IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal number: CA-2023-001319**

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

B E T W E E N:

MRS KRISTIE HIGGS **Appellant**

-and-

FARMOR'S SCHOOL **Respondent**

-and-

(1) THE ARCHBISHOP'S COUNCIL OF THE CHURCH OF ENGLAND
(2) THE FREE SPEECH UNION
(3) THE ASSOCIATION OF CHRISTIAN TEACHERS
(4) SEX MATTERS **Interveners**

-and-

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Proposed intervener

WRITTEN SUBMISSIONS ON BEHALF OF SEX MATTERS

References to documents in the bundles are given in square brackets and prefixed "CB" for the core bundle and "SB" for the supplementary bundle.

SUMMARY OF SUBMISSIONS

1. The present appeal concerns the vexed question of how the courts and tribunals should approach religious or philosophical belief cases in which the Claimant argues that she was discriminated against not because she held a particular religious or philosophical belief, but because of her manifestation of it.

2. A particular difficulty which arises in these "manifestation" cases is how the relevant provisions of the Equality Act 2010 ("EqA") can be given effect in a manner which is consistent with the European Convention on Human Rights ("ECHR"). This issue is raised broadly by Ground ii of the Grounds of Appeal [CB 14] (as set out in the Order granting permission to appeal[1]) and is identified more closely by Elisabeth Laing LJ at §27 of her Reasons for making that Order. There, the learned Judge raises the possibility that the approach of the EAT in the present case has the effect of diluting the stringency of the statutory rule that direct discrimination pursuant to s.13 EqA can never be justified by requiring a Claimant to show not only that she has been discriminated against, but also that the discrimination was not compatible with the ECHR.

3. Sex Matters seeks to assist the Court in formulating a lawful and practicable approach to giving proper effect to the protected characteristic of religion or belief in the EqA which is consistent with ECHR principles and with the decision in *Page v NHS Trust Development Authority* [2021] EWCA Civ 255, by which this Court is bound. Sex Matters argues that the approach formulated by the EAT in the present case results in a number of undesirable consequences, going beyond those identified by Elisabeth Laing LJ in granting permission. In summary, Sex Matters advances the following propositions:

    3.1. The approach to manifestation cases developed by the EAT in the present case[2] requires the court or tribunal to be satisfied that the Respondent's actions were not objectively justified before a Claimant can establish that the protected characteristic of religion or belief is in play (§28 below). In direct discrimination cases this amounts to the introduction of a justification test by the back door

[1] 18 January 2024 [CB 170]

[2] [CB 43ff]

(§§23—30 below). In harassment cases it introduces a higher bar for causation and confounds the safeguards which already exist within the cause of action (§§38—40 below). In indirect discrimination cases there is a significant risk that it reverses the burden of proof as regards justification. In these ways it is inconsistent with the scheme of the EqA and places Claimants at a substantial disadvantage.

3.2. Furthermore the EAT's approach effectively introduces direct horizontal effect of the ECHR into UK law and – in part as a result of this – it is unwieldy and incapable of being understood by anybody but the specialist lawyer (§§42—45 below). As such it is a threat to access to justice. In reformulating the approach the Court should be mindful of the accessibility, clarity and practicability that are required to enable rights-holders and duty-bearers to understand their rights and responsibilities.

3.3. The ordinary application of the EqA, in combination with the proper application of the principles in *Williamson* / *Grainger* and *Eweida*, are sufficient to ensure that the EqA can be applied in a manner that is consistent with Arts 9 and 10 ECHR and the decision in *Page* (§§46—67 below).

3.4. Assessment by way of a full proportionality test, if it is necessary at all, should occur only in exceptional cases where a court or tribunal has grounds to believe that the ordinary application of the EqA in a given case is not compatible with the ECHR (§67 below).

THE LAW ON MANIFESTATION OF RELIGION OR BELIEF

Freedom of thought, conscience & religion in Art 9 ECHR

4. Art 9 ECHR provides that everyone has the right to freedom of thought, conscience and religion. This freedom is "one of the hallmarks of a civilised society"[3]. The Article expressly encompasses the right to hold a religion or belief as well as the right to manifest it, but the former is absolute whilst the latter is qualified. This reflects the fact that "the way a belief is expressed in practice may impact on others"[4], such that a balance must be struck between the reasonable needs of members of society, and "the value of religious

[3] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 HL per Lord Nicholls at §15
[4] *Williamson* per Lord Nicholls at §17

harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance"[5] may be given effect.

5. In *Eweida v United Kingdom* (2013) 57 EHRR 8 the ECtHR described the test for identifying what sort of conduct amounts to a "manifestation" of a religion or belief within Art 9 ECHR, as follows (at §82):

> *Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 … In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question".* (emphasis added)

6. Manifestation of belief can include speech acts but also behaviours such as wearing particular items[6] or restrictions against eating or handling certain foods[7], and by the same reasoning must also be capable of including unwillingness to share space with members of the opposite sex when washing, sleeping, using the toilet or undressing.

7. The qualifications to the freedom to manifest a religion or belief are set out in Art 9.2 ECHR, which takes the form of an objective justification test. Thus, the State may interfere with an individual's manifestation of her religion or belief if the interference is prescribed by law and is necessary in a democratic society in pursuit of a legitimate aim. The specified legitimate aims are the interests of public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others.

8. Art 9.2 ECHR requires a full proportionality assessment, so the interference must be balanced against the legitimate aim(s) in question. The four factors relevant to a proportionality assessment are set out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 per Lord Reed JSC at §74 as follows:

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[5] *R (Begum) v Headteacher and Gvnrs of Denbigh High School* [2006] 1 AC 100 per Lord Bingham at §32

[6] *Eweida and Others v United Kingdom* [2013] ECHR 48420/10, 59842/10, 51671/10 and 36516/10 ECtHR ; *SAS v France* [2014] ECHR 43835/11 ECtHR

[7] *Cha'are Shalom Ve Tsedek v France* [2000] ECHR 27417/95 ECtHR

(i) whether [the] objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether [the measure] is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community

Freedom of expression in Art 10 ECHR

9. Article 10.1 ECHR contains a qualified right to freedom of expression:

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.

