CO/4116/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

B E T W E E N:

AUTHENTIC EQUITY ALLIANCE C.I.C

Claimant

- and -

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

DEFENDANT'S SKELETON ARGUMENT FOR PERMISSION HEARING 6 MAY 2021

References *: The bundle page x and paragraph y (where applicable) is referred to as* ***[PB/x/§y]***
Time estimate *: 1 day*
Essential documents/ suggested pre-reading *: Statement of Facts and Grounds ("****SFG****")****;*** *Summary Grounds of Resistance ("****DGR****"); Claimant's Reply ("****R****"); Code of Practice paragraphs 13.57-13.60*

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Authentic Equality Alliance ("**the AEA**") seeks to challenge paragraphs 13.57-13.60 of the Code of Practice on "*Services, Public Functions and Associations*" ("**the COP**") promulgated by the Commission for Equality and Human Rights ("the **EHRC**"). The challenged paragraphs cover "*Gender reassignment discrimination and separate and single-sex services*" pursuant to the Equality Act 2010 ("**the EA 2010**"). On 24 March 2021 Goose J ordered an oral hearing to determine AEA's application for permission, and, if permission is granted, AEA's cost capping application. The following is the skeleton argument submitted by the EHRC and deals with the AEA's claim, whether it is out of time and the cost cap.

2. Both parties agree that if the COP contains errors of law, it is amenable to judicial review. It is also agreed (or at least does not appear to be disputed by the AEA) that the relevant paragraphs of the COP should be read as a whole and that the COP is not to be read as a statute or legal treatise. It is intended as an accessible and practical explanation to help service-providers and users understand their rights and obligations under the EA 2010, and, given the detailed public consultation process, and the EHRC's expertise

in this area, the Court should be slow to interfere with the EHRC's assessment of how best to communicate practical advice to those who use the COP it is respectfully submitted.[1] Unless some clear error of law is identified it should be a matter for the Commission how best to frame the Code. The particular issue that arises in the present case is the way in which the COP deals with exclusion of trans-persons ("**TPs**") from the separate or single-sex service ("**SSS**") of their "*acquired gender*". It concerns when it will be lawful, under the EA 2010, for a service provider to apply a policy or practice of "*trans-exclusion*" (i.e. a policy or practice of excluding TPs from the SSS of their "*acquired gender*" and insisting, for example, a transwoman not use a women's refuge or use men's changing rooms / toilets, or disabled or gender-neutral facilities if they are available).

3. The COP states that "*the [EA 2010] does permit the service provider to … exclude a [TP from a SSS of their acquired gender]*" provided "*the exclusion is a proportionate means of achieving a legitimate aim*" (COP paragraph 13.57). The COP goes on to explain that "*Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service*" (COP paragraph 13.60). As originally pleaded, AEA's case was that it had identified a "*fundamental misconception*" and "*fundamental error of law*" underpinning the COP.[2] It concerned the position of TPs with and without a gender recognition certificates ("**GRCs**") (referred to by the AEA as "TPCs" and "TPNCs"). In that regard it should be noted that many TPs will not have GRCs including those who may have lived for many years, have physically transitioned, and present entirely, in their "*acquired gender*". While, as AEA correctly states, a TP with a GRC may not have physical features of their acquired gender.[3]

4. The AEA's originally pleaded case was that the EHRC's "*fundamental error*" was a failure to recognise the "*distinction, when applying the [SSS] exceptions to people with the gender reassignment protected characteristic, between a TPCs and TPNCs*".[4] The error said to be identified was that AEA considered that application of a trans-exclusionary policy or practice required justification if applied to TPCs, but not when applied to TPNCs. AEA's position was that, insofar as the COP suggested that exclusion of TPNCs from the SSS

[1] DGR/§6 and 28
[2] SFG/§20 and §22
[3] CSkel/§4(iv)(2)
[4] [SFG/§20

of their acquired gender needed to be "*a proportionate means of achieving a legitimate aim*," and required consideration of a "*balance*" between their needs and those of "*other service users*" who might be affected by their presence, that was wrong. The COP should have stated that that only applied to TPCs.

5. If AEA was right it would have been surprising. As set out above, and as the ECJ has recognised,[5] a trans-person, even if they do not have a GRC, may have lived for many years in their acquired gender. It would be surprising if they could be excluded from a SSS of that gender without any justification being required. In the EHRC's DGR of 9 December 2020 it was pointed out that was not the position, and that AEA's case was based on a flawed understanding of the EA 2010.[6] In AEA's Reply to the DGR of 8 January 2021 it maintained its position, but on a new basis.[7] It now appears from AEA's skeleton of 28 April 2021 that the argument may have been abandoned (though as it remains AEA's pleaded case it is dealt with below). It now appears to be accepted that a trans-exclusionary practice or policy needs to be justified for <u>both</u> TPNCs and TPCs.[8] AEA sets out a detailed explanation for how the legal route by which that outcome is reached is different for TPCs and TPNCs, but recognises that "*in almost all cases that does not change the outcome*"[9] (i.e. it will either be justified to exclude both TPNCs <u>and</u> TPCs from the SSS of their acquired gender, or it will be justified to exclude neither). For the purpose of an academic debate there may be some purpose of discussing the different legal analysis for TPNCs and TPCs, and whether there is some subtle distinction between the justification defence in EA 2010 s 19(2)(d) and Schedule 3 para 28,[10] but where AEA now accepts that exclusion of both TPNCs and TPCs from the SSS of their acquired gender requires justification, and accepts that whether it is a TPNC or TPC that is excluded will almost never affect the outcome of a case, it is not clear what "*fundamental error*" of law it is now said the COP contains.

