EMPLOYMENT TRIBUNALS

Claimant: Mrs A Islam-Wright

Respondents: 1. Arts Council England
2. Craig Ashcroft

Heard at: Manchester (by CVP) **On:** 24-26 July 2024 and in chambers on 29 August 2024.

Before: Employment Judge McDonald
Mrs V Worthington
Ms S Howarth

Representatives
For the claimant: Mr A Alemoru (Solicitor)
For the respondents: Mr J Feeney (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The complaints of victimisation against the first and second respondents are not well-founded and are dismissed.

2. The complaint of unfair dismissal against the first respondent is well-founded. The claimant was unfairly dismissed.

REASONS

Introduction

1. This was the final hearing of the claimant's complaints of constructive unfair dismissal and victimisation in breach of section 27 of the Equality Act 2010.

2. Having considered the papers in the case and heard from the parties we decided that the hearing would deal with liability only.

Preliminary Matters

3. The Tribunal had received a request from Tribunal Tweets for permission to live tweet the Tribunal hearing. The parties had received notification of that application prior to the start of the hearing but Mr Alemoru and Mr Feeney confirmed on behalf of their respective clients that there was no objection to that request.

4. Tribunal Tweets also requested inspection of the claimant's witness statement once she had begun giving evidence. That request, in accordance with rule 44 of the Employment Tribunal Rules 2013, was granted. The Tribunal is grateful to the respondent for arranging a temporary document room which enabled the statement to be shared.

Potential Recusal – Employment Judge

5. After preliminary discussions with the parties the Tribunal adjourned to read the witness statements and key documents in the case. In doing so, the Employment Judge noted in the index to the final hearing bundle that there was correspondence between the first respondent and the Equality and Human Rights Commission. That related to a previous Employment Tribunal decision of the Leeds Employment Tribunal which upheld a complaint of harassment by Ms D Fahmy against the first respondent (case number 6000042/2022). The Employment Judge notified the parties by email that he had been employed by the Equality and Human Rights Commission as a lawyer for a period up to 2019. He indicated that his preliminary view was that there were no grounds for recusal but invited the parties to make any representations on that point if they wished to do so. Neither party wished to do so, and both confirmed they were content for the Employment Judge to continue deal with the case.

Potential Recusal – Non Legal Member Howarth

6. During the period when the Tribunal were reading the documents and witness statements Mr Alemoru alerted the Tribunal that he had done some work with Ms Howarth in her capacity as an HR consultant. That was many years prior to the hearing. Mr Feeney for the respondents confirmed that they had no objection to Ms Howarth continuing to hear the case...

The Issues

7. The issues were identified at the preliminary hearing conducted by Employment Judge Ainscough on 3 March 2023. The List of Issues arising from that hearing was the basis for our consideration of the case.

Day 2 – Amendment by addition of 2 further detriments to the victimisation claim

8. During the claimant's cross-examination evidence on Day 2 it appeared to the Tribunal that the detriments about which she was complaining as part of her victimisation claim went further than the single detriment set out at 3.2 of the List of Issues (“instigating the disciplinary procedure on 7 June 2022”). We decided to deal with the application to amend after the claimant’s evidence had been concluded. The parties had no objection to us doing so on the basis that the matters referred to in the additional detriments had already been covered in the claimant’s evidence.

9. Following the break at the end of the claimant’s evidence Mr Alemoru confirmed that the claimant was alleging 2 further detriments. They were:

a. Rejection of the claimant's request to deal with her Dignity at Work complaint before proceeding with the disciplinary procedure.

b. Mr Ashcroft's email of 23 June 2022 (pp.182-183) and in particular his statement in it that the claimant's emails were focussed on why she would not participate in the investigation process unless it was on her terms and running order; and his drawing the claimant's attention to the respondent's rules which said that wilful hindrance or obstruction of a disciplinary or grievance procedure may be considered misconduct.

10. Having heard submissions from Mr Feeney and Mr Alemoru we decided to allow an amendment to the List of Issues to add the 2 further detriments. We gave oral reasons. Neither party requested them in writing. In summary, we accepted Mr Alemoru's submission that the detriments sought to be added were included in the claimant's particulars of claim (at paras 11 and 13 respectively). Although not included in the List of Issues, the alleged detriments had not been withdrawn or dismissed. We took into account the guidance in **Z v Y [2024] EAT 63** about the need for a Tribunal not to stick slavishly to a List of Issues and not to elevate that list to the status of pleadings. We decided there was limited practical impact of allowing inclusion of the 2 detriments because doing so did not expand the scope of evidence we needed to hear. The detriments were part of the evidence about the investigative and disciplinary procedure which we would need to hear to determine the constructive dismissal complaint. It would not prolong the hearing and it was in accordance with the overriding objective to amend the List of Issues to include them.

11. The List of Issues Annexed to this judgment incudes the 2 additional detriments at para 3.2.2 and 3.2.3. It also includes a minor correction to 1.1.1.5. It is not in dispute that the relevant date for that incident was 30 rather than 13 August 2022.

Clarification of the protected act relied on for the victimisation complaint

12. The List of Issues identified the protected act as having made an allegation of a breach of the Equality Act 2010 or done something in connection with that act "when commenting on an online petition". We agree with the respondent's submission that there was at times a lack of clarity on Mr Alemoru's part about what that meant. At times the protected act relied on appeared to be the act of supporting the petition by adding a comment to it. At other times, the focus was on the contents of the claimant's comment as being the protected act.

13. In his oral submissions, Mr Feeny for the respondent accepted that the relevant protected act was that set out at para 13 of the claimant's skeleton submissions. That is the definition of the protected act on which we have reached our decision.

14. Para 13 says that "the protected act is the support the claimant showed for the grievance circulated on 11 May 2022 (i.e. that she identified as a supporter and posted the comment) showing her support for the complaint of homophobic/anti-trans views of staff in decision making positions and HR arising out of the drop in sessions dealing with the grant to the LGB Alliance".

Relevant Law

Victimisation in breach of the Equality Act 2010

15. S.27 of the 2010 Act makes victimisation unlawful:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because —**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

16. This means that for a victimisation claim to succeed, the claimant has to show three things. First, that they did a protected act; second, that they were subjected to a detriment; and third that they were subjected to that detriment because of the protected act. The claimant does not have to show "less favourable treatment" so there is no absolute need for a tribunal to construct an appropriate comparator in victimisation claims.

The meaning of "protected act"

17. As to the meaning of a protected act in 27(2)(c), the EAT in **Kirby v National Probation Service for England and Wales (Cumbria Area) [2006] IRLR 508** described the equivalent (though differently worded) subsection in Section 2(1)(c) of the Race Relations Act 1976 as a "catchall" in a case where the alleged "victim" has otherwise done anything … by reference to this Act in relation to the discriminator" or any other person.

18. In **Kirby** the claimant had given information in connection with a complaint of race discrimination raised in internal grievance proceedings.

19. In **Aziz v Trinity Street Taxis Ltd [1988] ICR 534, 542, CA** Slade LJ said: "An act can, in our judgment, properly be said to be done "by reference to the Act" if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."

20. In relation to "allegation" in s.27(2)(d), Mr Alemoru drew our attention to what was said in **Beneviste v Kingston University (UKEAT/0395/05)** namely "that there is no need for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation."

21. In **Fullah v Medical Research Council (UKEAT/0586/12)** the EAT held that it was not necessary, for example, to refer to "race" using that word but that there must be something sufficient about the complaint to show that it is a complaint to which at least the Equality Act 2010 potentially applies. In that case, the word "discriminatory" was used but the tribunal was entitled to find it was used to mean unfair treatment rather than detrimental action based on a protected characteristic.

The meaning of "detriment"

22. S.27(1)(a) refers to detriment because of a protected act but does not refer to "less favourable treatment". There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para 9.11 states: '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'.

23. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. In **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] UKHL 16** the House of Lords stressed that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. Accordingly, the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. This means the employee's own perception of having suffered a 'detriment' may not always be sufficient to found a victimisation claim.

Separability of the protected act from the manner of doing it

24. The question in any claim of victimisation is what was the 'reason' that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, the employer is liable for victimisation; and if not, not. There will in principle be cases where an employer has subjected an employee to a detriment in response to the doing of a protected act but where it can, as a matter of common sense and common justice, say that the reason for the detriment was not the complaint as such but some other genuinely separable feature of the complaint (such as the unreasonable or offensive manner in which it is made) (**Martin v Devonshires Solicitors [2011] ICR 352 ("Martin").**

25. In **Martin [para 22],** the EAT acknowledged that it would be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against

employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself. Tribunals should be slow to recognise a distinction between the complaint and the way it is made save in clear cases.

26. In the Court of Appeal in **Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941, CA, at para 58,** Underhil LJ, revisiting his judgment in **Martin** confirmed that **Martin** does not establish a rule of law that so long as there is no more than "ordinary" unreasonable behaviour by the person doing a protected act any detriment will be treated as being because of that act. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself.

27. The key question is one of fact, i.e. what were the reasons for any detrimental treatment. Once the reasons have been identified, the Tribunal must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.

28. In **Fecitt and others v NHS Manchester [2011] EWCA Civ 1190, [2012] ICR 372,** (a whistleblowing case cited in **Kong**) Elias LJ said in the Court of Appeal that where the whistleblower is subject to a detriment without being at fault in any way, the Tribunal will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistle-blower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

29. That does not mean, however, that in the case of such an innocent whistleblower there could be no explanation which the employer could offer in these circumstances which would relieve him from liability. In **Fecitt**, that meant that the need to resolve a difficult and dysfunctional situation could provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower.".

The burden of proof in Equality Act 2010 cases

30. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(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 subsection (2) does not apply if A shows that A did not contravene the provision."**

31. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

32. In **Hewage v Grampian Health Board [2012] ICR 1054, SC**, the need to avoid an overly technical approach to the application of section 136 was emphasised. Lord Hope observed that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

33. That means that where there is "room for doubt", the approach s.136 lays down provides a valuable tool for determining whether the inference of discrimination should be drawn. In **Field v Steve Pye & Co [2022] IRLR 948 EAT** HHJ Tayler emphasised that if there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment.

34. He said that "where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a non-discriminatory reason for the treatment has been made out."

35. He also said that where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions.

36. A finding that an employer has behaved unreasonably, or treated an employee badly, will not, however, be sufficient, of itself, to cause the burden of proof to shift; **Glasgow City Council v Zafar [1998] ICR 120**.

The Unfair Dismissal complaint

The right not to be unfairly dismissed

37. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the effective date of termination, which the claimant had in this case.

38. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the

potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

39. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

40. For there to be an unfair dismissal there must first be a dismissal. The claimant claims she was constructively dismissed.

