RE: JOANNA CHERRY MP

ADVICE of SENIOR COUNSEL

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legal issues and options arising in relation to the venue operator's decision to cancel her appearance/participation, scheduled for 10 August 2023, at the Edinburgh Fringe show *In Conversation with Joanna Cherry*

May 2023

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Glasgow

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1. INTRODUCTION

1.1 I refer to the E-mails dated 3 and 4 May 2023 sent from my instructing solicitor and directly from the client, Ms Joanna Cherry MSP. I am asked to advise Ms Cherry on legal issues and options arising in relation to the decision to cancel her appearance/participation, scheduled for 10 August 2023, at the Edinburgh Fringe show *In Conversation with Joanna Cherry*.

2. THE FACTS

2.1 On 16 January 2023 Ms. Cherry received an E-mail from Stephen Wright, a Director of Fair Pley Ltd., inviting her to take part in an event to be held at New Town Theatre, George Street, Edinburgh during the Edinburgh Festival. This invitation was in the following terms:

> "I understand from Tommy Sheppard that you are interested in doing one of our *In Conversation with…* shows at this year's Fringe. We would be delighted if you were able to do so.
>
> I have attached some more information on the *In Conversation with…* series.
>
> The shows are every day from 4th to 27th August inclusive, in the New Town Theatre, George Street at 12.00pm. Each show lasts one hour. At the moment, we can offer most of these dates
>
> If you were available, could you let me know which date(s) would suit best.
>
> Once a date was *agreed*, we would then need a hi-res head and shoulders image and a short biography.

Thanks and hope we can make this happen."

2.2 The Tommy Sheppard referred in this E-mail is the SNP MP for Edinburgh East. Tommy Sheppard is also the founder of the Stand Comedy Club and is a member of the Board of Directors of Salt 'n' Sauce Promotions Ltd., the company which runs the Stand Comedy Club.

2.3 This invitation to speak was accepted by Ms Cherry in an E-mail sent on her behalf on 20 January 2023 in the following terms:

> "Thank you for your email. Joanna is indeed interested in taking part in an 'in conversation' with you.
>
> I am holding these dates in her diary: Wednesday 9th, Thursday 10th, Friday 11th August. Please let me know if one of these is suitable."

2.4 The event date and time were finalised by the Director of Fair Pley Ltd., Stephen Wright, responded to this on 23 January 2023 as follows

> "That's great. Really delighted.
>
> Shall we go with Thursday 10th? The show starts at 12.00pm and lasts 60 minutes. Can Joanna arrive at the venue no later than 11.30am for sound check, etc.
>
> The venue is New Town Theatre, Freemasons Hall, 96 George St, Edinburgh EH2 3DH.
>
> Could you send me a hi-res head and shoulders image of Joanna, plus a short biog."

2.4 On 13 April 2023 the following press release/public statement was issued by "The board of directors at The Stand Comedy Club":

> **"Statement regarding Joanna Cherry's participation in The Stand's Edinburgh Fringe programme.**
>
> We are aware of a number of concerns being raised regarding the *In Conversation With Joanna Cherry* event that is scheduled as part of our Edinburgh Fringe programme in August 2023.
>
> We wish to make the following comments in response:
>
> > This event is part of a series.
> >
> > The *In Conversation With …* strand is not booked directly by The Stand. It is produced by independent Glasgow-based producer Fair Pley. For more information on them and the nature of the *In Conversation With* programme, please click here.

> As a company we oppose any form of discrimination, including against people on the basis of their gender identity. The Stand does not endorse or support the views expressed by any participant in this series and it is wrong for others to imply that we do.
>
> *Whilst we may disagree with a particular viewpoint, we believe that people should have the right to express views that others might find controversial or strongly disagree with, providing this is done within the law and does not violate our code of conduct.*
>
> This event is open to all and will include questions from the public on any issues that might be raised. This was not specifically intended to be an event focussed on gender recognition or the rights of trans people.
>
> Joanna Cherry is the MP for Edinburgh Southwest and the chair of the UK Parliament's Human Rights Committee. Her invite to participate in this event is due to her wide ranging political and public role.
>
> Some of our staff have expressed their concerns about Ms Cherry's views and said that they do not wish to be involved in promoting or staging this show - we will ensure that their views are respected."

The Board of Directors of Salt 'n' Sauce Promotions Ltd. (The Stand Comedy Club)

2.5 On 1 May 2023 the Board of Directors of Salt 'n' Sauce Promotions Ltd. (The Stand Comedy Club) issued the following "Update regarding Joanna Cherry's participation in The Stand's Edinburgh Fringe programme":

> "Further to our previous policy statement on this matter (see above), following extensive discussions with our staff it has become clear that a number of The Stand's key operational staff, including venue management and box office personnel, are unwilling to work on this event.
>
> As we have previously stated, we will ensure that their views are respected. We will not compel our staff to work on this event and *so have concluded that the event is unable to proceed on a properly staffed, safe and legally compliant basis*.
>
> We advised the show producers, Fair Pley Productions, of this operational issue and they advised Joanna Cherry that it is no longer possible to host the event in our venue."

2.6 It is understood by Ms Cherry that Stephen Wright of Fair Pley Productions Ltd. did not support this cancellation of this show by Salt 'n' Sauce Promotions Ltd. and expressed his concerns to the Managing Director of The Stand Comedy Club that the cancellation was inappropriate and may constitute discrimination against Ms. Cherry because of reasonably held and legally protected beliefs and requested that the the show with Ms Cherry scheduled for 10 August 2023 proceed as originally planned.

2.7 On 3 May 2023 Mike Jones, the Managing Director of The Stand Comedy Club, E-mail Ms Cherry's office to the following effect:

> "Given recent media comments made by Joanna Cherry MP, I thought it would be helpful to establish some kind of dialogue.
>
> It's been reported in some outlets that Joanna has offered to meet with Stand staff to discuss their concerns – this is not an offer that has been made to me directly or, as far as I aware, any staff representatives. How would you suggest we proceed in this regard?
>
> Also, clearly I am concerned at statements suggesting that Joanna is considering legal action but note that she is also suggesting that there may be other ways of resolving the situation. I would be interested to understand what these alternatives might be.
>
> I would welcome your thoughts."

3 SUMMARY OF THE LAW

3.1 Because of the complexity of the law in this area (as more fully set out below) I summarise the relevant legal principles as follows:

(1) Section 4 of the Equality Act 2010 (EA 2010) include "religion or belief" among the Act's "protected characteristics"; and Section 10(2) EA 2010 defines "belief" as meaning "any religious or philosophical belief, and a reference to belief includes a reference to a lack of belief".

(2) Case law has established that statements of belief to the following effect, among others
   (a) that, as a matter of scientific fact, sex is biologically immutable; and/or
   (b) that there are only two sexes, and/or
   (c) that it is impossible to change sex; and/or
   (d) that a (biological) man claiming the protected characteristic of gender reassignment, even after obtaining a gender recognition certificate attesting to this protected characteristic of gender reassignment, cannot properly claim the benefit of such protections and rights which the law affords, under the protected characteristic of "sex", to "women"; and/or
   (e) that a (biological) woman claiming the protected characteristic of gender reassignment, even after obtaining a gender recognition certificate attesting to this protected characteristic of "gender reassignment", should continue to be able to claim the protections and rights and rights which the law affords, under the protected characteristic of "sex", to "women"

are to be regarded in law as "philosophical beliefs" which are worthy of respect and protection in a democratic society.[1] Accordingly the holding and/or expression of such beliefs constitutes a "protected characteristic" for the purposes of section 10 of the Equality Act 2010 (EA 2010)

(3) The private holding or public expression of such "gender critical" beliefs does not, of itself, constitute unlawful harassment, whether because of the protected characteristic of "gender reassignment" or because of the protected characteristic of "sex". [2]

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[1] See for example *Forstater v. CGD Europe* [2022] ICR 1, EAT per Choudhury J at §§ 111-114, 115:

> 111. .... The claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the tribunal was that she believed that it is not 'incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender': see para 39.2 of the judgment. That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether.
>
> 112 In the present case, there are two further factors which, upon analysis, are wholly at odds with the view that the belief is not one worthy of respect in a democratic society.
>
> 113 First, there is the evidence that the gender-critical belief is not unique to the claimant, but is widely shared, including amongst respected academics. The popularity of a belief does not necessarily insulate it from being one that gravely undermines the rights of others; history is replete with instances where large swathes of society have succumbed to philosophies that seek to destroy the rights of others. However, a widely shared belief demands particular care before it can be condemned as being not worthy of respect in a democratic society.
>
> 114 Second, the claimant's belief that sex is immutable and binary is, as the tribunal itself correctly concluded, consistent with the law.
> ...
> 115 Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society."

[2] See for example *Forstater v. CGD Europe* [2022] ICR 1, EAT per Choudhury J at §§ 103-104:

> "103 The second error [of the Employment Tribunal] was in imposing a requirement on the claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the claimant's right to freedom of expression in so far as they relate to her beliefs. However, that right applies to the expression of views that might 'offend, shock or disturb'. The extent to which the state can impose restrictions on the exercise of that right is determined by the factors set out in article 10(2) ECHR, *i.e.* restrictions that are 'prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others'. It seems that the tribunal's justification for this blanket restriction was that the claimant's belief 'necessarily harms the rights of others'. As discussed above, that is not correct: whilst the claimant's beliefs, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a Gender Recognition Certificate ("GRC"), could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. In our judgment, it is not open to the tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.
>
> 104 That does not mean that in the absence of such a restriction the claimant could go about indiscriminately 'misgendering' trans persons with impunity. She cannot. The claimant is subject to the same prohibitions on discrimination, victimisation and harassment under the

(4) By corollary, any refusal by an individual to assent to others' "gender identity belief" - to the effect that everyone has a gender which may be different to their sex at birth, and which effectively trumps sex, so that it may properly be said that "transmen are men" and that "transwomen are women" - is also a (lack of) belief the holding and expression of which is also protected against unlawful discrimination. [3]

(5) Direct discrimination contrary to section 13 of the EA 2010 in relation to the protected characteristic of philosophical belief, occurs wherever a person is treated less favourably *because of* a protected philosophical belief, or *because of* conduct which manifests a protected philosophical belief.

(6) It appears from the account of the facts set out above that the Board of Directors of Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) has denied Ms. Cherry, or has withdrawn from Ms. Cherry, access to the Edinburgh Fringe venue (the New Town Theatre, Freemasons Hall, 96 George St, Edinburgh) and/or has refused to provide Ms. Cherry such services associated with the occupation of these premises (which it otherwise provides to the public) for the purposes of the producers Fair Pley Ltd. holding with Ms Cherry the advertised Edinburgh Fringe event *In Conversation With Joanna Cherry*, which all parties had agreed to hold on 10 August 2023.

(7) This decision by the Board of Directors of Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) to stop this event being held on these premises is avowedly taken

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Equality Act 2010 ("EA 2010") as the rest of society. Should it be found that her misgendering on a particular occasion, because of its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EA 2010. The fact that the act of misgendering was a manifestation of a belief falling with section 10 of the EA 2010 would not operate automatically to shield her from such liability. The tribunal correctly acknowledged, at para 87 of the judgment, that calling a trans woman a man 'may' be unlawful harassment. However, it erred in concluding that that possibility deprived her of the right to do so in any situation."

[3] See for example *Forstater v. CGD Europe* [2022] ICR 1, EAT per Choudhury J at §§ 107-108:

"107 The claimant had also put her claim in her ET1 on the alternative basis of a lack of belief. The belief that she did not subscribe to was described by the tribunal as follows at para 92 of the judgment: 'everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and trans women are women.'

108 We refer to this as the 'gender identity belief'. The claimant accepted that the gender identity belief was a philosophical belief qualifying for protection under section 10 EA 2010. However, instead of treating the claimant's lack of the gender identity belief as also qualifying for protection, the tribunal treated the claimant's lack of that belief as necessarily equating to a positive belief that trans women are men (which the tribunal considered to be a belief not worthy of protection). In our judgment, that approach was wrong. The fact that the claimant did not share the gender identity belief is enough in itself to qualify for protection."

because of (objections being expressed by certain of their staff members to) the protected philosophical beliefs concerning "gender identity" which are understood to be held and professed by Ms. Cherry, and/or by those with she is associated.

(8) For the purposes of establishing unlawful discrimination on the part of Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club), it does not matter whether those objections to the philosophical beliefs concerning the (disputed philosophical) concept of "gender identity" which are understood to be held and professed by Ms. Cherry and/or by those with she is associated were held directly by Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) itself, or by other parties (such as their employees), or by other third parties who The Stand Comedy Club feared (reasonably or otherwise) might seek to protest against or disrupt the event.

(9) It is enough that Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) has acted against Ms Cherry *because of those objections* to the philosophical beliefs concerning "gender identity" which are understood to be held and professed by Ms. Cherry and/or those with she is associated by those objecting to the venue holding the event

(10) It is not possible as a matter of law to justify acts of direct discrimination under section 13 of the EA 2010 (such justification is only possible in relation not indirect discrimination under section 19(2) of the EA 2010, which is not at issue on the facts of the current case).