6. Instead, the case now put forward is that, AEA claims, the COP should reflect AEA's belief that if it is permissible to have a women's service, it will "*very likely*"[11] or "*almost*

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[5] <u>*MB v Secretary of State for Work and Pensions*</u> (27 June 2018, C-451/16)
[6] DGR/§4(i) and 21-26
[7] R/§2-11
[8] CSkel/§27(iv) for TPNCs and §27(v) for TPCs
[9] Cskel/§4(iii)
[10] Cskel/§18-24
[11] C/skel §24 & 27(vi).

always"[12] be justified to exclude trans-women from it. That is so, AEA believes, whether or not a transwoman has a GRC.[13] AEAs view is that the rights of "*the large class of women who fear for their space being intruded upon by males*" will always outweigh any impact on trans-women of being excluded from the facility of their acquired or lived-in gender.[14] It is not clear if that is said to be the case as a matter of law or simply AEA's belief as to where the right balance lies. The AEA is entitled to its opinion. But the fact the EHRC does not agree with it is simply not a proper basis for judicial review. It is unarguable that the EHRC's failure to agree with the AEA that excluding TPs from SSS is always or almost always justified is irrational or otherwise not open to it. Insofar as the objections are to the ways the EHRC has decided to draft particular sentences in the COP, that is within the expertise of the Commission and it is not arguable its judgments in that regard are unlawful.

FACTUAL BACKGROUND

Debates around access by trans-persons to single sex services

7. The question of when a trans-person can be lawfully excluded from a SSS of their acquired gender has been the subject of considerable controversy over the past few years. There has been a heated, and often fractious, debate between those who suggest a fully trans-inclusive approach (that trans-persons should be able to access the single-sex organisations, institutions and services of their acquired gender without restriction), and those who advocate for the exclusion of trans-persons, and in particular trans-women, from such organisations, institutions and services. The AEA advocate an approach that aligns with the latter position in the debate.

8. The EHRC's position has consistently been that there are rights and interests which require balancing. The EHRC recognises that trans-persons (with and without GRCs) have rights and interests in being able to access services of their acquired gender. The EHRC also recognises the importance of separate and single-sex service provisions, and the potential detriments that can arise if trans-persons are allowed to access the service of their acquired gender. That is expressly recognised in COP paragraph 13.60.

[12] R/§12
[13] C/skel §24-25 for TPNCs and 27(vi) for TPCs.
[14] C/skel §27(vi).

9. The position that a balance is required is also reflected in the EHRC's publicly expressed views. In 2019, the EHRC's former Chair stated: "*One only has to look at the debate about transgender rights to see how polarized this discourse has become. It's a good example of complicated issues and competing rights. We must reach a sensible accommodation to ensure that the rights of both women and the transgender community are protected.*"[15] He stated in 2020 "*we have to acknowledge there are lots of difficult issues in relation to women-only spaces, but shouting at each other doesn't help anybody. We need to move beyond that toxic debate so talking to each other, engaging in respectful listening even if you disagree, that's the way forward*". It is thus not accepted that the EHRC has taken a "*partisan*" approach as the AEA asserts.[16] It has consistently stressed the difficult balance and the competing rights and interests and has sought to reflect that in the COP. The fact that some, such as the AEA, may disagree with the EHRC's position does not justify its accusation that the EHRC is biased or that it is guilty of "*misconduct*".[17]

Alleged impact of the COP

10. The COP was laid before Parliament in 2010 and came into force in 2011. It is a key part of AEA's case that there are "*numerous examples of organisations in the public, private and voluntary sectors that have adopted EHRC's unlawful guidance*".[18] It is said that the impugned paragraphs of the COP "*frankly misrepresent the law and will encourage (and have encouraged) an incorrect and unlawful approach to service provision which is likely to be significantly to the disadvantage of women and their protected rights*"[19] and AEA states that the COP has "*led to an assortment of misleading guidance being issued by a number of bodies*".[20] The guidance referred to is exhibited to the witness statement of Ms Sinnott, AEA's director, and she quotes various extracts said to state, incorrectly, that trans-persons must always be allowed to use the SSS of their acquired gender.[21]

11. A striking feature of the guidance said to have adopted the EHRC's COP "*unlawful approach*", is that not a single one refers to the COP or quotes from it, and it is not explained why it is asserted the guidance is based on the COP. Indeed, insofar as the

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[15] PB/169
[16] PB/184
[17] PB/184
[18] See witness statement of Ms Sinott at §38 [PB/59].
[19] R/§19
[20] SFG/§49(ii)
[21] See guidance at PB/283-525 and quotations at PB/59/§39-57.

AEA's primary objection is to guidance suggesting trans-persons must be allowed to access the SSS of their acquired gender, that is directly inconsistent with the COP. As set out below, the COP makes clear, in terms, that trans-persons can be excluded from a service where that is justified, and, indeed, the EHRC has taken steps to bring that to the attention of service-providers whose guidance erroneously suggests trans-persons must always be permitted to use the SSS of their acquired gender irrespective of the needs of, or detriment to, others. A striking feature of the present litigation is that, if the AEA or others affected have identified guidance or practices of <u>other</u> public or private bodies' that does, in fact, reflect incorrect statements of law, it is not clear why they are not being pursued. Instead, a claim has been brought in relation to the EHRC's COP which simply does not contain the alleged errors.