Constructive dismissal

41. A constructive dismissal occurs where "the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct" (s.95(1)(c) ERA). To be a constructive dismissal the employer's actions or conduct must have amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**

42. There is implied into every contract of employment a duty of mutual trust and confidence. Each party to the contract is under an obligation not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**). The question for the Tribunal is whether, viewed objectively, a party's conduct has breached the implied term (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

43. If a party is found to have been guilty of conduct breaching that implied term, that is something which goes to the root of the contract and amounts to a repudiatory breach. Such conduct by an employer entitles an employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

44. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there will be a final act or "last straw" before the resignation. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that that "last straw" need not itself be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of has to be more than very trivial and has to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach.

45. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

46. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

47. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

48. In **Gordon v J & D Pierce (Contracts) Ltd [2021] UKEAT 0010_20_1201** the EAT held that an employee does not affirm a contract of employment by engaging in a grievance process available under that contract.

Overlapping grievance and disciplinary cases

49. The ACAS Code of Practice on Discipline and Grievances at Work (2015) ("the ACAS Code") deals with overlapping grievance and disciplinary cases at para 46. That states that:

> **"46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."**

50. The ACAS Guide Discipline and Grievances at Work ("the ACAS Guide") provides guidance on this issue in the context of its discussion of conducting a disciplinary meeting (at p.22):

> **"When an employee raises a grievance during the meeting it may sometimes be appropriate to consider stopping the meeting and suspending the disciplinary procedure – for example when:**

- **the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have**

- **bias is alleged in the conduct of the disciplinary meeting**

- **management have been selective in the evidence they have supplied to the manager holding the meeting**

- **there is possible discrimination.**

It would not be appropriate to suspend the meeting where the employee makes an invalid point. For example if they mistakenly claim that they have the right to be legally represented or that a collectively agreed and applicable procedure does not apply to them because they are not a union member."

The Hearing and the evidence

51. The parties, their representatives and their witnesses attended the hearing by CVP. The Tribunal panel attended in person at Manchester Employment Tribunal except on the first day when Ms Howarth attended by CVP.

52. We heard the claimant's evidence on the afternoon of Day 1 of the hearing and the morning of Day 2. Having granted the application to amend we heard from the respondent's witnesses. On Day 2 and the beginning of Day 3 we heard Mr Ashcroft's evidence. On Day 3 we also heard the evidence of Miss Jane Beardsworth ("Miss Beardsworth"). Miss Beardsworth is a Senior Relationship Manager for the first respondent and held the disciplinary investigation meeting with the claimant. On Day 3 we heard the evidence of Mrs Karen Coundon ("Mrs Coundon") a Senior HR Partner for the first respondent. She was due to hear the disciplinary hearing in the case.

53. There was an agreed final hearing bundle of 559 pages which included as the final page the claimant's Schedule of Loss. It also included the Leeds Employment Tribunal Judgment in case 6000042/2022 ("the Leeds Judgment"). That decision is not binding on us but we have read and taken it into account. We have adopted some of its findings of fact where it seems to us those facts were not disputed.

54. Both parties had prepared written skeleton arguments. We heard oral submissions and reserved our decision. We directed that the parties provide further written submissions. We took into account the parties' oral and written submissions in reaching our decision. We have not set the submissions out in full but refer to them where relevant in the Discussion and Conclusions section below.

55. The Employment Judge apologises to the parties that other judicial work and his absence from the Tribunal for various reasons has led to a delay in finalising this judgment so it could be sent to the parties.

56. Because the unfair dismissal complaint succeeded a remedy hearing will be listed. Directions will be given separately. We did not hear submissions about **Polkey** and contribution and will be do that as part of the remedy hearing.

Findings of Fact

57. In this section we set out our findings of fact based on the evidence we heard and read.

58. The claimant was employed by the first respondent as a Relationship Manager, Diversity, from 1 September 2020. She worked part time, her working days being Monday to Wednesday. She is of South Asian origin. The second respondent is a Senior HR Partner at the first respondent. To make this Judgment easier to read we refer to him as "Mr Ashcroft".

Context - The LGB Alliance funding award

59. The context for the claimant's claim was a decision by the London Community Foundation (LCF) to award funding to the LGB Alliance. The LGB Alliance is a registered charity. It holds the position that sex is binary and (for the vast majority of people) determined at conception. In this judgment we refer to that belief as "gender-critical belief". In **Forstater v CGD Europe and others [2021] IRLR 706** the EAT found that the gender-critical beliefs held by the claimant in that case were protected beliefs for the purposes of the Equality Act 2010.

60. The first respondent had awarded £5m to UK Community Foundations to run the Let's Create Jubilee Programme. LCF was part of the UK Community Foundations network and the award to the LGB Alliance came from that programme fund. The respondent did not directly award funding to the LGB Alliance nor was it involved in LCF's decision to do so. However, the first respondent was the subject of adverse criticism in relation to that award both inside and outside the organisation. The LGB Alliance was viewed by some (including some of the first respondent's employees) as being a "transphobic" or "anti-trans" organisation.

61. This case is not about the validity or otherwise of those criticisms of the LGB Alliance or of gender critical views more generally. It is about the lawfulness of the first respondent's actions in relation to the claimant as its employee. Specifically, it is about whether it acted lawfully in initiating a disciplinary process against her. The starting point is what happened at a drop-in session on 14 April 2022.

The drop-in session on 14 April 2022 and events up to 11 May 2022

62. The first respondent had run regular virtual drop-in sessions on Microsoft Teams for some time as a way for staff members to engage and interact with its leadership. The drop-ins were unstructured sessions which were intended to be informal and to provide an opportunity to raise issues of concern. They did not have an agenda and were not formally recorded or minuted.

63. The drop-in session on 14 April 2022 was chaired by Simon Mellor, the Deputy Chief Executive Arts and Culture. It was not set up because of the award to the LGB Alliance but that topic dominated the session, both in the Teams video discussion and the Teams chat which ran in parallel.

64. Ms Fahmy, the claimant in the Leeds Employment Tribunal case, had raised concerns about the accusations of transphobia made against LGB Alliance prior to the drop-in session. She also expressed that view during the drop-in session itself on 14 April 2022. We find that hers was the minority view at that session. A number of the other participants in the drop-in session expressed the view that the LGB

Alliance was transphobic. There were calls for the first respondent to arrange training for staff around gender identity and trans awareness.

65. The claimant did not attend the drop-in session.

66. On the afternoon of the drop-in session Mr Mellor sent an all-staff email which confirmed the first respondent would continue to create safe spaces for challenging conversations. He stressed the importance of everyone treating colleagues with respect and dignity during those conversations and said that the wellbeing of everyone working at the first respondent was his priority. He said that included all LGBTQIA+ colleagues and particularly wanted to express his personal solidarity with trans and non-binary colleagues. Mr Mellor confirmed the respondent would undertake an "after action review" of the awards programme as well as the LGB Alliance decision to identify lessons for the future. In response to the requests for training voiced at the drop-in session he confirmed that a wider suite of training around equality, diversity and inclusion would soon be rolled out which would provide learning opportunities on all protected characteristics.

67. On 20 April 2022 Ms Fahmy submitted a protected disclosure under the first respondent's whistleblowing policy. She said that Mr Mellor had breached the first respondent's Code of Ethics and the Nolan principle of objectivity at the drop-in session by stating that in his personal opinion the award to the LGB Alliance should not have been made and that the LGB Alliance was anti trans. It was agreed that Paul Roberts, a member of the first respondent's National Council, would investigate her disclosure and provide a report for consideration by the Chief Executive.

68. On 3 May 2022, the first respondent sent an email to all members of staff indicating the issues raised by the LGB Alliance grant was a cause for concern for the first respondent's Executive Board. It said that they would not respond to any questions about the matter in the next few drop-in sessions but that the matter was receiving ongoing attention.

<u>The 11 May 2022 email and the claimant's comment</u>

69. At 13:39 on 11 May 2022 an email entitled "Ally support of grievance and demand for trans awareness training" was circulated to the first respondent's employees via 13 internal email distribution groups ("the 11 May email").

70. The 11 May email said that the staff LGBTQIA+ Working Group ("the Working Group") was raising a formal grievance in accordance with the company's grievance procedure "in response to how the LGB Alliance funding decision was handled in the drop-in sessions, avoiding accountability, the conflict of interest on senior members of staff with clear homophobic/anti-trans views in positions of decision making and members of HR, the historic refusal to include trans awareness training (a request which has been continuously refused for years), and the unfair treatment of our working group compared to the others within the organisation. The reason for this is to investigate the concerns which we have raised with a view to resolving these then as soon as possible".

71. In fact, the 11 May email had been sent without the approval of the Working Group. The employee who sent it had acted on their own initiative. The Working Group did not raise a grievance about the drop-in session.

72. The email explained that because several members of staff outside the Working Group had asked how they could show support, an Excel spreadsheet was attached which they could sign ("the Spreadsheet"). The email referred to the sheet as "our allies support sheet" and said it would be submitted alongside the grievance.

73. At the head of the Spreadsheet was a paragraph which read: "We the undersigned are concerned members of [the first respondent's] staff who, as proud allies of the LGBTQIA+ Working Group as well as every trans person in our workplace support the formal grievance regarding the LGB Alliance and associated issues". A second paragraph at the head of the sheet said "We demand for internal gender awareness training and for fair treatment to all staff". The spreadsheet had a column for the name of the signatory and a column headed "Additional Comments (if comfortable)".

74. The claimant signed the Spreadsheet and added the following comment:

> "If I came to work one day, and attended a drop-in session where staff members were openly making racist statements, and asking [the first respondent] what protection would be offered to them as race critical staff members – I would feel terrified. I can't imagine what my trans and nb [i.e. non binary] colleagues are feeling right now. I'm very concerned that gender critical staff members make funding decisions, and believe it is of the utmost importance that trans awareness training is delivered and also training about our public sector equality duty – it shouldn't be taken as given that everyone comes to work with no discriminatory views. We can't necessarily 'train' people out of being transphobic, but we can make it clear that we don't tolerate transphobia – by not tolerating it."

75. We find based on the claimant's evidence that her comment was made after having heard second-hand from colleagues what had happened at the drop-in session. There was no suggestion she had seen a transcript of the call or the parallel Teams chat. We find the claimant's motivation in making the comment was to express support for her trans colleagues who might have felt hurt by what had been said during the session on in the chat. We accept her evidence that she was not seeking in her comment to identify or aim her comments at any specific colleague.

<u>The respondent's response to the 11 May email</u>

76. Mr Ashcroft discussed how to respond to the 11 May email with the first respondent's then Chief Finance Officer and Executive Board Member, Liz Bushell, and its Human Resources Director, Ian Matthews. They contacted members of the first respondent's Executive Board. Mr Ashcroft's evidence, which we accept, was that the Executive Board were "shocked and surprised" by the use of the medium of an "all staff" email for the purpose it was used. They considered it to be a potential abuse of the first respondent's Staff Communication Policy, a misuse of the grievance procedure as well as being generally disrespectful to its intended targets (who they understood to be members of the senior management and HR).

77. Within an hour or so of the 11 May email being posted, Mr Ashcroft had met with the employee responsible. His unchallenged evidence was that they were "completely unapologetic". A decision was taken to suspend them pending further investigation and potential disciplinary action. Shortly after that suspension, the

employee submitted their resignation, so it was not possible to proceed with the investigation or disciplinary action against them.