(11) Accordingly the *only* conclusion that can be drawn is that Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) has, on the facts of this case, acted in a manner which runs contrary to its obligations under the EA 2010 not to discriminate against Ms Cherry because of philosophical belief.

(12) Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club), having acted unlawfully in contravention of the EA 2010, Ms Cherry is entitled to an effective remedy from the sheriff court (which has exclusive original jurisdiction in claims involving breach of the obligations imposed under part 3 EA 2010 (provision of services to the public, and exercise of public functions: Section 114(a) EA 2010).

(13) The sheriff court is empowered by section 119 EA 2010 to grant any remedy which could be granted by the Court of Session (a) in proceedings for reparation, or (b) on a petition for judicial review.

(14) In principle, then, in any court action which may be raised before the sheriff court, the sheriff therefore has power to grant, among other remedies:

- declarators of the law;
- orders for specific implement;
- orders for payment;
- and (arguably) also an order requiring the party found to have been guilty of unlawful discrimination to issue a public apology in terms acceptable to the court.

(15) It is no answer in law to an order from the court requiring the discriminating party to go ahead with the event, for the discriminator to claim that it would find complying with the order difficult or even impossible. A party which has been fund to be guilty of unlawful discrimination is required to find a way to comply with the order of the court.

(16) Damages for breach of the Equality Act 2010 may be awarded by the sheriff court to serve a compensatory function.

(17) It is at least arguable that an additional sum by way of EA 2010 damages may be awarded by the sheriff court to serve a vindicatory purpose, where otherwise justified in all the circumstances

3.2 I expand on the basis for this summary of the law more fully in the following section.

4. THE EQUALITY ACT 2010 (EA 2010)

Basic Legal Framework

4.1 Part 3 of the EA 2010 prohibits discrimination in respect of defined protected characteristics in the provision of services, and separately in the exercise of public functions. The protected characteristics for these purposes include religion and belief: section 10 EA 2010.

4.2 Under Part 3 EA 2010, any (public or private, corporate or natural) body which is "*concerned with the provision of a service to the public*":

(a) must not discriminate against a person requiring the service by *not* providing the person with the service: section 29(1) EA 2010; and

(b) must not, in providing the service, discriminate against a person by *terminating the provision of the service* to that person: section 29(2)(b) EA 2010.

4.3 The EA 2010 confers rights against discrimination on "*persons*". This has authoritatively been interpreted as meaning that its protection can be claimed by legal persons just as much as by natural persons.[4]

4.4 Further, the discrimination prohibited by section 29 EA includes direct discrimination and indirect discrimination because of religion or belief. On the proper analysis, however, the present case raises only the issue of *direct* discrimination. And, if direct discrimination is established, the court is obliged to make a finding of breach of the EA 2010 since, as a matter of law, an act of direct discrimination cannot be justified.

Expression/manifestation of philosophical belief

4.5 Case law confirms - consistently with the Section 3 of the Human Rights Act 1998 (HRA 1998") obligation – that there is no material difference between the scope of the religious and philosophical beliefs which are protected under the EA 2010 from those which are protected under article 9 ECHR (freedom of religion and thought, conscience and belief): *Harron v Chief Constable of Dorset Police* [2016] IRLR 481 at per Langstaff J at § 33. Any philosophical belief which is genuinely held and which meets certain modest minimum requirements attracts the protection of article 9 ECHR.

4.6 Further, Article 10 ECHR, which guarantees the freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference.[5] So it is clear that the circumstances of this case also in principle engage

[4] See *EAD Solicitors v Abrams* [2016] ICR 380, EAT per Langstaff J's judgment at §§ 25-26:

> "25 As a general conclusion, therefore, there is no obvious reason implicit in the wording of the Equality Act 2010 taken as a whole to restrict the wording of 'person' to an individual, nor is there, as it seems to me, any particular reason for thinking that the general definition provision, which section 13 amounts to, should be so read. There is a reference in section 45 to 'person' in a context in which, as I have pointed out, it was well understood by the time the Equality Act 2010 came to be enacted that an LLP could have a corporate body as one of its members.
>
> 26 Accordingly, in company with the employment judge I reject the argument that a corporation cannot complain of discrimination."

[5] The importance which the ECtHR attaches to free expression principles appears from its decision in *Annen v Germany* [2015] ECHR 3690/10 (Fifth Section, 26 November 2015). The pursuer was an anti-abortion campaigner who handed out leaflets next to an abortion clinic naming and giving the addresses of doctors who performed abortions at the clinic. The leaflets appeared to draw an analogy with the Shoah/Holocaust and identified a website named "www.babycaust.de". Despite what many would undoubtedly consider to be the extreme nature of Mr Annen's expression, the ECtHR found that an injunction preventing him from disseminating the leaflets violated his article 10 rights. Cf *In re*

Article 10 ECHR on freedom of expression. In *ES v. Austria* (2019) 69 EHRR 4 the European Court of Human Rights noted (at paras 42-43):

> "42 ....Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to para.2 of art.10, *it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb*.
>
> The Court further notes that there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate on questions of public interest. Those who choose to exercise the freedom to manifest their religion under article 9 of the Convention, irrespective of whether they do so as members of a religious majority or a minority, *therefore cannot expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.*
>
> 43 As para.2 of art.10 recognises, however, *the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under art.9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.*
>
> Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a state may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by art.10 of the Convention."

4.7 The case law of the European Court of Human Rights in relation both to Article 9 ECHR and Article 10 ECHR are relevant to the proper interpretation of the provisions of the EA 2010 relative to the protections afforded under the EA 2010 against discrimination

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Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32 [2023] AC 505 per Lord Reed (with whom Lord Kitchin, Lord Burrows, Lady Rose, Lord Lloyd-Jones JJSC, Lord Carloway, and Dame Siobhan Keegan agreed) at §§ 156-157:

> "156 The right of women in Northern Ireland to access abortion services has now been established in law through the processes of democracy. That legal right should not be obstructed or impaired by the accommodation of claims by opponents of the legislation based, some might think ironically, on the liberal values protected by the Convention.
>
> A legal system which enabled those who had lost the political debate to undermine the legislation permitting abortion, by relying on freedom of conscience, freedom of expression and freedom of assembly, would in practice align the law with the values of the opponents of reform and deprive women of the protection of rights which have been legislatively enacted.
>
> 157 For all the reasons which I have explained, I conclude that clause 5(2)(a) of the Bill is not incompatible with the Convention rights of those who seek to express opposition to the provision of abortion services in Northern Ireland, and that it is therefore not outside the legislative competence of the Northern Ireland Assembly."

because of the protected characteristic of religion or belief. As was noted by Choudhury J in *Forstater v. CGD Europe* [2022] ICR 1, EAT (at §§ 53-55):

> "53 Having identified the belief in question, the next task of the tribunal was to determine whether that belief amounted to a philosophical belief within the meaning of section 10 EA 2010. Given that domestic statutory provisions are to be read and understood conformably with the ECHR, it is appropriate to consider the effect of articles 9 and 10 of the ECHR first, as that is likely to inform the analysis of section 10 EA 2010. We note, however, that there is no rule that the analysis should always follow this sequence: see *Page v NHS Trust Development Authority* [2021] ICR 941,
>
> 54 Article 9 ECHR and Article 10 ECHR are set out above. The rights protected by these articles have been described by the ECHR as 'closely linked' and the approach to be taken is to consider the case law in relation to the most directly applicable right, interpreted where appropriate in light of the other: see *Ibragimov v Russia* (Application Nos 1413/08 and 28621/11) (unreported) 4 February 2019, at para 78.
>
> It is not in dispute that the most directly applicable right here is the article 9 right to freedom of belief.
>
> 55 We were referred to numerous authorities emphasising the high importance attached by the ECtHR to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy. …"

4.8 It is not for the court to embark on any inquiry – theological, philosophical or otherwise - into the "validity" of the belief, or the extent to which other person share the belief. [6] Similarly, religious and/or philosophical based beliefs are protected however supposedly irrational, apparently inconsistent or otherwise surprising they might seem to others. [7]

4.9 And beliefs to which many individuals may now be opposed – while they may be regarded as antediluvian or unreconstructed - are not to be too readily dismissed as unacceptable or unsayable because beyond the pale of respectful discourse properly to be expected and protected within a democratic society. For example *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127 [2019] ELR 443 concerned a challenge to the decision by the university authorities to remove a student from a social work course because the university decision-maker considered that a student's Facebook posts expressing his religious belief that homosexuality was sinful might bring the profession of social worker (for which the claimant was training) into disrepute on the basis of the risk of public perception that Mr Ngole's beliefs might cause him to discriminate against homosexuals were he permitted to qualify and practice as a social worker. The Court of Appeal of England and Wales

[6] *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) [2007] ICR 1176 per Richards J at §§ 36-39

[7] *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246 at § 22

condemned the approach of the university decision-maker as unlawful, on the basis that (as it noted at para 5 (10)) the university had "wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (e.g. that 'homosexuality is a sin') does *not* necessarily connote that the person expressing such views will discriminate on such grounds". The English Court of Appeal made the following further general observations (at paras 124-127, 129):

> "124. .. [W]hat is apparent from the records of the disciplinary proceedings: namely, that the University told the claimant that whilst he was entitled to hold his views about homosexuality being a sin, *he was never entitled to express such views on social media or in any public forum*.
>
> 125. .... Aside from expressing views online or in social media, or such old-fashioned modes of expression such as writing in a local newspaper or speaking or preaching on a street corner: even expressing these views in a church, at least in a community small enough for these views to be known and associated with the speaker, would, it is said, be sufficient to cross the line.
>
> 126. The breadth of the proposition became clear in another way, conveniently referenced from the ambit of the HCPC regulations in question here. If social workers and social work students must not express such views, then what of art therapists, occupational therapists, paramedics, psychologists, radiographers, speech and language therapists: all professions whose students and practitioners work under the rubric of the same general regulations? What of teachers and student teachers, not covered by the HCPC regulations, but by a similar regulatory regime? For present purposes it is not easy to see a rational distinction between these groups. All are usually engaged with service users who often have no opportunity to select the individual professional concerned. Very many of these professions deal on a day-to-day basis with personal problems of a particular nature, where the social, family and sexual relationships of the client or service user are relevant, sometimes central.
>
> 127. In our view the implication of the University's submission is that such religious views as these, *held by Christians in professional occupations, who hold to the literal truth of the Bible, can never be expressed in circumstances where they might be traced back to the professional concerned. In practice, this would seem to mean expressed other than in the privacy of the home. And if that proposition holds true for Christians with traditional beliefs about the literal truth of the Bible, it must arise also in respect of many Muslims, Hindus, Buddhists and members of other faiths with similar teachings.*
>
> In practice, if such were a proper interpretation of professional regulation supported by law, no such believing Christian would be secure in such a profession, unless they resolved never to express their views on this issue other than in private. Even then, what if a private expression of views was overheard and reported? The postings in question here were found following a positive internet search by the anonymous complainant. What if such statements had been revealed by a person who had attended a church service or Bible class? ...
>
> 129. In our view, such a blanket ban on the freedom of expression of those who may be called 'traditional believers' cannot be proportionate. In any event, the HCPC guidance does not go so far. The specific guidance prohibits
>
> > 'comments ... [which] were offensive, for example if they were racist or sexually explicit': see para [27] above.

> No doubt if the appellant's comments were abusive, used inflammatory language of his own, or were condemnatory of any individual, they would fall to be regarded in the same way as would racist views, or inappropriate sexually explicit language. But in our judgment, there is no equation here demonstrated between what is rightly condemned by the guidance, and the fundamental position now advanced on behalf of the University. What is here formulated represents a much greater incursion into the Article 10 ECHR rights of the appellant, and by obvious implication, those of many others, than has hitherto been clear. *In our judgment this is not the law*."

4.10 And as Sales J (as he then was) in *Catholic Care v Charity Commission (No 2)* [2012] UKUT 395 (TCC) [2013] 1 WLR 2105 noted in another context (at § 44) :

> "[W]here third party donors are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Roman Catholic Church (and particularly where, as here, their activities do not dominate the public sphere in relation to the activity in question - provision of adoption services - which are otherwise widely available to homosexuals and same sex couples), the position is rather different.
>
> *In my opinion, donors motivated by respect for Roman Catholic doctrine to have a preference to support adoption within a traditional family structure cannot be equated with racist bigots, as Ms Dixon sought to suggest. Such views have a legitimate place in a pluralist, tolerant and broadminded society, as judgments of the European Court of Human Rights indicate.*"

4.11 As with article 9 ECHR, it is clear the protection against discrimination on grounds of "religion and belief" under the EA 2010 protects not only the holding of religious or philosophical beliefs but also manifestations of those beliefs. Such manifestation or expression of a belief is also protected under and in terms of Article 10 ECHR.

