IN THE EDINBURGH EMPLOYMENT TRIBUNAL
4104864/2024

BETWEEN:

SANDIE PEGGIE

Claimant

and

FIFE HEALTH BOARD (1)
DR UPTON (2)

Respondents

CLAIMANT SPEAKING NOTE
FOR 1 SEPTEMBER 2025

CONVENTION RIGHTS IN THE EMPLOYMENT TRIBUNAL

1. Domestic courts and tribunals cannot enforce human rights claims except as permitted or required by the Human Rights Act 1998

2. For the respondents' article 8 arguments succeed, they would have to clear all of the following hurdles:

    a. Satisfy the tribunal that the article 8 right to gender recognition includes a right to use single sex changing rooms on a self-identification basis. There is no ECHR or domestic case law that establishes this.
    b. Satisfy the tribunal that it would be a disproportionate interference with that right to operate single-sex changing rooms based on biological sex. There is no ECHR or domestic case law that establishes this. Bearing in mind that the article 8 rights of all the women who use a women's changing room are also engaged, and their privacy would have to be sacrificed in order to satisfy the article 8 claims of one

trans-identifying man, or at most a very small number of trans-identifying men, this is ambitious.

c. In the absence of ECHR case law establishing (a) and (b), satisfy the tribunal that it can be 'fully confident' that ECHR would find both (a) and (b).[1] Bearing in mind the need to take account of women's article 8 rights as above, this is not merely ambitious but wholly unrealistic.

d. Identify the specific provisions of the EqA which need to be read down to give effect to R2's article 8 rights.

e. Satisfy the tribunal that reading down the EqA in this way would not conflict with a fundamental feature of the legislation in question: *Ghaidan v Ghodin-Mendoza* at ¶33.

f. Show that the meaning imported by application of section 3 is compatible with the underlying thrust of the legislation being construed; the words must "go with the grain of the legislation". Such a finding would be in defiance of the judgment of the SC in *FWS*, which has authoritatively determined that a biological meaning of sex is a fundamental feature of the EqA.

3. The respondents' argument fails at each stage.

HIGGS ETC

4. R1 deals in its GoR with the complaint that its treatment of C was harassment related to her protected belief by way of a flat, unparticularised denial that it had engaged in unwanted conduct related to her belief. It now seeks to argue that its treatment of her is not properly analysed as related to her protected belief, or a manifestation of it, because it was a response to the objectionable manner in which she manifested her belief.

[1] (*R (AB) v Secretary of State for Justice* [2021] UKSC 28, [59]; *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [63].)

5. Adverse treatment in response to an employee's manifestation of a protected belief is not to be treated as having been "because of" that belief if it constituted an objectively justifiable response to something objectionable in the way the belief was manifested, the burden being on the employer to show that its response was objectively justifiable. So to succeed in such a defence, R1 must satisfy the tribunal of the following:

    a. the treatment complained of was in fact a response not to C's manifestation of her belief, but to something about the manner of her manifestation to which it took exception;

    b. the manner of C's belief was in the relevant way(s) objectively objectionable (having in mind that, given the need to interpret the EqA consistently with the ECHR, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under articles 9(2) or 10(2) ECHR: see ¶82 of Eady J's judgment cited with approval by Underhill LJ at ¶107);

    c. its treatment was an objectively justifiable response to that objectionable manifestation.

6. A *Bank Mellat* analysis should be done at both stages (b) and (c).

7. Those questions must be considered against the background of an appreciation of the foundational nature of C's article 9 and 10 rights: "the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and

even if its expression may offend": ¶94 of Eady J's judgment in the EAT, cited with approval by at ¶112 of Underhill J's judgement.

8. Failure at any of these stages is sufficient to defeat R1's "objectionable manifestation" argument. It fails at all three.