78. An "all staff" communication was sent that afternoon. It acknowledged the strength of feeling about the issues raised in the 11 May email while making it clear that the approach it took was not appropriate. We find the 11 May email and attachment were not taken down immediately to avoid any suggestion that the first respondent was shutting down the debate it related to.

79. We find that Mr Ashcroft saw part of his role to address strategic risks to the first respondent. We find that by 12 May he and senior colleagues viewed the continued access to the 11 May email and the Spreadsheet as such a risk given its potential for giving rise to grievances, Dignity at Work complaints and, ultimately, employment tribunal claims. To use Mr Ashcroft's wording, they viewed some of the comments on the Spreadsheet as likely to become a "single causal factor in many potential employment relations cases" to "an unprecedented extent".

80. Employees who felt harassed by the criticism of gender-critical views had by the 12 May indicated to Mr Ashcroft that they intended to submit grievances. Others (including managers and directors) had raised concerns that, irrespective of the position taken on the issues, some of the comments could be seen as inciting hate, as bullying or victimisation. Those concerned highlighted examples which seemed to liken gender critical beliefs to bigotry, to a cancer, to being anti trans or transphobic. One manager suggested that the 11 May email seemed to have resulted in staff making comments akin to Twitter posts with no thought to their consequences.

81. As a result, on 12 May 2022 the first respondent's Executive Board requested that the IT team remove the 11 May email and the Spreadsheet from the first respondent's system. Access to the Spreadsheet was removed at 15:50 that day, about 26 hours after the 11 May email was posted. By that time there were 149 signatures on the spreadsheet with 41 colleagues having left comments.

<u>Events from 12 May 2022 to the end of May 2022 – the decision to start a disciplinary investigation</u>

82. On 13 May 2022 Ms Fahmy submitted a complaint under the respondent's Dignity at Work policy relating to the drop-in session and the 11 May email. The Dignity at Work complaint was considered by Paul Roberts together with Ms Fahmy's whistleblowing complaint.

83. After the email and Spreadsheet had been taken down the first respondent's HR team met to discuss the situation. They decided that there was a need to launch an internal investigation into some of the comments posted in the Spreadsheet. The aim, we find, was to establish whether any of the comments potentially breached the first respondent's policies. It was agreed that the first step was to review the comments in the Spreadsheet and to categorise them by seriousness.

84. Mr Ashcroft undertook that initial review. He shared his findings with HR colleagues on 24 May 2022 by email with an attached table. In that table he categorised 9 comments which had been identified as warranting further action by seriousness, "A" being the most serious and "C" being the least serious. In his covering email he identified 3 main issues meriting disciplinary action:

- Made remarks about an identifiable organisation regarding their access to public funding, which would be subject to Freedom of Information access and possible legal action against Arts Council England

- Rejected the right of colleagues to hold a belief or beliefs, (which are contrary to your own) in violation of their rights under the Equality Act

- Possible action in contravention of the Dignity at Work Policy (section 4.1, page 18 - Insubordination intended to undermine a colleague).

85. Mr Ashcroft identified 3 comments as being in the "A" category. He highlighted areas of particular concern in those comments. 1 of the 3 was the claimant's comment. Mr Ashcroft identified the issues with her comment as being:

- Equates gender critical beliefs to racism and colleagues with these opinions being the same as racists;

- Creates a hostile environment for colleagues with different views (bullying, harassment, marginalisation, victimisation);

- Gender critical colleagues can be identified

- Undermines colleagues involvement in funding decisions

86. The other 2 comments in the A category referred to colleagues as "openly discriminatory and transphobic", to the need to "stamp out bigotry" and for "this cancer to be removed" from the first respondent.

87. We find that an important element in Mr Ashcroft's categorisation was whether a comment was seen to be directed at colleagues or at external organisations. His table explained that a comment referring to the LGB Alliance as a "cultural parasite and glorified hate group" with "funds and supporters that also happen to be neo-nazis, homophobes and Islamophobias" was category B not category A because it did not involve bullying or harassment of colleagues. Instead, the worst comments being directed towards external parties. None of the 3 "A" comments referred to colleagues by name. However, Mr Ashcroft's assessment was that the gender critical colleagues could be identified from the call record of the drop-in session.

88. The HR Team discussed Mr Ashcroft's findings and the consensus was that the 3 category "A" comments demonstrated potential breaches of the first respondent's internal policies and warranted further investigation and potential disciplinary action.

<u>The first respondent's disciplinary procedure</u>

89. The first respondent's Disciplinary Procedure was at part 5 of its Disciplinary Policy and Procedure. In summary, at the relevant time it provided that:

- In less serious cases of alleged misconduct, before taking disciplinary action, the line manager should make every effort to resolve the matter by informal discussion with the person whose misconduct is an issue (5.1.1)

- Only where that failed to bring about the desired improvement, or in instances of serious or gross misconduct, would the formal disciplinary procedure be implemented (5.1.3).

- In all disciplinary cases, regardless of the seriousness, the employee would be informed verbally as soon as possible of the alleged conduct, or the circumstances, that had led to a disciplinary investigation (5.3.1).

- When a disciplinary matter arose, ordinarily, an investigating officer would be appointed to collect evidence and investigate the matter as required, with advice from an HR Partner (5.2.1). The role of the investigating officer was to establish facts and determine whether there was a case to be heard (5.2.2).

- Employees would be given at least three days' working notice of the investigation meeting, which could be held face to face or virtually (5.2.4)

- Employees were required to participate fully in the investigation process. Hinderance, avoidance or obstruction to an investigation process was in itself a disciplinary offence (5.2.5).

- Having investigated all the facts, the investigating officer would make a recommendation whether a) there was no case to be heard, b) that the employee should be referred for counselling or training, c) whether the matter should be dealt with under the disciplinary procedure or d) whether the matter should be dealt with under any other formal procedure. It was not the role of the investigator or the HR representative to make a decision in respect of the outcome when there was a disciplinary case to be heard (5.2.11).

90. Part 2 of the Disciplinary Policy and Procedure set out "Principles". Of relevance to this case, they included:

- Minor issues would initially be dealt with through counselling by the relevant line manager or by training and coaching. Where there were no major disciplinary issues but interpersonal relationships were damaged or at risk and informal measures to resolve them had been unsuccessful, formal mediation may be an option. Where those informal measures did not result in an improvement in conduct, the disciplinary procedure might then be used (2.2).

- Where matters went beyond difficulties with interpersonal relationships the disciplinary process would be invoked without need for informal counselling or mediation (2.3).

- The role of an HR partner was to consult on process and best practice (2.4)

- All matters would be dealt with consistently and without unreasonable delay (2.5)

- Employees under investigation could not raise a related complaint under the grievance procedure until the disciplinary process had been completed. If a grievance was related to the alleged disciplinary offence or

its proceedings, it should be raised as an issue during the investigation and / or hearing (2.9).

91. That final point was reflected in broadly similar but not identical terms in para 2.5 of the first respondent's Grievance Policy which provided that grievances raised by employees whilst they were subject to disciplinary proceedings would usually be heard only when the disciplinary process has been completed. Para 2.5 said that an employee's response to disciplinary allegations should be presented in the disciplinary investigation and any complaint arising from any disciplinary action taken should be raised by way of appeal in the disciplinary process. Para 2.5 also stated that complaints would not be reinvestigated or re-heard via a separate and subsequent grievance process unless new evidence came to light which, had it been known at the time of the disciplinary sanction, would be extremely likely to have changed the disciplinary outcome.

92. Both the Dignity At Work Policy (para 3.1) and the Disciplinary Policy (4.1) confirmed that in cases of bullying, victimisation and harassment the first respondent expected managers to take action irrespective of whether a formal complaint had been made.

Miss Beardsworth's involvement and the 7 June 2022 invitation to the investigatory meeting

93. At the end of May 2022, Mr Ashcroft contacted Ms Beardsworth and asked her to be the investigating office in the claimant's case. It was agreed that he would provide Miss Beardsworth with technical assistance and that he would lead on liaising with the claimant rather than Miss Beardsworth.

94. Miss Beardsworth asked for and was provided with copies of the 11 May email and the Spreadsheet. She was also provided with copies of 2 anonymous impact statements. They were undated and Miss Beardsworth did not interview the authors because they wished to remain anonymous. They explained the impact on the authors of the 11 May email and the Spreadsheet, describing it as public bullying and a mob mentality and referring to vilification of those seen as having gender critical beliefs in the Spreadsheet comments.

95. On the 7 June 2022, Mr Ashcroft emailed the claimant to invite her to attend a disciplinary investigation meeting on 14 June 2022. That was the first time the claimant was aware of any possible disciplinary action. She had not been spoken to about the matter prior to the email being sent. Her line manager, Mr Gaffney, knew nothing about it. When the claimant emailed him about it late on the evening of 7 June he immediately emailed Miss Beardsworth and Mr Ashcroft to ask what the disciplinary was about and why he, as the claimant's line manager had not been informed.

96. We find that Mr Ashcroft had thought that one of his HR colleagues was going to speak to Mr Gaffney about the disciplinary. That colleague had asked another HR colleague to do so but she had not. There was no suggestion that anyone from HR had attempted to speak direct about the matter to the claimant prior to the 7 June email. The end result was that the formal invitation to a disciplinary hearing came out of the blue as far as the claimant and Mr her line manager were concerned.

97. The 7 June letter set out 3 allegations of misconduct related to the comments the claimant made on the Spreadsheet. They were :

- Rejected the right of colleagues to hold a belief or beliefs, (which are contrary to your own) in violation of their rights under the Equality Act.
- Contravention of the Dignity at Work Policy (section 4.1, page 18 - Insubordination intended to undermine a colleague).
- Harassment of other colleagues - creating an intimidating, hostile, degrading, humiliating or offensive environment for them, based on a personal characteristic (belief) (section 2.1, page 5, Dignity At Work Policy).

98. The first respondent's Dignity at Work Policy and Disciplinary Policy were attached to the email alongside the invitation letter. Also attached were the 2 anonymous impact statements. Neither impact statement expressly quoted the claimant's comment. However, both referred to the adverse impact on them of their views on gender being compared to racism. Both also referred to comments in the Spreadsheet that that those holding "gender critical" views should not be making funding decisions despite there being no evidence of discrimination by such decision makers. We find Mr Ashworth' view was that those references applied to the claimant's Spreadsheet comment.

<u>Events immediately following the 7 June disciplinary investigation invitation.</u>

99. On 7 June 2022 the claimant emailed Mr Ashworth and Miss Beardsworth to request more time to prepare for the meeting. She pointed out that her working pattern meant she only had 2 working days to prepare for the meeting on 14 June. She explained that this was her first ever disciplinary and that she felt anxious and frightened. She said that having contacted Mr Gaffney for support and finding he knew nothing about the meeting, she was not confident the process was set up to support her in any way. She said that because her comment was about racism, she did not feel comfortable being the only ethnically diverse staff member at the meeting and asked whether that could be addressed.

