in the last 6 months of her employment.

701. Although there is an approximate 3 weeks delay between the last straw on 10 November 2021 and the Claimant's resignation on 2 December 2021, we do not consider that there was affirmation of the repudiatory breaches. Delay in itself does not amount to affirmation and applying Chindove, we consider that 3 weeks is not an unreasonable period within which to resign following the last straw. We conclude that where there was a breach that is continuing as was the case here in respect of the suitable work environment, (New Southern Railway v Quinn [2006] IRLR 276 (EAT)) and as long established in the EAT decision of Walton & Morse v Dorrington it was not unreasonable for the Claimant to wait until she had a job offer before resigning from the Respondent considering the Claimant's length of service (5 years) and her clear desire to spend the rest of her career at the OU. Jones confirms that the fact that the Claimant left her employment in order to commence new employment as well as in response to the repudiatory breaches, does not prevent it from being a constructive dismissal.

702. Undertaking the process as advocated for Tribunals by Underhill LJ in Kaur, we first considered whether 10/11/21 VC Statement as the last straw was a repudiatory breach. We find that the 10/11/21 VC Statement was not itself a repudiatory breach but did contribute to the repudiatory breaches that the Claimant had already been subjected to, as following the Claimant's 29/06/21 Email, it indicated that the Respondent was not going to provide any protection to the Claimant against the on going campaign of harassment. The 10/11/21 VC Statement contributed to the accumulative effect of all the harassment which had continued until the Claimant's resignation (and was not affirmed) because of its unreasonable absence of protection for the Claimant. The 10/11/21 VC Statement was indeed the straw that broke the camel's back.

703. We conclude that the Claimant's complaint of discriminatory constructive dismissal amounting to harassment under issue 2(r) is well founded.

Constructive unfair dismissal: sections 94 & 98 Employment Rights Act 1996

Issue 22: Was the Claimant constructively dismissed with effect from 02.12.21

704. We have concluded that the Claimant was dismissed because the Respondent was in breach of the implied term of trust and confidence and

the duty to provide a suitable working environment and that was discriminatory.

705. We also conclude that the Claimant was constructively unfairly dismissed under section 98 ERA. We consider that the reason for dismissal was the repudiatory breaches of the implied terms of trust and confidence and the duty to provide a suitable working environment. The Claimant did not affirm this breach for the reasons we have already explained. This is not a fair reason within the meaning of section 98(2) ERA. The Respondent have said *"that the reason for dismissal was some other substantial reason of the need to ensure it fulfilled its duties to ensure free speech and academic freedom, its duties under the Equality Act 2010 and its duties of care to all of its staff and students, in the context of some of the most fiercely contested and polarised set of contemporary debates OU's need, throughout the course of the investigation into C's grievance, to strike the right balance between ensuring expedition, maintaining rigour, and guaranteeing that fairness to all*".

706. However, we have already found that the Respondent could have protected the Claimant and still upheld academic freedom. The reason for dismissal was the repudiatory breaches of the implied term of trust and confidence and the duty to provide a suitable working environment and so we do not accept that there was a fair reason for the Claimant's dismissal. We conclude that the Claimant's constructive unfair dismissal complaint under issue (22) is well founded.

Post Employment Victimisation

707. It was an agreed fact that the Claimant's presentation of the First Claim form dated 3 November 2021 was a protected act. We conclude that it falls within the meaning of "bringing of proceedings" under s.27(2)(a) EqA 2010.

708. It was an agreed fact that following the Claimant's resignation on 2 December 2021, the Respondent suspended the investigation into the Claimant's grievance.

709. The parties referred to section 39 Equality Act 2010 in respect of the claim for victimisation, however we acknowledge that it is unclear in the case law as to whether the correct statutory provision is section 39 or section 108 when dealing with post termination victimisation. Underhill's LJ reasoned judgment in the Court of appeal decision of Rowstock, acknowledges the existence of a right to claim victimisation post employment is based upon the Rhys Harper v Relaxion Group plc House of Lords decision as being consistent with s39(4) EqA 2010; as including employees who became ex employees and their right to claim victimisation. The victimisation complained of in the Claimant's ET1 dated 3 November 2021 has always been put as victimisation post employment, we therefore determine that it falls to be considered within section 108 EqA.