10. By s.12(4) of the Human Rights Act 1998 ("HRA") courts and tribunals must have particular regard to the importance of freedom of expression.

11. Arts 9 and 10 ECHR are closely connected. The right to manifest beliefs guaranteed by Art 9.1 ECHR includes a right to express those beliefs, and as such is analogous to the right to "impart information and ideas" guaranteed by Art 10.1 ECHR.

12. Art 10 ECHR protects the manifestation of all speech other than that which offends against Article 17 ECHR, which provides that no part of the ECHR may be relied upon to defend speech or other action which is aimed at the destruction of the rights and freedoms in the Convention. For example, there is no right to freedom of expression in respect of Holocaust denial[8] or of the promotion of totalitarianism. However Art 17 ECHR only applies exceptionally, where it is clear that there is an intention to achieve ends which are clearly contrary to the values of the ECHR. Speech which is less grave does not fall entirely outside the protection of Art 10 ECHR, but it is permissible for the State to restrict speech such as vulgar homophobic slurs that promote intolerance and detestation of homosexual persons[9].

13. Thus, although Art 10 ECHR cannot be relied upon to protect the gravest forms of "hate speech", it protects speech which is offensive, shocking, disturbing, dangerous or irresponsible[10], and "the irritating, the contentious, the eccentric, the heretical, the

[8] *Garaudy v France* [2003] ECHR 65831/01 ECtHR. See also *Ivanov v Russia* [2007] ECHR 35222/04 ECtHR; *Norwood v United Kingdom* [2004] ECHR 23131/03 ECtHR; *Glimmerveen and Hagenbeek v The Netherlands* [1979] ECHR 8343/78 & 8406/78 ECtHR at §16

[9] *Lilliendahl v Iceland* (Application 29297/18) (12 May 2020) ECtHR. See also *Perinçek v Switzerland* [2015] ECHR 27510/08 ECtHR, §§ 113-115

[10] *R v Central Independent Television plc* [1994] Fam 192 per Hoffmann LJ at 202-203

unwelcome and the provocative"; otherwise it would not be a freedom worth having[11]. It also protects speech which is or may be wrong, because:

pluralism requires members of society to tolerate the dissemination of information and views which they believe to be false and wrong. This can be difficult for people to understand, especially if the subject is an important one and they are so convinced of the rightness of their views that they believe that any different view can only be the result of prejudice. Welcoming pluralism cannot be justified by logic. But in a society where people in fact hold inconsistent views about important matters, pluralism is a practical necessity if that society is to be free[12].

14. The qualifications to Art 10.1 are in Art 10.2. The exceptions in Art 10.2 must be narrowly interpreted[13]. There is "no real distinction" between the principles set out in Art 10.2 and Art 9.2[14] (see §7 above).

The protected characteristic of religion or belief

15. In any complaint of religion or belief discrimination or harassment, the court or tribunal must first be satisfied that the Claimant has the protected characteristic of religion or belief within s.10 EqA. Under that section a person who has the protected characteristic is a person "of a particular religion or belief" (s.10(3) EqA). A religion means any religion (s.10(1) EqA) and a belief is any religious or philosophical belief (s.10(2) EqA).

16. In *Grainger plc v Nicholson* [2010] ICR 360 the EAT formulated a five part test for determining whether a philosophical belief falls within s.10 EqA, as follows:

(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. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others[15].

17. The *Grainger* test is a consolidation of principles developed in *Campbell v United Kingdom* 4 EHRR 293 ECtHR and *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 HL. The latter concerned religious belief for the purposes of Art 9 ECHR. Lord Nicholls said:

Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of manifestation arise, as they usually do in this type of case, a belief must satisfy some modest,

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[11] *Redmond-Bate v DPP* (1999) 7 BHRC 375 per Sedley LJ at §20
[12] *Trimingham v Associated Newspapers* [2012] 4 All ER 717 per Tugendhat J at §265
[13] *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 ECtHR
[14] *Page* per Underhill LJ at §66
[15] Per Burton J at §24

objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. … Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention[16].

18. Following *Forstater v CGD Europe* [2022] ICR 1 EAT it is now understood that the benchmark for *Grainger* V is whether the belief is aimed at the destruction of Convention rights within the meaning of Art 17 ECHR[17]. If the belief falls foul of Art 17 ECHR, it is not worthy of respect in a democratic society and it is not protected. This excludes egregious beliefs such as Nazism and totalitarianism (see §12 above).

19. If it is possible to do so, a court or tribunal must apply the EqA in a way which is compatible with ECHR rights[18]. Thus although s.10 EqA makes no mention of manifestation, courts and tribunals must attempt to give the Act effect so as to encompass that concept[19]. The duty to apply domestic law compatibly with the ECHR is a judicial one[20]; other than in certain limited circumstances where the Respondent is a public authority or is exercising public functions, duty-bearers are not obliged directly to comply with the ECHR since it does not have horizontal direct effect.

20. Moreover, since manifestation of religion or belief may usually be characterised as a form of expression, the EqA should also be read consistently with Art 10 ECHR[21]. In effect, s.10 EqA must be interpreted in such a way that EqA rights-holders are not prevented from exercising their freedom of expression in relation to their religion or belief within the domains of life that fall within the ambit of the Act (employment, education, provision of services etc). At the same time, because duty-bearers under the EqA also have ECHR rights, they must not be prevented from exercising their own freedoms of belief,

[16] At §23
[17] *Forstater* at §62
[18] Human Rights Act 1998 s.3; *Page*
[19] See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 EAT at §§48—55; *Page*; *Forstater*
[20] *Mba v Merton LBC* [2014] ICR 357 CA per Maurice Kay LJ at §4
[21] See for example *Forstater*. In *Page*, it was argued by the Respondent that Art 10 ECHR was not relevant, as to which the Court expressed some doubt but ultimately declined to resolve the point (per Underhill LJ at §64).

expression or association which allow them to establish and manage organisations with particular goals and working practices[22].