100. Miss Beardsworth asked Mr Ashcroft for advice. In her email she asked in particular whether the claimant had a point about the ethnic make-up of the investigation panel, drawing an analogy with the first respondent's aim of having diverse panels for recruitment processes. Mr Ashcroft's response was that the situations were not comparable and that people did not have the "right to pick and choose their investigation manager" unless there was a clear conflict of interest.

101. Miss Beardsworth said she had understood that the claimant would have known the disciplinary was coming because of the requirement to be verbally informed in the Disciplinary Policy. She suggested it was reasonable to postpone given the Policy required at least 3 days notice and that could be read to mean 3 working days. Mr Ashcroft did not address the first point but confirmed that "people can request a postponement". Mr Ashcroft did not acknowledge the upset the claimant had expressed in her email about the process and the way it had been handled to date. Miss Beardsworth had done so in her email to him, noting the need to address the claimant's concerns swiftly and for the process to not be any more

upsetting than necessary given they had not yet established whether there was anything to answer. Mr Ashcroft's response was that he had provided the claimant with details of the Employee Assistance Programme in the invitation letter. We find the impact of the process on the claimant was not something Mr Ashcroft gave much weight to. His focus was on pushing ahead with the process.

102. Mr Ashcroft replied to the claimant that same day by inserting his responses to the claimant in red into her email to him. He agreed to re-schedule, made clear the desire to conclude matters "as expediently as possible for everyone's benefit and welfare" and that delays and indefinite postponements only prolonged matters.

103. In response to the claimant's request to address the ethnic diversity at the investigation meeting, Mr Ashcroft responded: "No. It's not possible for colleagues under investigation to choose their own investigating officer based on their preference." He said the first respondent did not have infinite resources who could manage the processes and to "accommodate every wish would not be practicable or reasonable". He said that the first respondent was investigating a number of comments and that it was taking a consistent approach to whoever made the comments. We do find his responses on this issue in particular somewhat terse and dismissive, particularly in the context of the anxiety voiced by the claimant in her initial email.

104. Mr Ashcroft conceded that Mr Gaffney should have been informed and said he was "sorry that action was not completed before you received this notification." He said that was "being addressed now". It is not clear to us what he meant by that – Mr Gaffney was not involved in the process or, it appears to us, proactively kept informed about it by Mr Ashcroft or Miss Beardsworth.

105. Mr Ashcroft confirmed that the claimant could contact a colleague or union representative to ask them to be her companion at the investigation meeting. In response to the claimant saying that the invitation email made her anxious and frightened, Mr Ashcroft said he was "sorry to hear that" and said it was for that reason he provided the details of the EAP in the invitation letter.

106. The investigation meeting was re-scheduled for 22 June 2022. The claimant thanked Mr Ashcroft for agreeing to that postponement and confirmed that she would provide the name of her companion as soon as possible.

<u>The interview questions script</u>

107. On 7 June Mr Ashcroft sent Miss Beardsworth a set of questions ("the Script") to ask the claimant at the investigatory meeting. The Script, as amended by Miss Beardsworth, provided the framework for the investigatory meeting when it took place on 9 August 2022. The second part of the Script were questions to be asked if the claimant denied making the comment which she never did.

108. The first part of the Script began by asking whether the claimant accepted that she wrote the comment and quoting it. There was then a statement that "You related gender critical beliefs to racism and colleagues with gender critical beliefs as the same as racists. You also indicate that colleagues are guilty of transphobia". That was followed by a question asking whether the claimant could explain the difference

between gender critical views and transphobia "or is there no difference in your opinion".

109. Subsequent questions asked what discriminatory acts the claimant was alleging, by who, what her evidence was and how she had sought to raise those concerns by appropriate means. This was followed by an assertion that "if you do not have any evidenced examples, this comment represents an unevidenced accusation against those colleagues in a public forum". There were then similar questions about "[the claimant's] challenge to the objectivity of colleagues in making funding decisions". That was followed by an assertion that if the claimant did not have evidence to challenge the objectivity of those who had made funding decisions, that was "unevidenced undermining of colleagues in core work activity" and a statement that labelling colleagues in a public forum in that way "is bullying and harassment".

110. There were then questions about what the claimant understood about the provisions of the Equality Act 2010 relating to religion or belief. e.g. "does this protection mean that everyone has to believe the same thing, or are all beliefs protected, including the right not to have a belief?"

111. The definition of harassment in the first respondent's DaW Policy was then quoted followed by a question asking what atmosphere the claimant's comments created for people who did not believe the same thing as her, suggesting "Marginalised? Singled Out? Harassed? Discriminated against, due to their own belief". The claimant was to be asked her comments on the statement that "labelling a colleague in a public forum where they have no right of response in a safe way is harassment, based on their beliefs."

112. The final question in that first part of the Script asked, "If colleagues feel harassed and bullied, decide to leave Arts Council's employment and then pursue a claim via the employment tribunal system, where does liability for their losses lie?"

113. Miss Beardsworth amended some of the questions. In her email on 16 June sending Mr Ashcroft the amended Script she explained she had taken out the final question about employment tribunal claims because she was not sure what it added. She also removed the opening statement about equating colleagues with gender critical beliefs to racists. She said she was not sure that analogy was going to be helpful. Beyond those changes and some reformatting of the questions the Script remained substantially as Mr Ashcroft had drafted it.

<u>Events from 13 June 2022 to 16 June 2022 – sickness absence</u>

114. On 13 June 2022 the claimant submitted a fit note confirming she was not fit to work because of stress and began a period of sickness absence.

115. On 14 June, the claimant's union representative, Huey Walker ("Mr Walker") a Senior Relationship Manager at the first respondent, wrote to Mr Ashcroft on her behalf. He explained that the claimant was signed off sick and asked for more information about the allegations and process on her behalf. He asked whether Mr Ashcroft could confirm who had made the complaint and allegations against the claimant. He also asked how the investigating officer for her case had been selected and whether it was the same one as for other cases.

116. Mr Ashcroft replied by email the following day. He confirmed he and Miss Beardsworth had not been informed of the claimant's sickness absence. He acknowledged that disciplinary processes could be distressing and said that was why he had provided details of the EAP in the invitation letter. He said that the first respondent could provide "as much support as possible to ensure the meeting and the process are concluded as quickly as possible whilst ensuring the thoroughness and integrity of their investigation".

117. Mr Ashcroft said that he could not confirm who had made the complaint against the claimant because the 2 people who had provided impact statements had asked to remain anonymous. He said that in cases involving dignity at work allegations, the first respondent did not have to wait for someone to complain before taking action. He said that to wait for a victim of bullying or harassment to raise a complaint by name "could effectively turn a blind eye from real concerns that were obvious to behold".

118. Mr Ashcroft also said he would not comment on other investigations. He said Miss Beardsworth had been selected based on "bandwidth", experience of managing employment relations matters in the past and her impartiality. He said that "one thing to note" was that as he had previously explained, it was not possible for people to choose their own investigation manager and that he had confidence in Miss Beardsworth's ability to lead the investigation.

17 June 2022 - the Dignity at Work complaint

119. On 17 June 2022 the claimant raised a complaint under the respondent's Dignity at Work policy. She did so in an email to Miss Beardsworth and Mr Ashcroft, copying in Mr Walker and Mr Gaffney. She explained that her comment merely sought to explain how she would feel if discriminatory statements were made about her protected characteristic (which she identified as "race and/or colour") so that she could show empathy with how trans colleagues felt in the circumstances where they may have faced similar treatment. She said she made her comment because that is what she understood her trans colleagues had experienced and what had been reported to her. She said her actions and intention were to support the concerns raised by her trans colleagues who asserted they had been treated unfavourably and criticised because of their protected characteristic. She said that as she was acting in good faith as a supporter of her trans colleagues, she believed she was effectively a witness to their cause.

120. The claimant did not expressly say she had done a protected act for the purposes of s.27 of the Equality Act 2010 but we find that that is what she was asserting. She went on to say that being subjected to a disciplinary investigation was an act of victimisation because of her support for trans colleagues. She asserted that the disciplinary investigation should be withdrawn forthwith otherwise any continuation of the process would amount to continuing victimisation.

121. She went on to say that the allegations of misconduct were without foundation and amounted to trumped up charges to try and justify the detrimental treatment to which she was being subjected. She pointed out that:

- Nowhere in her comment did she reject the right of colleagues to hold a belief contrary to her own. She asked what specific statement she had made in the post which gave a rise to that particular allegation;

- Nowhere in her comment did she say anything which could be regarded as insubordinate and intended to undermine a colleague. She asked which colleague she referred to and what words were used giving rise to that allegation;

- She asked what specific word she had used in her comment which referenced directly or indirectly any person's personal characteristic or belief which created an intimidating, hostile, degrading, humiliating or offensive environment for any such person.

122. She asked that those particulars of the allegations against her be provided in advance of any hearing. She also said that the action had been taken against her because of her race and/or colour and amounted to harassment based on race. She said that the fact the impact statements provided objected to "a simple and obvious comparison", i.e. "that discrimination on the grounds of race hurts and discrimination on the grounds of transgenderism hurts" was, in her view, in itself conduct which was based on her protected characteristic, i.e. race, which was unwanted and created an intimidating, hostile and offensive environment.

123. The claimant requested that her Dignity at Work complaint ("the DaW complaint") be heard before any further action was taken in relation to the disciplinary process against her.

124. The respondent's Dignity at Work Policy provided that when a complaint was made under the policy, the relevant manager would consult with the relevant HR Partner to determine the level of investigation required (Appendix 3 para 3.1). The complainant would then receive a written response from the relevant manager outlining the process to be followed (Appendix 3 para 3.1.2) which it was envisaged would involve an investigation (Appendix 3 para 3.1.3). Sections 3 and 4 of the Policy set out the respective roles of managers (section 3) and of the Human Resources Department (section 4). In short, it was the manager's role to manage any investigation (section 3.1) and HR would not normally take the role of decision-maker in the process (section 4.3). Where it was unavoidable for HR to take a role as decision maker, that would be made clear during the process (section 4 para 4.3).

125. There was no provision in the policy setting out what would happen where the person who raised a Dignity at Work complaint was subject to pending disciplinary proceedings, i.e. nothing equivalent to para 2.9 of the Disciplinary Policy or para 2.5 of the Grievance Policy.

<u>Mr Ashcroft's initial response to the DaW complaint</u>

126. Mr Ashcroft responded to the DaW complaint by email on the same day. He explained that he was not copying Mr Gaffney into his reply because he was not involved in the process. We find that Mr Ashcroft had by that point concluded that the claimant was (in his words) "reluctant to engage with the investigation process". Having discussed with colleagues (but not Miss Beardsworth) he emailed the claimant to say that the Disciplinary Policy and the Grievance Policy were explicit about submitting grievances in response to disciplinary actions. He quoted para 2.5

of the Grievance Policy in full. He suggested it "would be really helpful" if the claimant and her companion familiarised themselves with those policies as well as the Dignity at Work Policy.