4.12 Accordingly because of the obligation on the court under Section 3 HRA 1998 to interpret and apply the provisions of the EA 2010 in the circumstances of this case a Convention compatible way [8] - it is necessary to read section 10 EA 2010 as protecting against Ms Cherry against any discrimination against her because of the philosophical "gender critical" beliefs believed to be held by her – and which or may not be mentioned or otherwise made manifest by Ms Cherry in her public activities - specifically in her appearing at *In Conversation With Joanna Cherry* event that was duly scheduled as part of the Edinburgh Fringe programme in August 2023. It is not enough to say that Ms Cherry can hold such beliefs, so long as she does not mention them publicly. Even less acceptable – and equally unlawful discrimination – would be any suggestion that Ms.

[8] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at §§ 106-7. See, too, *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 per Baroness Hale at § 56

Cherry can be "no-platformed" because of "gender critical" beliefs she is understood to hold privately, even if the public event in question is not specifically intended to raise or discuss or otherwise air these gender critical beliefs. Any such position would be wholly incompatible with, and would have no legitimate place in, the pluralist, tolerant and broadminded society, which the United Kingdom's continued membership of the Council of Europe commits it as a matter of international law to be and to protect.

What does it mean to do something "because of" a protected characteristic

4.13 Section 13 EA 2010 defines direct discrimination as follows:

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

4.14 The basic question in a direct discrimination case is: what does it means to say that an action has been taken "because of" another's protected characteristic? [9] In the case law a distinction is sometimes made when considering this question between what it is that the alleged discriminator is hoping to achieve by the impugned action (sometimes referred to in the case law as "the motive" or "intention") from the question as to whether the protected characteristic was in fact taken into account in deciding upon the action impugned as discriminatory (which some case law refers to as "the motivation"). As has

[9] See *Page v. NHS Trust Development Authority* [2021] EWCA Civ 255 [2021] ICR 941 per Underhill LJ at § 29:

> "29 Section 13 EA 2010 is headed 'Direct discrimination'. The only relevant subsection for our purposes is (1), which reads:
>
> > 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'
>
> There is a good deal of case law about the effect of the term 'because' (and the terminology of the pre-2010 legislation, which referred to 'grounds' or 'reason' but which connotes the same test). What it refers to is 'the reason <u>*why*</u>' the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the 'mental processes' that caused them to act. The line of cases begins with the speech of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728 ('the Jewish Free School case'). The cases make it clear that although the relevant mental processes are sometimes referred to as what 'motivates' the putative discriminator they do not include their 'motive', which it has been clear since *James v Eastleigh Borough Counci*l [1990] ICR 554; [1990] 2 AC 751 is an irrelevant consideration

been noted "'a benign *motive* for detrimental treatment is no defence to a claim for direct discrimination".[10]

[10] In *Page v. Lord Chancellor* [2021] EWCA Civ 254 [2021] ICR 912 Underhill LJ make the following observations (at § 69-70):

> "69 … It is indeed well established that … 'a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation': the *locus classicus* is the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751. But the case law also makes clear that in this context 'motivation' may be used in a different sense from 'motive' and connotes the relevant 'mental processes of the alleged discriminator' (*Nagarajan v London Regional Transport* [1999] ICR 877, 884F). I need only refer to two cases:
>
> (1) The first is, again, *Martin v Devonshires Solicitors* [2011] ICR 352. There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At § 35 I said:
>
> > "It was well established long before the decision in the *JFS* case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in *Nagarajan v London Regional Transport* [1999] ICR 877, 884F)_one of which may be relevant in considering the 'grounds of', or reason for, an allegedly discriminatory act, and the other of which is not.'
>
> I then quoted §§ 61—64 from the judgment of Baroness Hale of Richmond JSC in the *Jewish Free School* case and continued, at § 36:
>
> > 'The distinction is real, but it has proved difficult to find an unambiguous way of expressing it. … At one point in *Nagarajan v London Regional Transport* [1999] ICR 877, 885E—F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in *Amnesty International v Ahmed* [2009] ICR 1450, explicitly contrasting it with 'motive': see § 35. Lord Clarke uses it in the same sense in his judgment in the *JFS* case [2010] 2 AC 728, §§ 137—138 and 145. But we note that Lord Kerr uses 'motivation' as synonymous with 'motive' (see § 113) and Lord Mance uses it in what may be a different sense again at the end of § 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved - though we must confess that we still find it useful and will continue to employ it in this judgment …'
>
> (2) The second case is *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010. At § 11 of my judgment I said:
>
> > 'As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [1999] ICR 877, which was endorsed by the majority in the Supreme Court in *R (E) v Governing Body of JFS* [2010] 2 AC 728. Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between

4.15 In *Gould v St John's Downshire Hill* [2021] ICR 1 Linden J, sitting in the EAT, recognised and identified the following approaches from the UKHL and UKSC authorities:

- first, *James v Eastleigh Borough Council* [1990] 2 AC 751 where the grounds or reason for the treatment complained of is inherent in the act itself; and

- secondly *Nagarajan v London Regional Transport* [2000] 1 AC 501 where the act complained of is not discriminatory, but it is rendered so by discriminatory <u>motivation</u>, *being the mental processes (whether conscious or subconscious) which led the alleged discriminator to act in the way that he or she did*.

- thirdly, as the UKSC confirmed in *R (on the application of E) v Governing Body of the Jewish Free School and another* [2009] UKSC 15, once a conscious or subconscious <u>motivation</u> because of a protected characteristic has been established to the court's satisfaction, the actor's (otherwise potentially benign) *motive or intention* in acting as it did is *wholly* <u>irrelevant</u> because such direct discrimination cannot be justified. [11]

'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same.'

70 As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses ..."

[11] See too *R (Birmingham City Council) v. EOC* [1989] AC 1155 Lord Goff of Chieveley noted at 1194:

"There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. *The intention or motive of the defendant to discriminate*, though it may be relevant so far as remedies are concerned (see section 66(3) of the Act of 1975), is not a necessary condition for liability; *it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex*.

Indeed, as Mr. Lester pointed out in the course of his argument, if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so <u>*but (for example) because of customer preference, or to save money, or even to avoid controversy.*</u> In the present case, <u>*whatever may have been the intention or motive of the council*</u>, *nevertheless it is because of their sex* that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975. This is well established in a long line of authority: see, in particular, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] 1 W.L.R. 1485, 1494, *per* Browne-Wilkinson J., and *Ex parte Keating, per* Taylor J., at p. 475; see also *Ministry of Defence v. Jeremiah* [1980] QB 87, 98, *per* Lord Denning M.R. I can see no reason to depart from this established view."

4.16 Linden J summarised the relevant law on this in *Gould* as follows:

> "62. The question whether an alleged discriminator acted *"because of"* a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the 'reason why' question and the test is *subjective*. This point was made by Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 501, 511C-D and again in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at paragraph 29 where he distinguished the nature of the 'reason why' question from the determination of "causation":
>
> > "29.....Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach...The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? *What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test*. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."
>
> 63. For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a *"significant influence"* on the decision to act in the manner complained of. *It need not be the sole ground for the decision*: per Lord Nicholls in *Nagarajan* [2000] 1 AC 501 at 513A–B.
>
> 64 Moreover, as the passage from *Khan* quoted above makes clear, *the influence of the protected characteristic may be conscious or subconscious*."

Subconscious bias and direct discrimination

4.17 In *Nagarajan v London Regional Transport* [2000] 1 AC 501 Lord Nicholls stated at 511-H-512C

> "I turn to the question of *subconscious motivation*. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or *unwilling, to admit even to themselves* that actions of theirs may be racially motivated.
>
> An employer may genuinely believe that the *reason why* he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, *whether the employer realised it at the time or not*, race was the reason why he acted as he did.
>
> It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of [what is now section 13 EA 2010] ... Such conduct also falls within the purpose of the legislation. Members of racial groups need protection

from *conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.'*

4.18 And in *Cary v Commissioner of Police of the Metropolis* [2014] EWCA Civ 987 [2015] ICR 71 Clarke LJ giving the judgment of the court noted at para 51:

> "51. .. [T]hose who in fact discriminate on any grounds (e g sex, race, religion, disability, same sex orientation) *often say that they would have acted in exactly the same way if the protected characteristic had been absent*.
>
> An ability to discern whether people are *deceiving the court or, sometimes as likely, themselves*, when they say that they would have behaved no differently if there was no question of sex, race etc playing any part, is thus an advantage in an assessor, as is *experience of the sort of masks, pretences and protests that those who discriminate often put forward and of the way in which unconscious bias or stereotyping can operate.*
>
> This is a skill in evaluation and analysis which can be honed by the experience of dealing with complaints of discrimination in, for instance, the workplace, and/or listening to and adjudicating on tribunal cases in which discrimination is alleged and disputed."

4.19 Accordingly, in assessing the evidence, any court has to be alive to the question of subconscious motivation and a failure on the part of individuals either to recognise their own prejudices or to be unable, or unwilling, to admit even to themselves that actions of

No need for a comparator

4.20 Underhill LJ stated in 14. *Page v. NHS Trust Development Authority* [2021] EWCA Civ 255 [2021] ICR 941

> "It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras 8—13 of the speech of Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337."

4.21 The guidance of the House of Lords by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [2003] ICR 337 is clear: the two issues of less favourable treatment and the reason for the treatment are intertwined and the tribunal is entitled to focus primarily on the reason for the treatment without necessarily having to identify and draw comparison with the treatment of the comparator. [12] The

[12] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [2003] ICR 337 per Lord Nicholls of Birkenhead at paras 7-12:

> 7. … When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then,

secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

8 No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: *did the claimant, on the proscribed ground, receive less favourable treatment than others*? But, *especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems*. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

9 The present case is a good example. The relevant provisions in the Sex Discrimination (Northern Ireland) Order 1976 are in all material respects the same as those in the 1975 Act which, for ease of discussion, I have so far referred to. Chief Inspector Shamoon claimed she was treated less favourably than two male chief inspectors. Unlike her, they retained their counselling responsibilities. Is this comparing like with like? *Prima facie* it is not. She had been the subject of complaints and of representations by Police Federation representatives, the male chief inspectors had not. This might be the reason why she was treated as she was. This might explain why she was relieved of her responsibilities and they were not. But whether this factual difference between their positions was in truth a material difference is an issue which cannot be resolved without determining why she was treated as she was. It might be that the reason why she was relieved of her counselling responsibilities had nothing to do with the complaints and representations. If that were so, then a comparison between her and the two male chief inspectors may well be comparing like with like, because in that event the difference between her and her two male colleagues would be an immaterial difference.

10 I must take this a step further. As I have said, *prima facie* the comparison with the two male chief inspectors is not apt. So be it. Let it be assumed that, this being so, the most sensible course in practice is to proceed on the footing that the appropriate comparator is a hypothetical comparator: a male chief inspector regarding whose conduct similar complaints and representations had been made. On this footing the less favourable treatment issue is this: was Chief Inspector Shamoon treated less favourably than such a male chief inspector would have been treated? But, here also, the question is incapable of being answered without deciding why Chief Inspector Shamoon was treated as she was. It is impossible to decide whether Chief Inspector Shamoon was treated less favourably than a hypothetical male chief inspector without identifying the ground on which she was treated as she was. Was it grounds of sex? If yes, then she was treated less favourably than a male chief inspector in her position would have been treated. If not, not. Thus, on this footing also, the less favourable treatment issue is incapable of being decided without deciding the reason why issue. And the decision on the reason why issue will also provide the answer to the less favourable treatment issue.

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator *by concentrating primarily on why the claimant was treated as she was*. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. *Or was it for some other reason?* If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

12 The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided *why* the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case."

matter was succinctly addressed by former EAT President, Langstaff J, in the case of *Cordell v Foreign and Commonwealth Office* [2012] ICR 280, in which he stated as follows:

> "18. The drafting of section 3A (5), in common with the provisions proscribing direct discrimination elsewhere in the anti-discrimination legislation, ***appears*** to require the tribunal to consider two questions – (a) whether the claimant has been treated less favourably than an actual or hypothetical comparator with the same characteristics (other than his or her disability) was or would have been treated ("the less favourable treatment question"), and (b) whether that treatment was on the grounds of that disability ("the reason why question").
>
> However, as was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, and as has been repeatedly emphasised since, both in this Tribunal and in the Court of Appeal – though still too often too little heeded by tribunals – those two questions are two sides of the same coin, and the answer to the one should in most cases give the answer to the other. To spell it out: if A, who is deaf, has been treated differently from B, who is not, and that is indeed the only difference between their cases, the irresistible inference will be that the reason for the different treatment is A's deafness; and likewise if A is subjected to a detriment on the grounds of his deafness it logically follows (at least if that disability is the principal ground) that a person who was not deaf would not have been so treated. As between the two questions, it is the reason why question that is in truth fundamental. *Where there is an actual comparator, asking the less favourable treatment question may be the most direct route to the answer to both questions; but where there is none it will usually be better to focus on the reason why question than to get bogged down in the often arid and confusing task of "constructing a hypothetical comparator".*"

Substantial, *not* the only or main, reason

4.22 In *Owen and Briggs v Jones* [1981] ICR 618 it was held that the protected characteristic would suffice for a discrimination claim to be upheld if it was a "substantial reason" for the decision.