Issue 17: was the suspension of the Claimant's grievance detrimental to her?

710. The Claimant was entitled to expect an outcome to her grievance and the fact that she did not get one was a detriment. The fact that an employee leaves an employer doesn't mean that the grievance process cannot continue. The Respondent did not ask the Claimant whether this was at all possible, in those circumstances we don't consider that the Respondent can reasonably rely on it.

Issue 18: Was the Claimant subjected to such detriment because she had done that protected act?

711. Ms Molloy did not suspend the grievance but terminated the grievance investigation. It made no sense to us that it was Ms Molloy who made the decision to terminate the process especially since she her lacked an appreciation of the details of grievance which meant that she did not grasp the gravity of the grievance. It would have been preferable for the panel to have made the decision whether to suspend the process. Ms Molloy was influenced by the fact that the Claimant had brought an Employment Tribunal and did not want the Respondent to be challenged and so terminated the process. Ms Molloy was fearful that any decision on the grievance could be challenged by the Employment Tribunal and so terminated the grievance because of her fears.

712. We considered whether Cornelius was applicable, and we decided that it was distinguishable in this case. In Cornelius the process was suspended, and the Respondent did it to protect their position. However, in this case the process was not suspended but terminated, it can't be said that the Respondent was suspending the process to protect their position, this wasn't even mentioned in the rationale. It was fundamental to the ratio of Cornelius that the process was only suspended and not ended because it could not be said to be retaliation as the pause was in respect of the existence of the proceedings not because the Claimant in that case had brought proceedings. But in this case, Ms Molloy did terminate the grievance process and so we consider it was retaliation. Furthermore, we did not consider the Respondent to be acting honestly and reasonably in protecting their position in pending discrimination proceedings as said in Khan. We considered that the Respondent was contradicting themselves when they said they wanted to speak freely about the case, but they also wanted to protect their position by suspending the grievance.

713. We conclude that Ms Molloy did retaliate against the Claimant by terminating the grievance process because the Claimant had brought an Employment Tribunal claim. We conclude therefore in accordance with Lord Nicholl's comments in Nagarajan v London Regional Transport [1999] ICR 877 HL that the Claimant was subjected to the detriment because she had brought proceedings against the Respondent by her 3 November 2021 claim form. The Claimant was therefore subjected to victimisation in contravention of section 27 EqA.

Issue 14 (a) did the conduct arise out of the employment relationship between the Claimant and the Respondent?

714. The conduct of terminating the grievance process did arise out of the relationship between the Claimant and the Respondent. The Respondent was only dealing with the Claimant's grievance because she was an employee. It was inextricably linked to the Claimant's employment.

Issue 14 (b): Was the treatment closely connected with the employment relationship between the Claimant and the Respondent?

715. We consider that the treatment was closely connected with the employment relationship that use to exist between the Claimant and the Respondent because it was in considering the Claimant's grievance whilst the Claimant was an employee that led to the decision to terminate the grievance process. It was a matter that the Respondent had to consider even after the Claimant's employment had terminated as there was no policy or procedure that we were pointed to that suggested that the grievance automatically ended after termination. The fact that the Respondent sought to argue that they only suspended the grievance process rather than terminated it in the rationale, indicated they considered that the process did not end on termination of employment.

Issue 8 (c): would the treatment, if it occurred during the employment relationship, contravene the Equality Act 2010?

716. We have found and concluded that the decision to terminate the grievance amounted to victimisation under s27 EqA. We conclude that the treatment if it had occurred during the employment relationship would have contravened the Equality Act 2010.

717. In those circumstances, we conclude the Claimant's post employment victimisation claim in respect of issue 2(s) is well founded and succeeds.

Issue 25: Wrongful dismissal

718. The Claimant was constructively unfairly dismissed. In those circumstances she is entitled to notice pay. The Claimant's notice period will be determined at a remedies hearing to be listed. The Claimant's claim is well founded.

_____

Employment Judge Young

_____

Date: 22 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 22 January 2024

L TAYLOR-HIBBERD
FOR EMPLOYMENT TRIBUNALS