127. He noted what he characterised as the claimant's written response to the allegations and said the points she raised would be considered during and not before the investigation meeting. He went on to say that "for the avoidance of doubt" it was "not acceptable to state preconditions or demands for your participation in the process".

128. He then summarised the process for categorising the Spreadsheet comments and said there was no common demographic across the people who made the comments in category A. He explained that it was the comments themselves which were the cause for concern and needed investigation, irrespective of who made them. That needed to be separated from the reason *why* they made the comments, which may or may not form part of their response to the investigation process.

129. Mr Ashcroft did not in his email acknowledge the DaW complaint as such. There was no evidence that he had discussed with Miss Beardsworth or Mr Gaffney whether it was appropriate for him to be responding to the DaW complaint. He was neither the claimant's line manager nor the Investigating Officer. There was no evidence that he had considered whether he might have a conflict of interest given the allegation made in the DaW complaint and the fact that it was his categorisation of the claimant's complaint and recommendation which had led to the detrimental treatment the claimant was alleging.

130. Mr Walker responded on 17 June 2022 pointing out that the claimant was signed off sick and that he was not sure what the first respondent's expectations were in that situation. He said he was mindful of not adding to her stress. He confirmed he had familiarised himself with the relevant policies. He said his understanding was that the 11 May email was raising a grievance on behalf of the Working Group and that other colleagues had raised complaints under the Dignity at Work Policy about comments made at the drop-in session. He asked how the investigation into the claimant's comment could be progressed before the investigation into those complaints had been completed. He also confirmed that the unless she confirmed otherwise, the claimant's comments in the DaW Complaint was not her full response to the issues raised.

131. On 19 June 2022 the claimant responded to Mr Ashcroft, copying to Miss Beardsworth, Mr Gaffney and Mr Walker. In her email she pointed out that the Disciplinary Policy did not say that a DaW complaint could not be raised by someone subject to a disciplinary process. (That is correct to the extent that the Disciplinary Policy and the Dignity at Work Policy were silent on this point.) The claimant disputed that para 2.9 of the Disciplinary Policy applied to a DaW complaint. If it did then, she alleged, it was not compliant with the ACAS Code. She quoted para 46 of that Code and said that Mr Ashcroft's interpretation of para 2.9 ruled out even the possibility of the disciplinary process being suspended if an overlapping grievance was raised. That, she argued, was not consistent with para 46.

132. In her e-mail. the claimant said that the act of instigating the disciplinary investigation against her for what she characterised as supporting the grievance brought by or on behalf of trans colleagues was an act of victimisation. She

confirmed that she had not yet responded to the allegations because she disputed that she should be subject to any investigation. She requested that her DaW complaint be heard before any investigation.

133. Mr Ashcroft responded to Mr Walker on 20 June 2022. He said that if the claimant was too unwell to attend the meeting they would need to hear that direct from the claimant rather than assuming it to be the case. He pointed out that the Working Group had not lodged a grievance. He said the investigation could proceed and again quoted what the Disciplinary Policy said about overlapping grievances. He said that indefinite delays to the process would only delay a conclusion and may prolong any discomfort the claimant was feeling "which I hope we all want to avoid". He asked Mr Walker to "Please consider this point" and said that "my advice would be not to delay the conclusion".

134. On 21 June 2022 Mr Gaffney emailed Mr Ashcroft to confirm that the claimant had advised him that due to her being off sick she would not be attending the investigation meeting. The meeting on 22 June was postponed.

Mr Ashcroft's email of 23 June 2022

135. Mr Ashcroft emailed the claimant on 23 June 2022 in response to her email of 19 June 2022. He copied in Mr Walker but not Miss Beardsworth. His email is said to be one of the acts contributing to the breach of the implied term of trust and confidence and an also an act of victimisation.

136. In his opening paragraph Mr Ashcroft said "It does feel as though your emails are not about clarification of points but are mainly focussed on why you will not participate in this investigation process, unless it is on your terms and running order."

137. He then went on to "draw your attention to certain features of our policies on this point". We find the point he was referring to was where there were overlapping disciplinary and grievance processes. Referring to the claimant's DaW complaint, he said that any written complaint about harassment was a grievance and would be dealt with in the same way as any other grievance. In other words, as we understand it, para 2.9 applied to her DaW complaint as if it were a grievance. He pointed out para 46 of the ACAS Code said that a disciplinary process "may" be suspended so gave an employer discretion over how to proceed. On that basis, he asserted, para 2.9 was not inconsistent with the ACAS Code.

138. Responding to the allegation of victimisation, Mr Ashcroft pointed out that 149 colleagues had signed the Spreadsheet, 41 had made comments but only a small number were subject to investigation. He said the comments that were subject to investigation were those which were critical of colleagues. Neither signing the petition nor leaving comments were in themselves grounds for investigation. He said that if the claimant was alleging that the grounds given for taking action against her were not the genuine grounds for doing so that would be dealt with in the disciplinary process including the appeal stage.

139. Mr Ashcroft in his final bullet point drew the claimant's attention to section 3.1 of the Disciplinary Policy, specifically that "wilful hindrance or obstruction of a disciplinary or grievance procedure may be considered as misconduct" Mr Ashcroft closed his e-mail by saying that the claimant's "request to postpone the disciplinary

investigation on the grounds you have put forward is declined". He confirmed the hearing on 22 June had been cancelled because the claimant was on sick leave but that they would be in contact to reschedule.

140. We find that Mr Ashcroft did not discuss his email of 23 June 2022 with Miss Beardsworth, the Investigating Officer, before he sent it.

Events from 24 June 2022 to 25 July 2022 – continued sickness absence and OH referral

141. Miss Beardsworth was unavailable on leave until 4 July 2022. The claimant remained absent due to sickness. On 6 July 2022 Mr Gaffney confirmed to Mr Ashcroft that she had a fit note for another two weeks but had confirmed that she would attend the investigation meeting which had been rescheduled for 12 July 2022.

142. On 11 July 2022, Mr Alemoru wrote to Mr Ashcroft on the claimant's behalf. He requested that all future correspondence be sent to him rather than directly to the claimant. He explained that the claimant was stressed and traumatised by the way she had been treated. He noted that Mr Ashcroft had confirmed that the disciplinary investigation would proceed. Mr Alemoru said this amounted to a denial of the claimant's right to have her DaW complaint heard, given that that complaint was that the investigation was an act of victimisation. He asserted that the first respondent had failed to follow a fair process in dealing with the DaW complaint and had failed to consider it on its merits. Mr Alemoru also said that Mr Ashcroft's reference to para 3.1 of the Disciplinary Policy had caused the claimant distress. That was because it equated her raising a DaW complaint with "hindrance" and "wilful obstruction" of the disciplinary process. He told Mr Ashcroft that given the claimant's state of mind she was in no position to attend a disciplinary investigation. She remained under the care of her GP but was willing to cooperate with any medical investigation which the first respondent may wish to undertake. In the final paragraph, Mr Alemoru put Mr Ashcroft on notice that the claimant was intending to bring an employment tribunal claim for racial harassment, victimisation and breach of her statutory rights. The claimant emailed Mr Ashcroft shortly after Mr Alemoru's email to confirm that she wished the first respondent to correspond with him as a reasonable adjustment given her state of mind.

143. Mr Ashcroft was absent due to COVID so cancelled the rescheduled meeting on 12 July. He replied to Mr Alemoru on 18 July 2022. He declined the request to correspond with Mr Alemoru rather than with the claimant direct. He justified that on the basis that the first respondent's policies allowed the participation of a work colleague or trade union official at an investigation meeting or hearing, but not a solicitor.

144. Mr Ashcroft confirmed that the first respondent was concerned for the claimant's welfare and acknowledged that she was currently unable to participate in the investigatory meeting. He confirmed that the first respondent would organise an occupational health appointment for the claimant and would also need to liaise direct with her for that purpose. When it came to the distress caused to the claimant by the process he said the record demonstrated that all communication since the investigation was instigated by the claimant or Mr Walker and that the first

respondent was merely answering their questions and ensuring the process continued without delay.

145. Having set out the claimant's comment from the Spreadsheet in full, Mr Ashcroft went on to clarify the first respondent's position in four bullet points. He said that her comment "compares gender critical views to racism and expresses concern about the ability of colleagues to make fundraising decision"; that no disciplinary decision or sanction had been made; that the claimant had been invited to the disciplinary meeting before her DaW complaint was made; and that the complaint was refused until such time as when the disciplinary investigation and any subsequent hearing in regard to that was concluded, in line with the first respondent's policy.

146. Mr Ashcroft said that it was "very strange" that relations had irretrievably broken down when they were yet to hold the investigatory meeting and would wait for ACAS to contact them. He urged the claimant and Mr Alemoru to reconsider their position. He stressed the need to have an open dialogue with the claimant which took into account the psychological effects she may be feeling while also "discussing the original statement from her which has led to the situation".

147. On 18 July Mr Ashcroft made an Occupational Health Management Referral. He asked the OH provider for an opinion on the claimant's ability to return to work. He also asked for an opinion on her fitness to attend an internal disciplinary investigation meeting and a possible hearing thereafter, with "recommendations on any reasonable adjustments that can ensure the meetings can proceed without further delay". In his covering email he asked to have a few minutes with the OH practitioner by Teams before the claimant's assessment. A phone call between him and the practitioner was arranged for the afternoon of 20 July 2022. We find it reflects Mr Ashcroft's desire to push matters ahead and ensure there were no delays. We had no evidence about what was discussed during that call.

148. On 19 July 2022 the claimant submitted a further fit note signing her off work for a further 3 weeks.

25 July to 8 August 2022 - the OH report and next steps

149. The OH appointment took place by telephone on 25 July 2022. The claimant accepted in her evidence that the report produced ("the OH Report") gave a reasonably good summary of what she said during the appointment. It did not refer to the call the OH practitioner had had with Mr Ashcroft or give details of what was conveyed during that call.

150. The OH Report recorded the impact of the investigation process on the claimant. It had impacted on her sleep and appetite causing low mood, reduced motivation and anxiety. The OH practitioner noted that the claimant clearly appeared concerned in relation to the investigatory process. The thought of attending the investigatory meeting caused her to feel extremely nauseous. She did not believe that it was fair and she did not believe that the process should happen. The claimant also said that she believed that there had been a breakdown in the relationship between herself and HR. She felt there was a lack of trust within the organisation and she was unaware how she could successfully return to the working environment because of the impact of the current situation on her.

151. The OH practitioner advised the claimant that in their opinion delaying the investigatory process would likely elevate her stress levels and cause her further concern. They reported that during the session the claimant appeared to have good cognition. Her memory and concentration appeared adequate and overall she appeared to be functioning to a good capacity.

152. In those circumstances, the OH Report advised that there was no reason why the claimant would be unfit to take part in the investigatory process. It urged that that take place as soon as possible. It advised that the stress the claimant was experiencing appeared to stem from that process and was likely to reduce once it was completed. It advised that the breakdown in the relationship between the claimant and HR and lack of trust in the organisation should be addressed as soon as possible. It advised that once the investigatory process had been completed and the breakdown in relationship was discussed the claimant would be in a position to return to work.