12. AEA's claim about the impact of EHRC's COP goes further. Ms Sinnott refers to a series of "*detriments*" to women if transwomen are admitted to women-only spaces. She refers to "*media reports of attacks on women by transwomen in single-sex facilities*", including a sexual assault of a ten-year old girl in a toilet and an assault by a trans-woman on a female prisoner[22]. Ms Sinnott refers, more generally, to "*hundreds of vulnerable patients being sexually assaulted in mixed-sex NHS mental health wards*" by men (ibid), to women being filmed by men in changing rooms and other ways in which women's dignity can be undermined by the presence of men in single-sex spaces.[23] Ms Sinnott then says this: "*EHRC's incorrect guidance … is a direct cause of such detriment and risk to women*".[24]

13. The EHRC has done a significant amount of work seeking to protect and promote the rights of women to be safe from violence and abuse in public and private spaces. There is no evidence of any kind that the EHRC's guidance is a "*direct cause*" of, or indeed has any connection to, the sexual assaults or other appalling incidents Ms Sinnott refers to. The suggestion that they have been "*caused*" by the EHRC's guidance, or anything else the Commission has done, is entirely baseless. The AEA is entitled to disagree with the EHRC's analysis, but it is wrong to make unsubstantiated allegation that the EHRC's guidance has led to women or girls being sexually assaulted or otherwise abused. It is

[22] PB/53/§21(a)
[23] PB/54/§21(b)] & (b)
[24] PB/55/§22

hoped that the AEA will take the opportunity of the hearing in the present proceedings to unequivocally withdraw the allegation.

RELEVANT STATUTORY PROVISIONS AND EXTRACT FROM THE COP

14. The relevant sections of the EA 2010 and the Gender Recognition Act 2004 were set out in the annex attached to the DGR, and paragraphs 13.57-13.60 of the COP are set out at DGR §19. The Court is invited to read the paragraphs in full.

EHRC'S SUMMARY RESPONSE TO CLAIM

15. The following is the EHRC's response to (i) the claim the COP is underpinned by a *"fundamental misconception"* of law and (ii) the specific sentences in the COP with which the AEA takes issues.

(i) Claim that the COP is underpinned by a fundamental error of law

(a) AEA's pleaded case

16. AEA's pleaded case was that it had identified a *"fundamental misconception"*[25] and *"fundamental error of law"*[26] underpinning the COP. The error was the EHRC's failure to recognise the "*distinction, when applying the separate sex and single-sex exceptions to people with the gender reassignment protected characteristic, between a TPCs and TPNCs*".[27] AEA contended:

> *In short, if a separate sex or single-sex service can be justified in accordance with Schedule 3, paragraphs 26 - 27 EA 2010, then all those who are in law of the opposite sex can lawfully be excluded. This is because a TPNC remains in law a person of their birth sex and cannot therefore have a right to access a separate sex or single-sex service provided for the opposite sex. The suggestion that their exclusion from such a service requires separate justification as a proportionate means of achieving a legitimate aim (applying Schedule 3, paragraph 28) is a fundamental error of law.*[28]
>
> *A TPNC who was born male and is excluded from a women's changing room because provision is single-sex would not be suffering discrimination on the basis of the protected characteristic of an intention to reassign. They would simply be treated in the same way as anyone else of the same legal sex (male) and excluded on that basis. To discriminate on the basis of a protected characteristic requires different treatment <u>because of</u> that protected characteristic… Discrimination might arise on the basis of the gender reassignment protected characteristic if a TPNC born male but dressing as a woman was denied access to a mens' changing room <u>on that basis</u>. The fundamental error in EHRC Guidance is that*

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[25] SFG/§20
[26] SFG/§22
[27] SFG/§20
[28] SFG/§22

> *it assumes that TPs (in particular TPNCs) are automatically entitled to access separate sex or single-sex services provided for people of the opposite sex from their birth sex. The Guidance has wrongly elided the requirement (i) not to discriminate against, for example, men who are transitioning because they are transitioning (TPNCs); with (ii) a requirement (subject to Schedule 3, paragraph 28) not to discriminate against women who were previously men but have become as a matter of law women because they have a GRC (TPCs).*[29] (emphasis in original)

17. AEA's case was thus that under the EA 2010, and unlike for a TPC, the exclusion of TPNCs from the SSS of their acquired gender was incapable of constituting gender reassignment discrimination, and TPNCs could be excluded from the service of their acquired gender even if that pursued no legitimate aim and was not proportionate. According to the AEA, the COP was legally flawed for not making that clear.

18. For the reasons set out in the EHRC's DGR that analysis is wrong. Exclusion of a TPC from the SSS of their acquired gender, as the AEA correctly recognise, is direct discrimination on grounds of gender reassignment as is it is less favourable treatment from others of the same sex on grounds of gender-reassignment. It therefore needs to be justified pursuant to EA 2010 sched 3 para 28 if it is to be lawful. The exclusion of a TPNC from the SSS of their acquired / lived-in gender is, however, also capable of constituting gender reassignment discrimination. The error, as the EHRC pointed out, was to fail to appreciate the exclusion of a TPNC from the SSS was capable of being <u>indirect</u> gender reassignment discrimination, and so also needed to be justified if it were to be lawful (whether under EA 2010 s 19(2)(d) or Schedule 3 paragraph 28). It is clear from the AEA's pleadings that it had proceeded on the erroneous assumption that the only potential form of discrimination was <u>direct</u> discrimination. Its pleadings referred only to EA 2010 s 13 and made no mention of s 19 which prohibits indirect discrimination. AEA stated that "*To discriminate on the basis of a protected characteristic requires different treatment because of that protected characteristic*".[30] That is wrong. Indirect discrimination does not require a difference in treatment "*because of [a] protected characteristic*". It arises where a "*provision, criterion or practice*" ("**PCP**") places those with a protected characteristic at a "*particular disadvantage when compared to those without [the protected characteristic]*" and where the PCP is not justified (see EA 2010 s 19).