Reason for treatment

9. It is clear from the evidence (see C's written closing at ¶¶171-175) that C was put on special leave not because of anything about the manner in which she spoke to Dr Upton, but simply because she had told him he should not be in the women's changing room because he was a man. LC's answer to AG on 26 April was conclusive of that [264]. If C was put on special leave because she manifested her protected belief, it follows from the respondents' concession at ¶16 that that was the cause, too, of all the other matters of which she complains.

10. To similar effect, [T745:24-747:2] GM said that C's alleged question about BU's pronouns was the worst thing about the report of the Christmas Eve incident, but confirmed that even if C had just said "I don't think you should be here because you are a man and this is the women's changing room," that alone would have been a serious matter of misconduct.

Objectively objectionable

11. Taking R's factual contentions about the manner in which C manifested her protected belief at their highest, the complaint seems to be:

(i) C pointed out that Dr Upton was a man;
(ii) C asked Dr Upton what his chromosomes were;

(iii) later in the conversation, C referred to "that person in the prisons" knowing that she was referring to a convicted rapist.
(iv) C was "confrontational and aggressive" (but in a calm "almost rehearsed" manner and without raising her voice) in the manner in which she spoke to him, partly by reason of the fact that she repeatedly said that she felt intimidated by his presence there [T756].

(i) Language

12. The first of these cannot be objectionable manifestation: it is core to sex realist or gender critical belief that a man who says he is a woman is still in reality a man. It is because and only because Dr Upton is a man that C objected to his presence in the changing room. If she can't speak that simple truth without it being condemned as an objectionable manifestation, she can't in any meaningful way manifest her protected belief at all.

(ii) Chromosomes question

13. C's evidence was clear that she did not ask Dr U what his chromosomes were: she didn't need to, because she could tell that he was male just by looking at him.

14. But even if she had done, it would not have been an offensive question. Lottie Myles did not find a question about her chromosomes offensive. Compare the language used in *Higgs:* see ¶¶10 and 12. Underhill LJ's doubt about whether the school was entitled to take objection to those posts is clear from ¶¶158-9, but he assumes it in the school's favour before addressing the question whether the school's response was proportionate.

15. C was faced with a man repeatedly insisting that he was a woman. Although she did not mention chromosomes, it would have been perfectly understandable, and not

impolite, if she had.

(iii) Prisons comment

16. It's common ground that C said "It's just like that person in the prisons. C denies having known at the time that she was referring to the case of a convicted rapist in a women's prison, and there's no reason to doubt that denial. But again, even if she did know she was referring to a convicted rapist, this was towards the end of a conversation in which Dr Upton was repeatedly insisting that he was a woman.

17. Note the passage from *Martin v Devonshires Solicitors* [2011] ICR 352 quoted at ¶59 of Underhill LJ's judgment.

(iv) Confrontational and aggressive

18. This on the evidence seemed to have no substance beyond the fact that C stuck to her guns (as BU did) and made her point in a matter of fact and direct manner, maintaining eye-contact [T217].

19. Even in the teeth of the evidence the tribunal were to find that there was anything at all confrontational or aggressive about C's manner, see the same passage from *Martin v Devonshires*. An employee manifesting her protected belief is entitled not to be punished for doing so even if she was not in every respect a perfect model of restraint and patience when doing so; and especially so when the context for the manifestation is a complaint of a violation of her rights.

20. In all four cases, analysis of whether the manifestation was objectionable in the relevant sense has to be approached by way of the *Bank Mellat* four-step analysis. R1 has the burden of establishing objectionable manifestation, but has made no attempt to assist the tribunal with that analysis, simply saying at ¶43.6 "It is submitted that Mrs Peggie's conduct was an inappropriate or objectionable manifestation of her belief." That is not enough.

Treatment objectively justifiable?

21. But even if the respondents could accomplish what should be the fairly demanding task of satisfying the tribunal that it could justifiably take objection to the manner of C's manifestation of her belief, it would still have to show that its response was proportionate.