4.23 In *O'Neill v Governors of Thomas More School* [1997] ICR 33 it was held that the protected characteristic needed to be *a cause* of the decision, but did *not* need to be the only or a *main* cause.

4.24 In *Igen Ltd v. Wong* [2005] EWCA Civ 142 [2005] ICR 931 the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context. After referring to the following quotation from Lord Nicholls judgment in *Nagarajan* [2000] 1 AC 501

> "Decisions are frequently reached *for more than one reason*. Discrimination may be on racial grounds even though it is not the *sole* ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a

cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

the Court of Appeal concluded in *Igen* (at para 37) as follows:

> A 'significant' influence *is an influence which is more than trivial*. We find it hard to believe that the principle of equal treatment would be breached by the *merely trivial*. We would therefore support the original para. (10) of the guidance set out in *Barton v Investec Securities Ltd*. [2003] ICR 1205 and, consistently therewith, a minor change suggested by Mr. Allen to para. (11) so that the latter part reads 'it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question'."

4.25 The law was later summarised in *JP Morgan Europe Limited v Chweidan* [2011] EWCA Civ 648 [2012] ICR 268 in which Elias LJ said the following (in a case which concerned the protected characteristic of disability):

> "5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – *not necessarily the only reason but one which is significant in the sense of more than trivial* – must be the claimant's disability.
>
> In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the *reason for* the treatment.
>
> If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 paragraphs 8–12.
>
> That is how the tribunal approached the issue of direct discrimination in this case.
>
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found.
>
> The burden of proof operates so that if the employee can establish a *prima facie case*, i.e. if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason then *the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason*".

The burden of proof under the EA 2010

4.26 There is a statutory onus of proof set out in Section 136 EA 2010 which provides, so far as relevant, as follows:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, *in the absence of any other explanation*, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

4.27 In *Igen Ltd v. Wong* [2005] EWCA Civ 142 [2005] ICR 931 the Court of Appeal approved the following modified *Barton* criteria to be applied in discrimination cases generally in relation to the burden of proof:

(1) Pursuant to section 136 EA 2010, it is for the pursuer who complains of unlawful discrimination because of a protected characteristic to prove on the balance of probabilities facts from which the court or tribunal <u>could</u> conclude, *in the absence of an adequate explanation*, that the defender has committed such an unlawful act of discrimination against the pursuer

(2) If the pursuer does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the pursuer has proved such facts that it is unusual to find direct evidence of discrimination because of a protected characteristic. Few persons would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be the result of an *intention* but merely based on an *assumption*.

(4) In deciding whether the pursuer has proved such facts, it is important to remember that the outcome at this stage of the analysis by the court or tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by that court or tribunal.

(5) It is important to note the word is '*could*'. At this stage the court or tribunal does not have to reach a definitive determination that such facts *would* lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a court or tribunal is looking at the primary facts proved by the pursuer to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance from an evasive or equivocal reply on the part of the defender to a question.

(7) Likewise, the court or tribunal must decide whether any provision of any relevant code of practice (or other established common standard of good practice in the sector) is relevant and, if so, take such standards of good practice into account in determining such facts. This means that inferences may also be drawn from any failure on the part of the defender to comply with any relevant code of practice, or other established common standard of good practice in the sector.

(8) Where the pursuer has proved facts from which inferences could be drawn that the defender has treated the pursuer less favourably because of a protected characteristic, then the burden of proof moves to the defender.

(9) It is then for the defender to prove that it did not commit, or, as the case may be, is not to be treated as having committed, that act.

*(10) To discharge that burden it is necessary for the defender to prove, on the balance of probabilities, that the treatment was **in no sense whatsoever** because of a protected characteristic.*

(11)That requires a court or tribunal to assess not merely whether the defender has proved *an* explanation for the facts from which such inferences can be drawn, but further that this explanation is *adequate* to discharge the defender's burden of proof on the balance of probabilities *that the identified protected characteristic was not a ground for the treatment in question*

(12) Since the facts necessary to prove an explanation would normally be in the possession of the defender, a court or tribunal would normally expect *cogent evidence* to discharge that burden of proof. In particular, the court or tribunal will need to examine carefully explanations for failure to comply with any applicable code of practice, or other established common standard of good practice in the sector.

4.28 Subsequently in *Efobi v Royal Mail Group Ltd* [2019] EWCA Civ 19 [2019] ICR 750 Sir Patrick Elias noted at para 10:

> "10 The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal *could* conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred.

> At that stage the tribunal *must leave out of account the employer's explanation for the treatment*.
>
> If that burden is discharged, the *onus* shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that *it was <u>not</u> tainted by a relevant proscribed characteristic*. If he does not discharge that burden, the tribunal ***<u>must</u>*** find the case proved."

4.29 In its decision in *Efobi v Royal Mail Group* [2021] UKSC 33 [2021] ICR 1263 (at §§14 and 34) the UK Supreme Court confirmed that the burden of proof where there is an allegation of conduct contrary to the EA 2010 is the same as it had been under previous anti-discrimination legislation. It is therefore a two-stage process for the court as follows:

(1) Has the pursuer satisfied the court that, on the balance of probabilities, there are facts which would permit this court to conclude, in the absence of any satisfactory explanation, that an unlawful act of discrimination had occurred?

(2) If yes, the burden then shifts to the defender to explain the reasons for the discriminatory treatment and it is for the defender to satisfy the court that the protected characteristic played ***<u>no part</u>*** in its reasoning.

No justification for direct discrimination

4.30 Further, as we have noted above, such direct discrimination because of religion or belief *cannot* as a matter of law be justified: see e.g. *R (E) v Governing Body of JFS* [2010] 2 AC 728.

4.31 Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) cannot escape a finding of direct discrimination by saying that it was forced by circumstances beyond its control (whether their staff's stated unwillingness to work at the event, or their professed inability to ensure effective avoidance of any possible unrest or violence from third parties attendees or outside protesters objecting to Ms. Cherry protected philosophical beliefs.[13])

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[13] In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 AC 1 Baroness Hale notes at § 88:

> "If a person acts on racial grounds, the reason why he does so is irrelevant: see Lord Nicholls of Birkenhead in *Nagarajan* [2000] 1 AC 501 at p 511. The law reports are full of examples of obviously discriminatory treatment *which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control*:

As Browne-Wilkinson J (as he then was) noted when sitting in the EAT in *Din (Ghulam) v Carrington Viyella Ltd (Jersey Kapwood Ltd)* [1982] ICR 256 at 260F-J:

> "In our view, if an act of racial discrimination gives rise to actual or potential industrial unrest, an employer will or may be liable for unlawful discrimination if he simply seeks to remove that unrest by getting rid of, or not re-employing, the person against whom racial discrimination has been shown. That that is the law seems to us to be supported by another passage in the *Seide* case where this appeal tribunal says, at p. 430:
>
> '[Counsel for the employers] accepts that if what had happened here was that the company had moved Mr. Seide because they were anti-Semitic, and also if the company had transferred him because another employee was anti-Semitic and the company was not willing to move the latter, that would amount to racial discrimination within the meaning of the Act. *It would be the same as the situation which has arisen from time to time where a company has either refused to appoint or promote or has demoted someone because of racial attitudes on the part of, not the employers, but their employees*."

4.32 Similarly in *R v Commission for Racial Equality, Ex p Westminster City Council* [1984] ICR 770 Woolf J (as he then was) noted at 780 C-E

> "The CRE were entitled to take the view that Mr. Rolfe was taking a different course in respect of someone who was black, albeit with the greatest of reluctance, which he would not have taken if he was white because *he knew that if he did not do so the result would be industrial action which could have serious consequences for the staff agreement.*
>
> As I interpret the Race Relations Act 1976, it is not a justification for what would otherwise be an unlawful discrimination to rely on the fact that the alternative would be possible industrial unrest.
>
> If the position were otherwise it would always be possible to frustrate the objects of the Act by threatening industrial action."

4.33 And in *James v Eastleigh Borough Council* [1990] 2 AC 751 Lord Lowry noted at 779:

> "If a men's hairdresser dismisses the only woman on his staff *because the customers prefer to have their hair cut by a man*, he may regret losing her but he treats her less

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- the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action (*R v Commission for Racial Equality, Ex p Westminster City Council* [1985] ICR 827);

- the council which for historical reasons provided fewer selective school places for girls than for boys : *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155)."

favourably because she is a woman, that is, on the ground of her sex, having made a deliberate decision to do so.

If the foreman dismisses an efficient and co-operative black road sweeper in order to avoid industrial action by the remaining (white) members of the squad, he treats him less favourably on racial grounds.

If a decision is taken, for reasons which may seem in other respects valid and sensible, not to employ a girl in a group otherwise consisting entirely of men, the employer has treated that girl less favourably than he would treat a man and he has done so consciously on the ground (which *he considers* to be a proper ground) that she is a woman.

In *none* of these cases is a defence provided by an excusable or even by a worthy motive."

4.34 In *Amnesty International v Ahmed* [2009] ICR 1450, Underhill J (as the then EAT President) stated (at para 58):

"The legislature - both here and in Brussels - has deliberately set its face against allowing any defence of justification in cases of direct discrimination. No doubt a principled case can be made that concerns about racial prejudice displayed by third parties overseas should no more afford a defence to an employer than the equivalent fears about discriminatory conduct by third parties in this country"

4.35 More recently, and directly on point with the situation of the present case in *Lancashire Festival of Hope v. Blackpool Borough Council* F00MA124 Manchester County Court (1 April 2021) Judge Claire Evans noted at paras 133-135:

"133. The suggestion that removal on the grounds of the offence caused to the public by the association of the Claimant with Franklin Graham and his religious beliefs would not be "because of" the religious beliefs but rather because of a response to public opinion or concern seems to me to be a distinction that cannot properly be drawn having regard to the intention behind the Equality Act of eliminating discrimination.

If mainstream societal opinion were to change consequent on, say, a white supremacist rising, should we allow a situation where the Defendants may, without fear of an EA claim, cancel advertisements for companies which are known to promote an anti-racist message because of pressure and complaint made by white supremacist groups?

Should a hotelier be able to refuse a double room to a same-sex couple not because he objects to their sexual orientation but because all of the other guests in his hotel object to it and find it offensive?

Rather than eliminate discrimination, to allow that reading of "because of" would be to give free rein to discrimination.

"Because of" refers to the factual basis for the decision rather than motive or intention (see Lord Goff in *R v Birmingham City Council ex parte EOC* [1989] AC1155 at p 1194:

if motive or intention was a necessary condition of liability, "*it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy*.").

134. There is no defence of justification to direct discrimination. The issues arising from the desire to avoid offence to certain sectors of the community are or may be relevant to the HRA claims, where there is a balancing exercise to be undertaken, but they seem to me not to be relevant to the EA claim in this particular case.

135. The complaints arose from the objections of members of the public to the religious beliefs. The removal came about because of those complaints. I find it also came about because the Defendants allied themselves on the issue of the religious beliefs with the complainants, and against the Claimant and others holding them. If there were any doubt about that it is made explicit by the content of the press statement issued on behalf of the Second Defendant when the advertisements were removed. "

4.36 This decision was approved and followed by Sheriff J N McCormick in *Billy Graham Evangelistic Association v Scottish Event Campus Ltd*, 2022 SLT (Sh Ct) 219 (24 October 2022) who made the following observations in upholding a claim in that case that the SEC's decision (under pressure from Glasgow City Council, who owned 90% of its shares) to cancel the booking for an evangelistic mass public outreach event constituted unlawful discrimination because of religion or belief (at §§ 2-5):

"2. Mindful that this judgment may be quoted out of context I commence by stating the obvious: the Equality Act 2010 applies to all, equally. It is an Act designed to protect cornerstone rights and freedoms within a pluralist society. It applies to the LGBTQ+ community as it does to those of religion (including Christianity) and none. It follows that in relation to a protected characteristic (here: religion or philosophical belief) no section of society can discriminate against those with whom he, she or they disagree. The court was told, in terms, that it is no part of the defender's case that the activities of the pursuer were unlawful. The event on 30 May 2020 was a Christian evangelical outreach event. Whether others agree with, disagree with or even, as was submitted on behalf of the pursuer, find abhorrent the opinions of the pursuer or Franklin Graham is not relevant for the purposes of this decision. This applies even where, as I heard evidence, members within the Christian community may not agree with the pursuer. The court does not adjudicate on the validity of religious or philosophical beliefs.

3. It was said during the hearing that nobody has the right not to be offended by the opinions of others. This is somewhat glib as there are also curbs on free speech. However, standing the lawful purposes of the planned evangelical event in this case, curbs on free speech (for example, "hate speech") are not issues which I require to explore.