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[29] SFG/§49(v)

[30] SFG/§49(v).

(b) AEA's position in its Reply

19. Following submission of EHRC's DGR, the AEA put forward a different case. It appeared to accept that a TPNC is entitled, unless it is a *"a proportionate means of achieving a legitimate aim"* (EA s 19(1)(d)), not to be subjected to a PCP which places trans-persons at a disadvantage when compared to non-trans person. The AEA did not dispute that a trans-exclusionary policy (i.e. a policy that allows someone to access a SSS only if the service corresponds to the sex they were ascribed at birth) is a PCP within the meaning of EA 2010 s 19, and thus that, if it disadvantages trans-persons when compared to non-trans persons, it will be unlawful unless it can be justified. The argument in the Reply was that EHRC was wrong to consider a trans-exclusionary policy is likely to disadvantage trans-persons as compared to non-trans-persons.[31] Therefore, according to the AEA, the COP was wrong to inform service-providers that, as a general matter, such a policy requires justification. That is not a good argument.

20. A trans-exclusionary policy means, for example, a sign on a toilet or changing room stating "*women's changing rooms / toilets – you may only use the facility if you were born female*" and vice versa for the male facility. If someone going into the changing room / toilets looked as though they might be trans, presumably staff would challenge them and tell them they had to use the facility of their "birth sex" (or a disabled or gender-neutral facility if one is available). The EHRC is entitled to reach a view that such a policy will disadvantage trans-persons more than non-trans persons. Indeed, it is not clear how the contrary could be seriously argued. It is difficult to imagine any significant number of non-trans persons who could properly say they are negatively affected by such a trans-exclusionary policy. The same obviously cannot be said for trans-persons, a much greater proportion of whom would clearly be negatively affected. It may not be that *all* trans-persons would be adversely impacted. That is irrelevant. A greater proportion of trans-persons will be disadvantaged by a trans exclusionary policy than non-trans persons. Indeed the whole purpose of a trans-exclusion policy is to prevent trans-persons from being able to use the services or facilities of the gender with which they identify. Such a policy may be justified, but to suggest the EHRC was wrong in concluding it would proportionately disadvantage trans-persons as compared to non-trans persons was unsustainable.

[31] R/§4-11

21. In its Reply the AEA had two arguments. The first was that the EHRC "*wrongly assumes that the entire pool of persons sharing the protected characteristic (i.e. transsexual persons) would suffer detriment [because of a trans-exclusionary policy] irrespective of their individual circumstances*".[32] That was said not to be the case as there might, for example, be "*a male-to-female transsexual person without a GRC [who] would [not] objectively be distressed or caused discomfort by their use of a male-only toilet or changing facility*" (ibid). That is not a good argument.

22. There is no requirement in an indirect discrimination claim that "*the entire pool of persons sharing the protected characteristic … suffer detriment*", indeed if that was the case it would very likely be direct discrimination. In *Essop v Home Office* [2017] UKSC 27 §27 Baroness Hale set out the "*salient features*" of indirect discrimination:

> *A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage…. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory.*

As Baroness Hale explained (in a case where the PCP was the requirement to pass a test which a smaller proportion of older and non-white candidates passed; emphasis added): "*The group was at a disadvantage because the proportion of those who could pass was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).*" Thus a requirement that police officers are 5ft 6" would not cause "*the entire pool*" of female candidates to suffer a detriment, and, indeed, would disadvantage some men. It is obviously, however, a PCP that disadvantages a higher proportion of women and would require justification. The same is true of a trans-exclusionary policy. It may not disadvantage all trans-persons, some of whom may be content to use the SSS of their gender as ascribed at birth or a gender-neutral facility, but it plainly disadvantages a greater proportion of those with the protected characteristic of gender reassignment than those without. It therefore needs to be justified if it is to be lawful.

[32] R/§7

23. The AEA's <u>second</u> response was that, it asserted, it is "*rarely*" or "*almost never*" the case there is a "*binary choice*" between a male and female-only facility or service as there is "*almost [always]*" a disabled facility alongside exclusively male and female ones.[33] It is not clear on what basis the assertion is made and how it was said to render the COP unlawful. In any event, it does not assist AEA's case.

24. That is because:

    a. <u>First</u>, the fact that some service-providers have gender-neutral facilities alongside male and female-only facilities may be relevant to justification (it may reduce the relative disadvantage of a trans-exclusion policy for TPs). It plainly does not remove all disadvantage. If a service-station operates a trans-exclusion policy, a TP living in their acquired gender is forced to use the disabled toilet or to "out" themselves as trans and use toilets different from the gender in which they may present and live their lives. That is an obvious disadvantage when compared to a non-TP who can simply use the toilet of the gender with which they identify.

    b. <u>Second</u>, it is not clear on what basis AEA asserts that there are "rarely" only male and female facilities. Some service-providers may have gender-neutral toilets or other mixed facilities alongside male and female-only provision. But others do not. It is not clear, for example, most shops have gender neutral changing areas or that most places providing women-only services (such as a refuges or drop-in centres) provide a gender-neutral equivalent. In the COP the EHRC sought to produce concise, readily understandable and generally applicable advice. It is entitled to conclude it is appropriate, as a general matter, to advise those adopting a trans-exclusion policy that they should consider if it is justified.