153. Having advised that the claimant was fit to partake in any investigatory meetings the OH Report suggested the following adjustments:

- If possible, as much information be provided to the claimant prior to the meeting;

- she should have the opportunity to regularly break during the investigatory process;

- should she still struggle to partake in this form of meeting the first respondent may wish to consider holding an investigatory meeting via written representation. That was the claimant's preference, but the OH Report's advice was that the claimant was in a position to successfully complete that meeting face to face.

154. The OH Report noted a request by the claimant that the investigatory meeting take place with an alternative HR professional. Miss Beardsworth responded to that request in her email to the claimant on 2 August 2022. She declined the request to change HR Partner. We do not find the explanation she gave easy to follow. She said that "as [the first respondent] were following legal advice on this matter, a different HR partner would also need to follow this advice in the same way. Given this request would not change any aspect of the investigation process [Mr Ashcroft] will be continuing as HR partner". Given that any other HR Partner would have to follow the same process it is not clear to us why, logically, another HR Partner could not have taken Mr Ashcroft's place given the concerns the claimant had raised about his continued involvement.

155. In that same email, Miss Beardsworth confirmed the investigatory meeting would take place 9 August 2022. She noted the adjustments proposed in the OH Report.

156. On 3 August the claimant confirmed she would attend. She also confirmed that Mr Walker was not available so she would be accompanied by Hannah Bentley ("Ms Bentley"). This was the first time Ms Bentley had acted as a companion. On 7 August 2022 she emailed Miss Beardsworth to ask whether there was an agenda for

the meeting and about her role. After consulting with Mr Ashcroft, Miss Beardsworth confirmed there was no agenda and provided clarification of the companion's role.

9 August 2022 – the Investigatory Meeting

The claimant's 3 statements

157. The investigatory meeting went ahead at 2 p.m. on 9 August by Teams. It was attended by the claimant, Ms Bentley, Miss Beardsworth and Mr Ashcroft. At 13:56 the claimant emailed Miss Beardsworth what she described as "statements pertaining to the disciplinary meeting". There were 3 numbered statements. "Statement 1" set out the claimant's position in a set of bullet points over 3 pages. "Statement 2" was a 2-page (plus 2 lines) impact statement from the claimant. "Statement 3" was, in effect, a character reference for the claimant from her line manager, Mr Gaffney

158. Statement 1 began with a bullet point again making a formal request for the claimant's DaW complaint to be heard before the disciplinary process went ahead. That first bullet point also reiterated the claimant's objection to Mr Ashcroft's presence at the meeting. The rest of the document set out the claimant's position in relation to the allegations; the reasons why she objected to Mr Ashcroft's involvement; why she said her DaW complaint should be heard first; and why she said the process followed did not accord with the first respondent's own written policies and procedures.

159. Those bullets repeated the allegation in the DaW complaint that instigating the investigation was an act of victimisation and race related harassment. In relation to Mr Ashcroft, the claimant described his response to her DaW complaint as "dismissive" and asserted that it demonstrated a lack of understanding of racism, a lack of compassion and a lack of support for an ethnically diverse employee. She refuted Mr Ashcroft's suggestion that she had asked to choose her own investigating officer. We find that to be a reference to Mr Ashcroft's response to her email of 7 June 2022. She asserted that Mr Ashcroft had sought to undermine her and ignore the underlying point she was making about seeking a suitably experienced officer to manage the proceedings.

160. We find, based on her cross-examination evidence, that Miss Beardsworth read the first paragraph and the start of the second paragraph of "Statement 1" before the meeting got under way. Given the contents of the first bullet point paragraph we find that means she was aware at the start of the meeting that claimant was asking for a decision on progressing the DaW before the investigation meeting went ahead. We find she was also aware that the claimant was objecting to Mr Ashcroft's involvement in the meeting.

161. Miss Beardsworth and Mr Ashcroft suggested in their evidence that there was no need to deal with those issues at that stage because they could be picked up at the end of the meeting or later in the process. We did not find that convincing. Neither was able to explain how dealing with the DaW/grievance after the outcome of the disciplinary process was reached made sense when the DaW was a challenge to the disciplinary process and how and by who it was being conducted. If the DaW was upheld after the disciplinary process was completed that would seem to us to involve unwinding the whole of that process and any sanction arising. It also risked

the claimant going through that whole process before a finding that it should not have happened.

162. We find that the reality was that Mr Ashcroft was leading on the process and that he wanted to press ahead with the meeting. We find he had already decided in June 2022 that the issues raised by the claimant about the DaW and his continued involvement were simply attempts to delay and/or derail the disciplinary process rather than genuine concerns on the claimant's part. It was he who told Ms Bentley that the start of the meeting was not the time to consider those statements. In his oral evidence, he explained that the time slot for the meeting was 1.5 hours and that could not be extended because he and Miss Beardsworth had very busy calendar schedules. We find he was in a hurry to get the meeting done in the slot allocated to it.

163. We find that the end result was that the points raised by the claimant in Statement 1 (including about Mr Ashcroft's continued involvement) were not considered by Miss Beardsworth before the investigation meeting began. She did not read Statement 1 in full so had not read the bullet points explaining why the claimant objected to Mr Ashcroft's continued involvement. Instead, Ms Bentley read out the statements at the end of the meeting.

What happened at the meeting

164. In broad terms the structure of the meeting followed the Script as amended by Miss Beardsworth on 16 June. The claimant did not deny making the comment. She was asked if she knew the difference between being gender-critical and being transphobic. We find that her answers made clear that she did not know the difference. She also made clear that her comments were not aimed at specific colleagues and when challenged she did not identify particular colleagues making funding decisions whose objectivity she questioned. She made it clear she was not referring to any specific funding decisions.

165. Following the Script, Miss Beardsworth then asked the claimant whether she had evidence of discriminatory acts or transphobic acts by colleagues. The claimant referred to an instance of a colleague being misgendered at a national meeting she had attended. She confirmed that she had not raised that incident with her line manager or through a more formal process.

166. Discussion then turned to the impact of the claimant's comment. Miss Beardsworth referred to the wide circulation of the Spreadsheet within the first respondent and to certain colleagues feeling that the comments in it were directed at them. The claimant's position was that she had understood the Spreadsheet to be directed at "allies and supporters" of the Working Group. She counted herself as one so responded in good faith by adding her comment. That comment reflected on her personal perspective having experienced racism and based on hearing afterwards what was said at the drop-in session.

167. The claimant did during this discussion make some comments which could be understood as saying that someone who did not count themselves as an "ally or supporter" of the Working Group should not put themselves in the position of reading something which they would find offensive. She said that she would not choose to put herself in the position of reading something which she knew would cause her

offence. We do find that she was sincere in her position at the meeting, i.e. that "this was [a document] for allies and supporters and I responded in that way and that was all the thought process that had gone in to that.".

168. The claimant confirmed that it was never her intention to vilify anyone or pick on any one or cause any one any upset. When it was put to her that labelling colleagues in a public forum as transphobic could be constituted as bullying and harassment, the claimant said her sole intention was to support her trans non-binary colleagues. She repeated on a number of occasions that it was never her intention to hurt anybody.

169. The claimant said her understanding was that transphobia was unlawful discrimination under the Equality Act 2010 just as racism was. Miss Beardsworth then asked the claimant about her understanding of the provisions in the Equality Act 2010 protecting beliefs. She was asked the question in the Script about whether that protection meant everyone had to believe the same thing and asked whether there was a difference between holding a belief and manifesting it. We find the claimant was confused by these questions. She said that everyone had the right to believe what they want to believe and that she had never said otherwise. She confirmed that since the issue had arisen, she had done some internet research about the issue of protected beliefs. She referred to the Tribunal case of **Jackson v Lidl Great Britain Ltd (2302259/2019)** ("the Jackson case"). She said that her understanding of that case was that the claimant's protected belief in Stoicism meant he was able to say things like "all Asian people smell" and explained how upsetting that was for her.

170. It was put to her by Miss Beardsworth that regardless of her intention, the 2 impact statements from colleagues showed that her comments had caused upset. She was asked what she would do differently. The claimant said she would ask for impact statements from trans and non-binary colleagues who had been upset by comments made by gender-critical colleagues. She repeated again that she was not targeting anyone. We find she was struggling to understand what else she was expected to say.

171. Towards the end of the meeting, Mr Ashcroft took over the questioning. Referring to the definition of harassment and the fact it encompasses conduct with a harassing effect, he asked what relevance the claimant's intentions were. He then suggested that the claimant had said that those who might be offended by comments shouldn't be reading the comments or should change their opinion. The claimant pointed out (accurately, we find) that she had never said anyone should change their opinion. Mr Ashcroft pressed her on this point, suggesting that she was saying that someone who was gender-critical should not have read the comments in the Spreadsheet. The claimant said it was not for her to say what should or should not happen. We find she tried to explain that she meant she would not deliberately seek out something she knew she would not agree with, e.g. an online petition which took a contrary view on the climate change issue to hers. Mr Ashcroft asked her for the details of the Jackson case, which she provided.

172. Ms Bentley then read out the claimant's 3 statements. The meeting closed with confirmation that the decision on next steps would be sent in due course.

173. Miss Beardsworth ensured that the claimant was able to take regular breaks during the meeting.

174. Immediately after the meeting the claimant emailed Miss Beardsworth, copying Mr Ashcroft and Ms Bentley to reiterate that in relation to the impact statements it was not her intention to cause hurt and upset, she was not targeting any one and she was sorry that people had been hurt.

Events from 10 August 2022 to the claimant 's resignation

175. On 12 August 2022 Miss Beardsworth emailed her draft conclusions to Mr Ashcroft. We find he then drafted the report based on those conclusions. We find the summary of what the claimant said at the meeting in section 5 of the final report to be broadly accurate. However, we find parts of the conclusion section (Section 8) inconsistent with what the claimant said at the meeting on 9 August. For example, para 8.27 of the report said that the claimant "continues to equate gender critical colleagues with racists, homophobes, transphobes and climate change deniers". That seems to us a distortion of what the claimant said at the meeting. The claimant specifically addressed the suggestion that she was accusing people of being homophobic (0:51:9.20) and replied that that was "not what I am saying at all". The only reference to climate change was in response to Mr Ashcroft's question near the end. Equally, we find it hard to understand the conclusion that the claimant showed no remorse for the hurt she had caused, given she expressly apologised for causing upset both during and after the meeting. At 8.17 the report quoted the claimant saying (in response to being asked who the comment about those making funding decisions was aimed) it "falls under the same banner as people with racist or homophobic views". We find it difficult to understand what that quote, taken out of context, means not to mention how it justifies the conclusion relying on it.