22. Again, the burden is on R1: see *Higgs* ¶77. It should do that, too, by reference to the four-step test in *Bank Mellat*. As an inevitable consequence of its failure to plead objectionable manifestation, it has not, either, explained in its grounds of resistance what objective its treatment of C was intended to serve nor why that was sufficiently important to justify the limitation of a Convention right; how its treatment of C was rationally connected to that objective; whether a less intrusive measure could have been used; or how the balance between the importance of the objective and the limitation of C's Convention rights favours its treatment of C.

23. In *Higgs*, Underhill LJ characterises the claimant's Facebook posts as "a series of derogatory sneers" and (at least possibly) as "stupidly rhetorical exaggeration", but has no difficulty in finding that dismissal was not "even arguably" a proportionate

response: see ¶163. There is nothing in what C said, even taking the respondents' case at its highest, that comes close to the level of "derogatory sneers" or "stupidly rhetorical hyperbole".

INDIVIDUAL CREDIBILITY

Sandie Peggie

24. The only witnesses who gave evidence about "intolerant comments" made by Sandie Peggie were Fiona Wishart and Lindsey Nicoll, whose contradictory and highly motivated evidence should be disregarded for the reasons explained at ¶¶613-618 of C's closing.

25. Beyond that, there is no evidence before the tribunal of Sandie Peggie holding intolerant beliefs or ill-will. Sandie Peggie was pressed on this in both February and again in July [T1763-7]. The tribunal is asked to remind itself of that section of Mrs Peggie's evidence and recall the manner in which she gave it.

26. The respondents focused on a message shared by Sandie Peggie on 31 August 2022 in the Benidorm group chat [1705] which contained 10 jokes about the 2022 floods in Pakistan. Her evidence as to those jokes was [T1739]:

> *I find looking at them, they are distasteful. At the time it was sent in dark humour expecting a shocked reaction from the girls. I think there was one laughing emoji. And it was purely for shock rather than laughter.*

27. Lindsey Nicholl accepted that this message was the only one R1 had seen fit to produce from a group chat dating back 7 years and numbering over 2,600 pages [T1632-4]. If, as R1 asks the tribunal to find, Sandie Peggie is an intolerant bigot, it is remarkable that it has not been able to find any further evidence of that in a 7-year chat. That single message of 31 August 2022, unpleasant though it is (as Mrs Peggie accepted) would be an inadequate and unsafe basis on which to conclude that she holds "intolerant beliefs" or that her evidence was untruthful.

28. Further Ms Russell's questions to Sandie Peggie laid bare the Board's conflation of commitment to the perseveration of single-sex spaces with transphobia [T1766]:

> *"What if someone has felt all their lives that they have been born into the wrong body and that their transness is about their true self; that's natural for them, isn't it?*
>
> *A. It is, but they are also still men and shouldn't be in a female changing area.*
>
> *Q. Don't they [i.e. trans people] deserve love as well?*
>
> *A. Definitely.*
>
> *Q. If you had a child that came out as trans you would still love that child, wouldn't you?*
>
> *A. Yes."* **[T1766]**

29. The respondents make the sweeping claim that Sandie Peggie was not truthful in her evidence; it is unfortunate that in making that serious claim they did not provide any examples in support of it. The tribunal is respectfully invited to find Sandie Peggie to have been a consistently careful, truthful and reliable witness.

Dr Kate Searle

Searches for productions

30. Dr Searle's email of 29 December 2023, to All ED Consultants **[720]** was only produced on 31 January 2025, following a direct request for it from C's legal representatives (30 Jan @ 16:20): "*In evidence the Claimant is likely to refer to her knowledge of a written communication Kate Searle sent to other Consultants on or about January 2024 about her situation/the third incident. The ET will want to see this document and so I would be grateful if it could be obtained for the purposes of inclusion in the JDB.*"

31. Once it became apparent that neither Respondent had properly complied with Judge Tinnion's Order, C made various further specific requests for productions and applications for orders and/or directions requiring further searches. On 5 February 2025, the emails "*Protected characteristic incident*" in the bundle at **[725]-[729]** were produced. On 7 February 2025, C made an oral application for further searches, part of which sought: "*... a comprehensive search of Kate Searle's email for any further mention of the incident, the complaint...*" [254][2]