(c) AEA's position in its skeleton argument

25. From AEA's skeleton it appears it is no longer arguing that a trans-exclusionary policy does not disproportionately disadvantage TPs as compared to non-TPs.[34] As set out above, it appears AEA is, in fact, no longer arguing that there was a "*fundamental error of law*" in the COP because it failed to recognise that there is no need to justify the application of a trans-exclusionary policy to TPNCs. It is also no longer apparently being

[33] R/§8 & 12

[34] CSkel/§27(iv)(d)

suggested that there is any significant difference, in practice, between TPCs and TPNCs in terms of whether a trans-exclusionary policy needs to be justified and it is accepted that for both it will need to be a proportionate means of achieving a legitimate aim. Instead the argument now put forward is that the EHRC is wrong not to agree with AEA that a trans-exclusionary policy or practice is "*very likely*" or "*almost always*" justified (for both TPCs and TPNCs).

26. AEA's view is that a trans-exclusionary policy or practice is "*plainly and obviously justified … because at centre of the reason of the exclusion is the biological identity of the person excluded. It is by reason of their biological identity that the excluded persons are considered to be a threat to the privacy and dignity of women*".[35] AEA's view is that:

> *The fair balance is in favour of protecting the large class of women who fear for their space being intruded upon by males, rather than the relatively small class of persons who possess the gender reassignment protected characteristic, and who wish to use the female facilities which align with their acquired gender but who may claim to suffer distress or embarrassment if required to use the facilities of their natal sex or other available facilities such as a mixed facility or a disabled toilet.*[36]

27. It is not clear what legal error AEA is now alleging. It is not clear whether AEA considers that the EHRC is acting irrationally in not agreeing with its opinion that trans-exclusion is almost always justified. If so, that is dealt with below. Or it may be that AEA's case is that as a matter of law trans-exclusions from a SSS is always justified. It may be AEA's case that, if the operation of a SSS does not constitute unlawful <u>sex</u> discrimination because EA 2010 Schedule 3 paragraph 26 or 27 applies, then (as a matter of law) excluding a trans-person from the SSS cannot constitute <u>gender reassignment</u> discrimination. If that is AEA's argument, it is obviously wrong.

28. Schedule 3 paragraph 26 provides (emphasis added):

> *(1) A person does not contravene section 29, <u>so far as relating to sex discrimination</u>, by providing separate services for persons of each sex if—*
> *(a) a joint service for persons of both sexes would be less effective, and*
> *(b) the limited provision is a proportionate means of achieving a legitimate aim.*

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[35] Cskel/§25.
[36] Cskel/§27(vi)

A shop may decide to provide separate changing facilities to men and women. That would not constitute unlawful sex discrimination if joint changing rooms would be "*less effective*" and the separate provision "*is a proportionate means of achieving a legitimate aim*".

29. The fact a service-provider may have a paragraph 26 defence to a sex discrimination claim, clearly does not mean the exclusion of a trans-person from the changing room of their acquired gender is, as a matter of law, incapable of constituting gender reassignment discrimination. The service-provider may fail to justify exclusion under EA 2010 s 19(2)(d) or it may fail to satisfy Schedule 3 paragraph 28. Paragraph 28 provides (emphasis added)

> *(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.*
> *(2) The matters are – (a) the provision of separate services for persons of each sex;*

If AEA was right, paragraph 28 would be otiose. Paragraphs 26 and 27 would simply have provided a defence to sex discrimination and gender reassignment discrimination. Parliament has recognised that provision of separate services to men and women may not be unlawful sex discrimination, but can still be gender reassignment discrimination. There are thus two separate defences and a separate requirement to justify gender reassignment discrimination. That is not surprising. It could be justified to have men and women's changing rooms, but not necessarily justified to exclude all transwomen from the women's changing room (see the example at paragraph 13.58 of the COP). Or it may be justified to have women's refuges but not necessarily to exclude trans-women from them. The argument that, as a matter of law, it is always justified to exclude TPs from SSS, if doing so is not sex discrimination is inconsistent with the statute.

30. Alternatively, it may be AEA's case that the EHRC is irrational not to share its opinion that the "*fair balance*" in this area is "*almost always*" struck by insisting TPs "*use the facilities of their natal sex*" (or mixed facilities if they are available). The AEA is entitled to that opinion. As set out above, the question of whether TPs should be excluded from the SSS of their acquired gender is a matter on which strong views on both sides have been expressed. Some agree with AEA's position. Others do not. The suggestion, however, that the EHRC is acting irrationally in not agreeing with AEA's view of where

the correct balance should lie, and is acting unlawfully in not reflecting it in the COP, is unsustainable. The EHRC would also respectfully suggest the Court should be very wary about entering the debate and determining whether trans-exclusion is or is not "*almost always*" the correct approach. It is not a matter suitable for determination by the Court as an abstract issue. If a service-provider is adopting practices or policies of trans-inclusion (or indeed trans-exclusion), and someone considers that to be unlawful, they can challenge it. The court can decide whether, on the facts of the particular case, a fair balance has been struck. That is the appropriate context to determine these issues, and not by way of an abstract challenge to the COP.

(ii) Challenge to the detail of the COP

31. If the above analysis is correct, the AEA's primary challenge fails. The AEA's remaining criticism of the COP relate to the EHRC's assessments of how best to frame the guidance in the Code, with which AEA disagree. They betray no arguable errors of law.

<u>Paragraph 13.57</u>

32. The AEA objects to the first sentence of COP paragraph 13.57 which states: "*If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present*". AEA Reply quotes the sentence out of context and states that it is "*entirely inapposite and not a proper reflection of the law*"[37]. The AEA, however, fails to quote the next two sentences which state: "*However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim*."

