EMPLOYMENT TRIBUNALS

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Your Ref: 298918-1

Date 04 June 2015 **Case**

Number: 3300656/2014

Claimant		**Respondent**
Miss S Tshikuna Mbuyi	**v**	**Newpark Childcare (Shepherds Bush) Ltd**

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment with reasons is enclosed. There is important information in the booklet The Judgment' which you should read. The booklet can be found on our website at www.iustice.gov.uk/tribunals/emplovment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to reconsider a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits.** An application for a reconsideration must be made within 14 days of the date the decision was sent to you. An application to *appeal* must generally be made within 42 days of the date the decision was sent to you: but there are exceptions: see the booklet.

The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these

reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at -

www.iustice.gov.uk/tribunals/emplovment-appeals

An appeal form can be obtained from the Employment Appeal Tribunal at: Employment Appeal Tribunal, Second Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,

NAILA KHALIL
For the Tribunal Office

Case Number: 3300656/2014

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Mbuyi	**v**	**Newpark Childcare (Shepherds Bush) Ltd**

Heard at: Watford **On:** 2 to 5 March 2015

Before: Employment Judge Broughton
Mr C Surrey
Mrs M Castro

Appearances

For the Claimant: Mr P Diamond, Counsel
For the Respondent: Mr D Panesar, Counsel

JUDGMENT

The unanimous decision of the tribunal is that the claimant was discriminated against because of her religious belief.

There is a permanent anonymity order in place in relation to **

REASONS

The Facts

1. The claimant was employed by the respondent from 4 April 2013. She is a Belgian national and a Christian. She attends an evangelical church in London.

2. The respondent operates four or five nurseries for young children across London. The claimant was employed as a nursery assistant initially as a floating resource across those sites, albeit she worked primarily at Shepherds Bush. **

3. The claimant was offered a position to be permanently based at Shepherds Bush following satisfactory completion of her probation period and this commenced on 2 September 2013.

4. We heard that there were a number of minor issues in the first few days thereafter. These were around the claimant's attitude, performance and alleged inappropriate comments including that she had said to ** that she had "hair too short for a woman" on 2 September. It was not suggested before us that this was a comment related to **'s sexual orientation, although it appears it may have been relied on as such when dismissing the claimant.

5. On the respondent's own case the claimant did not know **'s sexual orientation at that stage, given that she was alleged to have said "Oh my God, are you a lesbian?" on 3 or 4 September. The claimant denied asking this. We note that it was added in different ink off the bottom of the incident log on which the other issues were recorded. In any event, the respondent clearly did not view it particularly seriously and there was no evidence that ** took particular offence.

6. ** is a lesbian and at all relevant times was living in civil partnership with a female.

7. It was common ground that some of these early issues were discussed with the claimant and she was informed of expectations around appropriate behaviour. The claimant was adamant, however, that none related to **'s sexual orientation.

8. There were no further material issues until the events that ultimately lead to her dismissal.

9. On 3 October the claimant had a supervision interview and there was no mention in the notes of any inappropriate comments. There was, however, a reference to speaking to her colleagues kindly in the next supervision on 21 October 2013. The claimant said that this was in relation to a race issue involving a child and not **. En said it related to various issues and so was unlikely to have specifically referenced religion or sexuality, or it would have been noted.

10. We heard that, in November, ** was in hospital following an incident where she was struck by a child which had affected her hearing.

11. It was common ground that the claimant endeavoured to be kind and supportive to her at this time.

12. On **'s return to work the claimant gave her a bible as a gift. In it she had written a note, although the bible had not been retained and so there was a lack of clarity around precisely what was written and, indeed, meant or understood. There was, however, some reference to **s struggle or difficulties.

13. Whilst this would, perhaps, tend to support the claimant's later suggestion that ** had approached her previously to discuss her faith, the claimant suggested that her note was merely

referencing **'s recovery from her injury.

14. It was common ground that ** thanked the claimant for the gift. The claimant, therefore, believed it was well received and no more was said about it.

15. It appears that at some point subsequently the comment the claimant had written was perceived by ** and others to have perhaps been a reference to **'s 'struggle' with her sexuality.

16. At Christmas the respondent put on a nativity and also the staff engaged in a secret Santa gift giving exercise.

17. The claimant contributed a book written from a Christian perspective by Joyce Meyer. It was not a particularly welcome gift for the employee receiving it, but no issue was taken at the time. It contained a message from the claimant not dissimilar from that in the bible given to **. Reference was, however, made to this incident by the respondent in the disciplinary hearing in January but not in the dismissal letter.

