Appeal No. UKEAT/0378/12/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 5 February 2013
Judgment handed down on 20 September 2013

Before

HIS HONOUR JEFFREY BURKE QC

MS V BRANNEY

MRS D M PALMER

DR D DREW — APPELLANT

WALSALL HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID McILROY (of Counsel) Instructed by: Waldrons Solicitors Wychbury Court Two Woods Lane Brierley Hill DY5 1TA
For the Respondent	MS ELEENA MISRA (of Counsel) Instructed by: Mills & Reeve LLP Solicitors 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

UNFAIR DISMISSAL – Reasonableness of dismissal

The Appellant was dismissed from his employment as a paediatric consultant. He worked in a multicultural and multi-faith department. Problems within the department arose because the Appellant habitually used Christian references in his professional communications. An internal investigation made a recommendation, among others, that he should keep his personal views and religious beliefs to himself and should not impose them on others. The Appellant did not accept the recommendation and took out a grievance. It was agreed that the Loyal College should carry out an independent review; the College appointed a panel of 2 consultants and an HR practitioner. The panel, after investigation, produced a report which made a number of recommendations; one of them was that the Appellant should refrain from any religious references in his professional communications.

All the relevant staff accepted the panel's recommendations, except the Appellant who refused to accept the recommendation set out above and maintained that position when a 3rd investigation, carried out by an independent HR consultant advised disciplinary proceedings, which were carried out and led to the Appellant's dismissal.

The Appellant claimed that he had been discriminated against on religious grounds in 14 respects, had been victimized and had been unfairly dismissed. The Employment Tribunal rejected his claims.

On appeal multiple grounds were argued; all failed. The ET had correctly directed themselves to follow the guidance given by the EAT in **Ladele** (2009 IRLR 154) and had correctly applied that guidance. They had identified correctly a hypothetical comparator (having rejected the Appellant's actual comparator, a conclusion which was not attacked on appeal) as someone whose relevant circumstances were the same as those of the Appellant save for his protected characteristic, described by the Appellant as that of being an "orthodox Christian", and who acted as the Appellant had done but used terms relating to his own religious belief system or non-religious or atheist belief system and were entitled to conclude that such a comparator would have been treated in the same way. Much of the appeal was or amounted to arguments of perversity; but the ET had reached factual conclusions which it was open to then to reach. The ET's conclusions on all claims were not based on error of law.

HIS HONOUR JEFFREY BURKE QC

The nature of the appeal

1. The Appellant, Dr Drew, appeals against the dismissal of his claims against the Respondent, Walsall Healthcare NHS Trust, of unfair dismissal, discrimination on the grounds of religion or belief, and victimisation by the Employment Tribunal sitting at Birmingham and presided over by Employment Judge Kearsley. The Employment Tribunal's reserved judgment, after a hearing over eight days, was sent to the parties on 13 April 2012.

2. In this judgment we shall refer to the parties as Dr Drew and "the Trust". Dr Drew was represented before the Tribunal and before us by Mr McIlroy of counsel; the Trust was represented before the Tribunal and before us by Ms Misra of counsel. We are grateful to both for their comprehensive and helpful written and oral arguments.

The facts

3. We take the facts, in so far as it is necessary to do so for the purposes of this appeal, from the Employment Tribunal's findings, which are set out at paragraphs 7-92 of the Tribunal's judgment. The Tribunal said at paragraph 10 that it was a feature of the case that there was no significant material disputes of fact; but, they said there were disputes

> **"[…] over how the factual matrix which provides the narrative to these claims should be perceived and interpreted."**

4. The Tribunal heard numerous witnesses and had four lever-arch files of documents, which appear from the pagination to have contained over 2,000 pages. The relevant history was lengthy and complex, and we cannot avoid setting out, at least in outline, the sad story of the decline in relationships within the Trust which led to Dr Drew's dismissal.

5. We have seen little of the primary documents which were before the Tribunal. We have seen the witness statements, or primary witness statements, and a transcript of the cross-examination of Mrs James, the Trust's chief executive, prepared by Dr Drew's solicitors. We do not complain about this; we are grateful to the parties for having sensibly limited the amount of material put before us. As will be seen, it has proved necessary for us to make extensive quotations from the Tribunal's judgment.

6. Dr Drew was employed by the Trust as a consultant paediatrician from January 1983 until his dismissal in March 2011. It was not in dispute that he had been praised for his clinical skills and had provided many years of dedicated service to the children of Walsall. He was clinical director of the paediatric department from 2001 to 2008.

7. Dr Drew is a practising Christian; it is plain from the Tribunal's findings that his faith was and is important to him. The paediatric department of the Trust was a multicultural and multi-faith department.

8. In April 2009 Dr Drew circulated to his colleagues a prayer from St Ignatius Loyola which he described as a personal inspiration in his "frail and imperfect efforts to serve my patients, their families and our department". This appears to have been one example of a manner or style adopted by Dr Drew, of which there were other examples, set out at paragraphs 85-91 of the Tribunal's judgment, to which we will come later.

9. Later in the same month Ms Palmer, a head of nursing who, we infer, worked in the paediatric department, raised a grievance against Dr Drew; and he raised a grievance against

her. Ms Palmer's was treated as a complaint under the Trust's "bullying and harassment policy"; and as a result Dr Drew was suspended by Mr Brown, the Trust's medical director while the grievance was investigated. The investigation was put into the hands of Dr Rashid, who reported to Mr Brown. We were not asked to consider that report beyond the extracts set out by the Tribunal at paragraph 17 of their judgment, which are as follows:

> **"Dr Rashid sent his concluding report to Mr Brown dated 31 July 2009 […]. His summary/conclusions are at paragraphs 5 […]. It includes the following:**
>
> > **'5.5 Dr Drew's actions are inappropriate but do not appear to be malicious against Karen Palmer personally. Karen Palmer is a member of staff caught up in Dr Drew's paediatric concerns but has been excluded from the correspondence. Whilst Karen perceives this as a slight on her own character and provides her with obstacles to working within an evolving paediatric service where staff have been unsettled as a result of change there is no case to answer with regard to misconduct issues.'**
>
> **Under the heading 'Recommendations' appear the following:**
>
> > **'6.4 Dr Drew does not feel that he has done any wrongdoing and has provided the Trust with honest feedback when he has concerns. Dr Drew must understand that his style of communication is unacceptable and can on occasions upset the department and his colleagues when he does not follow a known Trust process for raising concerns.**
> >
> > **6.5 Dr Drew must also accept that his own wider personal views and religious beliefs should be kept to himself and should not be imposed on others. All staff would be treated with dignity and respect whatever their personal beliefs or views but all staff also have a responsibility not to force these on staff or use them in a professional capacity where this could be deemed inappropriate or irrelevant.'"**

10. On 11 September the Claimant, having received Dr Rashid's report, wrote to Mr Brown a letter which included the following extracts, set out in paragraph 18 of the Tribunal's judgment as follows:

> **"'It is of course a relief to hear that the investigation found no merit in the allegations made against me. That is outweighed by the anger and frustration I feel that you ever allowed or caused this to happen in the first place. I have answered all the questions the Trust wishes to ask me. It is now your turn to answer some questions.'**
>
> **The letter ends:-**
>
> **'Sorry Mike you have behaved in such a reprehensible fashion towards me (and this is not the first time) that I do rather wonder if in the presence [sic] circumstances you have not made it impossible for me to return to work. I have lost faith in you as a competent medical director. I also believe that you have behaved unprofessionally and unfairly to me. I have a catalogue of complaints against you … I am copying this to the CEO to request that another Trust officer be instructed to investigate your actions.'"**

11. Six weeks later Dr Drew put before Mrs James a detailed grievance. The Tribunal described this document and quoted from it in paragraph 20 of their judgment as follows:

> **"On 26 October 2009 the claimant wrote a detailed grievance to Mrs James, Chief Executive […]. He set out his complaints under seven separate headings. The seventh area of complaint concerned his recent suspension. He referred to the conclusions and recommendations of Dr Rashid and in particular his recommendation at 6.5 which he describes as follows:**
>
> **'The final recommendation however does take the biscuit.'**
>
> **He then quotes 6.5 and continues:**
>
> **'I have no idea where this came from … I presume that the germ of his recommendation must lie somewhere in the statements made to investigators.'**
>
> **The letter continues:**
>
> **'I am a practising Christian. This is the meta-narrative that informs my whole life and work. I do not have any opinions other than fairly orthodox Christian beliefs. It is still not against the law in this country. I have never in any way tried to force my opinion on anyone. That would be stupid. I would like to know who made the allegation that this recommendation is based upon. I work in a multi cultural department. We have consultants who are Muslim, Hindu, Catholic, woolly Catholic and an Atheist. I get on with them all equally and I do not think anyone has ever heard me express a religious opinion.'**
>
> **The letter then concludes:**
>
> **'I have made my case I believe that managerial bullying has become institutionalised in the paediatric department. As Chief Executive you fail to take notice of this even when it has been drawn to your attention. … in forwarding this letter to Mr Stuart Gray and Mr Ben Reed I am expecting that they will be in contact with me to agree that a fully independent enquiry into the management of the Paediatric Department over the last 2 years is mandatory.'**
>
> **The letter was copied to a number of individuals and the reasons for doing so are contained at page 348/349 [of the Employment Tribunal bundle]."**

12. On 5 November Dr Drew, with a trade union representative, met Mrs James and others to discuss how his complaint should be dealt with. It was decided that the Royal College of Paediatrics should carry out an independent review, under terms of reference set out in paragraph 24 of the Tribunal's judgment. The Royal College appointed a panel of two consultants and an HR practitioner to undertake that task. The panel conducted its review in early March 2010 and sent its report to the Trust later that month.