21. The courts and tribunals have recently begun to approach this issue on the basis of an assumption that an ECHR-compliant reading of the EqA cannot be achieved simply by reading manifestation of religion or belief into s.10 EqA, since that would not allow for the limitations placed on the right to manifest a religion or belief by Art 9.2 ECHR or to the qualifications to the right of freedom of expression in Art 10.2 ECHR. Instead, they have sought to formulate a more sophisticated mechanism by which an appropriately qualified right not to suffer adverse treatment because of or related to the manifestation of religion or belief can be read into the EqA.

22. The formulation of this mechanism has been a challenging task, given the markedly divergent architecture, scope and applicability of the ECHR and the EqA. The current appeal presents the Court with an opportunity to clarify and improve upon the endeavours made by the appellate courts to date. In Sex Matters' submission, a wider perspective which takes account of the EqA as a whole will show that no elaborate gloss on the ordinary application of the Act is required.

Direct discrimination and the ratio in *Page*

23. It might seem that the most obvious way to accommodate the Arts 9.2 and 10.2 ECHR qualifications in the EqA would be to attempt to locate them in the relevant causes of action: direct discrimination (s.13 EqA), indirect discrimination (s.26 EqA), harassment (s.26 EqA) and victimisation (s.27 EqA).

24. This appears to have been the approach taken by the CA in *Page*. In that case, Underhill LJ concluded that s.13 EqA is not satisfied where the reason for the treatment complained of was that the employee manifested his belief "in a manner to which objection could justifiably be taken"[23]. The learned Judge observed that this approach "achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it"[24]. Thus an Art 9.2 ECHR justification test seems to be imported into the core of s.13 EqA, which is the question of what the reason was for the treatment complained of.

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[22] Art 11 ECHR guarantees Freedom of Association
[23] At §68
[24] *Page* per Underhill LJ at §74

25. If indeed the ratio in *Page* was that manifestation cases must be approached in this way in order to ensure compliance of the EqA with Art 9 ECHR, then Sex Matters would contend that it was incompatible with the general rule that direct discrimination is not susceptible to justification. Section 13 EqA contains nothing resembling the Art 9.2 (or Art 10.2) ECHR objective justification test[25], and effectively reading such a test into the EqA would go against the grain of the Act and undermine the principle that a conforming interpretation should not result in "judicial vandalism"[26] or damage the scheme of the legislation or its essential principles[27].

26. However, Sex Matters contends that that is not the ratio in *Page*. Underhill LJ did not hold that implying a justification test into s.13 EqA is the only way or indeed the correct way to approach the matter. It is difficult to discern the Grounds of Appeal from the judgment, but a careful reading of the Reasons shows that the learned Judge disposed of the appeal by way of the following findings:

    26.1. if there is "reason to believe that a particular approach or outcome may involve a breach of the claimant's Convention rights that question must be fully considered", and there is "nothing wrong" with doing so by taking the EqA as the primary basis of the analysis[28];

    26.2. there was no error of law in the Tribunal's finding that the purported manifestation did not have a close and direct nexus with the underlying Christian religious belief (per *Eweida*) and that therefore Art 9 ECHR was not engaged on the basis advanced[29];

    26.3. there might have been an argument that there was a close and direct nexus between the manifestation and the narrower "traditional family belief", but it was not clear that this argument was open to the Appellant because it did not seem to have been relied upon below, and in any event the Tribunal's findings on justification were correct and satisfied Art 9.2 ECHR[30]; and

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[25] Save for s.13(2) EqA which contains an objective justification test for age discrimination

[26] *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 HL per Lord Bingham at §30; *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 CA at §25

[27] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 HL per Lord Nicholls at §33; *British Gas Trading Ltd v Lock & Anor* [2017] ICR 1 CA at §25

[28] At §37

[29] At §48

[30] At §§50—51

26.4. it followed that the Respondent had not infringed the Claimant's ECHR rights[31].

27. Underhill LJ then went on to consider the issues "through the lens" of the EqA[32], as to which he reached the conclusions set out in §24 above. Those conclusions amount only to an approval of the Tribunal's ultimate decision[33] and not to a stipulation that manifestation cases must be analysed in this particular way.

28. Hence in the present case a somewhat different approach was taken by the EAT to the incorporation of Art 9.2 ECHR principles. Here the EAT appears, in effect, to have read into the protected characteristic in s.10 EqA a pre-justified form of manifestation before even turning to s.13 EqA. On this approach, even if the purported manifestation amounts to conduct with a close and direct nexus to the underlying protected belief (in the *Eweida* sense), if the manner of the manifestation was such that objection could justifiably be taken to it then the protected characteristic has not come into play at all[34]. It is only unobjectionable manifestations which are capable of falling within the protected characteristic. Furthermore, the objectionableness or otherwise of the Claimant's manifestation should be measured by determining whether the Respondent's reaction to it was objectively justified under Arts 9.2 and 10.2 ECHR:

> *In order to determine whether or not the manifestation can properly be said to be "objectionable" … it is necessary to carry out a proportionality assessment: keeping in mind the need to interpret the EqA consistently with the ECHR, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under articles 9(2) or 10(2) ECHR*[35].

29. Eady P further held that on remission the Tribunal in the present case should apply to this justification analysis not only the terms of Arts 9.2 and 10.2 ECHR themselves as well as the factors in *Bank Mellat*, but also a series of factual considerations which the learned Judge formulated "to aid mutual understanding of the basic principles" in employment cases[36].

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[31] At §67

[32] From §67

[33] See in particular §§70—72

[34] See the terms of the remission at §91 of the EAT's judgment. Sex Matters notes that the FSU (another intervener in the present appeal) argues that the EAT in the present case did not in fact import an ECHR justification test into the protected characteristic, but that it should have done so [SB 85]. For the reasons given below, Sex Matters departs from the FSU's position on this point.