4. I have edited the names of a Member of the Scottish Parliament (MSP) and two Ministers of the Church of Scotland. I do so primarily because although their lobbying/writings featured in the case, they were not witnesses. *In addition, the (on occasion, polemical) terms of what they were reported to have written and their mischaracterisation of the event was neither supported by the facts nor by either party to the case.*

5. *A theme among those seeking cancellation of the event included prefacing their remarks with a professed belief in free speech while denying that right to others and denying third parties their choice to attend*."

Remedies for breach of EA 2010

4.37 The present case involves a breach of a statutory right (not to be discriminated against because of religion or belief). A breach of this right entitles those found to have been unlawfully discriminated against in breach of the statute to whatever constitutes an effective remedy or remedies to them in all the circumstances, whether a declarator, and/or an award of damages, and/or an order for specific performance or any combination of the foregoing.

4.38 Proof of actual loss, harm or damages is *not* an essential requirement before one can be found to have acted in breach of the statutory obligation under the EA 2010 not to discriminate because of religion or belief. [14] Instead the case law on effective remedy in respect of a breach of an individual's right not to be the victim of unlawful discrimination highlights the importance of a declaratory remedy, regardless of damages, as providing essential vindication of this fundamental equality law right. [15]

4.39 By virtue of Section 119(3)(b) EA 2010 "The sheriff has power to make any order which could be made by the Court of Session …on a petition for judicial review." In a petition for judicial review the Court of Session has power to make such orders by way of remedy as it considers just even if these have not been specifically sought in the pleadings. This discretion as to remedy is made clear in particular by the terms of Rule 58.13 of the Rules of the Court of Session 1994 which provides as follows (emphasis added):

[14] Cf *Constantine v Imperial Hotels Ltd* [1944] KB 693, in which Birkett J held at first instance that the plaintiff was entitled to damages without proof of loss where the defendant was in breach of his common law duty as an innkeeper to receive him as a guest but had refused him accommodation apparently on grounds of his race/ethnicity as a black West Indian. The judge concluded as follows (at page 708):

> "Having given the matter the fullest consideration, *I hold this action by Mr. Constantine to be maintainable without proof of special damage*. His right, I think, is founded on the common law. That right I found was violated. The law affords him a remedy, and the injury which he has suffered imports damage. I think that the principles of the decision in *Ashby* v. *White* (1) apply to this case. It only remains for me to say that I was urged by Sir Patrick Hastings to award exemplary or substantial damages, because of the circumstances in which the denial of the right took place when Mr. Constantine suffered, as I find that he did suffer, much unjustifiable humiliation and distress, but on the authorities I do not feel that I can accede to that submission, having regard to the exact nature of this action and the form in which it comes before me. My conclusion is that I must give judgment for Mr. Constantine for nominal damages only, and I, therefore, award him the sum of five guineas."

[15] See e.g. Case C-30/19 *Braathens Regional Aviation AB* EU:C:2020:374 [2021] 3 CMLR 13

"58.13.— The substantive hearing
(1) At the substantive hearing the Lord Ordinary must hear the parties.

(2) In exercising the supervisory jurisdiction on a petition for judicial review, the Lord Ordinary may—

(a) grant or refuse any part of the petition, with or without conditions;
(b) make *any* order that could be *made* if sought in *any action or petition including*, in particular, an interim order or any order listed in paragraph (3) (whether or not such an order was sought in the petition).

(3) Those orders are—

(a) reduction;
(b) declarator;
(c) suspension;
(d) interdict;
(e) implement;
(f) restitution; and
(g) payment (whether of damages or otherwise)."

4.40 Among the possible "fitting" remedies which may in principle be open to the courts if and to the extent that it finds a violation by the venue managements of principles of toleration and the preservation of pluralism with respect to the Ms. Cherry would be at least the following:

- pronounce a declarator;
- order specific performance and/or require some other form of mandatory action such an apology;
- award damages.

Declarator

4.41 The ECtHR has held that a person who considers himself or herself a discrimination 'victim', within the meaning of Article 34 ECHR,[16] and who seeks reparation for this in the form of compensation loses his or her victim status only if two conditions are fulfilled. Not only must that person receive the compensation sought, but the national authorities must also have acknowledged the alleged breach of the ECHR. [17] Application of that case-law of

[16] Under Article 34 ECHR, the ECtHR may receive applications from any person claiming to be the victim of a violation by one of the 'High Contracting Parties of the rights set forth in the Convention or the protocols thereto'.

[17] See, among other authorities, the inadmissibility decision of the ECtHR *Nardone v. Italy* [2004] ECtHR 34368/02 (Third Section, 25 November 2004) at § 1 of the Section, 'Law'), and judgment of the

the ECtHR to the present case would mean that at the very least this court should pronounce a formal declarator to the effect that Ms Cherry has been discriminated against because of her philosophical beliefs around the (disputed philosophical/ideological) concept of "gender identity".

4.42 In line with this approach, Advocate General Saugmandsgaard Øe noted in his Opinion of 14 May 2020 in Case C-30/19 *Braathens Regional Aviation AB* EU:C:2020:374 as a matter of EU law an individual who complained of unlawful discrimination on a protected ground (in this case race) in the provision of commercial services by another private party had a right to maintain a court action to obtain a finding and declaration of discrimination even where the defendant airline in that case had agreed to pay the compensation sought, but would not admit any form of discrimination, it having (as the AG notes at para 37)

> "declared that it is willing to pay and indeed has paid the compensation sought, though only to demonstrate 'it's good will' and avoid potentially lengthy and costly proceedings requiring it to defend itself against the allegation of discrimination".

4.43 In upholding the conclusion of the Advocate General, the Court of Justice of the European Union (CJEU) noted as follows (at §§ 84-94, 128-130, with its original footnotes):

> "40 In the present case it is clear from the order for reference that, under national law transposing, inter alia, Directive 2000/43, any person who considers that he or she is a victim of discrimination on the grounds of racial or ethnic origin may bring an action for enforcement of the sanction constituted by "compensation for discrimination". The national law at issue in the main proceedings provides that, where the defendant acquiesces to the claimant's claim for compensation, the court hearing that action orders the defendant to pay the sum claimed by the pursuer by way of compensation.
>
> 41 It is, nevertheless, also clear from the order for reference that such acquiescence—which under that national law, is legally binding on the court and results in the termination of the proceedings—may be given where the defendant does not however recognise the existence of the alleged discrimination, or even, as in the case in the main proceedings, where he or she explicitly contests it. In such a situation, the national court delivers a judgment on the basis of that acquiescence without, however, it's being possible for any conclusion to be drawn from that judgment as to the existence of the discrimination alleged.
>
> 42 It follows that, in such a situation, the defendant's acquiescence has the effect that the obligation for the latter to pay the compensation claimed by the claimant is not linked to recognition, by the defendant, of the existence of the alleged discrimination

ECtHR of, *Centro Europa 7.S.R.L and Di Stefano v. Italy* [2012] ECtHR 3843309 (Grand Chamber, 7 June 2012) at § 81 and the case-law cited, as well as §§ 87 and 88

or to a finding thereof by the competent court. In addition, and in particular, such acquiescence has the consequence of preventing the court hearing the action from ruling on the reality of the discrimination alleged, even though that was the cause on which the claim for compensation was based and is, for that reason, an integral element of that action.

43 As regards the declaratory action provided for in the national law at issue in the main proceedings, it is clear from the order for reference that it does not ensure, for the person who considers himself or herself to have been a victim of discrimination prohibited by Directive 2000/43, the right to have the existence of the alleged discrimination examined and, if appropriate, upheld by a court. In accordance with that law, the action for a declaration cannot address purely factual elements, and its admissibility is subject to the court hearing the case deciding that it is appropriate to proceed, which depends on the balance of interests at issue, namely, inter alia, the claimant's interest in bringing proceedings and the inconvenience that the action might cause to the defendant.

44 It follows that, under the national law at issue in the main proceedings, in the event of the defendant's acquiescing to pay the compensation claimed by the claimant, without however recognising the discrimination alleged, the claimant is unable to obtain a ruling by a civil court on the existence of that discrimination.

45 It must be held that such a national law infringes the requirements imposed by arts 7 and 15 of Directive 2000/43, read in the light of art.47 of the Charter.
46 In the first place, as is clear from [33]–[35] of this judgment, the procedures referred to in art.7 of that directive have the aim of permitting the enforcement of rights derived from the principle of equal treatment of any person who considers himself or herself to be the victim of discrimination based on racial or ethnic origin and to ensure compliance. It therefore follows necessarily that *where the defendant does not recognise the discrimination alleged that person must be able to obtain from the court a ruling on the possible breach of the rights that such procedures are intended to enforce.*

47 Consequently, *the payment of a sum of money alone, even where it is the sum claimed by the claimant, is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment derived from that directive*, in particular where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification.

48 In the second place, a national law such as that at issue in the main proceedings is contrary to *both the compensatory function and the dissuasive function of sanctions* laid down by the Member States in accordance with art.15 of Directive 2000/43 where there is a breach of national provisions transposing that directive.

49 In that regard, as the Advocate General observed, in essence, at AG83 and AG84 of his Opinion, *the payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered, of the fact that he or she has been the victim of discrimination, meaning that the payment cannot, for that purpose, be regarded as having a satisfactory compensatory function.*

Similarly, *the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination by inducing him or her not to repeat the discriminatory behaviour and thereby preventing further discrimination*

on his or her part where, as in the present case, he or she contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant, while also thereby avoiding a finding by a national court that there had been discrimination."

4.44 Although as the decision in *Braathens* makes clear the prohibition against discrimination because of race or ethnic origin in the provision of services to the public falls within the ambit of EU law,[18] it is only work-related discrimination because of religion or belief (or sexual orientation) which was at time the UK ceased to be a Member State covered by EU law.[19] Nonetheless in *Anwar v. Secretary of State for Business Energy and Industrial Strategy* [2019] CSIH 43 2020 SC 95 the First Division made it plain that the effective remedy principle prayed in aid by the CJEU in *Braathens* applied equally in wholly domestic circumstances. Lord President Carloway noted (at para 9):

> "9. In *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [2020] AC 869 (para 106), Lord Reed said:
>
> > 'EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law: see, for example Case C-268/06 *Impact v Minister for Agriculture and Food* ECLI:EU:C:2008:223 [2008] ECR I-2483, para 46.'
>
> Lord Reed acknowledged the principle that a person whose rights require protection must have an effective remedy before a tribunal (paras 106, 107, citing the Charter of Fundamental Rights of the European Union (2012/C 326/391), Art 47).
>
> Although this case is focused on EU law, domestic law enshrines the same idea in its requirement of access to justice. That common law principle would be breached if, despite a court or tribunal ruling, the system was such that securing a remedy would be 'practically impossible or excessively difficult'. In short, there is no need to invoke EU law in this area. The remedies available in the courts and tribunal systems must be effective."

4.45 It is therefore clear that Scots law, EU law and ECHR law are as one on this point. In cases alleging unlawful discrimination, where the claimed discrimination is established, the victim has a right to have this wrong-doing publicly recognised by court pronouncing a declarator to this effect, even in the absence of any pecuniary damage following therefrom. This is because public declarations of the law in this area themselves can serve a vindicatory function and contribute towards a form of just satisfaction for the wronged victim of discrimination.

[18] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

[19] Employment Equality Directive 2000/78/EC

4.46 While a declarator at common law – or indeed a declaration made under reference to the remedies confirmed by Section 119(7) EA 2010 as being available Sheriff Court in respect of breaches of the provisions of the 2010 Act - may serve a useful purpose in generally clarifying the relevant law, it has no mandatory force of itself.

4.47 A declaration or declarator therefore cannot be used to require any action from another party, whether payment of damages or any form of specific performance and failure by a party to comply with a declaration will not constitute contempt of court.[20] In that sense it

[20] See the discussion of declarator in *Craig v. HM Advocate* [2022] UKSC 6, 2022 SC (UKSC) 27 per Lord Reed at §§ 44-46:

> "44. … [S]ome general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order, and that it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead. In that case, the House of Lords held that a mandatory interim injunction had been properly granted against the Home Secretary, and that, following his department's breach of the injunction, he could properly be found in contempt of court (although no punishment was considered necessary beyond the payment of costs). Lord Woolf, with whom the other members of their Lordships' House agreed, observed at p 397 that the fact that these issues had only arisen for the first time in that case was confirmation that in ordinary circumstances ministers of the Crown and government departments scrupulously observed decisions of the courts. He continued:
>
> > *'Because of this*, it is normally unnecessary for the courts to make an executory order against a minister or a government department since they will comply with any declaratory judgment made by the courts and pending the decision of the courts will not take any precipitous action." (Emphasis added)
>
> He added at pp 422-423:
>
> > 'The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations."
>
> 45. The Government, for their part, have always accepted that they can be relied upon to comply with declarations: see, for example, the recent case of *Vince v Advocate General for Scotland* [2019] CSIH 51 2020 SC 90, where the court accepted the Government's submission that it was unnecessary to make a coercive order against the Prime Minister, since members of the Government could be expected to respect a declaratory order. It is to be hoped that the submissions made on behalf of the Government in the present case do not represent a fully considered departure from that longstanding approach.
>
> 46. The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of *R (Majera (formerly SM (Rwanda)) v Secretary of State for the*

may not be regarded to be – not least in circumstances where a wrongful action has actually resulted in loss - an effective remedy.