13. Before turning to that report, it is necessary to set out some of the findings made by the Tribunal as to events between the making by Dr Drew of his complaint to Mrs James and the report that it produced, namely:

(1) Mr Brown accepted Dr Rashid's report and confirmed that there was no case of misconduct for Dr Drew to answer.

(2) Dr Drew continued to challenge Dr Rashid's report; again, the best way, as it seems to us, to summarise the relevant exchanges is to refer to what the Tribunal set out, at paragraphs 25-29 of their judgment. On this occasion it is not necessary to set those paragraphs out in full again here.

14. There was an exchange between Mrs James and Dr Drew about the terms of reference of the independent review panel ("IRP"); see paragraph 31 of the Tribunal's judgment. On 2 February 2010 Dr Drew lodged a second grievance against Ms Palmer, which was also referred to the IRP.

15. The IRP's report was produced on 26 March 2010; Dr Drew agreed to keep its contents confidential. It contained, inter alia, the following conclusions:

> **"'David Drew grievance**
>
> **17. David Drew was and remains a respected and effective clinician.**
>
> **18. The decision to remove David Drew from the Clinical Director role was the right decision.**
>
> **19. Mike Brown did not manage the removal of Clinical Director appropriately.**
>
> **20. The exclusion of David Drew as a result of the grievance from Karen Palmer was the wrong decision.**
>
> **21. Mike Brown mismanaged the Karen Palmer grievance.**
>
> **22. The post suspension process communication failures intensified the breakdown of trust between Mike Brown and David Drew.**

23. The use of religious language by David Drew is not appropriate in a professional business setting.'

Under the heading 'current situation March 2010' appears the following:

'25. David Drew's lack of trust and communication style is continuing to have an impact on individuals, relationships and on the functioning of the department and the Trust.

26. David Drew by his style of communication is actively contributing to the demise of the paediatric service.'"

16. It then made recommendations in respect of Dr Drew (and it made recommendations in respect of other individuals as well) in these terms:

"1. Outcome required for David Drew.

David Drew accepting the findings of the report, stopping the negative communication and focusing all his energy in carrying out his role as a paediatrician …

David Drew must …

(a) accept that it was appropriate that he was removed as Clinical Director as described by the findings of this report.

(b) stop communicating in the way he does:

(i) writing emails and conventional letters at length and copying in a wide range of individuals;

(ii) apologise to the Board Executive and Divisional Management of Paediatric Department staff for the impact his communication has had on individual's [sic] relationship and the department;

(iii) use business etiquette when using email communication;

(iv) refrain from using religious references in his professional communication, verbal or written – regardless of past apparent acceptance of this style.

(c) desist from undermining the Trust by communicating to the media on issues that can be resolved within the organisation.

(d) accept the apology for the way the exclusion was managed, accept closure on the situation and not pursue the post exclusion issues.

(e) withdraw the grievances against Mike Brown and Karen Palmer;

(f) direct any questions or service issues through the agreed Paediatric Department managerial structures;

(g) agree his exact role as a paediatrician from April 2010 until retirement. He should seek out a mentor to support him during this period; a Deanery may be able to identify a mentor;

(h) agree to any mediated relationship building investment;

(i) not use this report/recommendations to persecute individuals or the organisation …

(j) allow the Trust to share this report as advised by the independent panel with the relevant staff and not to pre-empt or interfere with the reporting process;

> **(k) accept restricted access to this report and not disseminate any of the contents or his interpretation of it to any third party; the report contains named person specific findings, conclusions and recommendations;**
>
> **(l) accept the findings of this report as final."**

17. The IRP concluded as follows:

> **"The independent panel believes that David Drew has received a fair and balanced hearing through this process. As a Christian David Drew has a great deal he can contribute to improve and secure the clinical reputation of the service. The independent panel believe that if David Drew does not accept this review as a final resolution and continues to unreasonably pursue through grievance procedures, tribunals or even courts of law, any or all of his grievances, he will gain a reputation undeserving of his highly recognised professional clinical value, will unfairly continue to damage individuals, including his fellow clinical colleagues, the paediatric service and the Trust."**

18. Unhappily, matters did not end there. Mrs James, on 29 March, wrote to Dr Drew to inform him that she and the chair of the Trust agreed to adopt the panel's findings and that she was planning their implementation. She asked Dr Drew to say whether he too would accept those findings. He responded that he unreservedly accepted the panel's recommendations but subject to exceptions, which he listed, as did the Tribunal at paragraph 42. Of the IRP's recommendation 2(b)(iv), he said:

> **"I cannot agree to this. Our language is replete with allegory and metaphor much of it with a religious connotation. I am not a fanatic. I am not a proselytiser. My purpose is purely expressive and not religious at all. … I believe this recommendation is unnecessary. I do not believe you are likely to have difficulty in this area again if you are willing to trust me."**

19. We do not need to list the other exceptions which Dr Drew made; but they were as a whole such that Mrs James responded in these terms:

> **"You will recall that the independent panel made it clear to all of us when we met on Friday that all parties involved had to accept the findings in full and commit to implementing the recommendations completely and in good faith. Ben Reed and I have agreed to do this and I have been working with other management colleagues, many of whom would like to amend elements of the panel's recommendations, to gain their agreement as well. This has now been achieved. I now expect you to do the same. If you cannot agree to this without qualification or reservation I must ask you to consider your position within the Trust, as we will be unable to rebuild the trust and mutual confidence that is enjoyed between managers and clinicians throughout the rest of the organisation and is an essential prerequisite for a successful conclusion to the difficulties and distress that have been caused within the Paediatric Department over the past 2 years."**

Dr Drew replied:

> **"It never occurred to me that my job was on the line here. Obviously this means I will have to give more serious thought to my position. I have to take advice. There is nothing in the reservations I expressed in my email of 30 March that prevents you implementing the changes recommended by the IRP. I look forward to hearing your plan and I believe you will find me an active and enthusiastic participant."**

20 On 15 April Mrs James informed Dr Drew that she was convening a disciplinary hearing on 29 April; but when it was pointed out to her that there had been no preliminary investigation, she cancelled the hearing. Dr Drew replied to the allegations contained in Mrs James' letter of 15 April in a long letter dated 26 April, the relevant parts of which are set out by the Tribunal at paragraphs 46-49. The correspondence that followed is set out in detail by the Tribunal at paragraphs 50-57; we do not need to incorporate them but refer expressly to them.

21 The paragraphs we have just referred to include reference to the fact that Dr Drew, while these exchanges were continuing, met Dr Moghal, one of the members of the IRP. Dr Moghal set out as an objective the acceptance by Dr Drew of the report's recommendations without reservation. Dr Drew declined to give that acceptance and said that he was aware of the likely consequences of that. Dr Moghal subsequently wrote again to Dr Drew, saying:

> **"'The issues relating to the use of religious language came from more than one source i.e. not raised by just one individual or from just one discipline. The inappropriateness of the use of religious language at work was also a conclusion drawn by a previous investigation led by Dr Rashid, a report that also informed the independent review. Your use of religious language was universally described as inappropriate when communicating with colleagues in a professional work environment.'**
>
> **The letter continues:**
>
> **'The use of a belief system based in the personal faith is exactly that, personal.'"**

22 It is relevant at this point to set out the other evidence relied upon by the Tribunal as episodes of Dr Drew's communication style. A divisional director of the Trust told Dr Rashid that Dr Drew:

> **"'[…] seems to have a constant determination to pick fault with the service – almost like a personal vendetta and accepts none of the responsibility for sorting it. It is the way he writes things; he also sent me poems and prayers to read which I find strange.'**
>
> **Q. 'Does he realise what he is doing?'**
>
> **A. 'It has been pointed to him on more than one occasion by more than just me.'"**

23 An associate medical director, Mr Pepper, told Dr Rashid that some of Dr Drew's emails were "a bit bizarre quoting the Bible etc I think these are a bit inappropriate". In December 2008 Dr Drew copied to Mr Hodgkiss an email that included these words:

> **"I know you have looked at DM before and interviewed him. 'mene mene telel uparsin' [sic]**
>
> **(Daniel Chapter V as I remember it)."**

24 There was also an email from Dr Drew to Mr Hodgkiss dated 19 January 2009 that contained a brief poem, and in an email two days later Dr Drew wrote:

> **"I wondered if prior to our meeting on Friday we can be candid (frank, outspoken, open and sincere. Its [sic] from a latin word that means shining bright) with each other."**

25 This led to exchanges between Mr Pepper and Dr Drew which prompted a response from another consultant paediatrician who told them both to calm down and asked Dr Drew to give his fingers "some much-needed rest".