[35] At §82. See also *Wasteney* at §55 and *Page* at §74, in which this formulation was prefigured

[36] At §94(5)

30. In summary, therefore, it appears that the schema of a direct religion or belief discrimination complaint relating to manifestation is currently as follows:

30.1. the court or tribunal must first be satisfied that the Claimant's underlying religious or philosophical belief meets the threshold criteria in *Williamson* / *Grainger*, including the *Grainger* V requirement that it be worthy of respect in a democratic society; and

30.2. next, applying *Eweida*, the court or tribunal must consider whether the "reason why" the Respondent acted as it did was conduct on the part of the Claimant which had a close and direct nexus with the underlying protected religious or philosophical belief;

30.3. if that conduct was the "reason why" but there was no close and direct nexus between the conduct and the underlying protected belief, the claim fails on the basis that the conduct was not a manifestation of the religion or belief; but

30.4. if the conduct was the "reason why" and there was a close and direct nexus between the conduct and the underlying protected belief, then, applying the EAT decision in the present case:

(a) if the Respondent's actions were not capable of objective justification within Arts 9.2 and 10.2 ECHR, applying *Bank Mellat* (as well as, in employment cases, the *Higgs* considerations[37]), then the manifestation was unobjectionable, the "reason why" the Respondent acted as it did was the protected characteristic and the claim succeeds; but

(b) if the Respondent's actions were capable of meeting the Arts 9.2 and 10.2 objective justification tests, then the manifestation was done in a manner to which objection could justifiably be taken, the "reason why" the Respondent acted as it did was not the protected characteristic and the claim fails.

Indirect discrimination

31. At first blush the Art 9 ECHR qualifications for manifestation of religion or belief seem apt to align with the indirect discrimination provisions in s.19 EqA, since indirect

[37] See §29 above

discrimination is capable of objective justification by way of the express statutory test in s.19(2)(d) EqA[38].

32. If the approach outlined above were not required by the EAT's decision in the present case, it would be theoretically possible – albeit in Sex Matters' submission not desirable or ECHR-compliant – to treat all s.10 EqA manifestation cases as potential indirect discrimination. Take the case of an employee similar to Mrs Higgs with protected gender critical beliefs who was dismissed for breaching her employer's social media policy after she posted about her views on Facebook. In an indirect discrimination case such a Claimant might frame the social media policy as a provision, criterion or practice ("PCP") which puts those with gender critical views at a disadvantage compared to others and which put her at that disadvantage. The employer would be able to rely on the justification defence in s.19(2)(d) EqA, at which point it could argue that the reason for the dismissal was that the manner of the Claimant's manifestation was objectionable (in the sense that interference with it was justified). In this scenario there is no need to import the concept of manifestation into the protected characteristic itself.

33. However the evidential burden for the Claimant in such a case would be a heavy one, since she would have to show a group-based tendency for those who share the protected gender critical belief to manifest it by posting on social media[39]. See for example *Eweida*, which related to the Respondent's policy that any accessory or clothing required for mandatory religious reasons had to be covered by an employee's uniform unless approval had been obtained. At first instance the Claimant was unable to demonstrate group disadvantage. That is, she did not show as a matter of fact that her employer's uniform policy put Christians generally at a disadvantage. As we can see from the fact that Mrs Eweida was successful at the ECtHR, in reaching that decision the Tribunal failed to comply with its ss.3 and 6 HRA duties and protect Mrs Eweida's Art 9 ECHR right to manifest her protected religion or belief. Of course, the more idiosyncratic the manifestation, the more unlikely it is that an indirect discrimination complaint framed in this way will succeed.

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[38] Albeit that there is an unresolved issue at CA level about whether the justification test in s.19(2)(d) EqA, which requires group disadvantage to be shown, can properly be read in compliance with Art 9.2 ECHR, which on the face of the Article does not require group disadvantage. See *Mba v Merton Borough Council* [2014] ICR 357 per Elias LJ at §34; *Gray v Mulberry Co (Design) Ltd* [2020] ICR 715 CA per Bean LJ at §44; *Page* per Underhill LJ at §90

[39] Assuming that group disadvantage has to be shown. See the discussion on this authorities referred to in fn38 above

34. On one view, if the concept of manifestation is imported into the protected characteristic in the way established by the EAT in the present case (as described in the section above), then the indirect discrimination claim becomes somewhat more accessible for the Claimant. In this scenario the group for comparison consists not of people with gender critical beliefs generally, but of people with gender critical beliefs who manifest those beliefs by posting unobjectionably on social media. Group disadvantage is much more readily shown if this is the appropriate framing.

35. However the fatal flaw in that approach is that it requires the Tribunal to conduct a justification assessment before it reaches the stage at which it ought to be considering the Respondent's s.19(2)(d) EqA justification defence. It must do so when considering whether the protected characteristic is even engaged, since no manifestation claim can get off the ground if the Claimant's conduct was objectionable in the sense that the Respondent's reaction to it was justified under Arts 9.2 and 10.2 ECHR. Crucially, since the burden of proving that she has the protected characteristic is upon the Claimant, it would appear to follow that she must show that her manifestation was unobjectionable. The position as to the burden of proof is, at best, unclear.