Order specific performance or require some other form of mandatory action

4.48 The courts undoubtedly have power at common law to order a person positively to do some action or actions as specified in the court order. In general, too, the courts can only exercise their powers to pronounce mandatory orders for the purpose of making a legal or natural person do something that that person already has it within his powers and duty to do, and which should have done, but has not been.[21] Such positive order may be orders for specific performance of existing contractual or of statutory obligations. [22]

Home Department [2021] UKSC 46 [2021] 3 WLR 1075), they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order, as *M v Home Office* and *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC (HL) 41 demonstrate. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of the declaration is determined and is res judicata as a result of the order being granted: *St George's Healthcare NHS Trust v S* [1999] Fam 26, 59-60. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a minister, and may consequently expose himself to a personal liability for wrongdoing: *Dicey, Introduction to the Study of the Law of the Constitution*, 10th ed (1959), pp 193-194."

[21] *R (OWD Ltd (trading as Birmingham Cash & Carry) v. HMRC* [2019] UKSC 30 [2019] 1 WLR 4020 per Lady Black at § 71:

> "Generally the High Court's power to order a person to do something by mandatory injunction is exercisable for the purpose of making that person do something that he has it within his powers to do and should have done, but has failed to do. Here, the court has concluded, and HMRC agree, that there is in fact nothing which HMRC can properly do in the exercise of their statutory functions. They may fairly be said to have no relevant power which they could legitimately exercise in this context without straying outside the purpose for which the power was given. In such circumstances, a conclusion that the High Court could none the less solve the problem by granting an injunction looks worryingly like endorsing the exercise of some sort of inherent authority to override an Act of Parliament, on the basis that the end justifies the means. It would take a lot of persuading for me to conclude that this would be a proper exercise of the High Court's undoubtedly wide power to grant injunctive relief."

[22] See for example Section 45(b) of the Court of Session Act 1988 which provide that

> "The Court may, on application by summary petition– …(b) order the specific performance of any statutory duty, under such conditions and penalties (including fine and imprisonment, where consistent with the enactment concerned) in the event of the order not being implemented, as to the Court seem proper.'

In *Vince & ors v Prime Minister* [2019] CSOH 77 2020 SC 78 Lord Pentland observed as follows (at § 24:

> "[T]he boundaries of any order under Section 45(b) of the Court of Session Act 1988 must be fenced by clear and precise reference to the statutory duty, performance of which is sought. Secondly, the court is given a discretionary power to determine whether, in the particular circumstances of the case before it, an order for specific performance of the statutory duty should be made. Thirdly, the procedure for obtaining such an order is to be summary in nature;

4.49 In *Retail Parks Investments Ltd v Royal Bank of Scotland (No. 2)*, 1996 SC 227 (Extra Division, comprising Lord McCluskey, Lord Cullen and Lord Kirkwood) Lord Cullen (at page 244) noted a conceptual distinction taken as between Scots law and English law in relation to the courts use of their powers to order specific performance in a contractual context. He notes:

> "[I]t is clear that in the law of Scotland where a party to a contract has acted or threatened to act in breach, the other party has a legal right to seek specific implement of the contractual obligation. In this respect there is a difference from English law under which the only legal right is to claim damages, and the granting of an order for specific performance is purely an equitable remedy (see *Stewart v Kennedy* (1890) 17 R (HL) 1, per Lord Watson at pp 9-10). At the same time it is recognised in Scotland that the court has a residual discretion to withhold the remedy of specific implement on grounds of equity *Grahame v Magistrates of Kirkcaldy* (1882) 9 R (HL) 91 and *Salaried Staff London Loan Co v Swears and Wells Ltd* 1985 SC 189"

4.50 So the clear position at common law is that an order for specific performance in the face of breach of contract is the primary remedy in Scots law (with damages fulfilling the role of a secondary role in the event of a non-performance of contractual obligations) in contrast to the position in English law where the primary remedy in the face of contractual breach is considered to be damages, with orders for performance or implementation of contractual obligations an exceptional equitable remedy where damages alone is thought to be insufficient.[23]

> this suggests that the issue will usually be capable of being determined on the basis of the averments made by the parties in their pleadings; elaborate inquiry into the facts is not what is envisaged by this statutory provision."

[23] Section 50 of the Senior Courts Act 1981 provides as follows:

> **50. Power to award damages as well as, or in substitution for, injunction or specific performance.**
>
> Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

This provision had its origins in section 2 of the Chancery Amendment Act 1858 (commonly known as Lord Cairns' Act). In *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 [2019] AC 649, Lord Reed said this in relation to the quantification of damages under this head (at § 95(3)-(5)):

> "(3) Damages can be awarded under Lord Cairns' Act in *substitution* for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.
> (4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a *quid pro quo* for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical

4.51 As Lord President Rodger noted in *Highland and Universal Properties Ltd v Safeway Properties Ltd*., 2000 SC 297 at 302:

> "Unquestionably, there are indeed happier circumstances in which to run a business, but it must also be recalled that the decree simply requires the party in question to perform the commercial obligation which it deliberately undertook in a formal contract, presumably for good reasons. Moreover, *ex hypothesi* it is an obligation *which the party can perform*."

4.52 If the court determines that the effective remedy for the defender's discrimination is to ordain the defender to reschedule the Event, purported difficulties or inconveniences are no answer and the defender must find a way to comply: *X v Glasgow City Council*[2022] CSOH 35, 2022 SLT 554 per Lord Ericht at §§45-47:

> "[45]. Counsel for the respondent submitted that specific performance was an equitable remedy and should not be granted in the circumstances of this case. It would be impossible for the respondent to comply with the order for the reasons set out in Mr Fulton's affidavit: …
>
> [46]. It is fundamental to the rule of law that public authorities obey the law and obey the courts. If a court decides that public authority is in breach of a statutory duty, the public authority must comply with the duty. The authority cannot just say that it chooses not to do so because, in its view, it is impossible to do so. It must find a way to comply with its duty. The duty must be discharged: the authority has no choice. It is not up to the court to decide the precise way in which an authority complies with its statutory duty. The authority must find a way and must allocate appropriate resources to do so. If the authority's usual third-party providers cannot provide it with the means to comply with the duty, then the authority must find other providers who can, or find another way to comply with the decision of the court.
>
> [47]. Having said all that, I appreciate that there may be practical issues for the respondent in complying with an order for specific performance immediately upon the issue of this opinion. I shall put this case out by order for discussion of the appropriate interlocutor in the light of my decision. At the by order, I will expect to be addressed by the respondent in detail as to how it proposes to comply with its statutory duty within a reasonably short timescale. It will not be acceptable for the local authority to say that it does not intend to comply."

4.53 A 2019 decision of the Upper Tribunal, *JKL v Ashdown School* [2019] ELR 530, established that the education first-tier tribunal has power under the EA 2010 to order the reinstatement of an independent school pupil (which is akin to an "order for specific performance"). That decision is specifically based on the statutory provisions in Schedule

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effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.
(5) That is not, however, the only approach to assessing damages under Lord Cairns' Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction."

17 EA 2010, but it is clear that the concerns which animate the decision of the Upper Tribunal are that Tribunal should be presumed to have been given the power by Parliament to pronounce appropriate effective remedies and were not rendered toothless by having the power to make only "pious exhortations" in the form of recommendations which were not even cast in mandatory terms.

4.54 Given the breadth of wording used in section 119(2) EA 2010 the same "effective remedy" logic which appealed to the Upper Tribunal in *JKL* can be applied in the circumstances of the present case to bolster the submission that the Sheriff Court also has power under Section 119(2) EA 2010 to make an order for specific performance of a contract notwithstanding that the date originally agreed for the event has since passed.

4.55 Obviously these kinds of remedies are always discretionary and so a Court would take into account a wide range of factors, such as workability, impossibility of compliance, the need for excessive supervision, the pursuer's own conduct and so on. In very broad terms "mandatory" orders tend to be used sparingly and in general require particular justification to persuade the court to exercise its jurisdiction, but the competency of the court making such orders is not in doubt.

4.56 In sum, there may be circumstances in which the injured party has an interest in the enforcement of the primary obligation which is <u>not</u> satisfied by the recovery of compensatory damages (i.e. the court conceives of circumstances in which the injured party – or the public generally - has an interest that goes beyond mere monetary compensation and the court should recognise this and fashion an appropriate remedy). In principle it might then be argued that the proper effective remedy in respect of a finding of discrimination because of philosophical beliefs would be - just as with race discrimination – not an award of damages but of performance which purges the original act of discrimination.

4.57 Further, on the question of a specific performance remedy it is also helpful for the court to have regard to the EU law principle of effective remedy in discrimination law cases which requires that observance of the principle of equality can be ensured only by granting to persons who have been unlawfully discriminated against the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons who have not been the subject of unlawful discrimination, even where the discrimination derives from contracts between individuals. This principle applies directly in UK law as a matter of retained EU law in

cases involving workplace related or employment discrimination because of religion or belief. Thus in Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43 (Grand Chamber, 22 January 2019) [2019] 2 CMLR 20 the European Court of Justice stated as follows (at §§ 58, 76-77, 79) that:

> "58 … [F]reedom of religion is one of the fundamental rights and freedoms recognised by EU law and that the term 'religion' must be understood, in that regard, as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public. …
>
> 76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the EU Charter of Fundamental Rights , is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law: Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257; [2019] 1 CMLR 9 *Egenberger* [2019] 1 CMLR 9 at [76]).
>
> 77 As regards its mandatory effect, art.21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, *even where the discrimination derives from contracts between individuals* (*Egenberger* [2019] 1 CMLR 9 at §77). …
>
> 79 …. [I]t should be noted that, according to settled case law of the Court, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, *observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned* (Case C-406/15 *Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control* EU:C:2017:198 at §66 and the case law cited).

4.58 In *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741 Baroness Hall noted in relation to a case concerning a claim of discrimination on grounds of sexual orientation in the provision of services to the public (i.e., like the present case and *not* directly covered by EU law) at § 22;

> "We do not have to construe these Regulations in accordance with the jurisprudence of the Court of Justice, *because they are not implementing a right which is (as yet) recognised in EU law.*
>
> But as the same concepts and principles are applied in the Equality Act 2010 both to rights which are and rights which are not recognised in EU law, it is highly desirable that they should receive interpretations which are both internally consistent and consistent with EU law."

4.59 By the same token although the present claim of discrimination on grounds of philosophical belief in the provision of services to the public does *not* fall within the ambit

of EU law (albeit that workplace discrimination because of religion or belief *does* fall within the ambit of EU law) and against the background that – as the Inner House confirmed in *Anwar v Secretary of State for Business, Energy and Industrial Strategy* [2019] CSIH 43, 2020 SC 95, the EU law principle of effective remedy is simply reflective of the Scots law principle *ubi ius ibi remedium* – then the same principle of effective remedy should be applied in this case by the court making the order for specific performance.

Court ordered apology to Ms Cherry from the venue operator

4.60 Under Section 119(3) EA 2010, this Court can only order remedies which the Court of Session has the power to order in proceedings in proceedings for reparation or on a petition for judicial review in delict.

4.61 There is at least one context in which the courts in Scotland has a power to determine the terms of an apology, namely in the context of the acceptance and enforcement of an offer to make amends in the context of a reparation action seeking damages for the civil wrong of defamation: see section 14 of the Defamation and Malicious Publications (Scotland) Act 2021. [24]

4.62 Accordingly it may be argued that the sheriff court has, by virtue of Section 119(3)(b) EA 2010, power to order a defender found to have acted in breach of their obligations under the EA 2010 to make a suitably court agreed worded apology to the offended party whose rights not to be discriminated against because of religion or belief they have contravened.

[24] Under subsection 14(4) of the Defamation and Malicious Publications (Scotland) Act 2021 where an offer of amends is accepted in principle but the parties cannot reach agreement as to the steps to be taken by way of correction, apology, and publication, then the person making the offer may make the correction and apology in open court, *in such terms as are approved by the court* and give an undertaking to the court as to the manner in which the correction and apology will be published subsequently. In effect, the person making the offer is, in this situation, asking the court to fill gaps left in the offer of amends process by lack of consensus between the parties. Under subsections 14(5) and 14(6) where the parties do not agree on the amount to be paid by way of compensation, it then falls to the court to determine the amount of compensation payable, taking in to account among other things what the curt makes of the sufficiency of the apology and whether the manner of the publication of the correction and apology was reasonable in the circumstances.