26 Further, at paragraph 92, the Tribunal set out this:

> **"In addition to the written communications to which reference has already been made it was the claimant's evidence that at his meeting with Dr Moghal on 8 June 2010, he specifically asked Dr Moghal what evidence the ILP [sic] had received concerning his use of religious language. Dr Moghal informed him that two individuals had said of the claimant that he**

would put his hand on his heart and say 'I am a Christian therefore'. The claimant refers to this in his interview with Julia Hollywood at page 726 [of the Employment Tribunal bundle] when he stated that on one occasion he said in a self deprecatory way to Karen Palmer 'I am a Christian therefore of course I forgive you'."

27 Presumably as a result of the contention that there had been an absence of investigation before disciplinary proceedings were proposed, the Trust appointed a Ms Hollywood, an independent human resources consultant, to conduct an investigation of Dr Drew's non-acceptance of the IRP report's recommendations. She was asked to consider three allegations, namely:

"By refusing to confirm his acceptance of the Independence Panels' [sic] recommendations and therefore failing to agree to normalise, or even to attempt to normalise working relations in the best interest of the service he is in breach of contract in that contrary to the obligations that were implied in his employment relationship with the Trust he has –

Failed to cooperate with the Trust in implementing its procedures; and

Failed to obey a lawful and reasonable instruction.

By refusing to confirm his acceptance of the independent panels' [sic] recommendations and to work alongside others in the service with the best interests of the patients and the Trust is a current continued manifestation of past failings indicating a lack of willingness to work as part of a cohesive term [sic];

By failing to confirm his acceptance of the independent panels' [sic] recommendations and work with the Trust in developing and delivering first class paediatric services shows a disregard for the Trust, its staff and the patients and represents a complete breakdown in trust and confidence between himself and the Trust as his employer."

28 On 16 August 2010 Dr Drew wrote three letters to the chairman of the Trust. The Tribunal summarised the contents of those letters at paragraph 59. Although the letters were all marked "confidential", Dr Drew copied them to 12 other consultants.

29 In October 2010 Ms Hollywood concluded her investigations and submitted her report. The Tribunal said, at paragraph 67, that Ms Hollywood:

"[…] recommended that the Trust convene a formal disciplinary hearing to consider the three allegations already articulated against the claimant together with a fourth allegation, namely:

> **'That on 16 August 2010 DD disclosed confidential information to a group of colleagues by copying to them a letter and enclosures addressed to the Chairman of**

> **the Trust Board containing information which she [sic] had been asked not to disseminate and that in so doing DD committed an act of serious insubordination and/or serious breach of confidentiality and potentially act(s) of gross misconduct.'**
>
> **Her report is dated 29 October 2010."**

30 The four allegations were considered by a disciplinary panel in December 2010. The panel's conclusions were set out in a letter of 22 December. The contents of that letter are set out in detail in paragraphs 77-79 of the Tribunal's judgment; in summary, they found all four allegations proved. They considered whether the instruction to Dr Drew to accept all the IRP's recommendations was reasonable and lawful and decided that it was, that Dr Drew alone had declined to accept all of the IRP recommendations, that it was not unreasonable to expect him to accept them and that his continued demands for an explanation of what religious language was acceptable and what was unacceptable served to demonstrate his unwillingness to co-operate. It was also concluded that Dr Drew had breached confidentiality in distributing correspondence to individuals within the Trust despite instructions that he should not do so, and that he had thereby committed gross misconduct.

31 At paragraph 79 the Tribunal quote the decision letter as saying this about the use of religious language:

> **"You and Mr McKivett make great play of this through the hearings. It was your continued request for a clear definition of what is acceptable and what is not that became a cause celebre for you. The fact is and this is a point that both you and Mr McKivett seemed to have missed is that [sic] the case against you was not that you used this language in your business dealings it was that you refused to accept a recommendation that you should not do it. In your evidence you said that you never did use such language and never would although you did qualify this. Given that this was the case we could not understand why you simply did not accept the recommendation instead of demanding that management provide you essentially with a list of words and phrases that you could and could not use. Clearly any reasonable individual would know what was expected of them."**

32 The conclusion of the disciplinary panel was that Dr Drew should be dismissed with three months' pay in lieu of notice. Dr Drew appealed against that decision; by the time the appeal

was heard, Dr Drew had commenced these proceedings; the appeal panel concluded that the request made by the Trust that Dr Drew should comply with the recommendations of the IRP was reasonable, that his refusal to comply with that request was unreasonable, that the sanction of dismissal was reasonable and fair, and that the process had been fair.

The discrimination claims

33 Dr Drew claimed that he had been treated less favourably on the grounds of or because of his Christian religion or beliefs in no less than 14 respects; they are identified in paragraph 5 of the Tribunal's judgment. The first 3 of the 14 allegations related to Dr Rashid's report; the 4th to 6th allegations related to the IRP report; the 7th to the 13th related to the disciplinary process; and the 14th was the dismissal itself.

34 The details of the issues raised by the unfair dismissal claim are set out at paragraphs 1-4 of the Tribunal's judgment; the details of the victimisation claim were set out at paragraph 6.

The Employment Tribunal's directions

35 The Tribunal's self-directions as to how they should in law approach the issues raised by Dr Drew's discrimination claim, which were claims of direct discrimination – there was no claim of indirect discrimination – were, principally, that they should follow the guidance set out by the Employment Appeal Tribunal (Elias P, as he then was, presiding) in **London Borough of Islington v Ladele** [2009] IRLR 154. Ms Ladele's case was one of four cases considered by the European Court of Human Rights in **Eweida and Ors v the United Kingdom** – judgment, 15 January 2013 – but it has not been suggested by either side that the decision of that Court or of the Court of Appeal significantly added to or departed from the guidance given by the EAT. The Tribunal, at paragraph 93, set out extensive quotations

from paragraphs 24-41 of the EAT Judgment in **Ladele**. We do not need to repeat them; there was no real dispute between counsel that that guidance provided the legal framework within which the present case fell to be decided.

36 The Tribunal also referred at paragraph 94, on the question of appropriate comparators, to the EAT's decision **Azmi v Kirklees Borough Council** [2007] IRLR 406.

37 Finally, at paragraph 95 the Tribunal stated, correctly, that since the course of events leading to Dr Drew's dismissal bridged the coming into force of the **Equality Act 2010** and the replacement thereby of the **Employment Equality (Religion or Belief) Regulations 2003** the provisions of the former would apply in preference to the latter in the realm of discrimination on the grounds of religion or belief; but the substitution in the former of the words "because of" for the words "on the grounds of" religion or belief made, the Tribunal thought, no material difference to the issues to be determined. We agree, and the contrary has not been argued before us.

The Notice of Appeal

38 The Notice of Appeal is, perhaps, unusually set out. Having put forward some background facts, it states at paragraph 15 that Dr Drew relied upon the grounds of appeal which followed. In paragraph 16 there are set out six alleged errors of law. In paragraph 17 there are six allegations of perversity. There follow, under the heading "Errors of law and in the application of the law to the facts", grounds of appeal 1 to 9. This was, at least on paper, not very easy to understand, and it was, we suspect, not easy to respond to. The net of criticism appeared to be cast with width across much, if not all, of the Employment Tribunal's judgment. However, at the beginning of his oral submissions Mr McIlroy eased our task by indicating that

his submissions fell into three major areas and by identifying the grounds of appeal which related to each of those major areas, namely:

(1) the recommendations of Dr Rashid (grounds 1-3 and 8);

(2) the IRP report (grounds 4, 9 and 10);

(3) and the decision of Mrs James that Dr Drew should accept the findings of the review and to pursue disciplinary proceedings when he did not (grounds 5, 6 and 7).

39 Although the Notice of Appeal appears to set out only nine grounds, there were two grounds numbered "8". Mr McIlroy's breakdown involves re-numbering the second ground 8 in the Notice of Appeal as 9 and the original ground 9 as ground 10.

40 Mr McIlroy also made it clear, at the beginning of his submissions, that, although the issues put before the Tribunal included numerous issues as to the disciplinary process, it was now accepted that there was no challenge to the disciplinary process. Dr Drew's case on appeal was that, if there had not been the errors set out in the Notice of Appeal at the three stages which we have identified, there would never have been any disciplinary action. Although he did not in any way abandon other points, he said at the outset and with frankness that the pivotal decision was that of the Trust to insist that Dr Drew accepted the conclusions of the IRP and whether that insistence was open to a reasonable employer.

41 It is apparent from the above that the discrimination claims were central to the case; that is, no doubt, why the Tribunal dealt with the law which applied to those claims before the law that applied to the unfair dismissal claims and set out its conclusions in the same order.