Exceptions to direct and indirect discrimination

36. Although, as stated above, direct discrimination is not generally susceptible to justification, the EqA does contain a number of express exceptions which limit the reach of s.13 EqA in certain specific and carefully circumscribed respects. These exceptions apply also to indirect discrimination (s.25(7) EqA). They include:

    36.1. the occupational requirements in Sch 9 §1 EqA, which (in summary) permit employers to require employees to have a particular protected characteristic (if that requirement can be shown to be a proportionate means of achieving a legitimate aim);

    36.2. the occupational requirements in Sch 9 §3 EqA, which permit persons who have an ethos based on religion or belief to apply a requirement, in relation to work, to be of a particular religion or belief (if the requirement can be shown to be a proportionate means of achieving a legitimate aim);

    36.3. the single characteristic associations exceptions in Sch 16 §1 EqA; and

36.4. the exceptions for organisations relating to religion or belief in Sch 23 §2 EqA, which (as relevant):

(a) apply to organisations which are associations or are engaged in the provision of services, public functions or premises where the purpose of the organisation is to practise or advance a religion or belief, or to teach the practice or principles of or conduct a variety of other activities in relation to a religion or belief; and

(b) excludes liability for discrimination under Parts 3 (Services and Public Functions), 4 (Premises) and 7 (Associations) relating to religion or belief in relation to membership, participation or the use of goods, facilities, services or premises, where it is done either because of the purpose of the organisation or to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief (Sch 23 §2(6)).

37. Through these means the EqA substantially narrows the scope of protection against discrimination because of religion or belief, and accommodates the freedoms of association, expression and belief of the employer so that it may establish and run an organisation in pursuit of particular aims. This is a factor which is not acknowledged in the authorities discussed above. In Sex Matters' submission it is of critical importance, since it shows that the EqA already takes adequate account of the need to protect the rights and freedoms of duty-bearers and other members of society in circumstances where it is appropriate or justified to do so.

Harassment

38. In Sex Matters' submission, the schema at §30 above is incompatible with the proper operation of the harassment cause of action in s.26 EqA. This can be seen by the fact that, in order to decide whether the Claimant had the protected characteristic, it is necessary for the court or tribunal first to identify what was the "reason why" the Respondent acted as it did (§30.2 above). The "reason why" is no part of the statutory test for harassment under s.26 EqA. Rather, the causation requirement for harassment is the lower bar of whether the Respondent's conduct was "related to" the protected characteristic. That test cannot readily be exchanged for the "reason why" test in 27.2 above. Even if it could, that would require the court or tribunal to apply a different test to determine whether the

Claimant has the protected characteristic for the purposes of a direct discrimination claim than for the purposes of a harassment claim.

39. On current authority, adapting the schema at §30 above to the harassment cause of action results in the following formulation:

    39.1. *Williamson* / *Grainger* must be applied to the underlying religious or philosophical belief; and

    39.2. *Eweida* must be applied to the purported manifestation; and

    39.3. if there was no *Eweida* manifestation, the claim fails; but

    39.4. if there was *Eweida* manifestation:

        (a) if the conduct complained of was not objectively justified, then the manifestation was unobjectionable and the court or tribunal must then ask whether the conduct complained of:

            (i) was unwanted; and

            (ii) was related to the protected characteristic; and

            (iii) had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (taking into account, if it had that effect rather than purpose, the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect); but

        (b) if the conduct complained of was objectively justified, then the claim fails because the Claimant cannot show she has the protected characteristic.

40. Sex Matters submits that this is an unworkable and incoherent approach. Furthermore, it illustrates that s.26 EqA harassment already imposes significantly higher thresholds as regards both intention and the gravity of the impugnable conduct than direct discrimination. The latter requires only that the rights-holder be subjected to a detriment which is motivated (whether consciously or unconsciously) by the protected characteristic. By contrast, as can be seen above, in harassment the conduct complained of must have one of the proscribed effects in s.26(1)(b). Where the proscribed effect is caused without deliberate intention, s.26(4) EqA imposes a mixed subjective and objective reasonableness test.

41. Thus, in Sex Matters' contention, the safeguards in the harassment cause of action already operate to buttress the cause of action against complaints about conduct which would be objectively justifiable within Art 9.2 ECHR. It is inappropriate additionally to require a Claimant to show – merely in order to establish that she has the protected characteristic – that the reason why the impugned conduct was done was unjustifiable within Art 9.2 ECHR.

DIRECT HORIZONTAL EFFECT & ACCESS TO JUSTICE

42. As submitted above, it should not be necessary for courts and tribunals to conduct a full human rights proportionality assessment by reference to Arts 9.2 and 10.2 ECHR at the point of deciding whether the Claimant has the protected characteristic of religion or belief within s.10 EqA. The EqA should be capable of being applied in a manner that is consistent with the ECHR without recourse to the terms of the Convention. Otherwise it is arguable that it is not, in fact, compliant with the ECHR at all. The presumption should be that the ordinary application of the EqA will be compatible with ECHR rights.

43. The effect of the current state of the authorities is that the ECHR is attaining direct horizontal effect in this context. This risk is particularly acute where the *Eweida* test is incorrectly or not robustly applied. It is Sex Matters' submission that the proper application of *Williamson* / *Grainger* and *Eweida* negates the need to conduct a subsequent full proportionality test under Arts 9.2 and 10.2 ECHR in all but exceptional cases. An assessment of that sort should occur only if a court or tribunal has grounds to believe that the ordinary application of the EqA in a given case is not compatible with the ECHR. This should be rare and is addressed further in the section below.

44. The complexity of the current approach is compounded rather than alleviated by the additional guidance provided by the EAT in the present case as to the application of Arts 9.2 and 10.2 ECHR (see §29 above). There is a significant danger that this guidance will be interpreted as a guide for duty-bearers against which the process and rationale of their decision-making will be judged. What should matter here is the substantive outcome of a duty-bearer's actions, not the formalities of its decision making:

Article 9 … confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2?[40]

45. Furthermore:

If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it[41].

COMPLIANCE OF THE EqA WITH ARTS 9 AND 10 ECHR

46. Sex Matters submits that there is no need to import the Arts 9.2 and 10.2 ECHR qualifications into the protected characteristic of religion or belief itself or to introduce them into the s.13 EqA direct discrimination test by way of provision for justification. The ordinary application of the EqA is already sufficient to comply with the requirements of Arts 9 and 10 ECHR as regards manifestation of religion or belief.