32. In responding to that application Ms Russell said:

> *So that is three things, and I think that that probably then leaves the outstanding issue of Kate Searle's emails, at – my instructions are that there is not anymore, but a further check is being done, because, of course, I have been having discussions with Mr Watson this morning, and impressing upon him the importance of this. I will need to speak with Mr Watson as to the timeframe for that search. It is – it will be done before Kate Searle gives evidence*. **[T/267]**

33. A little later, Ms Russell returned to the issue of Dr Searle's searches and said [T273]:

[2] The exchange set out in the Merged Transcript T254-256 is worthwhile reviewing in full.

> *"... there is a couple of confirmations, but I am now going to turn to the other documentary issue, which was the Kate Searle material. She has performed another search. There are four emails. I am not sure at the moment, I have not seen it, whether it is emails, or email chains. And Adam is putting together a bundle of that, and will be sending it over this afternoon, and we have managed – let him know the correct page number as well, so that will be paginated, and sent over. So that is the Kate Searle material."*

That further, and purportedly complete search yielded the emails produced at [753]-[759]**.** Accordingly, both C and the tribunal were led to believe that Dr Searle had, by the afternoon of 7 February 2025, produced all the documents falling within Judge Tinnion's Order and in her possession.

34. Despite that, further efforts at producing documents falling within Judge Tinnion's Order threw up further emails from, or to, Dr Searle which were not produced in February. See for example: [1223], [1224], [1226], [1239], [1490]. Most significantly, those efforts produced the email from Maggie Currer dated 05 January 2024 [1253].

35. When it was put to Dr Searle that the reason the email [1253] had not been produced until April, despite bearing precisely the same terms and recipients as other emails [725]-[729] which were produced earlier (albeit still after the deadline for compliance) was that it had been deliberately withheld, her evidence was as follows:

> *"I cannot comment whether this email was withheld. I don't think you can prove that these two emails are linked. And when we were all asked by the IT department*
> *to do a thorough search of our emails, we did so and this email was produced*

Q. But you were asked to do some degree of search of emails on previous trawls and this email wasn't produced, was it? You didn't produce it in time for the first part of this hearing in response to the 3 January order?

A. It would appear not." [T/1125]

36. In C's submission, it is inconceivable that any search producing the email thread at [725] – [729], with the subject line "Re: Protected characteristic incident" with the recipients including Esther Davidson, Kate Searle, Maggie Currer, Melvin Carew, Louise Curran and Lauren Harris would not also produce the email at [1253] with virtually the subject line "*Protected characteristic incident*" and the same recipients. That's before considering the likelihood that, as was put to multiple witnesses, all of the emails in fact belong to the same chain.

37. Accordingly, C invites the tribunal to infer that, on balance of probabilities, when Dr Searle searched her emails before and during the February 2025 Hearing, this email would have been found but was not produced at that time. In those circumstances, Dr Searle withheld the email at [1253], it only being produced in April 2025 – most probably when a different recipient of that email searched their inbox and produced it to the Board.

Contact with witnesses

38. Dr Searle admitted in evidence that having learned of Rehanna Ashraf's identity (probably whilst accompanying Dr Upton to his investigatory interview with Angela Glancey) she sought out Rehanna Ashraf whilst

trying to round up support for Dr Upton: "*I asked her to see if her story supported Beth's.*" [T1179]. Dr Searle accepted that she had no business making contact with an individual who was witness to a live internal investigation and a potential witness to pending ET proceedings [T1179]. Dr Searle's conduct demonstrates a startling willingness to step around standard protocols and procedure for the benefit of Dr Upton and at the cost of integrity of the investigation and tribunal processes.