176. The conclusions also rely on the claimant's lack of understanding of the Equality Act 2010. It suggests that her interpretation of the Jackson case is wrong (8.12). It suggests the case was rejected as having no reasonable prospect of success and that that was because the belief relied on (Stoicism) failed the test of being worthy of respect in a democratic society (7.4). It is not clear why the claimant's understanding or not of that case is relevant to the issue being investigated. In any event, what the report says is itself incorrect. In the Jackson case the tribunal accepted that Stoicism did qualify as a belief meeting the test of being worthy of respect in a democratic society. Although parts of the claim in Jackson were struck out as having no reasonable prospects of success other claims based on the belief were allowed to proceed subject to deposit orders.

177. Although the report dealt with the allegation that the investigation into the claimant was motivated by her race (sections 8.3 and 8.4) it did not address her complaint about Mr Ashcroft's involvement.

178. The first recommendation (9.1) of the report was that the matter should proceed to a disciplinary hearing in relation to all 3 allegations. The second recommendation (9.2) was that it was clear the claimant had a gap in her knowledge and understanding about the Equality Act 2010 and its application. It noted the claimant had raised this herself and there was clearly a training issue which needed to be addressed irrespective of the outcome of the disciplinary process.

179. Mrs Coundon was appointed to chair the disciplinary hearing. On 30 August 2022 Mrs Coundon emailed the claimant to advise her that the investigation had been completed and that she would be invited to attend a disciplinary hearing. She

did not at that point provide a copy of the investigation report. The claimant remained absent due to sickness.

180. On 3 September 2022, Mr Alemoru responded to Mrs Coundon. He notified her that the claimant was intending to bring an Employment Tribunal claim against the first respondent and Mr Ashcroft and would be contacting ACAS to initiate early conciliation.

181. Mrs Coundon replied on 7 September 2022. She confirmed the first respondent's position in relation to the claimant's grievance, which was that it would not allow the disciplinary process to be delayed to enable the grievance to be dealt with first. She said that did not prevent the claimant from being able to express her belief that the initiation and continuation of the disciplinary process was an act of discrimination or victimisation as part of the disciplinary process itself.

182. In the meantime, on 7 September 2022 the claimant sent a brief email to Mr Gaffney resigning. It gave no reason for that resignation. She forwarded it to Jennifer Cleary ("Ms Cleary") because she received Mr Gaffney's out of office. After speaking to Ms Cleary, the claimant sent a longer email confirming her resignation. She said her position had become untenable because of the way she was treated by the first respondent and Mr Ashcroft since she exercised her right to express support for "the grievance raised for and by trans colleagues". She said that all attempts to get a fair hearing had been ignored and that she had been threatened and undermined. She said that being told she would be disciplined before there had even been a hearing was the last straw.

183. On 12 September 2022 Ms Cleary accepted the claimant's resignation on behalf of the first respondent. She confirmed that Mrs Coundon had not said that the claimant would be disciplined but had confirmed there would be a disciplinary hearing. She noted that the claimant's notice period would end on 30 November 2022.

184. In the meantime, Mrs Coundon had been taking steps to progress the disciplinary hearing. On 8 September she invited the claimant to a disciplinary hearing on 16 September 2022. The invitation letter warned that the result might be the issuing of a disciplinary warning to the claimant. It said the investigation report would be sent to the claimant's work email. On 12 September Mr Bentley contacted Mrs Coundon on the claimant's behalf. The disciplinary hearing had by then been rearranged to 20 September 2022.

185. On 13 September 2022 Mrs Coundon sent Ms Bentley the investigation report which she shared with the claimant. The claimant emailed Ms Cleary and Mr Gaffney that same day to say that having seen the report it was not in her best interest to continue with the process. She said that the report was biased against her and sought to destroy her credibility. She asked whether her notice period could be reduced.

186. Ms Cleary responded on 14 September, having discussed with Mrs Coundon. She confirmed that the notice period could be reduced but suggested continuing with the disciplinary hearing was in the claimant's best interests. She advised that the claimant could ask to postpone the disciplinary hearing or make written submissions.

If she could not attend the original or postponed hearing then the matter would be considered in her absence. We find that letter was supportive in tone.

187. The hearing on 20 September did not go ahead. The claimant contracted COVID. On the 20 September she wrote to Ms Cleary to confirm that she wanted to leave with immediate effect. She said she did not feel able to attend the disciplinary hearing but did not want to leave the investigation report unchallenged. Her decision to leave immediately reflected, she said, the impact on her health. The claimant's last day of employment with the respondent was on 22 September 2022.

188. On 20 September 2022, Mr Gaffney was sent a reference request from the claimant's new prospective employer. It was part of the respondent's case that the claimant resigned because she had a new job rather than in response to any breach of the implied term. We find the claimant had applied for that new role on 28 July 2022 and been interviewed in August. She received the job offer on 7 September 2022. The claimant started her new employment on 1 December 2022.

189. We do find the claimant had previously sought other job opportunities outside the first respondent. We find those significantly pre-dated that events we are considering. We did not hear any evidence to support a finding that the claimant was actively seeking new employment prior to the commencement of the investigation and disciplinary process.

Discussion and Conclusions

190. In this section we set out our conclusions. We do so by reference to the numbering in the list of issues.

Unfair dismissal

191. For her claim to succeed, the claimant has to establish she was constructively dismissed. She relies on the matters at 1.1.1.1-1.1.1.5 in the List of Issues as amounting to a breach of the implied term of trust and confidence ("the implied term").

192. We remind ourselves that to amount to such a breach, the first respondent's conduct, viewed objectively, must be conduct calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent for which there was no reasonable and proper cause.

193. We have explained below why we did not find victimisation in this case. However, we have concluded that the way the first respondent dealt with the claimant's comment does amount to a breach of the implied term. That is very little, if anything, to do with the comment and its context and much more to do with the process it adopted.

194. We accept that the first respondent had grounds for viewing the claimant's comment as a matter for concern, given the impact it and other comments had had on the colleagues who submitted the 2 impact statements. There were also more broad concerns about the impact of the fall-out from the drop-in session on employment relations within the first respondent. We find that Mr Ashcroft approached matters from an organisational risk perspective. He was, we find, keen to push through with actions to reduce the risk of the first respondent facing

employment tribunal claims or internal grievances. We find that caused him and the first respondent to lose sight of what they were doing when applying its disciplinary and other policies to the claimant. One indicator of that is the question he originally included in the Script about liability were the first respondent to face tribunal claims arising from the claimant's comment. As Miss Beardsworth recognised, that did not help in fulfilling the purpose of the investigation meeting, which was deciding whether the claimant was potentially guilty of misconduct such as to justify a disciplinary hearing.

195. The usual first step under the first respondent's disciplinary policy was to decide whether the action amounted to sufficiently serious misconduct to mean that informal resolution through discussion with a line manager was inappropriate. Only in instances of serious or gross misconduct was the first step to implement the formal process (para 5.1.3 of the policy). In the claimant's case, the first respondent bypassed the claimant's line manager completely in deciding to proceed straight to an investigating meeting. That decision was in essence made by Mr Ashcroft's categorisation of the claimant's comment as being in the "A" category.

196. We do not in any way minimise the genuine upset caused by the claimant's comment to some of her colleagues. However, it seems clear to us that the first respondent never viewed the claimant's actions as amounting to sufficiently serious misconduct to bring the possibility of dismissal into play. That appears to be the case from Mrs Coundon disciplinary hearing invitation which suggests that a warning is the highest sanction which would be applied if the allegation was upheld. The misconduct was also no serious enough to merit the first respondent suspending the claimant.

197. We also bear in mind that what the claimant did was to make a one-off comment on a Spreadsheet, naming no specific colleagues and in far less virulent language than other comments categorised by Mr Ashcroft as "Category B". We are surprised that the first step was not for Mr Gaffney to sit down with the claimant and talk through her comment and its impact. Had that happened we find that it would have because clear that the claimant's comment was hasty, ill-informed and ill-thought through but clearly not intended to cause the hurt and upset which it did.

198. We think that approach might have avoided the difficulties which followed. However, we do not think that the decision to invite the claimant to an investigation meeting (1.1.1.1) in itself was conduct without proper cause sufficient in itself to destroy or seriously damage the implied term. We do find that the investigation invite coming out of the blue from an HR Partner rather than via Mr Gaffney did damage the relationship of trust and confidence with the first respondent. We find that relationship was further damaged by Mr Ashcroft's response to the claimant's email of 7 June 2022. There was no good reason for the terse and dismissive way he dealt with the genuine anxieties raised by the claimant linked to her ethnicity in her email of 7 June.

199. When it comes to the claimant's Dignity at Work complaint on 17 June 2022 (1.1.1.2), the respondent's submission was that its decision to deal with the disciplinary process before addressing her DaW complaint was in accordance with section 2.9 of its disciplinary policy/2.5 of its grievance policygrievance policy. We prefer the respondent's submission that the fact that this was a DaW complaint rather than a grievance complaint meeting did not mean that principle in section 2.9

did not apply. We find that it was for the first respondent to decide whether to proceed with a disciplinary in light of any grievance or DaW complaint raised. However, we find that the first respondent did undermine the trust and confidence between it and the claimant by not properly considering the DaW complaint. The ACAS Guide gives as examples of occasions when it may be appropriate to pause or suspend disciplinary process:

- **the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have**
- **bias is alleged in the conduct of the disciplinary meeting**

200. We find the first respondent should have paused and properly considered whether in this case the DaW complaint should have been considered first. Alternatively, it could have decided how to incorporate the DaW complaint into the investigation hearing. Instead, on 17 June 2022 Mr Ashcroft responded in a few hours to confirm that the process was going ahead. There was no pause for thought, it seems to us.

201. We found that by 17June Mr Ashcroft had already concluded that the claimant was "reluctant to engage with the investigation process". We do not find there was a proper basis for that conclusion. The claimant was asserting rights to bring a DaW complaint which the first respondent's policies granted her. We also remind ourselves that this was a point some 10 days after the initial investigation invitation which started the process. This was not a case where an employee subject to a disciplinary process had already strung out the process for a number of weeks or months with spurious challenges.

202. Mr Ashcroft did not in his email acknowledge the DaW complaint as such. There was no evidence that he had discussed with Miss Beardsworth or colleagues whether it was appropriate for him to be responding to the DaW complaint. He was neither the claimant's line manager nor the Investigating Officer. There was no evidence that he had considered whether he might have a conflict of interest. It seems to us it would have been proper for him to do so. The allegation made in the DaW complaint was that it was inappropriate for the disciplinary process to go ahead and it was his categorisation of the claimant's complaint and recommendation which had led to the instigation of that process.

203. We do find the refusal to deal with the DaW complaint contributed to further damaging the relationship of trust and confidence. We do not think that in itself or cumulatively, the damage was sufficient to amount to a breach of the implied term at that point.