Dr Rashid's report – grounds of appeal 8, 1, 2 and 3

42 We have said above that three allegations of discrimination were put forward in connection with Dr Rashid's report. They were set out at paragraphs 5.1 to 5.3 of the Tribunal's decision in these terms:

> **"5.1 The investigative report dated 31 July 2009 making a recommendation that 'Dr Drew must also accept that his own general wider personal views and religious beliefs should be kept to himself and should not be imposed on others' without having ever given the Claimant any or any adequate opportunity to respond to the material on which the recommendation was based;**
>
> **5.2 Making the said recommendation in the investigative report without sufficient evidence to justify such a recommendation;**
>
> **5.3 Failing to provide clarification on the reasons of the said recommendation in the investigative report […]."**

43 The Tribunal's resolution of those issues is to be found in their general conclusions in respect of the claim of direct discrimination at paragraphs 99-101 (note that there are two paragraphs numbered 100; we shall call them "100(1)" and "100(2)") and in their conclusions specific to those issues at paragraph 103. We need to set them out in full:

> **"99. As the tribunal is dealing with a complaint of direct discrimination where the claimant is not asserting that he has been subjected to detriment for manifesting his belief the construction of the hypothetical comparator or the adoption of an actual comparator is likely to be determinative of the issues which this tribunal has to decide.**
>
> **100[1]. The tribunal reject the contention that Mr Brown can be an actual comparator. Counsel for the claimant describes Mr Brown as an individual 'woolly in his religious beliefs as he is'. There can be no distinction between a 'woolly' and an 'orthodox i.e. practising' Christian. Both would have the same protected characteristic of having a Christian belief. Each would adhere to those same beliefs with varying degrees of tenacity. In any event no complaint had been made about Mr Brown's communication style nor was it suggested that he used religious references. At most he forwarded the prayer to others.**
>
> **100[2]. The tribunal concludes that the correct comparator is the comparator proposed by the respondent. The correct comparator is a consultant paediatrician whether of a different faith or no faith at all who circulated emails and adopted a communication style about which others complained. This could be a Muslim or a Hindu Consultant Paediatrician using references to that individual's holy texts or indeed an atheist Consultant Paediatrician who was keen to educate his fellows about or use references from the works of Richard Dawkins or Christopher Hitchens and about whom complaint was made that his style of communication was inappropriate or caused a measure of unease. It could indeed be an atheist who chose to use references from Christian or other religious sources in professional communications. In the case of *Ladele* the Employment Tribunal were criticised for falling into the trap of confusing the Council's reasons for treating Ms Ladele in the way they did with Ms Ladele's reasons for acting as she did. In this case the claimant used references to the Christian religion because, as an educated and practicing [sic] Christian, he had access to that material. An educated and practicing Hindu or Muslim would have access to religious material from a different source. There is no evidence from which this tribunal could conclude that an**

individual in those circumstances would not have received a recommendation that he desist had he or she chosen to make religious references in professional communications. There is no evidence from which this tribunal conclude that those employees of the respondent and those members of the independent panel who had dealings with the claimant throughout this process were influenced, even subconsciously, by a prejudice against Christians when compared to persons of other faiths or no faith at all.

101. The claimant's central assertion that everything about which he complains occurred because he is a practicing Christian and would not have occurred had he been of any other faith or no faith at all has no evidential basis other than his bare assertion that that was indeed Dr Rashid recommended that the claimant moderate his communication style because others found it inappropriate. The IRP recommended that the claimant refrain from using religious references in professional communication for the same reason and because it had accepted, in addition, evidence that the claimant had on occasion said 'I am a Christian, therefore'. The disciplinary investigation was commenced because it appeared that the claimant was not prepared to accept the recommendation of the IRP report in full without qualification. The claimant was dismissed for the reasons articulated in the dismissal letter but these were not influenced by the fact that the claimant was, and was known to be, a practicing Christian. The tribunal will expand on its reasoning when reaching its conclusions in respect of the individual issues identified by the parties. […]

Conclusions in respect of the specific issues identified in the list of issues.

Issues 5.1 to 5.3

103. Dr Rashid did make the recommendation complained of and did not clarify the reasons for it. It was a recommendation and not an instruction. The respondent accepts that it was clumsily worded. Having seen the evidence presented to Dr Rashid the tribunal concur that there was sufficient concern expressed to justify the recommendation even though the recommendation itself was inelegantly worded. There is no evidence from which the tribunal could conclude that Dr Rashid did this because the claimant was a Christian and would not have made the recommendation had the claimant been of another faith, or no faith at all, but still making references to which others objected. The recommendation refers not just to 'religious beliefs' but also to 'wider personal views'. The tribunal has also considered, in assessing whether the recommendation could properly be termed a detriment, that it was made in the context of a report which largely exonerated the claimant and which rejected the grievance which had been made against him of bullying and harassment. He was not disadvantaged in the circumstances in respect of which he was thereafter required to work. Furthermore any detriment which could be said to have occurred from the failure to release the material was cured when Ms Hollywood did, with the consent of those concerned, show the relevant extracts and emails."

44 Mr McIlroy began his criticism of those paragraphs of the judgment with ground 8, which asserts that the finding that there was sufficient concern expressed to justify Dr Rashid's recommendation at paragraph 6.5 of his report as to Dr Drew's personal views and religious beliefs was perverse. That conclusion is set out in the third sentence at paragraph 103. Mr McIlroy accepted that, if there was evidence that Dr Drew was imposing his religious views on others, the Trust was entitled to require him to desist; but, he submitted, there was not sufficient evidence to justify the recommendation that Dr Rashid made. That evidence, he submitted, consisted only of the one email which circulated the prayer from St Ignatius

of Loyola, which had received some positive responses, an email dated 9 December 2008 which quoted a passage in Aramaic from the book of Daniel; Dr Rashid's interview with Mr Hodgkiss; and Dr Rashid's interview with Mr Pepper. The Tribunal ought, Mr McIlroy submitted, to have seen this as insufficient evidence in the light of the view expressed by Mrs James, when challenged by Dr Drew about Dr Rashid's recommendation; that the issue of Dr Drew's religious beliefs was highly marginal; and no reasonable Tribunal could, he submitted, have reached the conclusion that the recommendation made by Dr Rashid was justified. Therefore, he argued, the Tribunal ought to have concluded that Dr Rashid was, consciously or subconsciously, acting in a religiously discriminatory manner in making the recommendation to which Dr Drew objected.

45 Mr McIlroy's argument took him somewhat further than what we have just set out. He submitted that in paragraph 103 the Tribunal were in effect saying, particularly by their reference to the recommendation being inelegantly framed, that the evidence was not sufficient; the Tribunal, he said, subconsciously did not themselves believe that the evidence was sufficient. When we asked for the basis of this argument, Mr McIlroy's response was that the Tribunal were clearly wrong.

46 It is, in our judgment, illustrative of the way in which this appeal has been put forward on behalf of Dr Drew that the attack on the Tribunal's judgment started with a perversity argument and an argument, expressed in the way we have set out, against a factual conclusion reached by the Tribunal in respect of an internal investigation which was not of a disciplinary nature and was intended simply to resolve grievances which had arisen between two senior members of the Trust's staff. As Ms Misra pointed out, it was not suggested in the list of issues put before the Tribunal that Dr Rashid's report had played any part in the Trust's decision to dismiss.

However, we accept that, if the making of the impugned recommendation was an act of discrimination, of course Dr Drew was and is entitled to complain of it.

47 Ms Misra pointed out that Mr McIlroy's case was not that there was no evidence to support Dr Rashid's recommendation but that it was so insufficient that no reasonable Tribunal could come to any conclusion other than the recommendation was unsupportable and was also an act of discrimination. Mr McIlroy had not surmounted the high hurdle necessary for that argument to succeed; the Tribunal had to evaluate the evidence and had done so.

48 It is trite law that in order to establish perversity of that type an appellant must demonstrate overwhelmingly that the Tribunal reached a factual conclusion which no reasonable Tribunal could reach. We are not persuaded that that has been demonstrated in the case of the Tribunal's conclusions as to Dr Rashid's report, overwhelmingly or otherwise. Dr Rashid's report, from paragraph 6.2 onwards, referred to Dr Drew's communication style, which affected others without his appreciating that it did so; one of those aspects of his communication style was that canvassed in paragraph 6.5 of the report, and there was evidence from two senior members of the Trust about the inappropriateness of the religious aspects of Dr Drew's communications. We have been through the evidence before Dr Rashid earlier in this judgment. Although it is correct, as Mr McIlroy pointed out, that Dr Rashid did not give evidence to the Tribunal, that does not lead to an appellate tribunal's having any wider remit than that which applies as standard to an argument of factual perversity; the nature and source of material for Dr Rashid that the Tribunal had to consider was not in dispute. It was for the Tribunal to assess the nature and weight of the evidence which went to support Dr Rashid's recommendation; they did so, and they reached, in our judgment, a conclusion which was open to them.

49 We would add that the suggestion that the Tribunal did not truly believe in their own findings of fact has no basis whatsoever. Dr Rashid was not a lawyer; a lawyer, especially one versed in the law of discrimination in the employment field, might have expressed the recommendation in a more appropriate way, but that does not indicate that the Tribunal did not mean what they said. Even if the Tribunal only came to their factual conclusion by a narrow margin (which they did not say), they would have been entitled to reach it. We have decided not to speculate on the reasons why this particular submission was made; we say, simply, that we do not accept it.