18. Following the Christmas break there was a staff training day on 2 January 2014. The claimant was extremely late, not arriving until the afternoon.

19. As a result, the respondent intended to call her to a disciplinary meeting and a letter was drafted early the next week, on 6 January, to invite her to the same.

20. Also on 6 January 2014 the claimant and ** were having a discussion at work about what they had been doing during the Christmas break and the claimant talked about some of her activities with her church.

21. ** had replied with a positive comment, given that the claimant is from Belgium, suggesting that it must be nice for her to have the church acting as a kind of extended family.

22. There was no consistent account from either the claimant or ** regarding the precise details of what each then said.

23. It is possible that the claimant perceived **'s comment to have indicated a desire on her part to be part of a church, such that the conversation then moved on to why ** did not attend.

24. It was, however, common ground that ** indicated that she would not be interested until the church would recognise her relationship such that she could get married there.

25. The claimant appears to have then given her understanding of biblical teaching on homosexuality, including a reference to homosexuality being a sin. This appears to have been in the context of the claimant believing that ** viewed her sexuality as a bar to church attendance. It was put in some context by the claimant suggesting ** need not worry as everyone sins.

26. It was common ground that ** was upset by the discussion and left the woodland room, where she and the claimant had been caring for young babies.

27. Seeing ** upset, her manager invited her into her office and ** asked if she could be moved to a different room. She did not make a formal complaint, nor was she seeking to get the claimant into trouble.

28. Due to her upset, ** was apparently sent home. Having brought the incident to the attention of her manager it was then brought to the attention of TC, one of the directors of the respondent.

29. The letter which was to be given to the claimant regarding her lateness was, as a result, amended and sent to her on 6 January 2014 inviting her to attend a disciplinary meeting on 8 January 2014.

30. The letter stated the meeting was to consider disciplinary action with regard to both the failure to arrive at work on time on 2 January 2014 and "alleged discriminatory conduct in regard to co-workers".

31. In the evening on 6 January 2014 ** sent an email to EN, first in charge at the Shepherds Bush nursery, following up on their conversation earlier that day. In that email she referenced the gift of the bible, albeit acknowledging that at the time she had considered it to be a gift given with good intentions.

32. ** described the events of 6 January 2014 as follows:

> "Sarah and I were in the woodland room when I wished her a happy new year and asked her how she celebrated her day. She explained that she spent it at church where she did various activities. She went on to tell me that she was a born again Christian and that God loves everyone EVEN me!
>
> Initially I did not understand what she was implying by this so I explained the religious education I received as a child is in contrast with my relationship and I do not consider myself a religious person. However, my family does include some practising Catholics. She then elaborated saying that homosexuality was a sin and she understands that I feel that I didn't choose to be gay but she believes it is a

> choice. At this point of the conversation I felt that this was a very personal attack and attempted to defend myself by explaining that I did not decide to be gay any more than she chose to be straight. She went on to say "Don't worry though we all sin every day. Some people lie, there are lots of sins we all do but don't worry God still loves you and forgives you."
>
> Again I felt as though Sarah was attacking myself and my marriage. Up until this point I have not felt my sexuality was any kind of issue and I was so taken aback by this outburst that I asked if I could be excused. I went to find M and broke down in tears. She then brought the issue to the attention of EN.
>
> This exchange has caused me to question the intent behind the bible she gave me. As I previously stated I had felt that it was inappropriate but given to me with good intentions. 1 no longer feel this to be the case.
>
> Sarah approached me after the event and attempted to make conversation. I replied and said "You have really upset me. Please don't speak to me unless it's work related" and Sarah just said "OK" and shrugged her shoulders without apology.
>
> I feel very uncomfortable working with Sarah now. I've never felt as though I had been judged by her because of my sexual orientation and yet this is how I feel in Sarah's presence."

- 33. ** was clearly indicating that she had first expressly brought up her sexuality, albeit after the claimant had already, perhaps, impliedly done so. That said, the 'even me' was not pursued before us.

34. That email, however, had not found its way to TC by the time of the disciplinary hearing, nor indeed by the time that she reached her decision to dismiss.

35. When asked about her considerations in relation to how the conversation between ** and the claimant had turned on to the subject of sexual orientation and religion, TC stated that she had not investigated or come to any conclusions.

36. She stated that she formed her decision based on the claimant's version of events and so there was no need to make any formal findings or carry out any further investigation with regard to the precise accuracy of either account.