39. The same tendency was also reflected in Dr Searle's intemperate email of 29 December to all ED consultants [720]; her email to Dr Upton of 12 January [729] inviting Dr Upton's written complaint "Hate Incident" to be shared with 7 individuals [725] (including witnesses to the internal investigation); her insistence that she be allowed to attend Dr Upton's investigation interview, despite also being a witness [1128] and her attempts to dissuade Lottie Myles from revoking Sandie Peggie's suspension [T1011] Given all of that, it is all the more remarkable that despite being listed as witness at Sandie Peggie's conduct hearing she did not attend [1602]–[1614].

40. In the circumstances, the Tribunal is invited find Dr Searle to have been and unreliable and untruthful witness and to treat her evidence with considerable circumspection.

Isla Bumba

41. Isla Bumba's evidence was contradicted by that of other witnesses. She told the Tribunal that she had never given anything other than "generic advice" about the access to the female changing rooms in A&E. That

evidence was contradicted by Esther Davidson who was clear that she had informed Isla Bumba of Sandie Peggie's concerns [T/470]. The documentary evidence also refers to advice having been taken from Isla Bumba by Jamie Doyle in the immediate aftermath of Sandie Peggie first having raised concerns [1186].

42. Insofar as the CoP on which Isla Bumba told the Tribunal she relied when giving the advice itself permits the exclusion of trans people in certain circumstances, the jeopardy for Isla Bumba in admitting that she gave advice she did (i) knowing that a female member of staff was raising concerns about privacy and having to undress in a changing room also used by Dr Upton and (ii) knowing nothing about Dr Upton (see the example about privacy in a shops changing rooms [1122] and 13.59 and 13.60) is stark. For Isla Bumba, on that basis alone there is a clear motivation for giving a less than full account of the circumstances in which she gave her advice.

43. As to the question of her own sex Isla Bumba told the Tribunal: "*Nor do I know what my own body is made of biologically.* ***I can hazard a guess that I would be female, but no one knows what their chromosomes are or their hormonal composition****, unless you've had that tested, and I at least have not and I am not sure if Beth has.*" **[T/94]**

44. Isla Bumba therefore appears to ask the Tribunal to accept that she is genuinely unable to fathom her own sex or anyone else's in the absence of chromosomal testing and hormonal testing. If that were true, Isla Bumba as Equalities and Human Right's Lead for NHS Fife would be incapable of

delivering any policy or intervention directed at sex discrimination on the basis that the sex of any individual employee or the proportions of men and women in the workforce at large was unknowable absent medical testing. Rather than being an admission of incompetence, the Tribunal is asked to find that Isla Bumba's evidence as to her inability to determine her own sex was untruthful.

45. The tribunal is invited treat Ms Bumba's evidence, too, with caution.

Esther Davidson

46. Before Esther Davidson gave evidence, Ms Russell made a number of statements, on instructions, as to the role Esther Davidon played in investigating Sandie Peggie's alleged misconduct: "*I have got confirming that Esther Davidson's role was only to collect the second respondent's statement, and she did not conduct an investigation herself.*" [T/266] "*Then the second confirmation is the – about Esther Davidson's role. The first respondent's position is that she was not an investigator, and nor did she complete any sort of investigation, in any real sense of the word. What she did do is receive Beth Upton's statement. And she also, as we can see at received Louise Curran – from Louise Curran, a document, the document at 731.*" [T273] **"***My instructions are that Louise Curran volunteered that statement, that we see at page 7-3*" [T275].

47. Esther Davidson's own evidence was hazy as to her role as *investigator "for me, when I asked Beth for that statement, that was to see - or to actually determine what I was going to have to investigate. I had not gone down the formal investigation process.* [T/501] and *"I had not actually commenced the*

investigation. I had looked at who the witnesses were to be, I had referred Sandie to OHSAS, to ensure that she was in a good state of mind for the investigation, and to ensure she had support from the occupational health service. I did not commence the investigation." [T/502] and "*I did not do the investigation, so, I am sorry, I have no insight into what happened with that, yes*" [T/503]

48. The reality was, Esther Davidson was appointed investigation manager on 03 January by Gillian Malone; she completed the Investigation Planning document; drafted the terms of reference; identified witnesses; took HR advice on how to complete the investigation; requested Dr Upton's statement from him; received chasers from HR as to the progress of her investigation [1262]. She was the investigator from 03 January 2024 – c.27 February 2024; that she altogether failed to progress the investigation she was charged with completing during that period is a different matter.