33. It is unarguable that paragraph 13.57, read as a whole, is unlawful. It should not be contentious that service providers should generally respect the gender identity of a trans-person, for example by using their preferred pronouns and chosen name. Indeed, the Employment Tribunal has held it lawful to dismiss a doctor who refused to call TPs by their preferred pronoun or title (Mr, Ms etc) because that would be discrimination or

[37] R/§15

harassment.[38] The second and third sentences of paragraph 13.57 make clear, however, the EA 2010 permits service providers to offer a different service or exclude TPs if that can be objectively justified. That is the start of the section to which AEA objects. It sets out the law correctly and makes clear to anyone reading the COP what is the applicable legal test for justifying a trans-exclusionary policy. On no proper basis can the paragraph, taken alone or with the rest of the section, be said to misstate the law.

Paragraph 13.58 and example

34. The AEA has no apparent objection to paragraph 13.58 which explains the circumstances in which a trans-person may need to access services of their "birth sex". Nor does it object to the example which follows: "*A clothes shop has separate changing areas for male and female customers to try on garments in cubicles. The shop concludes that it would not be appropriate or necessary to exclude a transsexual woman from the female changing room as privacy and decency of all users can be assured by the provision of separate cubicles*."

35. Indeed, it is clear from the example, as well as the rest of the COP, that much of the AEA's criticism is simply misplaced. The AEA repeatedly asserts that the COP states that TPs are "*automatically*" entitled to access SSS of their acquired gender.[39] That is a statement made nowhere in the COP and is obviously inconsistent with it. Instead, as paragraph 13.57 and 13.60, and the example in paragraph 13.58 make clear, a TP can be excluded from a SSS if it is "*a proportionate means of achieving a legitimate aim*". As the example illustrates, the exclusion is unlikely to be justified if inclusion is possible while the "*privacy and decency of all users*" is respected. That accurately describes the law.

Paragraph 13.59

36. COP paragraph 13.59 states that "*Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary*." The AEA objects to that sentence.

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[38] See *Dr Mackereth v DWP* (18 July 2019) (ET 1304602/2018). The ET held at para 201 "In our judgment, refusing to refer to a transgender person by his/her/their birth sex, or relevant pronouns, titles or styles would constitute unlawful discrimination or harassment under the EqA."

[39] SFG/§49(i), (ii), (iv)

37. The context, as set out above, is the statement at paragraph 13.57 that a trans-person can be excluded from a SSS if that is a proportionate means of achieving a legitimate aim. The EHRC considers that where someone is "*indistinguishable from a non-transsexual person of that gender*" they should "*normally*" be treated according to their acquired gender, and that, in order to establish it is proportionate to exclude them from a service, "*strong reasons*" will be required. The EHRC considers that to be correct and helpful advice to service-users as to how a court is likely to decide a case. The EHRC considers, for example, that if a shop has separate cubicles for changing, "*strong reasons*" would be required for insisting that a trans-woman who is "*for all practical purposes indistinguishable from a non-transsexual person of that gender*" use the men's changing area. The EHRC consider it is helpful to service users and service providers to know that is the EHRC's view and it is unarguable that it is irrational for the EHRC to reach it.

Paragraph 13.60

38. It is notable that the AEA does not discuss the second half of paragraph 13.60. It states: "*Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users…*" That is plainly a correct assessment of the law and entirely unobjectionable. It also makes clear, again, trans-persons do not have an "*automatic*" right to access facilities of their acquired gender but that a "*balance*" needs to be struck. The fact the AEA considers that balance should always, or almost always be struck, by a policy or practice of trans-exclusion does not make the COP unlawful.

39. The AEA objects to the first part of the first sentence of paragraph 13.60 which states "*As stated at the beginning of this chapter, any exception to the prohibition of discrimination must be applied as restrictively as possible…*" Read in the context of this chapter of the COP, and the COP as a whole, that reflects the law. The principle of equal treatment requires any exceptions to the prohibition of discrimination within the EA 2010 to be construed as narrowly as possible. The first sentence of paragraph 13.60 simply reflects this principle and any suggestion that it is unlawful is unarguable.

40. The AEA objects to the second part of the first sentence of paragraph 13.60 which states "*the denial of a service to a transsexual person should only occur in exceptional circumstances*."

As set out above, the start of the section makes clear that a trans person can be excluded from a SSS if it is a proportionate means of achieving a legitimate aim. The EHRC considers that "*denial of a service*" to trans-persons is generally only likely to proportionate in "*exceptional circumstances*". If, for example, a trans-man wishes to use a swimming pool and is told that he cannot use the men's changing rooms (because the swimming pool adopts a trans-exclusionary policy) and that he cannot use the women's changing rooms (because he physically appears male) and so is denied the service, the EHRC's view is that that is only likely to be lawful in "*exceptional circumstances.*" As paragraph 13.60 makes clear "*the provider will need to show that a less discriminatory way to achieve the objective was not available*". There may, of course, be cases where it is not possible to provide a service to a trans-person, but the EHRC consider it helpful to indicate that such instances are likely to be the "*exception*". It is unarguable that in reaching that view, or expressing it in the COP, the EHRC has acted *ultra vires*.