4.63 Just in case the party found to have discriminated unlawfully against Ms Cherry might argue that the concept of an apology is too vague to be the subject of a court order, Section 3 of the Apologies (Scotland) Act 2016 usefully defines the term thus:

> "an apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence."

4.64 Though the issue has not often been addressed in many reported cases from the UK, there is no reason in principle why the Sheriff Court could not order the defender to make an apology for its wrongdoing in suitable court-approved terms. [25]

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[25] See for a general discussion from a common law perspective see Robyn Carroll "You Can't Order Sorriness, so Is There any Value in an Ordered Apology? An Analysis of Apology Orders in Anti-Discrimination Cases" (2010) 32 *University of New South Wales Law Journal* 360 and See too Robyn Carroll *"Apologies as a Legal Remedy"* (2013) 35 *Sydney Law Review* 317 which notes at 318 at 332:

> "The article draws upon the author's published research relating to apology orders, provides an extended analysis of the remedial role of apologies and discusses recent developments. In work to date, the following propositions have been advanced, (sometimes with co-authors):
>
> - A court exercising equitable jurisdiction has the power to order a person to make an apology, spoken or in writing, in private or in public and to publish the apology in some manner. The order will be one for specific relief. In most cases it would be in the form of a mandatory injunction; if the purpose is to enforce a promise to apologise it will be an order akin to specific performance;
> - When a plaintiff seeks an apology from the defendant a court should give consideration to the plaintiff's remedial choice in exercising its discretion and determining the appropriate remedial response to the defendant's wrongdoing;
> - It is not appropriate for a court to order a defendant to apologise unless this is a remedy sought by the plaintiff;
> - Aside from the usual discretionary factors that a court considers when deciding whether to grant specific relief, it needs to consider the remedial 'fit' between the aims and purposes of the cause of action and the remedy. Where the relief sought is statutory, a court will also be guided by statutory goals;
> - An ordered apology, and other forms of specific relief, have the potential to strengthen the vindicatory function of the law and to meet the psychological needs of plaintiffs;
> - An ordered apology has the potential to be 'good enough' to satisfy the purposes of a plaintiff and the law if an apology is understood as having multiple components that need not all be present in all circumstances.
>
> ...
>
> In *Burns No 2*, [2005] NSWADT 24 (16 February 2005), the second respondents, two radio presenters, made comments during a morning broadcast that were held to be unlawful vilification pursuant to the *Anti-Discrimination Act 1977* (NSW) s 49ZT(1) because they were capable of inciting severe ridicule of gay men. The complainant proposed that the presenters 'each read an apology, in specified terms, on air for seven consecutive days at specified times, and that Radio 2UE publish a written apology in four specified newspapers in specified terms' (at para 26) The Tribunal ordered the various respondents to publish or cause to be read and broadcast apologies as directed: (at para 47) In so doing it stated that in these circumstances (at para 29):

4.65 Certainly, the Inter-American Court of Human Rights has in some instances made orders requiring states to *apologise* for violations of human rights: see for example the decision of the Inter-American Court of Human Rights in *Cantoral Benavides v Peru. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88 §81.*

4.66 The issue of ordering an apology in discrimination claims has arisen in a number of decisions of the Upper Tribunal (Administrative Appeals Chamber), in the context of disability discrimination claims brought on behalf of students under the EA 2010, culminating in the decision in *The Proprietor of Ashdown House School v JKL* [2019] ELR 530 (albeit in the context of a different part of the EA 2010). In *JKL* the Upper Tribunal affirmed that the First-Tier Tribunal has the power to order apologies to be made in disability discrimination claims in the education context and offered guidance on the circumstances in which they may or may not be appropriate.

4.67 For these reasons it may be argued that that the sheriff court has the power to order the venue operators to apologise to Ms Cherry and should do so. This will play an important role in vindicating the pursuer's rights and helping to redress the damage caused to the pursuer and those associated with it as a result of the defender's unlawful decision to cancel this event.

Submissions on EA 2010 damages

> 'The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct".

See, too, from a Roman and ECHR law based legal system's perspective Andrea Zwart-Hink, Arno Akkermans and Kiliaan van Wees "Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction" (2014) *University of Western Australia Law Review* 100 at page 113

> "*Compelled Apologies, Freedom of Expression and the European Court of Human Rights*
>
> In the case law of the European Court of Human Rights (ECHR), several rulings can be found that concern the relation between the right to freedom of expression and compelled apologies. Claims to receive an apology have been awarded in several contracting states, such as Slovakia, Russia, Turkey, Ukraine and Poland. In none of the cases brought before the ECHR, the court has taken the position that the national courts' authority to grant an order to apologise *as such* constituted a breach of the right to freedom of expression. The ECHR considered that the national court's decision constituted an interference with the right to freedom of expression, and subsequently examined whether that interference was justified under Article 10 (2) of the Convention. The ECHR considers compelled apologies to be a restriction of the right of freedom of expression that can be permitted provided that the interference with this right is prescribed by law and 'necessary in a democratic society'."

4.68 As we have noted at common law in Scotland (in contrast to what appears to be the situation under English law) the primary approach to remedy in the face of a civil wrong is to make an order of specific implement, restoring the position of the parties to the position *ab ante*.

4.69 Damages is very much a secondary remedy coming into play only where the court considers that it is not possible to make relevant orders *ad factum praestandum*, or any such orders of specific implement would not be sufficient to result in full reparation to the party injured by the other's civil wrong.

4.70 Nonetheless an award of damages may be necessary in this case to afford full and proper reparation to the discriminated against person, having regard to the seriousness of the defender action in discriminating against them on ground of philosophical belief. A declarator alone may not suffice to reflect the seriousness of the statutory violations of the principles of equality law.

Solatium damages at common law

4.71 It is a prerequisite to any award of other than purely nominal damages –for it to be established both that there was a wrongful act (*iniuria*) and that that act has resulted in what the law recognises as damage (*damnum*). For example, simple distress, upset, injured feelings, indignation or annoyance at the wrong done will not, of themselves and without something more, be regarded as sufficient basis which to award damages at least in a private law action based on the common law tort/quasi-delict of negligence [26] (or on breach of contract [27]).

4.72 But where inured feelings/distress are associated with what the law recognises to be other "material damage", the law will allow for an award to be made under this head, commonly referred to in Scots law as *solatium* (although *solatium* most commonly

[26] See *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932

[27] In *Johnson v Gore Wood & Co* [2002] 2 AC 1 by Lord Bingham (at 27) :

> "The general rule laid down in *Addis v Gramophone Co Ltd* [1909] AC 488 was that damages for breach of contract could not include damages for mental distress. Cases decided over the last century established some inroads into that general rule: see, generally, *McGregor on Damages,* 16th ed (1997), §§ 98-104. But the inroads have been limited ... It is undoubtedly true that many breaches of contract cause intense frustration and anxiety to the innocent party. I am not, however, persuaded on the argument presented on this appeal that the general applicability of *Addis v Gramophone* Co *Ltd* should be further restricted. I would strike out Mr Johnson's claim for damages for mental distress and anxiety."

associated with personal injury claims, can arise in relation to any wrongdoing[28]) and in England as general damages.

4.73 In English law compensation is also sometimes awarded in tort claims under the head of "aggravated damages". [29] Aggravated damages are damages awarded as compensation for the claimant's mental distress, where the manner in which the defendant has committed the wrongdoing, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the claimant. [30] Such conduct or motive aggravates the injury done to the claimant, and therefore warrants a greater or additional compensatory sum. [31]

Moral/non-pecuniary damage

4.74 In *Gulati v Mirror Group Newspapers Ltd* [2015] EWCA Civ 1291 [2017] QB 149 Arden LJ observed at para 48: "Damages in consequence of a breach of a person's private rights are *not* the same as vindicatory damages to vindicate some constitutional right."[32]

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[28] See *Stair Memorial Encyclopaedia* vol 15 § 922 and *McLelland v Greater Glasgow Health Board,* 1999 SC 305 in which the Inner House held that a father was entitled to damages by way of solatium to compensate him for the severe shock and distress on his discovering only on birth that his child had Down's syndrome and increased stress and wear and tear on him in bringing up and caring for a child with Down's syndrome. See too the early 19th century case of *Hughes v Gordon* (1819) 1 Bli. 287 at 295 4 E.R. 109 a decision of the Appellate Committee of House of Lords in an appeal from the Court of Session at 113 in which the summons sought payment to the, pursuer of the sum of £500 sterling, in name of damages, and by way of recompense for the loss sustained by the pursuer through the said eviction, and "as *solatium* of the detriment arising from the loss of the pursuer's vote and right of electing at the said election meeting."

[29] See *Rookes v Barnard* [1964] AC 1129 per Lord Devlin at 1221:

> "[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant *where they aggravate the injury done to the plaintiff*. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate *compensation*."

[30] In *Thompson v Commissioner of the Police for the Metropolis* [1998] QB 498 where Lord Woolf MR made clear that although there could be a penal element in the award of aggravated damages, these were primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated or where those responsible had acted in a high handed insulting or malicious manner.

[31] See *Phonographic Performance Ltd v Ellis (trading as Bla Bar)* [2018] EWCA Civ 2812 [2019] Bus. L.R. 542 per Lewison LJ at § 11

[32] See to similar effect *Docherty v. Scottish Ministers* [2011] CSIH 58, 2012 SC 150 at § 54:

> "[D]amages payable in reparation are in Scotland fundamentally compensatory in character (Walker, *The Law of Damages in Scotland*, p 4; Stewart, *Reparation: Liability for Delict*, §§ A.28.002, A.28.003).
>
> There is English support for the view that compensatory damage may in some (probably limited) circumstances include a vindicatory purpose (*Ashley v. Chief Constable of Sussex*

4.75 Under this head Ms Cherry might seek an award of damages by way of reparation to compensate for, among other things the reputational harm and non-pecuniary loss which the pursuer suffered as a result of the defender's actions in unlawfully discriminating against it.

4.76 Such damages sought in the present case – whether under reference to the common law or under reference to Section 119(4) EA 2010 – may be said to be, like the pecuniary remedies available for breach of other fundamental common law constitutional rights, essentially vindicatory in character: cf *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 [2006] 1 AC 328, per Lord Nicholls at §§ 18-19; *R (Lumba) v Home Secretary* [2012] 1 AC 245.

4.77 As Lady Hale observed in *Lumba* [2012] 1 AC 245 which concerned a claim for damages based on the tort of false imprisonment:

> "213 But suppose there is no such harm. The claimant has nevertheless been done wrong. Let us also assume, as is the case here, that *the circumstances are not such as to attract punitive or exemplary damages*. Is our law not capable of finding some way of vindicating the claimant's rights and the importance of the principles involved? *A way which does not purport to compensate him for harm or to punish the defendant for wrongdoing but simply to mark the law's recognition that a wrong has been done*?
>
> 214 As Lord Collins of Mapesbury JSC explains, the concept of vindicatory damages has been developed in some Commonwealth countries with written constitutions enshrining certain fundamental rights and principles and containing broadly worded powers to afford constitutional redress (and also in New Zealand, which has no written Constitution but does have a Bill of Rights: *Taunoa v Attorney General* [2008] 1 NZLR 429).
>
> In an early article on the Canadian Charter, 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Canadian Bar Review* 517, Marilyn L Pilkington argued that an award of damages under section 24(1) of the Charter should not be limited by the common law principles of compensation. *In a proper case it might be designed to deter repetition of the breach*, or to punish those responsible or to reward those who expose it.
>
> In *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, the Privy Council upheld a modest award of exemplary damages for breach of a

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Police [2008] 1 AC 962, especially per Lord Scott of Foscote, § 22, Lord Rodger, § 60); but it is far from certain that that purpose would be legitimate in respect of an award of damages in reparation in Scotland.

Damages awarded for an infringement of the Scotland Act, like remedies under other constitutional statutes, appear to be essentially vindicatory in character (*Attorney-General of Trinidad and Tobago v Ramanoop* [2006] AC 328, per Lord Nicholls, §§ 18, 19; *Simpson v Attorney-General (Baigent's Case)*, [1994] 3 NZLR 667 (NZ Court of Appeal Wellington), especially per Cooke P, p 678; Beatson et al, § 7.169–7.172), albeit restitution may be an important element in quantifying the award."

constitutional right. *But there can be a middle course between compensatory and exemplary damages*.

In *Jorsingh v Attorney General* (1997) 52 WIR 501, de la Bastide CJ and Sharma JA in the Court of Appeal of Trinidad and Tobago both said, albeit *obiter*, that the remedies available under section 14(2) of the constitution were *not* limited by common law principles. Sharma JA said, at p 512, that:

> 'The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights … *Not only can the court enlarge old remedies; it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached*.'