47. Where:

    47.1. the manifestation of belief is the true reason for the detrimental treatment rather than merely the trigger for it; and

    47.2. the underlying religious or philosophical belief meets the threshold criteria in *Williamson* / *Grainger*; and

    47.3. the conduct is in a sufficiently close and direct nexus with the underlying religion or belief to meet the test in *Eweida*

    it is generally unlikely that the manifestation will be such as to justify an interference within Arts 9.2 and 10.2 ECHR. Where it is, no direct discrimination or harassment case could succeed, because both causes of action require there to be no good reason for the adverse treatment which is capable of amounting to a legitimate aim within Arts 9.2 or 10.2 ECHR.

48. The circumstances in which it might be justifiable to interfere with manifestation which overcomes these hurdles are provided for by:

    48.1. the EqA exceptions, such as those contained in the occupational requirements provisions; and/or

[40] *Begum* per Lord Hoffmann at §68
[41] *Begum* per Lord Bingham at §31

48.2. the provision in s.19(2)(d) EqA for an objective justification test in indirect discrimination.

True manifestation and manifestation as a trigger for discrimination

49. It is contended that in the overwhelming majority of situations which are amenable to a complaint of direct religion or belief discrimination relating to manifestation, questions of proportionality will not arise so long as the court or tribunal focusses carefully on the relevant causation test and thereafter properly applies *Williamson* / *Grainger* and *Eweida*.

50. In the first place, the court or tribunal must carefully scrutinise the evidence in order to reach a clear finding as to whether the purported manifestation was:

50.1. the true "reason why" the employer acted as it did ("true manifestation"); or

50.2. merely the trigger for the detrimental treatment, the actual "reason why" being the fact that the employee held the underlying religion or belief ("manifestation as a trigger for discrimination").

51. Sex Matters submits that, on proper analysis, there are few true manifestation direct discrimination or harassment cases. It is much more often than not the case that the manifestation is merely the pretext for adverse treatment caused to the rights-holder because of her underlying belief[42], in which case Arts 9.2 and 10.2 ECHR do not arise.

The proper application of *Williamson* / *Grainger* & *Eweida*

52. The test in *Grainger* provides a high threshold which, if properly applied, ensures that transient, superficial or unserious beliefs do not gain protection. Even where the belief meets the threshold criteria in *Williamson* / *Grainger*, action taken against an individual in respect of conduct motivated, inspired or influenced by that belief but without the requisite close and direct nexus to it will not pass the "close and direct nexus" test in *Eweida*. As can be seen from the passage cited at §5 above, that test is a stringent one[43].

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[42] *Adams v Edinburgh Rape Crisis Centre* Case No 4102236/2023 (ET(S), 14 May 2024) is an example of a first instance decision in which the ET found that the Claimant's manifestation of her gender critical belief was "taken as a pretext" for disciplining her; the "real reason" was that the Claimant held the protected belief (at §210)

[43] See also *Pretty v UK* [2002] ECHR 2346/02 ECtHR

In Sex Matters' submission, there is a danger that the narrow confines of *Eweida* may be becoming lost to domestic courts and tribunals in the confusion and complexity of the current law. For example, in the first instance case *Lister v New College Swindon* Case 1404223/2022 (27 March 2024, Bristol ET) the Employment Tribunal reached the questionable conclusion that the Claimant's interactions with a student, including conduct which potentially amounted to discrimination and harassment, were manifestations of his protected belief.

53. Hence Sex Matters argues that, once *Williamson* / *Grainger* and *Eweida* have properly been applied, there is a very low likelihood of manifestations which might justifiably be the subject of interference within Art 9.2 ECHR slipping through the net. It is argued below that, when considered as a whole, it can be seen that the EqA contains three further bulwarks against this: the direct discrimination and harassment tests in the EqA, the justification test for indirect discrimination and the exceptions for discrimination.

The ordinary application of the EqA as a whole

The direct discrimination and harassment tests

54. The first bulwark is the structure of the direct discrimination and harassment provisions.

55. To take the latter first, Sex Matters argues that harassment as a cause of action is focussed on conduct which has a purpose or effect which is incapable of amounting to a legitimate aim within Art 9.2 ECHR. That is clearly true if the purpose of the unwanted conduct is to cause the proscribed effect; in such a case there can be no question of the perpetrator pursuing a legitimate aim. Where the effect rather than the purpose of the unwanted conduct is such as to cause a violation of dignity etc, the reasonableness test in s.26(4) EqA excludes cases in which there is a legitimate reason for the unwanted conduct. Thus, even in a true manifestation case (and it is argued above that such a case will be extremely rare), if the ordinary test in s.26 EqA is properly applied then Art 9.2 ECHR considerations are already built in.

56. Sex Matters contends that direct discrimination is similarly focussed on arbitrary adverse treatment which is incapable of pursuing a legitimate aim. If, for example, an employee is dismissed for objectionable conduct which was a manifestation of a protected belief, he will only succeed in a direct discrimination complaint if he can show that, all other factors being equal, a comparator who was guilty of equally objectionable conduct expressing an opinion on a different subject matter would not have been dismissed. That is, he can only show that he was directly discriminated against if he can establish that his particular manifestation was singled out for no good reason. If he can do so then Art 9.2 ECHR justification does not arise since it is by definition not objectively justifiable to act arbitrarily; no legitimate aim within Art 9.2 ECHR, such as the protection of morals or the protection of the rights and freedoms of others, could sensibly be said to arise.

57. Adverse treatment may not be arbitrary in two situations: firstly, where the duty-bearer is imposing a general, neutral rule which does not single out particular religions or beliefs; and second where it is legitimate for the duty-bearer to single out particular religions or beliefs because it is legitimately seeking to uphold a particular ethos or values. Sex Matters argues below that the EqA provides for the first situation by way of the indirect discrimination provisions and for the second by way of the express exceptions in the Act. In both cases the duty-bearer must act proportionately to pursue its legitimate aim.

Justification for indirect discrimination

58. Thus the second bulwark against overly constraining duty-bearers is the possibility of justification for the imposition of neutral rules which adversely affect those who manifest protected beliefs.