49. Esther Davidson also repeatedly told the Tribunal that completely undocumented patient safety concerns were a reason for Sandie Peggie's suspension. [T504]

50. Ms Davidson evidence should be treated with caution.

REMAINING MYSTERIES

51. One mystery that remains after hearing all the evidence is why the patient care allegation swung in and out of view during the course of the chronology. The facts of that were discussed extensively at ¶596-624 of C's 26 August submissions. It is significant: the patient care allegations are relevant to the determination of issues 5(a),

5(b), 5(c), 5(d), 5(e), 5(g), 5(h), 5(j), 24(a), 24(c), 24(d), 24(e), 24(f), 24(g), 24(h), 24(i), 24(j), 25(b) & 28(b).

52. On the Board's own chronology, the patient care allegations were not being formally investigated until about 9 May 2024, when Dr Upton told Angela Glancey of them (after all the issues listed above, the latest detriments 5(j) and 24(j) having accrued on 28 March 2024). If those allegations were considered credible at any earlier point from which they were known about (being 29 December for Dr Searle and 3 January at the latest for Esther Davidson, Gillian Malone, Jamie Doyle, Angie Shepherd and the HR professionals), there has been no explanation of why there were not actively pursued and investigated from that time.

53. In C's submission, in respect of every issue the patient care allegations touches this is a matter from which the tribunal can properly draw inferences, in accordance with *Royal Mail v Efobi* [2021]. That is to say, C having established the facts from which the tribunal could decide that a contravention of the Act's provisions (here, s.26 7 s.27) had occurred by s.136 the burden passes to the respondents. In the absence of any explanation as to why the patient care allegations appear and disappear, there is no basis on which the tribunal can properly find that the respondents have discharged the burden of proof on those issues.

54. Another mystery which remains is why Esther Davidson remained investigating manager until about 27 February 2024, when, from at least 5 January 2024 [1253] it was known to her, Dr Searle, Dr Currer and Ms Malone [761], amongst others that Esther Davidson could not investigate because she would be a witness to the investigation. Esther Davidson could not be asked about this because (in breach of Judge Tinnion's 3 January Order) the documents which made clear that her prior involvement was

recognised internally as being a bar to her remaining investigator were not produced before the hearing. No other witness was able to assist the tribunal with this mystery, which necessarily effects the tribunal's determination of issues 5(c), 5(j), 24(c), 24(j), 25(b) & 28(b). In C's submission, as above, the tribunal should draw adverse inferences in respect of those issues from the Boards's failure to explain the above.

BIOLOGICAL SEX

55. The Respondent's position on the definition of biological sex is set out, in response to C's 30 July submissions at ¶¶33-36 of their 25 August submissions. At ¶35, R's say:

> *Mrs Peggie's insistence (at para 17) that the "law's approach to biological sex is*
> *determined by a congruence of chromosomes, gonads and genitals at birth" is wrong. Chromosomes are not the defining characteristic of sex:...*

56. That submission seems to flow a failure (or refusal) to comprehend "congruence of chromosomes, gonads and genitals at birth". "Congruence" means agreement or harmony; compatibility. By definition, congruence is a quality that exists as between multiple things. Something cannot be congruent with itself; that is why gonads and genitals at birth as well as chromosomes are referred to. C does not suggest that chromosomes are "the defining characteristic of sex" as a matter of law.

57. *Forbes-Sempill* does not assist the respondents. The tribunal is encouraged to read the judgement in full. The Second Petitioner in that case did not demonstrate congruence of chromosomes, gonads and genitals. He was what Lord Hunter referred to as a "true hermaphrodite" (or alternatively to suffer from Klinefelter's Syndrome, which as was established in evidence, is a DSD). In that case, Forbes-Sempill was considered to be inter-sex (or, put differently his sex was indeterminate).