Ground 1

50 By this ground it is asserted on Dr Drew's behalf that the Tribunal did not determine issue 5.1 in the list of issues, namely whether the impugned recommendation was made without Dr Drew being given the opportunity to respond to the material on the basis of which the recommendation was made. It was, we were told, his case that he was not asked to comment upon the material to which we have referred above, in contrast to the specific complaints of Ms Palmer, which were put to him. If he had been asked to comment, he would have been able to explain that he was trying to persuade people of his views by ordinary communication; the absence of such an opportunity gave rise to an inference of discrimination, and, because Dr Rashid did not give evidence, there was no explanation to rebut that inference.

51 Ms Misra in response submitted the Tribunal did not need to consider an express finding as to whether Dr Rashid had put to Dr Drew the material that supported the impugned recommendation because it was not the Trust's case that Dr Rashid had done so; that was reflected in the words "from the failure to release the material" in the last sentence of

paragraph 103. What the Tribunal did need to consider was whether an inference of discrimination could be drawn from that; and the Tribunal expressly addressed that question and decided against Dr Drew in the third and fourth sentences of paragraph 103.

52 A failure by the Tribunal to draw a prima facie inference of discrimination if they had reached the factual conclusion that Mr McIlroy submits they did not reach is not a ground of appeal. The ground which we are considering is that the Tribunal did not reach any such factual conclusion; but in our judgment neither way in which this area of the appeal might be put is made out. We agree with Ms Misra that this issue of fact was not in contention; it was not necessary for the Tribunal to be more explicit than they were. Furthermore, even if Mr McIlroy had sought to put this ground forward on the alternative basis we have set out, the argument would not bring him home. He conceded that Dr Rashid had carried out a reasonable investigation and that his investigation was not a "put-up job". Dr Rashid was not carrying out a judicial or quasi-judicial task; he was not obliged as part of an internal investigation into grievances to achieve anything approaching the standard of a judicial investigation or even the lesser standard of an internal disciplinary investigation. There is, in our judgment, no reason why the Tribunal should have drawn an inference of discrimination from the failure to put to Dr Drew the material supporting the impugned recommendation; Dr Rashid was under no duty to do so. The Tribunal considered and rejected the drawing of a conclusion of discrimination in the third and fourth sentences of paragraph 103; we cannot see that they made any error of law in reaching those conclusions.

Ground 2

53 This ground goes to the Tribunal's choice of a hypothetical comparator. Dr Drew had put forward Mr Brown, the medical director, as an actual comparator, but, as can be seen from the

extract we have set out earlier, the Tribunal rejected him as an actual comparator at paragraph 100(1), and that conclusion has not been the subject of any ground of appeal. Their conclusions as to a hypothetical comparator are set out in paragraph 100(2) and in paragraph 103.

54 In his skeleton argument Mr McIlroy submitted that the hypothetical comparator identified in paragraph 100(1) was the wrong comparator because that choice of comparator would not provide protection to religious believers whose employers discriminated against all religious or philosophical beliefs; that the Tribunal had been led into error by Ms Misra's written submissions, which invited them to choose the wrong comparator; and that the correct comparator was an atheist who had circulated the same material as that circulated by Dr Drew.

55 Ms Misra, in reliance on section 23 of the 2010 Act and its preceding provision, which required a comparison to be made with a person or persons whose relevant circumstances are the same, submitted that the comparison had to be with somebody who was in Dr Drew's circumstances save for the protected characteristic, that being, as he described himself, an orthodox Christian (we should interpose that while some may regard the expression "an orthodox Christian" as creating no small measure of difficulty, that problem does not appear to have arisen before the Tribunal in this case, and we shall say no more about it). In reliance on judgments of the EAT in **Ladele** and **Azmi**, Ms Misra submitted that the Tribunal had correctly identified the appropriate hypothetical comparator as someone who was in the same position as Dr Drew and who had acted as he did in the context of his own religious belief system or a non-religious or atheist belief system.

56 Mr McIlroy's argument appeared from his skeleton to amount to an argument that the comparator which the Tribunal identified, because if it included persons with a religious belief it did not protect against an employer who discriminated against all religious beliefs, was in error; the comparator should have been one involving only an atheist belief system. Indeed, in the course of argument Mr McIlroy agreed that that was what he had put to the Tribunal; and paragraph 26 of his skeleton argument before us repeated that assertion. Mr McIlroy then – and our notes are clear about this – backed away from that assertion and stated that the exercise of identifying the correct comparator required inclusion of all the various comparators, which included an atheist comparator; and that modified submission produced the judicial reaction "that that is what the Tribunal did". Mr McIlroy then put forward a somewhat different submission: that the Tribunal may have been correct to include a hypothetical comparator who was of another faith or no faith at all but fell into error in failing to treat such a comparator as someone who had made not references of the same genre, appropriate to his belief system, but had made exactly the same references.

57 We have some sympathy for anyone who has to identify an appropriate hypothetical comparator in the context of this particular form of discrimination and are not critical of Mr McIlroy's attempts to nail down a convincing rationale for his criticism of the Tribunal's conclusions on this issue. The exercise of identifying an appropriate hypothetical comparator is not straightforward, as the EAT said in **Ladele** at paragraph 35; the Tribunal could have avoided the exercise by going directly to determination of the reason why Dr Drew was treated as he was – see **Ladele**, paragraphs 37 and 38 – but they were clearly entitled to seek to identify the appropriate comparator and indeed received extensive submissions on the topic. Neither Mr McIlroy nor Ms Misra criticised the Tribunal for seeking to resolve the arguments between

the parties as to the correct hypothetical comparator or for deciding that "reason why" issue by reference to a hypothetical comparator, as they did.

58 In our judgment, it being clear that Dr Drew's case was that he was discriminated against because of his orthodox Christian beliefs the Tribunal did not err in law in determining that the hypothetical comparator, who was in the same or not materially different circumstances, was a person in Dr Drew's position – i.e. a consultant paediatrician – who in the course of his work made references to which others objected based on his own religious or non-religious belief system. The second sentence of paragraph 100(2) of the Tribunal's judgment, in rather fuller terms, is, in our judgment, correct or at least sets out a solution which was open to the Tribunal. There would have been no basis for restricting the comparator in the context of this case, in which Dr Drew claimed discrimination on the grounds of his orthodox Christian beliefs, for excluding a comparison of a consultant paediatrician of a different religion. Dr Drew's case was not that Dr Rashid or the Trust were discriminating against all religions as opposed to a non-religious belief system; the Tribunal were not in error in failing to restrict the comparator to one who was an atheist.

59 As to the alternative submission, that the Tribunal should have used as a comparator a person of a different religion or no religion who made exactly the same references as opposed to references of a similar genre but related to their own religion or belief system, that is in our judgment unrealistic. The notion that, to take an example we put to Mr McIlroy, a Sikh consultant paediatrician, or an atheist consultant paediatrician, would ever use references that were culled from orthodox Christian beliefs, as Dr Drew did, is not one which we would expect the Tribunal to have considered. However unrealistic the exercise of identifying a hypothetical comparator may have to be, a Tribunal is not required to enter the realms of fantasy. A person

who puts forward beliefs which are not his own, in which he does not believe or from which he does not seek to persuade is in materially different circumstances from a person who puts forward beliefs which are his own and as to which he does seek to persuade.

60 For these reasons, we have concluded that the Tribunal made no error of law in its approach to the comparator exercise.

Ground 3

61 By this ground Dr Drew challenges the conclusion in the last three sentences of paragraph 103 of the Tribunal's judgment that the recommendation did not subject Dr Drew to a detriment.

62 The argument put forward on his behalf starts with the definition of "detriment" set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 by Lord Hope at paragraph 35, namely:

> **"Treatment of such a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment."**

63 Ms Misra accepted that that was the relevant definition.

64 Mr McIlroy in his skeleton argument submitted that Dr Rashid's recommendation would have amounted to such a detriment because: (1) it related to a matter which Dr Rashid had not been asked to investigate; (2) it was made without Dr Drew's being given any opportunity to respond to it; (3) there was insufficient material to support it; (4) it restricted Dr Drew's ability to express his religious beliefs at work and did so in his case alone; and (5) it had not been

suggested before that Dr Drew's references caused offence or were in breach of any policy of the Trust.

65 However, orally Mr McIlroy accepted that only points (4) and (5) above amounted to a detriment. He was sensible to do so; the other points do not amount to a detriment arising from the discrimination complained of. His submission was that the restriction imposed on Dr Drew and on him alone by the recommendation fell within the definition of "detriment" to which we have referred.

66 Ms Misra submitted that any detriment on which Dr Drew relied must come not from the recommendation itself but from the act of discrimination alleged, namely the failure on Dr Rashid's part to give Dr Drew an opportunity to comment on the material which led to the recommendation. It was not Dr Drew's case that the making of the recommendation in itself was a discriminatory act, and the Tribunal had appreciated that, as can be seen from the final sentence at paragraph 103, in which they refer to the fact that Ms Hollywood had provided that material to Dr Drew. There was, she submitted, nothing to show that the Tribunal had applied the wrong test; whether there was a detriment, assuming an absence of error of self-direction, was a question of fact; and the Tribunal had reached a factual conclusion in the last part of paragraph 103 that was not perverse.