204. When it comes to Mr Ashcroft's letter of 23 June 2022 (1.1.1.3) we find that his response was disproportionate and without proper cause. As we have said, we found that Mr Ashcroft had at an early stage formed the view that the claimant was trying to obstruct matters. We find there was no proper cause for that view. The claimant was, as we have already said, seeking to assert her rights under the DaW policy. We find Mr Ashcroft was keen to push matters through to a conclusion and that led him to ignore potentially valid points the claimant was making. In short, Mr Ashcroft was not taking time to consider the claimant's points in a measured and

objective way but was finding ways to rebut them so he could push through his own agenda. We do find that his reference to potential disciplinary misconduct under 3.1 of the policy was conduct likely to seriously damage the relationship of trust and confidence and was without proper cause. Accusing the claimant of being obstructive when that was not the case seems to us to be conduct sufficient in itself to amount to a breach of the implied term. If we are wrong about that then we find it was sufficient to breach the implied term cumulatively with the previous damage done which we have already referred to.

205. When it comes to the Investigation meeting (1.1.1.4) there are 2 aspects which are relevant.

206. The first is the failure to read and consider the claimant's statements prior to starting the meeting. We found that Miss Beardsworth had read enough of Statement 1 to understand it was a challenge to how and by who the meeting was being conducted. In addition to requesting again that the DaW be decided prior to proceeding with the investigation it specifically raised concerns about Mr Ashcroft's continued involvement giving reasons. We do find that these were the kinds of things which the ACAS Guide advises might require a disciplinary process to be paused or modified. We did not find the reasons given for not doing so (pressure of time) were a proper cause for failing to pause and give proper consideration to the points raised.

207. We accept there had been some consideration of Mr Ashcroft's involvement in response to a comment by the claimant reported in the OH report. However, there had not been an occasion for her to spell out her concerns and for proper consideration to be given to whether it was appropriate for Mr Ashcroft to continue to be involved. The reasons given previously by Miss Beardsworth for his continued involvement on 2 August 2022 (that he would be bound to act consistently because he would be following legal advice) do not seem to us to be so overwhelmingly strong that consideration could not be given to someone else taking his place.

208. The second issue was the structure of the investigation meeting, which derived from the Script. At times that led to the claimant being asked questions about not obviously relevant matters which simply caused confusion. The prime example was being asked about matters relating to the interpretation and application of the Equality Act 2010 in the context of protected beliefs. The discussion at times veered into an oral legal examination. On a fair reading of the transcript, it seems to us clear that the claimant had no intention to cause hurt, was motivated solely to support trans and non-binary colleagues and was genuine unclear about the nature and extent of protection for beliefs such as gender critical views under the Equality Act 2010. The Script seemed to us at times heavy handed and adopting a sledgehammer to crack a nut. The claimant's evidence at the investigation meeting seem to us to make it clear she had given little thought to the comment and its effect and that it was made in haste.

209. We have already found a breach of the implied term as at 23 June 2022. Had we not, we would have found that the failure to take time to consider the claimant's statements would have amounted to a breach of the implied term as part of a cumulative breach. There was a need to properly decide whether the DaW should be heard first (or otherwise incorporated into the investigation meeting rather than being tacked on at the end) and whether Mr Ashcroft should continue to be involved. The failure to do so did seriously damage the relationship of trust and confidence and

there was no proper cause for it. We do not find that the way the questioning was carried out would amount to such a breach if there was no breach already.

210. The final allegation relates to informing the claimant that she had to attend a disciplinary hearing (1.1.1.5). As we have already said, there were inconsistencies between the conclusions of the investigation report and what the claimant actually said at that investigation meeting. Some of her comments appear to us to have been taken out of context or distorted to justify action being taken. In addition, it seems to us there was an inconsistency in the finding on the one hand the claimant did not know what she was doing because of her lack of understanding of gender critical views as being a protected characteristic, and at the same time saying that she was guilty of harassment. While we accept that the definition of harassment includes conduct with a harassing effect as well as conduct with a harassing purpose, it seems to us that when an employer is deciding whether an employee is guilty of misconduct, the extent to which they intended to harass is clearly relevant. We also find that the report seemed keen to minimise the extent to which the claimant showed remorse for what she had done. Her apology was deemed as "not really an apology" when there does not seem to be any real grounds for doubting the sincerity of it. That is especially given that she followed up with an email to the same effect after the meeting. The recommendation that the claimant should be subject to training seems to us to suggest that she was (in the view of the investigation) not someone who had deliberately made harassing remarks or comments. In those circumstances, we do find that the decision to inform the claimant that she had to attend a disciplinary hearing would have amounted to a breach of the implied term as at 30 August 2022 had the breach not already occurred on 23 June 2022.

211. We have found that there was a breach of the implied term as at 23 June 2022.

212. We find that that breach was the cause of the claimant's resignation (1.1.3). We accept that she applied for another job while still employed by the claimant but find that the claimant was looking for a job as a result of what happened rather than the new job being the cause of her resignation.

213. The respondent did not seek to argue that the claimant had affirmed the contract. We find that she did not (1.1.4). There was not a significant delay from what we have found was the breach until she resigned. What delay there was explained by her waiting to be confirmed in her new job. We do not find that she engaged in conduct which could be regarded as affirming the contract.

214. The respondent did not seek to argue that there was a fair reason for dismissal if we found a constructive dismissal (1.2-1.4).

215. In those circumstances the claimant was constructively dismissed and that dismissal was unfair.

Victimisation (Equality Act 2010 section 27)

216. For this claim to succeed the claimant must show that she did a protected act within s.27(2) of the Equality Act 2010. The protected act as defined by the claimant is the support she showed for the grievance circulated on 11 May 2022 (i.e. that she identified as a supporter and posted the comment) showing her support for the

complaint of homophobic/anti-trans views of staff in decision making positions and HR arising out of the drop in sessions dealing with the grant to the LGB Alliance)".

217. The parties were agreed that the two possible categories into which the alleged protected act fell were 27(2)(c) or (d).

218. We considered section 27(2)(d) first. That requires an allegation that a person has contravened the Equality Act 2010. We find that what the claimant put in her comment was not an allegation. It was not specific enough either in terms of the alleged contravention of the Equality Act 2010 or in terms of the person alleged to have committed the contravention. This was not a case of specific allegations which were not explicitly labelled as being under the Equality Act 2010. Instead, as the claimant's evidence at the investigatory meeting made clear, she was not making a specific allegation of discrimination against anyone. There was no protected act within s.27(2)(c).

219. We then considered whether the protected act fell within the "catch-all" category in section 27(2)(c). The claimant's explanation of her comment was that it was an expression of support for her trans and non-binary colleagues.

220. For the respondent, Mr Feeney submitted that the "catch-all" nature of s.27(2)(c) did not mean its scope was infinitely elastic. There had to be something done "by reference to" the Equality Act 2010. Specifically, he submitted, there had to be a degree of formality involved in the protected act. By that we understand him to mean that there must be some form of claim of a breach of the Equality Act 2010 to which the act is connected or done by reference to, even if indirectly. The examples he gave were the recording of colleagues to provide evidence to support a claim (**Aziz**) or providing evidence in a grievance (**Kirby**). The claimant's comment was, he submitted not of that nature. There was not even a grievance submitted despite what the 11 May email suggested. Alternatively, if the claimant's act was a protected act, it must lose that character given the finding in the Leeds Judgment that it was an act of harassment.

221. Mr Alemoru submitted that the claimant's comment had what he referred to as the "chemical properties" of a protected act. It did not specify the legislation but it did enable the respondent to know it related to a protected characteristic under the Equality Act 2010 and the grievance distributed in favour of such colleagues following the drop in. The finding of the Leeds Judgment that the alleged protected act was harassment was not binding on us.

222. We prefer Mr Feeney's submissions. On the facts, there was no grievance submitted. The proposed terms of the grievance outlined in the 11 May email are general and do not set out specific allegations of a breach of the provisions of the Equality Act 2010. (For the avoidance of doubt we also so not find that the 11 May email was specific enough to amount to an allegation for the purposes of s.27(2)(d). Even taking a purposive approach, it does seem to us that an expression of support for colleagues without something more concrete does stretch the "catch-all" nature of s.27(2)(c) too far. We find there was no protected act in this case.

223. There was no protected act. That means that the claimant's victimisation complaint fails.

Summary and next steps.

224. The victimisation complaint fails. The unfair dismissal complaint succeeds.

225. Because the unfair dismissal complaint succeeded a remedy hearing will be listed. Directions will be given separately. We did not hear submissions about **Polkey** and contribution and will be do that as part of the remedy hearing.

_____

Employment Judge McDonald

Date: 3 February 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 February 2025

FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex
List of Issues

1. Unfair dismissal

Dismissal

1.1 Can the claimant prove that there was a dismissal?

[Constructive dismissal]

1.1.1 Did the respondent do the following things:

1.1.1.1 On 7 June 2022 – invite the claimant to a disciplinary investigation;

1.1.1.2 17 June 2022 – refuse to deal with the claimant's grievance prior to the disciplinary investigation meeting;

1.1.1.3 23 June 2022 – the second respondent's email of 23 June 2022;

1.1.1.4 The investigation meeting of 9 August 2022;

1.1.1.5 13 August 2022 – informing the claimant that she had to attend a disciplinary hearing.

[trust and confidence case]

1.1.2 Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

1.1.2.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not

1.1.2.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

[all cases]

1.1.3 Was the fundamental breach of contract a reason for the claimant's resignation?

1.1.4 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the

claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

1.2 Has the respondent shown the reason or principal reason for the fundamental breach of contract?

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

[Section 98 cases - general]

1.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 What basic award is payable to the claimant, if any?

2.7 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2.8 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.8.1 What financial losses has the dismissal caused the claimant?

2.8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.8.3 If not, for what period of loss should the claimant be compensated?

2.8.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.8.5 If so, should the claimant's compensation be reduced? By how much?

2.8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.8.7 Did the respondent or the claimant unreasonably fail to comply with it?

2.8.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.8.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

2.8.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.8.11 Does the statutory cap apply?

2.9 What basic award is payable to the claimant, if any?

2.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows:

3.1.1 On 11 May 2022 when commenting on an online petition,

3.1.1.1 do any other thing for the purposes of or in connection with the Equality Act 2010; or

3.1.1.2 make an allegation (whether or not express) that the respondent or another person had contravened the Equality Act 2010.

3.2 Did the respondent do the following things:

3.2.1 instigate the disciplinary procedure on 7 June 2022?

3.2.2 reject the claimant's request to deal with her Dignity at Work complaint before proceeding with the disciplinary procedure.

3.2.3 Mr Ashcroft's sending an email of 23 June 2022 (pp.182-183), in particular his statement in it that the claimant's emails were

focussed on why she would not participate in the investigation process unless it was on her terms and running order; and his drawing the claimant's attention to the respondent's rules which said that wilful hindrance or obstruction of a disciplinary or grievance procedure may be considered misconduct.

3.3 By doing so, did it subject the claimant to detriment?

3.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

3.5 If so, has the respondent shown that there was no contravention of section 27?

4. Remedy for victimisation

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.9 Did the respondent or the claimant unreasonably fail to comply with it?

4.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

4.11 By what proportion, up to 25%?

4.12 Should interest be awarded? How much?