37. At the disciplinary hearing on 8 January the claimant was present as were her nursery manager, EN, and two of the respondent's directors, JC and TC. TC gave evidence before us and appeared to be a principal decision maker both at this stage and, indeed, at the appeal.

38. At the outset of the hearing the claimant was informed that a possible outcome was her dismissal.

39. The issue of the claimant's alleged conduct with co-workers was addressed first.

40. The claimant was asked for her account of what had happened on Monday 6 January.

41. The claimant stated as follows:

> "** and I were in the woodland room working, she and I were talking and she asked me about how I was and how things were at church. During the conversation about my church Laura asked me if she would be welcomed at church and if God is okay with what she is doing. I believe in God and as a Christian I follow the bible. So I told her God is not okay with what you do."

42. TC sought to clarify what the question and response related to and the claimant confirmed "living with a woman".

43. The claimant went on to say that she had also stated to **

> "If God is against her God is against me as well because we are all sinners."

44. The claimant sought to explain this at the disciplinary meeting thus:-

> "I can only tell the biblical truth. I am not a homophobic person but I believe homosexuality is a sin and God doesn't like that."

45. There was already, therefore, a blurring between what had been said and what was believed.

46. The claimant was clear in suggesting that ** had

46.1 first raised the claimant's church

46.2 first raised her own sexuality and lifestyle

46.3 asked if she would be welcomed at church and,

46.4 specifically asked what [the claimant believed] God thought about her living arrangements.

47. The discussion at the disciplinary then went into the "type of sins God does not like" which, on the face of it, could only have been an enquiry into the claimant's belief as opposed to what may have been said to **.

48. The claimant responded,

> "lying, homosexuality, that's in the bible! There is no way I would compromise my faith"

49. It was common ground that the claimant had made the analogy with, or at least referenced, lying as another sin in her discussion with **. However, the issue of whether this was said to ** was not something that was addressed at the disciplinary hearing.

50. The claimant was asked why she had chosen to reply at all, to which she responded:

> "Simply because I care for her. She approached calling for me for the right reasons. She is struggling, you can see. My heart is going out to her. Jesus says come to me as you are."

51. The claimant did acknowledge that ** was upset before the discussion moved on to her gift of the books.

52. She was also asked about whether there had been previous discussions with ** about religion and the claimant again stated that ** had approached her, not vice versa. This was not investigated.

53. In the dismissal letter, the respondent seemingly upheld an allegation that the claimant had made "inappropriate" comments to ** about her being a lesbian in September 2013. In fact there was only one such allegation, supported before us by the manuscript note added to the bottom of the incident log alleging the Claimant had said on 4 September - "OMG are you a Lesbian?".

54. This was not put to the claimant at the disciplinary hearing and she denied having said it before us. ** suggested that it had been said but she took no offence.

The respondent, having stated that they did not investigate because they felt they had enough to dismiss based on the claimant's version of events, offered no explanation for this apparent failing.

The claimant was then reminded of the respondent's policies with regard to what was, and was not, appropriate to say at work, to which she responded:

> "1 believe what I have got is a gift. It is a desire to share not to force…… I know ** has a desire…… everybody is able to share but if somebody doesn't want it it's okay."

57. The claimant was then asked about what she would do if the respondent had a child from a homosexual family in the nursery to which she responded:

> "First of all they are not to be hated. I give a care what they desire for. If they approached me I would give them my gift, I wouldn't lie."

This reference to being "approached" somehow became "if it came up in conversation" in the dismissal letter

58. The claimant was then asked what she would do if the parents asked for their family type to be promoted at the nursery, such as reading a book about a child

59. with two mothers, to which she responded she would ask a colleague to do it.

The claimant was then asked:

> "Do you think ** is wicked?"

60.

61. It was unclear why this question was asked. There was no suggestion that the claimant had called ** "wicked".

This appeared, again, to be a direct question about what the claimant believed as opposed to how that belief may have manifested itself in the workplace. She responded:

> "Yes we are all wicked."

62. There was no express reference to homosexuality in this exchange, although the respondent clearly intended to link the two, as they did in the dismissal letter.

63. The disciplinary hearing then moved on to discuss the claimant's lateness, which, from the notes, appeared to take at least as much time as the more serious harassment allegations.