67 We need to point out that, unless Dr Drew's attack on the Tribunal's conclusion in the first part of paragraph 103 that there was no discrimination succeeds, success on the detriment issue will not avail him. In order to succeed, in relation to Dr Rashid's report, Dr Drew needs to succeed in his attack on the Tribunal's judgment both in respect of discrimination and in respect of detriment; and he has failed to surmount the first of those hurdles. Nevertheless, it is

appropriate that we should express our conclusions on the detriment issue; and our conclusion is that there is nothing to show that the Tribunal misdirected themselves as to what constituted a detriment and that, in the absence of a demonstrated misdirection, whether a detriment was established was a factual matter for the Tribunal to resolve. They gave reasons that Mr McIlroy did not expressly challenge as perverse, although his argument that the recommendation, applied to Dr Drew alone and restricting his freedom of expression, must be taken as amounting to a detriment certainly had overtones of perversity about it. We do not agree that what resulted from the alleged discrimination must have been taken by any reasonable Tribunal to have been a detriment, looking at the context of this case overall and within the agreed definition. It was open to the Tribunal to take a different view, looking at the facts as a whole.

The independent review – grounds 4, 9 and 10

68 In addressing us on these grounds, Mr McIlroy began with grounds 9 and 10, which are perversity grounds, and then went to ground 4. We shall adopt the same order.

69 The allegations of discrimination arising from the independent review panel's report ("the IRP report") are set out at paragraphs 5.4-5.6 of the judgment as:

> **"5.4. Instructing the Claimant in the independent review dated March 2010 to refrain from using religious references in his professional communication, verbal or written – regardless of past apparent acceptance of this style;**
>
> **5.5. Failing to give the Claimant any or any adequate opportunity to respond to the material on which the recommendation was based;**
>
> **5.6. The independent review instructing the Claimant with regards to the Claimant's religion without sufficient evidence to substantiate such a recommendation? […]"**

70 We have already set out the Tribunal's general conclusions as to direct discrimination and need not repeat them. As to these three allegations of discrimination, the Tribunal's conclusions, at paragraphs 104 and 105 of their judgment, were:

> **"104. The tribunal rejects the respondent's submissions that they cannot be held liable for the actions of the IPR because it was independent. The respondent adopted the recommendations and sought to implement them. However, the claimant consented to there being an independent review of his particular grievance and of his wider concerns in relation to the Paediatrics Department. This tribunal accepts that that review panel was genuinely independent and carried out a full investigation into the serious issues raised by the claimant. The panel had the benefit of the claimant's detailed grievance and interviewed him personally.**
>
> **105. The tribunal accepts that there were grounds for making all the recommendations contained in the report including the recommendation to which the claimant now takes particular exception and upon which the claimant has focused both in the disciplinary hearings and in these tribunal hearings. The independent panel received the same evidence as that which informed the Rashid recommendation together with the additional assertion that the claimant used the expression 'I am a Christian therefore …' The correct comparator in respect of that particular assertion would be an individual who said 'I am a Muslim therefore …' or 'I am an atheist therefore …' or 'I am a Hindu therefore …' There is no need for such assertions in professional communication nor was there a need to make religious references if they are considered inappropriate and if they hinder proper communication."**

Ground 10

71 It is submitted on Dr Drew's behalf that the Tribunal's finding that there were grounds for the IRP's making the recommendations contained in their report, including the recommendation that he should refrain from any religious references in his professional communication – which Mr McIlroy accurately described as "the sticking point" – was perverse, in the sense that no reasonable Tribunal could have reached that conclusion.

72 The material before the IRP was that which was before Dr Rashid, together with additional pieces of material, namely that two individuals had told the panel that Dr Drew would put his hand on his heart and say, "I am a Christian, therefore …" (see paragraph 92 of the judgment). Mr McIlroy drew our attention to this further information.

73 Ms Misra drew our attention to two further pieces of material. In a letter to Mrs James of 26 October 2009, Dr Drew said:

> **"I am a practising Christian. This is the meta-narrative that informs my whole life and work. I do not have any opinions other than fairly orthodox Christian beliefs. It is still not against the law in this country. I have never in any way tried to force my opinion on anyone. That would be stupid. I would like to know who made the allegation that this recommendation is based upon. I work in a multi cultural department. We have consultants who are Muslim,**

Hindu, Catholic, woolly Catholic and an Atheist. I get on with them all equally and I do not think anyone has ever heard me express a religious opinion."

74 And in an email dated 17 December Dr Drew said:

"It is not a new thing for me to use a quotation from religious or circular literature in my correspondence. I have always done it. It has always been part of my style. I have even done it here. If anyone has a problem with that (especially if it is someone as senior as the Divisional Director) he can take it up with me. I cannot believe that the NHS this Trust and our department are not in desperate need of a little wisdom. It is true that most wisdom is best and most pithily expressed by the ancients, Jesus, The Profit (PBUH) Buddha and Plato to name but a few. I would have thought that we could all benefit from this especially a prayer encouraging us all to selfless service."

75 Mr McIlroy did not, according to our notes, contend by way of reply that that material was not before the IRP; if it was, his argument faces even greater difficulties than those which it faces without that material. But in order to avoid a potential error, we will approach this ground on the basis most favourable to Dr Drew, as if that material were not before the panel. However, we have already considered the issue of perversity based on the material before Dr Rashid under ground 8 above and have set out our conclusions in addressing that ground. What we said in relation to ground 8 applies equally to ground 10. We see no necessity for repetition. It was for the Tribunal to make the factual assessment that they made; the assessment they made was permissible on the basis of the material before them.

76 Mr McIlroy made the point that, as in the case of Dr Rashid, so in the case of the IRP; the Tribunal had no oral evidence from them. Therefore, he submitted, the EAT was in as good a position to form a judgment on the material as was the Tribunal. This submission misunderstands the nature of the jurisdiction of the EAT in addressing an appeal against a decision of the Tribunal on a point of fact. Where the issue is a factual one, whether the evidence before the Tribunal was oral or in writing, it is for the Tribunal to determine the factual issue, and the EAT can only interfere with the Tribunal's conclusions as to that on

well-established principles. We accept that if the evidence relevant to a particular issue of fact is all in documentary form, the Respondent to an appeal cannot deploy the familiar argument that the Tribunal "saw the witnesses and heard the evidence"; and the unavailability of that argument may make easier the task of an appellant who seeks to overturn a first-instance decision of fact in the County Court or in the Queen's Bench division, but it does not lower the threshold for perversity on an appeal from the Tribunal to the EAT. It is possible, if perversity were to be established where the relevant evidence was wholly in writing, that a remission would be unnecessary; it would be easier for the appellant to persuade the EAT to substitute its own decision. But the test for perversity remains the same: has it been overwhelmingly demonstrated that the Tribunal reached a factual conclusion which no reasonable Tribunal could reach?

77 The answer to that question in relation to ground 10, for the reasons we have set out above and in relation to ground 8, is in the negative.

Ground 9

78 By this ground Dr Drew attacks as perverse the Tribunal's finding at paragraph 104 that the IRP carried out a full investigation into the issues raised by him and, at paragraph 122, that the IRP's process was inherently fair.

79 These criticisms are based on the assertion that the IRP's review was set up as a result of Dr Drew's grievance raised in October 2009, in particular as to the recommendation of Dr Rashid to which he objected, but the IRP adopted a process whereby persons interviewed by them were afforded anonymity and therefore that was an unfair process, particularly when part of Dr Drew's complaint was that he had not been given an opportunity to respond to the

material that was considered by Dr Rashid. It was submitted that no reasonable employer would have adopted that procedure.

80 It was further submitted that the IRP's process was unfair because the Trust's statement to the panel was not seen by Dr Drew, although it contained material critical of him, and that he had not been asked about that material (which was effectively that which we have set out in addressing ground 10).

81 In oral argument Mr McIlroy focused attention particularly on the panel's affording anonymity to witnesses. The allegations of discrimination against the IRP have already been set out above. We have already addressed the third. Dr Drew's case is that if the IRP conducted their review in an unfair manner, the Tribunal should have drawn the inference that they were guilty, consciously or subconsciously, of religious discrimination. A conclusion that the panel did conduct the review unfairly would not necessarily lead to the drawing of any such inference; but we accept that it could.

82 It is, in our judgment, important to bear in mind in considering this ground: what was the task which the IRP were carrying out? The IRP set out to consider, according to the invitation letter to the IRP (see appendix 3 to their report) three areas, namely the functioning of the paediatric service, relationship between the service and the Trust management, and issues specific to a consultant paediatrician (obviously, Dr Drew). The panel were not carrying out any form of disciplinary function; they were not the employer or part of the employer. An analysis in terms of what would or would not have been expected of a reasonable employer was not appropriate to a wider investigation by a panel found by the Tribunal to have been genuinely independent. Although there were some differences of detail between Dr Drew and

the Trust about the panel's terms of reference, it is not in dispute that Dr Drew had, as the Tribunal said at paragraph 104, consented to there being an independent review of his grievances and of his wider concerns.