58. As set out by Lord Nicholls in Bellinger ¶6 – 7, transgender people are to be distinguished from intersex people. In the cases where an individual is intersex and suffers a DSD, the law has a particular regime for determining sex which involves consideration of 7 factors. That is to say, in cases of indeterminacy of sex (as presented by intersex people) the court will go beyond the *Corbett* criteria in determining sex. None of this is of any relevance here.

59. There has been no intimation in the pleadings, in the evidence or in submission that Dr Upton suffers from a DSD such that any special approach needs to be taken to the determination of his sex. Quite the contrary, the pleadings reflect that Dr Upton is a "trans woman" [¶4, 58]. Dr Upton's evidence as to what a trans woman is was as follows [T331]:

> *So a transwoman is a woman who was assigned male sex at birth, and now wishes to live their life as a woman*

60. FWS at ¶171 says: "*... Although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women are on the face of the definition only differentiated as a grouping by the biology they share with their group.*" It is clear that the Supreme Court was able to operationalise and apply that concept with ease in its approving discussion of the authorities (*Corbett* and *Bellinger)* which do define it (for all the reasons provided in the July submissions).

61. That the respondents consider authorities that do not help them to be "outdated" is a view to which they are entitled; but it is not a basis on which this tribunal can sidestep the reasoning of the Supreme Court:

62. Insofar as the respondents suggest that Lord Nicholl's in *Bellinger* is inconsistent with modern medicine given his reference to "psychiatric disorder", this Tribunal is not constituted to or capable of adjudicating on the state of modern medicine. In any event, s.3(2) GRA 2004 requires transpeople applying for a GRC to produce evidence of a diagnosis of gender dysphoria. Therefore, legal recognition of acquired gender under the GRA is predicated on diagnosis of psychiatric disorder, and *Bellinger* remains entirely consistent with the post-*GRA* domestic landscape.

    a. The attempt to limit the application of *Bellinger* and *Corbett* to "cases about the validity of marriages" is wrong as a matter of law. In *A v Chief Constable of West Yorkshire* [2004] UKHL 21 as per Lady Hale at [59] and Lord Bingham at [3] the Corbett criteria reflect the domestic legal position at large – no just confined to marriage cases.

THE TRIBUNAL'S ABILILTY TO DRAW INFERENCES BEYOND s.136 Eq A

63. The Tribunal is asked to draw inferences on matters not related directly to contraventions of the Equality Act. This short sections sets out the Tribunals ability to do so on the basis applicable principles of evidence.

64. In civil cases, the standard is the balance of probabilities, and the tribunal must ask whether is it more probable than not that the fact in issue occurred, taking into account all the evidence and inherent probabilities. It does not have to be satisfised that no reasonable person could fail to draw the inference (*W v Greater Glasgow Health Board* [2017] CSIH 58; *Principal Reporter v N' Scottish Ministers v Stirton*).

65. Ms Russell repeatedly asked Mr Borwick whether Dr Upton having lied was the only possible explanation for the otherwise inexplicable issue of the pre-dating of the phone notes. With respect, whilst that line of questioning might have some basis in the English law principles relating to the drawing of inferences, it is contrary to the Scots law position. The tribunal must draw reasonable inferences but need not be satisfied that the inference sought is the only one. The decision turns on whether the inference is a reasonable one in light of all of the evidence and the relevant standard of proof. In C's submission, the inferences and findings sought at ¶673 are more than reasonable in light of the evidence set out at ¶672.

66. Furthermore, in making a finding as to Dr Upton's untruthful evidence in respect of collateral matters, any prior positive assessment of Dr Upton's credibility will be nullified as set out by Lord Greene MR in Yuill v Yuill [1945] CA cited in CD v ND [2025] CSIH 12:

> *If it can be demonstrated to a conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.*

NAOMI CUNNINGHAM
CHARLOTTE ELVES

67. 1 September 2025