64. The meeting was concluded to allow the respondent to give consideration to what action to take.

65. We heard that they received advice from ACAS who highlighted the difficulty where two protected characteristics, in this case sexual orientation and religious belief, potentially conflict. They were advised to consider treading carefully and objective justification for their decision and offer a right of appeal.

On the very next day, 9 January 2014, the claimant was sent the outcome of the disciplinary.

The decision was apparently taken by the two directors, JC and TC.

67. It was determined that the claimant had committed gross misconduct and
68. should be instantly dismissed. The reason given was harassment and specifically that:

> "On Monday 6 January 2014 you entered into a conversation in the workplace with your colleague, **, and the topic moved on to the issue of homosexuality... During that conversation you stated that homosexuality was a sin."

Of course, the only evidence on which TC said she based her decision (about what was said) was that the claimant had said in response to a direct question
69. that "God is not OK with what you do" and "we are all sinners"

Whilst not in dispute before the tribunal, the meeting notes do not indicate that the claimant was ever asked if she had stated in terms that homosexuality was, in her belief, a sin.

70
71. The decision does not reference the fact that TC had not investigated and had accepted, for the purpose of the disciplinary, the claimant's version of events. On that basis, which was how she put her case before us, she must

have accepted that ** both instigated the discussion and took it into dangerous territory.

The letter went on to reference the claimant's belief that ** was "wicked" before concluding that this belief was as a result of **'s sexual orientation. That was not something borne out by the notes which did not expressly link the word to sexual orientation and the claimant indicated she believed everyone was wicked. It was, in any event, not something that was alleged to have been said to ** by the claimant, either at the time or, indeed, subsequently. No explanation was offered regarding why it was referenced at all.

72.

It was suggested by the respondent in the dismissal letter that: "These comments are wholly inappropriate, especially in our workplace and constitute unlawful discrimination." This use of the plural must have included reference to the "wicked" comment, which was made solely in the context of a response to a direct question at the disciplinary hearing.

The letter recorded that the claimant did not regret saying what she had and that she "categorically would do it again". The context contended for by the claimant, both at the disciplinary hearing, appeal and before us, which was not in dispute, was that she would do it again "if she was approached". To characterise this as a refusal to refrain from a repeat was to not give the whole picture.

The dismissal letter went on to reference previous incidents, being the inappropriate comments (plural) allegedly made in September and the gift of the bible as demonstrating that the claimant had "specifically targeted ** because of her sexual orientation" and that " this constitutes harassment".

Whilst that may or may not have been the case, that was an untenable finding on the evidence of the claimant, which was allegedly all the respondent considered. The comment in September was not perceived by ** as harassment at the time, nor was there any investigation as to whether it was said or not. It was not even mentioned in **'s email of 6 January. Unlike the comment about her hair which was before the claimant knew of her sexual orientation, ** did not say in her witness statement that it had upset her, merely that she was taken aback that the claimant was so openly shocked.

Perhaps tellingly, no reference was made to the gift of another religious book to another employee, which would tend to support the proposition that the claimant would take opportunities to share her faith with anyone.

TC then addressed what the claimant would do if required to care for the child of a homosexual family. It was stated on behalf of the respondent in evidence before us that these were secondary matters and that the claimant was dismissed for harassment of **. The letter then addressed the lateness issue for which the claimant would have received a written warning but for her dismissal.

78.

79. Whilst there was a suggestion, perhaps opportunistic, at appeal stage, that part of the reason for her lateness was some conscientious objection to yoga on religious grounds,

this was not mentioned at the time or at the disciplinary. It was clear that the claimant was primarily late through her own failings, her explanations were inconsistent and lacked credibility and a warning was appropriate.

80. This played no part in the decision to dismiss.

81. The letter concluded as follows:

> "We regret having to come to this decision. However your harassment of your colleague, lack of remorse for your discriminatory conduct and refusal to refrain from repeating this action in future is unacceptable and makes your continued employment with us untenable. You have irreparably breached the trust that we as responsible nursery owners need to have in you as an early years' educator."

82. The claimant was given the right to appeal. The claimant did appeal in writing dated 15 January 2014.

83. She alleged that the findings were not based on an accurate account of the circumstances and that the hearing was not fair and she had not seen the allegations in advance.

84. Those would be legitimate concerns in an unfair dismissal complaint but the claimant did not have qualifying service for such a claim.

85. The claimant alleged that she had been targeted because of her faith by ** and the respondent generally.

86. The claimant specifically stated that ** had approached her on 6 January and commenced the conversation on Christianity, stating that she wanted to be a Christian. The claimant expressly stated that she had never approached **, targeted her or initiated conversation.