83 It was, from the outset, part of the IRP's framework of engagement that interviews would not be attributable. On the basis of the information they gathered from documents, interviews and focus groups, they reached what they described as their "own individual findings". The process included, of course, an interview with Dr Drew, who does not complain that there was anything he wished to tell the panel but was not able to tell them. In that context we have no doubt that it was open to the IRP to conduct their investigation as they did, including, no doubt, in order to ensure that they were provided in frankness with full information that would enable them to seek satisfactorily to resolve difficulties in the paediatric department, by the adoption of a process in which witnesses were able to supply them with information on a non-attributable basis. The Tribunal were, in our judgment, entitled not to consider the use of non-attributability (or anonymity, which is not entirely the same) and the absence of a formal putting to Dr Drew of the material which led to the IRP's recommendation (b)(iv) as creating unfairness. The arguments put forward on Dr Drew's behalf do not, in our judgment, demonstrate that the IRP's process was one which could only be reasonably regarded as having been unfair in the respects criticised, or indeed at all: nor has it been demonstrated that the Tribunal reached a perverse judgement in paragraph 104 and 122 as to the fairness of the IRP's process.

Ground 4

84 This ground is set out in the Notice of Appeal in these terms:

> **"Ground 4: The tribunal erred in law in holding that the independent review's recommendation that Dr Drew must 'refrain from using religious references in his**

> **professional communication, verbal or written – regardless of past apparent acceptance of this style' was reasonable and lawful (para. 105).**
>
> **24. It was not lawful or reasonable to instruct a Christian employee to refrain from using any religious references in his professional communications. Such a recommendation was either an unlawful act of discrimination on the grounds of religion or belief or was unreasonable in the circumstances."**

85 No further particulars were given for the basis of the criticisms here made of the Tribunal's judgment; but elucidation was to be found in Mr McIlroy's skeleton argument. There, at paragraphs 37-43, the argument is put in these ways, in summary form:

(1) The English language is littered with expressions which are religious in origin; to exclude religious references from professional communication is absurd and therefore unlawful or unreasonable.

(2) Such a recommendation amounts to unlawful discrimination on the grounds of religion; the law protects religious diversity and the manifestation of religious belief.

(3) Alternatively, the recommendation was unreasonable because it was "beside the point", i.e. it did not materially contribute to a resolution of the difficulties that had led to the panel's appointment.

86 In oral submissions Mr McIlroy accepted that "absurd" was not the most appropriate word on which to found an argument that the Tribunal had made an error of law; he substituted the formulation that the recommendation was so unreasonable that no reasonable Tribunal could have regarded it as anything other than unreasonable. Thus the first of the three arguments we have summarised became a perversity point.

87 Before addressing these arguments, we need to state that, because the Trust adopted the recommendations of the IRP, no point is taken that the IRP's conclusions or any discrimination which might be found in those conclusions is not the responsibility of the Trust.

88 We have already, in addressing grounds 9 and 10, held that the Tribunal's conclusion that there were grounds for making the recommendation of which Dr Drew complained and that the IRP carried out a full investigation by a fair process was open to them. The first of the arguments which we have identified under this head appears to us to be very similar to that advanced under ground 10. It differs in that the complaint is not of lack of evidence to support the recommendation but that it goes too far by seeking to exclude from professional communications any expression which might have a religious origin, such as, to take two examples from those given by Mr McIlroy, "giving up the ghost" or "going the extra mile". However, the recommendation did not seek to prevent Dr Drew from using expressions which are in common parlance but have a religious origin, or at least may be said by some to have such origin. It recommended that he should refrain from any religious references in his professional communications. The Tribunal had evidence before it that such use had been causing difficulties. We have considered that evidence earlier in this judgment; and we do not accept that no reasonable Tribunal could, on the evidence before them, regard the recommendation as one which the IRP was not entitled to make, bearing in mind the objectives which it was it was required to seek to achieve. Had the IRP sought to recommend that Dr Drew should not use any expression that had or could be said to have its origin in religion, the Tribunal might have taken a different view; but the recommendation was not cast in any such terms.

89 In considering the second argument, it is important to repeat that there was no claim of indirect discrimination, by the establishment of a provision, criterion or practice falling within Regulation 3(1)(b) of the 2003 Regulations and the equivalent provision in the 2010 Act. This was a claim based on direct discrimination only, to which the principles set out in **Ladele**, as adopted by the Tribunal, applied. Mr McIlroy's arguments in support of this argument, as set out in his skeleton, were in our judgment correctly described by Ms Misra as seeking to construct an indirect discrimination case. The IRP were seeking not to recommend that Dr Drew should cease to hold, practice or manifest his religious beliefs but that he should not use religious references in his workplace communications because his communication style, which on the material evidence included the use of religious references, was continuing to have "an impact on individuals, relationships and the functioning of the department and the Trust" (IRP report, paragraph 25). As the Tribunal said at paragraph 105:

> **"There is no need for such assertions in professional communication nor was there a need to make religious references if they are considered inappropriate and if they hinder proper communication."**

90 The argument that the recommendation amounted to religious discrimination not only, in our judgment, fails to appreciate what we have just set out but also fails to take account of the Tribunal's approach to and conclusions on the issue of direct discrimination, as set out in paragraphs 100(2), 100(1), 104 and 105. The Tribunal carried out the exercise of comparing the treatment of Dr Drew with a hypothetical comparator, the nature of whom is not criticised in the Notice of Appeal in this part of the case. In any event, we have addressed and decided upon such criticism and, on the evidence, concluded that there was no evidence that the comparator, expressing himself in the same way but using expressions based on a different belief system, whether religious or non-religious, would have been treated any differently in

terms of the IRP's recommendations. That was a finding that, subject to the perversity arguments that we have addressed, was open to the Tribunal.

91 We also reject the third argument, that the recommendation was "beside the point". The Tribunal found as fact that there were grounds for making the recommendation. Again, we have considered the evidence which supported that conclusion; and it is referred to expressly in paragraph 105. We have already set out that the Tribunal found that the recommendation was justified and that there was no direct religious discrimination, and how they reached those conclusions; this argument is another attempt to attack the Tribunal's factual conclusions. It does not, in our judgment, disclose any error of law.

92 Accordingly, we do not accept the criticisms made of the IRP's recommendation to which Dr Drew takes objection, either in terms of discrimination or in terms of the fairness and independence of the IRP's process and conclusions.

Mrs James – grounds 5, 6 and 7

93 These three grounds assert errors of law or perversity on the part of the Tribunal in different aspects of their judgment as to whether Mrs James was guilty of religious discrimination or behaved unfairly. The issues which fall into this third phase of alleged direct religious discrimination are set out at paragraphs 5.7 to 5.13 of the judgment, but the allegations at 5.10 and 5.12 were not pursued. The Tribunal's conclusions are to be found in paragraphs 100(2)-101 and paragraphs 106-108. In paragraph 106 the Tribunal considered the allegation that there was the discrimination complained of at paragraph 5.7, in paragraph 107 they addressed the allegations at paragraphs 5.8 and 5.9, and in paragraph 108 they dealt with the allegations in paragraphs 5.11 and 5.13. At paragraph 124 the Tribunal addressed

issue 1.2.6 under unfair dismissal, i.e. whether Mrs James' request that Dr Drew accept the findings of the review without qualification was a reasonable, lawful instruction or generally reasonable. At paragraph 124 the Tribunal relied on its earlier conclusions in respect of direct discrimination.

Ground 5

94 By this ground it is submitted that the Tribunal failed to consider whether the request to Dr Drew that he accept without qualification the findings of the IRP as they applied to him was a reasonable or lawful instruction or was generally reasonable. In his skeleton argument at paragraph 44 Mr McIlroy asserted (1) that it was clear from paragraph 124 of the Tribunal's judgment that the Tribunal had failed to so consider; (2) that if the IRP's recommendation was unlawful or unreasonable as alleged in ground 4, Mrs James' insistence that Dr Drew comply with it was also unlawful or unreasonable; and (3) that the Tribunal's finding on this issue was perverse.

95 As to (1), Ms Misra submitted, correctly in our judgment, that paragraph 124 could be seen from its very words not to have been intended by the Tribunal to stand alone. Paragraph 124 is a specific response not to one of the discrimination issues but, as we have pointed out above, to the corresponding issue raised under the unfair dismissal head. The Tribunal sought to resolve that issue by referring to their earlier conclusions in relation to direct discrimination, which we have already set out. The Tribunal's judgment must be considered as a whole and not by considering one paragraph in isolation, even if that paragraph did not expressly refer back to earlier findings. The Tribunal in their findings of fact set out the passage of arms between Dr Drew and Mrs James after the IRP report in considerable detail. At paragraphs 101 and 104/105 they found that the IRP had carried out a genuinely independent

and full investigation of Dr Drew's grievances and that there were grounds for making all the recommendations contained in their report. At paragraph 106 they concluded that it was central to the recommendations in the report that they were accepted and implemented by all. That has not been challenged and was, in the context, not arguably an unreasonable conclusion. When the relevant paragraphs are read as a whole, it is in our judgment clear that the Tribunal concluded that it was both reasonable and lawful for Mrs James to require Dr Drew to accept all the recommendations which affected him, including the disputed recommendation; and they gave reasons for those conclusions which go far beyond what is expressed in paragraph 124. If it was reasonable for the IRP to make the disputed recommendation, an argument that it was not reasonable for Mrs James then to require on behalf of the Trust that Dr Drew comply with it faced serious difficulties, and in any event the Tribunal expressly said at paragraph 130, in setting out their general conclusions on the reason for dismissal, this:

> **"The requirement that the claimant accept and implement the recommendations in the independent report was neither unreasonable nor unlawful for the reasons already articulated in these conclusions. The panel dismissing the claimant were entitled to conclude that the implementation of that report without reservation was key to the future of the Paediatric Department and that the claimant's continued failure to accept and adopt the recommendations had potentially harmful consequences for the Department."**

96 Further, in so far as the Tribunal's conclusions on unfair dismissal is challenged, the Tribunal concluded that the panel was entitled to conclude that the admitted breaches of confidentiality on the part of Dr Drew in widening the distribution of certain conclusions in the report contrary to his express agreement not to do so was itself an act of gross misconduct.