41. Finally, the AEA objected in its Grounds to the second sentence of paragraph 13.60 which states "*A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances*". Again, the EHRC submits that is a helpful and correct summary of the legal position. For example, suppose a women's refuge has a general policy that it will provide services to transwomen, but will not allow transwomen (including those with a GRC) to stay overnight in the refuge because of concerns about the impact on other service users. As the COP makes clear, service-providers can have "*policies*" in this area. However, if a transwoman comes in the middle of the night with young children fleeing from a violent partner, it is the EHRC's view that the refuge should consider whether it is necessary, having regard to all the relevant factors in her case and the situation in the refuge that night, to refuse to allow her and her children to stay the night. The EHRC considers a court is likely to find a blanket refusal in those circumstances to be unlawful. That is not an irrational or otherwise unlawful view. Indeed, it appears that it is now accepted by the AEA that a decision-maker, applying a policy, will need to be prepared to consider an individual who argues it should not be applied to them.[40] It is not clear, therefore, on what basis the objection to the COP is now pursued.

[40] Cskel/footnotes 10 and 11.

TIME BAR

42. Claims for judicial review must be brought "*promptly and in any event not later than 3 months after the grounds to make the claim first arose*" (CPR 54.5(1)). AEA asserts in its Claim Form that the date of the decision under the challenge is "*23 September 2020*", when the EHRC responded to the AEA's letter before claim, and it is also stated that the refusal to amend the COP is a "*continuing breach of the law*".[41] Neither statement is correct.

43. In relation to secondary legislation, which is made on a particular date but continues to be applied, the Courts have made clear that the legislation should not be regarded as a "*continuing act*" that can be challenged whenever a claimant chooses. There is no reason to treat the COP any differently (and in this case the COP was laid before Parliament before it came into force much like secondary legislation). In relation to subordinate legislation there are two possible dates for calculating limitation which depend on the nature of the challenge. If the challenge is a "*person specific*" challenge (i.e. one brought by a person affected by the application of the legislation) a claim should be brought within three months of their being affected (see *R (Badmus) v SSHD* [2020] EWCA Civ 657 §63 and discussion at §59-87). If the challenge is brought in the "*abstract*" (i.e. by an NGO or other body that is not itself directly affected by legislation), the claim should be brought within three months of the legislation being made (ibid).

44. There is an argument that the present case is an "*abstract*" challenge to the COP, and the claim should have been brought within three months of the Code being made. The EHRC does not, however, wish to discourage those who consider parts of a COP are unlawful to enter correspondence with the Commission. It would therefore invite the Court to take a more generous approach to limitation. It cannot, however, be correct that those who wish to challenge a Code can bring a claim at any time of their choosing. At the latest, once a person becomes aware of what they consider to be an unlawful provision in a Code, they should draw it to the EHRC's attention without delay. Once it is apparent that the EHRC is not amending the Code, as requested, proceedings should be issued within three months.

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[41] PB/8

45. The relevant chronology is set out in the DGR at §11-17. It is, in summary as follows:

(i) On 6 April 2011 the COP came into force.

(ii) On 17 February 2020 the AEA wrote to the EHRC.[42] It complained about the EHRC's position on access of trans-persons to SSS and raised the objections in the present case (namely the apparently "*prescriptive … language*" used by the EHRC, the reference to "*exceptional circumstances*" in which trans-persons could be excluded from SSS).

(iii) On 23 March 2020 the EHRC replied.[43] It accepted that some terminology it used in its guidance was outdated, and that some references to gender ought to have been references to sex. The EHRC stated this would be altered. As to the issues that arise in the present case, the EHRC made clear its position. Quoting from its "*Core Guidance for Business*", the EHRC set out its position that it considered the COP reflected the law. AEA cannot have been under the misapprehension that the EHRC agreed with its analysis and intended to change the COP.

(iv) On 26 March and 7 April 2020 the AEA wrote re-iterating its position.[44]

(v) On 3 July 2020 the EHRC replied.[45] It outlined a timetable for amendments to guidance which it had agreed to make in March. The EHRC rejected the suggestion it had acted unlawfully and again repeated its position, reflected in the COP and which the AEA challenges in these proceedings.

(vi) On 26 August 2020 the AEA sent a letter before claim.[46]

(vii) On 23 September 2020 the EHRC responded.[47]

(viii) On 17 November 2020 proceedings were lodged**.**

46. The AEA claim to have identified the EHRC's misinterpretation of the law sometime prior to it writing to the EHRC on 17 February 2020. On 23 March 2020 the EHRC wrote to the AEA making clear its position on the matters now raised. The EHRC's position was again repeated in the letter of 3 July 2020. The fact that the EHRC repeated its position for a third time in the response to the letter before claim of 23 September 2020, does not make that the date the grounds of challenge first arose. The AEA could not

[42] PB/165
[43] PB/178
[44] PB/182 & 184
[45] PB/186
[46] PB/204
[47] PB/262

have believed prior to 23 September 2020 that the EHRC agreed with its analysis and was in the process of amending the sections of the COP that are now impugned. Indeed, if it had so believed it would not have sent a letter before claim on 24 August 2020. The grounds to make the present claim first arose, at the latest, on 23 March 2020 when it was clear that the EHRC was not amending the COP in the way the AEA now seeks. Proceedings should have been issued by 22 June 2020. No good reason was put forward for the failure to do so in the AEA's Grounds or evidence.

47. The AEA it skeleton now seeks an extension. There is no good reason for doing so:

(i) The AEA assert that the first time it became "*unequivocally clear*" the EHRC was not intending to amend the COP in the way sought was on 23 September 2020.[48] There is no evidence to that effect. If AEA's position was that until 23 September 2020 it thought the EHRC was agreeing with it and amending the COP that would be very surprising given the correspondence between the parties.

(ii) The AEA asserts that EHRC's letter of 23 March 2020 did not properly engage with its complaints as "*AEA's subsequent letters of 26 March, 7 April and 23 April make clear*".[49] Whether AEA considered the EHRC's response to be adequate is irrelevant. What matters is whether AEA could have thought after 23 March, and until 23 September, that the EHRC had agreed to make the changes sought.