87. The claimant expressly objected to the reference to calling ** "wicked" as this was an enquiry brought up by the respondent and never alleged.

88. The claimant also clarified that she would work with and support and love all children and their parents including those from same sex couples, whilst reiterating that if she was directly asked about her faith she would answer honestly. That was no more than a clarification of what she had said at the disciplinary hearing.

89. An investigation was only then carried out, involving interviewing a number of employees.

90. Ultimately the decision to dismiss was upheld.

91. At this stage we would note that it was contended on behalf of the claimant that she may have been specifically targeted by ** and/or others to provoke her into saying something which may have justified a dismissal.

92. There was no evidence to support that view. ** had not formally complained or raised a grievance; she merely asked to be moved to a different room.

93. The conversation on 6 January started as a normal workplace conversation between colleagues discussing the Christmas and New Year break. The claimant referenced her church activities in that context. ** acknowledged before us, albeit not in her email at the time, that she then took the conversation into the arena of the potential conflict of her sexual orientation and traditional Christian belief. The claimant responded to that.

94. Similarly, therefore, there was little or no evidence before us to suggest that the claimant had been targeting ** in an attempt to force her faith upon her, albeit it was common ground that the claimant would look for opportunities or openings to share her faith when she felt she was being invited to do so. She would also, by virtue of the book gifts for example, do so indirectly on other occasions. It was apparent that at least some staff at the respondent felt that she did so too readily.

95. We note that those were not matters that were investigated further at the time of the decision to dismiss.

The Issues and The Law

96. The claimant's claims were brought under the Equality Act 2010 alleging her dismissal as the act of direct or indirect discrimination and/or harassment.

97. The protected characteristic relied on was the claimant's religion or belief and, specifically, the religious belief that homosexuality is a sin.

98. Section 26: Harassment

98.1 Did the respondent engage in unwanted conduct in dismissing the claimant?

98.2 Was the conduct related to the claimant's protected characteristic?

98.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

98.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

98.5 In considering whether the conduct had that effect, the Tribunal take into

account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

99.

100. Section 13: Direct discrimination

100.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely dismissing her? Dismissal was not disputed.

100.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relied on a hypothetical comparator.

100.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

100.4 If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

101. Section 19: Indirect discrimination

101.1 Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely a prohibition on employees expressing any adverse views on homosexuality and/or on describing homosexuality as a "sin"? The respondent acknowledged that such a provision was applied.

101.2 Does the application of the provision put others who share the religious view that homosexuality is a sin at a particular disadvantage when compared with persons who do not have this protected characteristic? The respondent took no issue on this point. Whilst no statistics were offered it appeared common ground that a significantly higher proportion of evangelical Christians would hold such a view, as opposed to the population, or, indeed, the respondent's workforce, generally. We note Ladele "There is no doubt that the policy decision to require all registrars to perform civil partnerships put a person who believed that civil partnerships were contrary to the will of God, "at a disadvantage when compared with other persons", namely those who did not have that belief."

101.3 Did the application of the provision put the claimant at that disadvantage in that she was dismissed

101.4 If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

The respondent relies on justification as it's defence to the indirect discrimination allegations. The legitimate aim contended for was providing its services in a non discriminatory way [for the benefit of clients and staff] and in accordance with the Early Years framework as it's legitimate aim.

102. The UK legislation has, where possible, to be read in conformity with article 9 by virtue of section 3 of the Human Rights Act 1998.

103. The European Convention on Human Rights provides:

Article 9

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 8

"Everyone has the right to respect for his private and family life, his home and his correspondence."

Article 14

"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention.

It was not in dispute that Article 14 also applied to discrimination related to sexual orientation

104. Freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is one of the elements that go to make up the identity of believers and nonbelievers alike.

105. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 (1), freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others

and in public.

106. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (Kokkinakis v. Greece, 25 May 1993 ECHR).

107. Since the manifestation by one person of her religious belief may have an impact on others, the Convention qualifies this aspect of freedom of religion in the manner set out in Article 9 (2). This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

108. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

109. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief.

110. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. There is no requirement on a claimant to establish that she acted in fulfilment of a duty mandated by the religion in question.

111. It is true, as observed in R (Begum) v. Headteacher and Governors of Denbigh High School [2006] UKHL 15, that there is case law which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 (1) and the limitation does not therefore require to be justified under Article 9 (2).