97 There is a further difficulty in the way of the arguments which we are now considering, in so far as they go to direct discrimination. The appeal, as we have stated earlier, has been directed principally at the Tribunal's conclusions on discrimination rather than unfair dismissal. It is trite discrimination law that an act is not to be held to be discriminatory because it is

unreasonable, nor, in the case of an instruction, unlawful in the sense that it was not an instruction that the employer was reasonably entitled to give; and, conversely, an employer can be guilty of discrimination without unreasonableness. The Tribunal's approach to direct discrimination issues, by carrying out an appropriate comparator exercise, and by concluding that in relation to all the allegations of discrimination the hypothetical comparator would not have been treated differently, was correct in law; in relation to the Trust's actions when Dr Drew refused to accept the IRP's report without qualification, they specifically concluded that the hypothetical comparator would have been treated in the same way. Of course, if they had found unreasonableness, it would have been open to them to infer differential treatment subject to explanation by the Trust, but they did not, and it is not argued that they erred in failing to draw such an inference.

98 The second argument under this head is posited on the proposition that, if the IRP's recommendation was unlawful and unreasonable, as alleged in ground 4, Mrs James' insistence on their acceptance must suffer the same fate. We do not need to decide whether that proposition is correct; we have some doubts about it; but we have concluded that Dr Drew's attack on the IRP's recommendations under ground 4 fails. This argument, therefore, also fails.

99 Mr McIlroy did not put forward any separate argument as to perversity under this ground from those he put forward under ground 7, and therefore we shall deal with those grounds together below.

Ground 6

100 By this ground Dr Drew contends that the Tribunal failed to apply the law correctly to the facts in that they failed properly to consider the question of whether the Trust's conduct was

reasonable. The Notice of Appeal asserts that, having found that the Trust's action did not amount to religious discrimination, the Tribunal failed to ask that separate question.

101 We did not immediately understand how by this argument it could be said that there was an error of law on the Tribunal's part in relation to their conclusion as to direct discrimination by the Trust. Mr McIlroy explained that his case was that, if the Tribunal's conclusions on discrimination could not stand, the Tribunal's reasoning did not support a conclusion that the dismissal was not unfair. However, (1) we have not concluded that any of the grounds of appeal against the rejection of Dr Drew's direct discrimination claim succeed; and (2) Mr McIlroy accepts that if none of those grounds of appeal succeed, he has no effective appeal against the rejection of the unfair dismissal claim. Therefore, we do not need to consider this ground of appeal any further, unless ground 7 succeeds, and do not intend to go beyond saying, lest we be wrong about the nature of his challenge, that when the Tribunal's judgment is read as a whole, it is clear that the Tribunal considered the facts which went to the reasonableness of the decision to bring disciplinary action against Dr Drew and to dismiss him in detail, made important findings as to the reasonableness of the Trust's conduct at paragraph 106, at paragraphs 121-129 responded to the specific issues raised as to unfair dismissal, listed at issues 1.2.1 to 1.2.13, in so far as they remained part of Dr Drew's case, and expressed clear conclusions in paragraph 130 as to the reasonableness of the course that the Trust took.

Ground 7

102 It is submitted that the Tribunal's conclusion that it was reasonable and lawful for Mrs James to require Dr Drew to accept the recommendation of the IRP (ground 5) and as to whether disciplinary action in the light of Dr Drew's refusal to agree to abide by

recommendation (b)(iv) (ground 7, as explained in Mr McIlroy's skeleton argument at paragraph 53) were perverse.

103 The submission is based on individual answers that Mrs James gave in cross-examination which are said to have amounted to admissions that, had they not been ignored by the Tribunal, could only have led to the conclusion that it was not reasonable for Mrs James/the Trust to act as she/they did.

104 The Tribunal considered the evidence, which was heard over nine days, and then deliberated for three days. Their general conclusion at paragraph 10 that there were no significant material disputes of fact and that the disputes were as to how the factual matrix, i.e. the primary facts, should be perceived and interpreted has not been challenged. It was the Tribunal's function to reach secondary findings of fact as to, where relevant, whether an individual or panel had acted in a discriminatory way or had acted unreasonably. Their conclusions on any such issue can only be successfully overturned if it is overwhelmingly demonstrated that they reached a conclusion that no reasonable Tribunal could reach (see our comments on the law of perversity earlier in this judgment).

105 The factual matrix or narrative has been summarised earlier in this judgment and is to be found, so far as Mrs James' role, after the IRP report, is concerned, at paragraphs 41 of the Tribunal's judgment onwards. Mrs James sought to gain Dr Drew's complete acceptance of the IRP's recommendations, having obtained such acceptance from all others. She said in an email to Dr Drew on 31 March (see paragraph 43 of the judgment) that, if Dr Drew could not do so, she would have to ask him to consider his position because the Trust would not be able to rebuild the trust and mutual confidence that was an essential prerequisite for bringing the

troubles in the paediatric department to an end. By May 2010, having not received the acceptance she sought from Dr Drew, Mrs James was reporting to the board that Dr Drew's continued presence in the department was probably the highest risk the Trust faced. Dr Moghal, in his email to Dr Drew, on 8 June made it clear that universal acceptance of the recommendations of the IRP was required in order to allow the focus of the staff to return to the primary purpose of the service. No progress having been made, Ms Hollywood was appointed to investigate and concluded that disciplinary proceedings should be instituted in respect of the three allegations set out in paragraph 58 and the further allegation, set out in paragraph 67, of breach of confidentiality.

106 These are only highlights from the account set out in paragraphs 41 onwards; and it is on the basis of the facts they set out that the Tribunal reached the conclusions they did at paragraph 130, to which we have already referred.

107 Mr McIlroy's submissions drew our attention to a number of individual extracts from Mrs James' answers in cross-examination. We do not intend to go through each of the specific items set out in his skeleton argument; we have read Mrs James' lengthy and detailed witness statement and each of the passages of cross-examination on which Mr McIlroy relies. We have considered each separately and all of them cumulatively. Having undertaken that exercise, we have come to the conclusion that those passages do not have the impact which it is sought to cull from them and that they do not set out evidence inconsistent with the general thrust of Mrs James' evidence, which was that, in order to get the paediatric department into good shape for the future, it was necessary that Dr Drew should accept all the recommendations, as had all other relevant persons. It is correct that Mrs James said that she had no personal issue with Dr Drew's use of religious language; but the evidence was that persons within the paediatric

department did have such issues. The fact that Mrs James did not herself have such issues and that others had not raised such issues with her directly, when it is clear that they had raised such issues with others (e.g. Dr Rashid) does not in any way undermine her evidence as to what she said she was seeking to achieve as to the reasonableness of her actions in seeking to obtain full acceptance from Dr Drew and considering disciplinary action when Dr Drew would not provide the assurance she sought. Nor does her acceptance that Dr Rashid had not been asked to investigate Dr Drew's use or religious language have any such effect. Whether invited to or not, Dr Rashid received material on that subject and reached a conclusion that the Tribunal regarded as justified and that Mrs James did not admit to have been unjustified.

108 All but the first section of paragraph 55.3 of Mr McIlroy's skeleton argument was withdrawn; what remains does not take the argument forward, in our judgment. Paragraphs 55.4-55.8 are not persuasive; the use of religious language may well have been only one aspect of Dr Drew's general communication style, but it was the point upon which he would not accept the IRP recommendation – described by Mr McIlroy as "the sticking point" – and Mrs James, for the good of the paediatric department, was surely entitled to insist that such acceptance should be forthcoming. But our view is irrelevant; the Tribunal's view of paragraph 30 was that the requirement that Dr Drew accept and implement the recommendations in the independent report was key to the future of the department, and nothing Mrs James said in cross-examination, in our judgment, provided any, still less overwhelmingly demonstrated, that the Tribunal's conclusions under attack in grounds 5 and 7 were conclusions that no reasonable Tribunal could reach. Perversity is not established.

Conclusions

109 We regret both the length of this judgment and the time it has taken to compose it. For the reasons we have set out, the appeal is dismissed.