215 Since then, the concept of vindicatory damages for breach of constitutional rights has been recognised by the Judicial Committee of the Privy Council, in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 and *Merson v Cartwright* [2005] UKPC 38 (Bahamas); applied to breach of constitutional provisions other than the fundamental rights and freedoms, in *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25 (St Lucia) and *Inniss v St Christopher and Nevis* [2008] UKPC 42 (St Kitts), which involved the dismissal of respectively a magistrate and a High Court registrar in breach of the procedures laid down in the Constitution; and applied to the breach of fundamental rights in *Takitota v Attorney General* (2009) 26 BHRC 578 (Bahamas), where the Board quoted from Lord Nicholls of Birkenhead in *Ramanoop*, at para 19:

> 'An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter future breaches …. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided …'

216 We are not here concerned with a written constitution with a broadly drawn power to grant constitutional redress. But neither are we concerned with a statutory provision, such as section 8(3)(4) of the Human Rights Act 1998, *with a narrowly drawn power to award damages.*

We are concerned with a decision taken at the highest level of Government to detain certain people irrespective of the statutory purpose of the power to detain.

The common law has shown itself capable of growing and adapting to meet new situations. It has recently invented the concept of a conventional sum to mark the invasion of important rights even though no compensatory damages are payable."

4.78 Thus, in addition to compensating for any pecuniary *losses* suffered by the party unlawfully discriminated against, an award of vindicatory damages might be said to vindicate the fundamental common law constitutional rights associated with respect for

freedom of expression, for pluralism and the freedom to hold and manifest one's philosophical beliefs which have been infringed by the defender's action in cancelling the booking of its venue for the *In conversation with Joanna Cherry* event.

4.79 As to the seriousness of the violation, by acting unilaterally in the way that it did the venue operator may be said to have demonstrated a one-sided aversion and opposition to the pursuer religious beliefs, "*taking a side*" on a contentious and highly sensitive set of issues, and their behaviour may be said to be the antithesis of how a responsible body should behave in a democratic society. [33]

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[33] Cf Sheriff J N McCormick in *Billy Graham Evangelistic Association v Scottish Event Campus Ltd*, 2022 SLT (Sh Ct) 219 (24 October 2022) at §§ 253-:

> "253. … [H]aving regard to the underlying purpose of the legislation as well as the European jurisprudence referred to by the pursuer, I am of the opinion that the word "damages" within section 119 does not extend beyond pecuniary loss to a recognition that the pursuer has suffered detriment by reason of not being able to hold (and having no real prospect of rescheduling) the event.
>
> 254. However, if this case is taken further and I am wrong in relation to vindicatory damages and/or just satisfaction and/or detriment, it might be helpful if I gave some indication of my view on quantification having heard the evidence at first instance. What I have to say has perhaps more relevance to vindicatory awards than to just satisfaction.
>
> 255. The range of awards quoted by the pursuer are case specific, depend on the gravity of the issue before the court and on the particular view of the court.
>
> 256. The defender terminated the contract in breach of a protected characteristic under the Equality Act 2010 and (it seems) has no real intention of rescheduling the event. Other events of the UK tour planned for 2020 have been rescheduled. The defender has provided no reason why this event could not be rescheduled other than proposing that fresh commercial terms would have to be negotiated. That sounded like a euphemism for "it will never happen".
>
> 257. Had it been competent to do so, I would have assessed an appropriate award at £50,000. This is not a fine. It is not payable to the state. It would represent damages over and above quantifiable pecuniary losses to reflect the loss (in its widest sense) of the opportunity to host a large evangelical event and the defender's ongoing refusal to reschedule. I would have assessed this award in the following broad manner.
>
> 258. The defender is a substantial institution having an international profile. In law it is a separate legal entity from its majority shareholder, Glasgow City Council, but which (as its largest shareholder) evidently holds considerable sway over its decisions. The defender bowed to that and to other pressures. Secondly, the venue was assessed as being the most appropriate venue for the pursuer's purposes in Scotland. I accept that it would not be easy to find an alternative. Thirdly, this was not a fringe event. In evidence witnesses for the defender described the event as "small". That may be true in purely commercial terms but I would view the event from the perspective of the hirer not the host.
>
> 259. The pursuer is a UK based organisation but it too has an international profile. The pursuer had sought a venue with the capacity of over 12,000 people. Pro rata therefore the sum which I suggest appears conservative. That said, I have not included an allowance for the fact that twelve thousand people were denied their choice/opportunity to attend. Fourthly, the cost to hire the venue was £50,000 being the sum by which the defender would have been enriched had the event proceeded (here I have not allowed for the pursuer having re-let the hall on the

4.80 The court should also when considering whether and how much to award under the head of EA 2010 damages should have in mind the authorities relating to "just satisfaction" damages for breaches of Convention rights.

4.81 In this context, it may be noted from the Strasbourg case law that damages awards can be made to compensate for many kinds of non-pecuniary loss and damage. In *Varnava v Turkey* (2010) 50 EHRR 21, the Court explained that:

> "224… (T)here is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the pursuer has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity… and those situations where the public vindication of the wrong suffered by the pursuer, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right
> …
> In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the pursuer as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case…"

4.82 In *Papageorgiou v Greece* (2020) 70 EHRR 36 in which the court found that the requirement under Greek law that a parent submit a solemn declaration to the school declaring that their children were not Orthodox Christians, in order for the children to be exempted from the otherwise compulsory religious education course. The school principal had the responsibility to check the documentation in support of the grounds relied on by the parents and draw their attention to the seriousness of the solemn declaration they have filed. The school principal was obliged to alert the public prosecutor if he considered that a false solemn declaration may have been submitted by the parents, since that would constitute a criminal offence under Greek law. The court considers that such a system of exemption of children from the religious education course was capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and that the potential for conflict is likely to deter them from making such a request and as such

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one hand nor the intervention of Covid on the other). Taking these factors in the round so to speak, the figure of £50,000 would seem an appropriate award of damages to reflect the initial and ongoing breach. Had I been persuaded that it was competent, that is the award I would have made."

was Convention incompatible. In considering the just satisfaction damages to be awarded the court noted as follows:

> "*A. Damage*
>
> 92 The pursuers in both applications each claimed €8,000 in respect of non-pecuniary damage.
>
> 93 The Government contended that the claim had been made without setting out any specific arguments or indicating the damage personally suffered by the pursuers as a consequence of the matters complained of. The Government considered that the finding of a violation would constitute sufficient just satisfaction under art.41.
>
> 94 The Court considers that the pursuers sustained, owing to the violation as found, non-pecuniary damage which cannot be redressed by the mere finding of a violation. Making its assessment on an equitable basis, as required by art.41 of the Convention, the Court awards jointly to the three pursuers [parents and school-child] in Application No.4762/18 the sum of **€8,000** and jointly to the two pursuers [mother and school-child] in Application No.6140/18 the sum of **€8,000** under this head.

4.83 As a further example of the level of awards made by the Strasbourg Court to individuals in religion related cases is *Barankevich v Russia* (2008) 47 EHRR 8 in which the European Court awarded **€6,000** to compensate a pastor who suffered a violation of his Article 11 ECHR rights when a state authority refused to grant him permission to hold a service of worship in a public park. In *Varnava v Turkey* (16064/90) it is established that courts are able to make awards for lots of different kinds of damage, in particular the statement at §224 that compensation could be awarded for "*evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity*".. Of particular interest is *Moscow Branch of the Salvation Army v Russia* (at §105) where the claimant there was awarded non-pecuniary damages for damages "resulting from the arbitrary refusal of re-registration and the negative publicity linked to its designation as a paramilitary organisation" (judgment, at [105]).

5 CONCLUSION: APPLICATION OF THE LAW TO THE FACTS OF THE CASE

5.1 It cannot be disputed that section 29 EA 2010 applies in the circumstances of the present case such as to require Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) not to discriminate when offering or refusing their services or use of their Festival venue premises in George Street. Section 29 EA 2010 plainly required Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) not to discriminate when making its decision on bookings or terminations in relation to the use of this venue.

5.2 The first branch of section 13 EA 2010 is plainly met: a decision unilaterally to terminate the booking for the event at which Ms Cherry was to appear constituted detrimental and less favourable treatment of her. And any continued refusal by Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) to agree to re-schedule/re-instate the event constitutes either a new or a continuing act of discrimination against Ms Cherry.

5.3 The key question is as to the other branch of section 13 EA 2010. The Court must ask whether, in taking the decision unilaterally to cancel the booking for the Cherry event - and thereafter in refusing to re-schedule the event for another mutually convenient date, or reinstate the original date - Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) was and is being influenced, in more than a trivial way by:

(1) The philosophical beliefs concerning the issue of "gender identity" which are attributed to Ms Cherry.

(2) The possibility of a "manifestation" by Ms Cherry of the philosophical beliefs concerning the issue of "gender identity" which are attributed to her at the booked event

5.4 Whether any less favourable treatment is *"because"* of a protected characteristic is answered by posing an objective question: *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741 at §§30, 66 and 71. In this case, that question is: would Joanna Cherry event have received the same treatment as any other booking but for philosophical beliefs concerning the issue of "gender identity" which are attributed to Ms Cherry ? And the evidence appears to be unequivocal on this. The cancellation decision has been made by Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) expressly under reference to beliefs which are attributed to Ms. Cherry concerning the issue of "gender identity".

5.5 The fact that Salt 'n' Sauce Promotions Ltd (The Stand Comedy Club) seeks now to paint the decision to terminate as a White Knight attempt to save their staff and public at large – and particularly those who hold the "gender identity belief" – from *offence* od "discomfort" is not a *defence* against a discrimination law claim by Ms. Cherry as the cancelled party.

5.6 Neither the common law nor the EA 2010 as interpreted in line with the HRA 1998 guarantees any right not to be confronted with opinions that are opposed to one's own convictions. To the contrary, freedom of expression constitutes one of the essential

foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As has been judicially noted:

> "89. … The United Kingdom has a long tradition of religious tolerance. Section 13 of the 1998 Act formalises and fortifies that tradition by compelling the courts to have "particular regard" to the importance of art.9, ECHR in any adjudication that "might affect" the exercise of that right by a religious organisation or its members. Article 9 ECHR protects both the right to hold a religion or belief (which is absolute) and the right to 'manifest' that religion or belief (which is qualified).
> …
>
> 95. … History is replete with grim memorials to the wreckage caused by religious intolerance. Intolerance of that peculiarly malignant nature is toxic and corrosive to social cohesion and harmony. It destroys community life. It is inimical to the pluralistic objectives of the ECHR." [34]

5.7 There is perhaps a current *social* (*i.e. not legal*) trend to consider that one should be protected from the expressions of others which cause one to feel uncomfortable or offended. It has led to the phenomenon commonly referred to as "cancel culture" where one side of an argument is simply silenced by the other. Such a trend is anathema to the freedoms that are protected in this country by the law. It is also anathema to healthy public debate. It has no basis in law, and it has no place in a modern democratic society.

5.8 The courts of England and Wales very recently summarised the position as regards the domestic law on freedom of expression (which cannot reasonably be said to differ between Scotland and England & Wales): *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [2020] HRLR 10 per Julian Knowles J at §§1-6. [35] Freedom of expression is *not*

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[34] *Apprentice Boys of Derry, Bridgeton v Glasgow City Council*, 2019 SLT (Sh. Ct.) 317 per Sheriff S Reid at §§ 89, 95

[35] In *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [2020] HRLR 10 per Julian Knowles J at first instance, Julian Knowles J held that that the decision of Humberside police (to record the claimant's expression on Twitter of his views on transgender issues as a "hate incident", and subsequently to visit the claimant's workplace and to contact him by phone to tell him that the matter had been so and advise him that, although his behaviour did not yet amount to criminal behaviour, if it escalated then it could become criminal, and that the police would then need to deal with it appropriately) had breached the claimant's right to freedom of expression under Article 10 ECHR. The claimant's further claim that Humberside Police Hate Crime Operational Guidance was in itself unlawful was dismissed by Julian Knowles J., but on appeal the Court of Appeal held that the Guidance was indeed unlawful on the basis that it was capable of unfairly stigmatising those against whom a complaint was made and constituted a disproportionate incursion into freedom of expression that was more than is strictly necessary: *R (Miller) v. College of Policing* [2021] EWCA Civ 1926 [2022] HRLR 6

restricted to matters that are uncontroversial or inoffensive. There is no protected right on the part of any individual not to be offended. [36] Indeed that is a central and recurring theme in freedom of expression case law. [37]

5.9 There will always be, in a pluralist society, strongly held beliefs that cannot be reconciled with one another. That does not mean that one or the other of those views should be prevented from being expressed.

5.10 What it does mean is that the court must provide properly effective remedies when those fundamental principles have been breached. And as noted in this case those remedies may include all or any of the pronouncing of a declarator, an award of damages (encompassing both solatium and arguably too an element of vindicatory damages even in the absence of any specific pecuniary losses), a court order for specific performance of the original agreement and/or a court ordered apology.

8 May 2023

AIDAN O'NEILL KC

[36] : *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 at §49
[37] : cf *Dojan v Germany* (2011) 53 EHRR SE24 at §68