(iii) The AEA asserts there would be no detriment to "*good public administration*" in allowing the case to proceed, and that, on the contrary, it would give "*clarity to the law and enhance the standing of the Code*".[50] The EHRC is entitled to assume, if concerns are raised about a code or guidance, and proceedings not issued three months after it has responded, that it will not be subject to litigation. It is detrimental to "*good public administration*" for the EHRC not to know, when it is dealing with stake-holders or the public, whether its guidance is in the process of being challenged. It is also not a case where there is a compelling public interest in the claim being heard out of time. As set out above, the EHRC's position is that the case is unarguable. Even if that is wrong, it is not a strong

[48] Cskel/§35(d)
[49] Cskel/§35(c)
[50] Cskel/§35(e)

case in which some clear illegality has been identified. There is also no evidence any service-provider has ever acted unlawfully in reliance on, or as a result of, the COP in the decade since it came into force. If there are any instances of service-providers acting unlawfully (whether as the result of the COP or otherwise), they can be challenged in the courts. The fact that, as far as the EHRC is aware, no such challenge has been brought, still less been successful, since the COP was promulgated suggests there is no widespread illegality in this area and no pressing need for allowing an out-of-time challenge to proceed.

COSTS CAPPING ORDER ("CCO")

48. For the reasons set out above, the EHRC submits that permission should be refused. If that is rejected, the EHRC does not, in principle, object to a CCO being granted. AEA has, however, already raised £88,650 for the purpose of this litigation. No doubt more will be raised if permission is granted. The caps suggested by the AEA is that if it loses it should pay only £5,000 of the EHRC's costs (or perhaps £10,000), and that if it succeeds the EHRC should pay costs of £35,000. That is not fair and appropriate.

Legal principles

49. Pursuant to Criminal Justice and Courts Act 2015 s 89(1)(d) one of the factors to which the court is required to have regard in deciding whether to make a CCO, and "*what the terms of such an order should be*", is "*whether legal representatives for the applicant for the order are acting free of charge*". Pursuant to CPR 46.17(1)(b)(ii) an application for a CCO must be supported by evidence of "*the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings*". That involves the applicant setting out the rates its legal team are charging if they are not acting pro bono.

50. The purpose of those provisions is not to prevent CCOs being made if legal representatives do not work for free. It is, however, clear that where legal representatives are not acting pro bono claimants are expected to be able to find lawyers willing to act at modest rates. The Court of Appeal made clear in R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 at §76 that:

> *The overriding purpose of exercising [the PCO] jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public*

> *importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.*

51. In Corner House the Court suggested that the "*The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest*" (§76(ii)). In subsequent cases the courts have accepted there is no absolute rule that cost caps are to be assessed on the basis of the fees of a "*single … junior*". It is, however, clear that an applicant for a CCO is required to find representatives willing to work at modest rates. In R (Medical Justice) v SSHD [2010] ACD 70 Cranston J accepted it was appropriate for the claimant to instruct a QC but went on at §27 to hold: "*I am quite clear that the claimant's costs must be restricted. There is no way that counsel undertaking this work can expect anything like their ordinary rates Anyone claiming to act in the public interest, or undertaking public service, must expect that their services will be charged out at a discount. … Those on the claimant's side cannot expect to be [paid at commercial rates]. The reciprocal cap must take that into account*".

Application to present case

52. AEA's position is that if it loses it is appropriate for it to pay only £5,000 (or perhaps £10,000) of the £88,650 it has raised towards the EHRC's legal costs as the rest is required for its legal fees. Otherwise, it is said, "*the Claimant's lawyers [will be conducting] this litigation of general public importance at a significant financial loss*" which is said to be "*unfair and unreasonable*".[51] AEA's position is that its legal representatives must be paid at least £78-83,000 whether the cases succeeds or not. On 28 April 2021, AEA complied with its obligation pursuant to CPR 46.17(1)(b)(ii) to indicate its likely costs which total £132,523.40 (inc VAT). That does not come close to being "*modest representation*" for what is likely to be a one-day judicial review. It is a matter for AEA how much it wishes to pay its legal team, but if commercial rates are being paid that cannot be used a basis for insisting that only 5% (or perhaps 10%) of the money raised for this litigation should go to the EHRC's costs if the case fails. The purpose of a CCO is to enable public interest litigation to be brought. It is not to prevent public bodies recovering their costs if they win so the claimant's lawyers can conduct commercial litigation. EHRC's proposed cap

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[51] Cskel/§38

of £25,000 is modest and would still leave AEA being able to pay its legal team over £60,000 if it loses. That is plainly appropriate.

53. As to the reciprocal cap on AEA's recoverable costs, the statutory duties imposed on the EHRC are set out in the DGR at §44. As is also explained, the EHRC has been subject to significant budget cuts since it was established, and public funds may be significantly further constrained in the coming years as the costs of dealing with the Covid pandemic are met. Unlike the AEA, the EHRC does not have in excess of £88,000 solely for this litigation, and any money it pays in legal fees, to its own representatives or in costs to the AEA, is money that cannot be spent discharging its statutory functions. In those circumstances the EHRC submits that a reciprocal cost cap of £25,000 is appropriate. That would still leave AEA able to pay its legal representatives over £110,000 if it succeeds which is fair and appropriate in all the circumstances.

CONCLUSION

54. For the reasons identified above and in the DGR, it is respectfully submitted that permission should be refused. The EHRC seeks its costs in preparing its response to the claim, as set out in the Costs Schedule accompanying its DGR.

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30 April 2021