59. Where the duty-bearer arbitrarily singles out a particular manifestation for adverse treatment the correct route for the rights-holder is a direct discrimination complaint, which (as discussed above) is not susceptible to justification because there can be no legitimate aim pursued by arbitrary adverse treatment. Where, however, the rights-holder is adversely affected in connection with his manifestation by a neutral rule, the correct route is an indirect discrimination complaint. The duty-bearer may demonstrate that the rule is truly neutral and that its discriminatory effect is justified if it can satisfy the objective justification test in s.19(2)(d) EqA.

60. For example, an employer may impose a rule that staff must not talk on the shop floor, or that those in customer-facing roles are expected to keep their personal political views to themselves, or that staff are required to wear particular clothing, handle particular foodstuffs or work on particular days. A rule of this sort is not susceptible to challenge by way of a complaint of direct religion or belief discrimination; any such claim would fail on causation. The appropriate route for challenge, where a rights-holder considers a general rule of this sort to be incompatible with the practical manifestation of her belief, is an indirect discrimination claim under s.19 EqA. The duty-bearer will then have at its disposal the objective justification provision in s.19(2)(d) EqA, and it is here that a proportionality test under Arts 9.2 and 10.2 ECHR is best located, with the burden on the Respondent, if it is necessary at all.

The exceptions

61. Sex Matters argues that the exceptions in the EqA properly identify the particular legitimate reasons for which it may be objectively justifiable for a duty-bearer to single out a particular manifestation for preferential or adverse treatment. This is the third bulwark against overly constraining duty-bearers .

62. The exceptions are the provisions which permit duty-bearers to privilege some expressions of belief over others: the occupational requirement provisions in Sch 9 §§1 and 3 EqA, the single characteristic associations exceptions in Sch 16 §1 EqA and the exceptions for organisations relating to religion or belief in Sch 23 §2 EqA (see §36 above). These allow the duty-bearer to impose values upon rights-holders where those values are relevant to the purpose or activities of the organisation and are therefore capable of amounting to the basis of a legitimate aim. Within these provisions the steps which may proportionately be taken in pursuance of the legitimate aim are limited either by a statutory requirement to show objective justification (e.g. in the occupational requirements provisions in Sch 9) or by a closed list of permissible detriments (e.g. in the Sch 23 exceptions).

63. Take by way of example an anti-abortion charity which refuses to employ a person on the basis that he has posted pro-choice content on social media. Sch 9 §1(1) EqA allows the charity to demonstrate that its right to pursue its objectives amounts to a legitimate aim and that its refusal to employ the individual is a proportionate means of achieving that aim. If the job for which the individual has applied is, say, as a cook in the charity's HQ canteen, then the charity is less likely to be able to satisfy the proportionality requirement than if the job applied for is a public-facing fundraising post.

64. Similarly, Sch 23 EqA would, in principle, allow an "affirmation" support group for parents of trans-identifying children[44] to deny inclusion to a mother who had posted gender critical content on social media if the reason for doing so related to the purpose of the group or was for the avoidance of offence to others in the group (Sch 23 §2(6)). The steps which may proportionately be taken by the group in respect of the mother are limited to refusal of membership, participation in activities and so on (Sch 23 §3). They

[44] Assuming that the group falls within the definition of "association" in s.107(2) EqA

do not extend to conduct capable of amounting to unlawful harassment or victimisation, which remain prohibited (ss.101(4) and (5) EqA).

65. Thus the State has taken the view, within its margin of appreciation, that the permissible legitimate aims for the restriction of manifestation of a particular protected belief are those provided for by the exceptions in the EqA. In this way a proper and lawful balance is struck between the reasonable needs of those duty-bearers and other members of society whose rights and freedoms are actually affected and the fundamental importance and essential nature of the rights of the individual to freedom of thought (Art 9 ECHR) and expression (Art 10 ECHR).

Conclusion

66. Thus, once it has been determined that the manifestation underlying religious or philosophical belief passes *Williamson* / *Grainger* and the manifestation passes *Eweida* (or that in fact the Respondent's conduct did not really relate to the specific manifestation but simply responded to it as a trigger):

    66.1. a harassment case may proceed to the question of whether the Respondent's conduct was "related to" the protected characteristic, and the other steps of the ordinary statutory test;

    66.2. a direct discrimination analysis can proceed with the comparator test in the usual way;

    66.3. an indirect discrimination analysis can proceed through the ordinary statutory test, with the burden upon the Respondent to show justification under s.19(2)(d) EqA; and

    66.4. the exceptions can be applied, similarly with the burden upon the Respondent to satisfy the relevant objective justification test.

67. In any type of manifestation case, a full proportionality analysis under Arts 9.2 and 10.2 ECHR may be undertaken by the court or tribunal as a global check on its reasoning if it appears to be appropriate to do so. This is highly unlikely to be necessary. In Sex Matters' submission, it is only likely to arise in a situation where there is a lacuna in the EqA exceptions. Save for those unpredictable situations, the constraints imposed by *Williamson* / *Grainger*, *Eweida*, the EqA exceptions and the harassment and indirect discrimination provisions are adequate to ensure that the EqA conforms with Arts 9 and 10 ECHR.

68. Furthermore, Sex Matters avers that the general guidance provided by the EAT[45] at the invitation of the First Intervener (see §§29 and 44 above) drives duty-bearers and rights-holders away from a commonly held understanding based on the unlawful acts and exceptions set out in the EqA and the principles which underpin its general application across all the protected characteristics. Guidance from the appellate courts should enable duty-bearers and rights-holders to identify direct and indirect discrimination and harassment and to understand the specific exceptions which allow belief discrimination and the justification defence for indirect discrimination.

69. Accordingly, it is respectfully submitted that the approach developed in the EAT in the present case should be reversed.

THE RESPONDENT'S RESPONSE TO THE INTERVENTIONS

70. Sex Matters has had sight of the Respondent's undated Response to the Interventions ("RRI") [SB XX]. Sex Matters regrets that it will not have the opportunity to respond to this document by way of oral submissions, which it considers would assist the Court in efficiently navigating these complex questions which go to heart of the relationship between the EqA and the HRA. The following brief points of reply are offered:

    70.1. Sex Matters' submission is simply that the EqA as a whole is already compliant with the ECHR such that its ordinary application is sufficient to deal with manifestation of religion or belief in all but the most exceptional cases. Hence, contrary to the Respondent's apparent understanding of the position, Sex Matters does <u>not</u> submit that the approach to philosophical belief cases generally or manifestation cases in particular should be different to that taken to other protected characteristics.

    70.2. RRI §17 rests on a mistaken premise. As explained at §§34—35 above, Sex Matters does not submit that in an indirect discrimination case the court or tribunal <u>should</u> determine whether the manifestation is objectionable before turning to s.19(2)(d) EqA. Indeed Sex Matters' position is the reverse: it is the approach taken by the EAT in the present case which requires court or tribunal to do this, and it is an impermissible "fatal flaw". The proper approach should be to apply the EqA in

[45] At §94(5)

the ordinary way, with the burden upon the Respondent to show justification under s.19(2)(d) EqA.

70.3. The assertions made in RRI §18 about the availability of a s.7 HRA claim are not understood. As apparently recognised in that paragraph, Sex Matters' submission is precisely that there is no need for "full reconfiguration of the statutory framework".

70.4. Similarly RRI §19 misapprehends Sex Matters' position. Sex Matters points to the EqA exceptions for religion or belief discrimination (at §§61—65 above) not in order to propose any novel approach to the legislation. It does so merely to demonstrate that there is no need to superimpose an explicit Art 9.2 or 10.2 ECHR analysis onto manifestation cases, because the EqA already makes sufficient provision for duty-bearers proportionately to interfere with rights-holders' manifestations of their protected beliefs. The exceptions are one mechanism by which it does so, by providing expressly for proportionate interference in pursuance of specific legitimate aims. The other mechanisms by which it does so, by other means, are the operation of the direct discrimination and harassment tests (§§54—57 above) and the justification test for indirect discrimination (§§58—60 above). The point goes no further than that.

70.5. RRI §20 misfires for the same reason. Sex Matters' position is that the structure of the s.26 EqA harassment test already incorporates all the ingredients necessary to comply with Arts 9.2 and 10.2 ECHR (see §55 above). It is nothing to the point that it is up to a Claimant to choose which cause of action she pursues; the point is simply that, where the facts justify a harassment complaint, s.26 EqA is capable of providing an ECHR-compliant analysis.

70.6. The Respondent's comments in RRI §21 on the correct comparator in a direct discrimination manifestation claim warrant fuller discussion than can be accommodated here. Put briefly, if the less favourable treatment is truly because of the act of manifestation and not because of the underlying belief[46], then the comparator cannot be somebody who has done precisely the same act but for

[46] The Court is invited to note that, as submitted at §51, Sex Matters argues that there are few cases in which the less favourable treatment is truly because of the manifestation rather than because of the underlying protected belief.

different reasons. If it were, then the comparator would in effect have the same protected characteristic as the complainant.

70.7. As to RRI §22, Sex Matters does not argue that the direct discrimination test formally requires that less favourable treatment be "arbitrary". It is recognised that there may be cases in which the less favourable treatment was done for a benign reason and yet is unlawfully discriminatory. The point is that direct discrimination occurs when the duty-bearer cannot show that there is a non-discriminatory reason for singling out one act of manifestation by comparison to a similar act (see the paragraph above as to comparators). The Respondent is, however, correct insofar as it suggests that Sex Matters takes the position that duty-bearers are entitled to maintain general rules as to neutrality in respect of manifestations of religion or belief (see §60 above). To do so for a legitimate reason and to a proportionate extent is not to fetter the Arts 9 and 10 ECHR rights of rights-holders. That, indeed, is the whole point of Arts 9.2 and 10.2 ECHR. If the rule as to neutrality or its enforcement is disproportionate, the proper complaint is one of indirect discrimination, and the justification test in s.19(2)(d) EqA accommodates the Arts 9.2 and 10.2 ECHR considerations.

DISPOSAL

71. The Court is invited to allow Ground ii of the appeal on the basis that the EAT erred in its formulation of the relevant legal tests for the reasons set out above, and as such failed properly to give effect to the principle that the ECHR protects both the substance and the manner of the relevant manifestation.

72. The proper approach to the question of whether the Claimant's manifestation of her belief was protected would have been for the Tribunal firstly to determine whether the Claimant's underlying belief passed the test in *Williamson* / *Grainger*, and second, if so, to determine whether the Claimant's conduct amounted to a manifestation in line with *Eweida*, in the sense that it had a close and direct nexus with the protected underlying belief (or whether the Respondent was acting in relation to the holding of the underlying belief and the specific conduct was simply a trigger). The EAT has already determined these questions in the Appellant's favour, as to which Sex Matters does not demur.

73. On both the direct discrimination and the harassment complaints, the Tribunal should then have applied the statutory tests in the ordinary way, if necessary thereafter considering the outcome in the round to decide whether there was a necessity for an assessment under Arts 9.2 and 10.2 ECHR, and if so undertaking that assessment. Such an approach would not offend against the ratio in *Page*, which requires only that the EqA is applied in a manner which is consistent with ECHR rights, principally through the lens of the EqA but with a full consideration of Arts 9 and 10 ECHR if there is reason to believe that the outcome may involve a breach of Convention rights (see §26 above).

74. Sex Matters takes no position as to whether the present case should be remitted to the Tribunal for determination of the outstanding questions.

16 September 2024

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Note: Counsel is grateful to Dr Michael Foran of the School of Law, University of Glasgow for his assistance in the drafting of these submissions. Dr Foran does not seek to address the Court.