112. However, contrary to the respondent's written submissions, in Eweida & others v UK [2013] the European Court of Human Rights considered that:-

"Given the importance in a democratic society of freedom of religion, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."

113. A related recommendation appears to have been made by the Assembly of the Council of Europe under resolution 2036.

114. Article45 of the Lisbon Treaty provides

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

115. There was substantial common ground between the parties as to

the approach to be adopted in claims of unlawful discrimination. The following propositions reflect the well-established approach:

115.1 The critical question in a discrimination case is why the Claimant was treated as she was: the 'reason why' question. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

115.2 Because direct evidence of discrimination is rare, it is often necessary to infer discrimination from all the material facts. A two-stage test has been adopted in dealing with the burden of proof (reflecting the requirements of the Burden of Proof Directive 97/80/EEC):

115.3 The burden is on the Claimant at the first stage to establish a prima facie case of unlawful discrimination i.e. to prove facts from which inferences could be drawn that the employer has treated the Claimant (i) less favourably and (ii) on the prohibited ground.

115.4 If the Claimant proves such facts then the second stage is reached. The burden shifts to the employer who can only discharge it by proving on the balance of probabilities that the adverse treatment was not, in any way, on the prohibited ground. If the employer fails to establish this, a finding of unlawful discrimination is required (save where justification is available).

115.5 If one of the reasons for the treatment is a Claimant's protected characteristic, it is sufficient to establish discrimination, even if not the only or even the main reason, provided it is a more than trivial reason for the impugned treatment: Igen v Wong [2005] ICR 931.

115.6 The two-stage approach is not obligatory: see Madarassv v Nomura International Pic [2007] EWCA Civ 33. In some cases it may be more appropriate to focus on the reason given by the employer for the impugned treatment. If the reason or reasons given by the employer demonstrate that the prohibited ground played no part whatever in the adverse treatment, the case fails.

115.7 Where a complaint is not that she was treated differently from others: rather it was that she was not treated differently when she ought to have been, and that complaint is about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference as Elias J said in Ladele, "[i]t cannot constitute direct discrimination to treat all employees in precisely the same way."

115.8 Even if there is sufficient evidence from which an inference of discrimination could be made, any allegation requires consideration of the explanation given by the employer for the less favourable treatment as, if we are satisfied that the reason is non-discriminatory, even if in other respects the conduct is unreasonable then no discrimination has occurred.

116. The respondent also relied on the case of Chondol v Liverpool City Council EAT 0298/08 which, perhaps, was the closest factually to the case before us. We remind ourselves what the actual reason for the treatment was in that case: the belief that Mr Chondol had been inappropriately promoting Christianity, having received a couple of warnings about expected standards. It was not on the ground of his religion that he received his treatment, rather on the ground that he was improperly foisting it on service users.

117. There are a number of similar cases, all decided the same way but none of which we are aware where there had been no warning and the dismissal was based primarily on an honest reply to an enquiry.

Decision

118. We will firstly address those matters on which we are unanimous.

119. Whilst aided by submissions on behalf of both parties, both appeared to miss the point. We need to consider the allegations at the time of dismissal based on what was said, done and known, or perhaps ought to have been said, done and known at that time.

Religion

120. None of the claimant's treatment was because she was a Christian. The claimant was open about her faith and colleagues and the respondent were aware of it at all material times. The respondent was not anti-Christian.

Belief

121. The issues in this case arose out of the claimant's belief that homosexuality is a sin. Such a belief has effectively already been accepted by the higher courts, in cases such as Macfarlane and Ladele, as capable of amounting to one that attracts the protection of the Equality Act 2010 and its antecedents.

122. It was a genuinely held belief that was more than an opinion or viewpoint and had attained a certain level of cogency, seriousness, cohesion and importance. It concerned a substantial aspect of human life and behaviour.

123. It is a belief worthy of respect in a democratic society, is not incompatible with human dignity and is not in conflict with the fundamental rights of others. Whilst some may dispute those propositions, we are considering here the belief itself. When, whether and how such a belief may be manifested, however, is one of the issues in this case, given the inherent interplay with the right not to be discriminated against because of sexual orientation.

Homophobia

124. The respondent's representative sought to characterise such a belief as discriminatory, homophobic and akin to racism, which was unhelpful. We note the Court of Appeal in McFarlane responded to representations made by the former Archbishop of Canterbury, Lord Carey, thus

"judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as "disreputable". Nor have they likened Christians to bigots."

125. There is a difference between, say, a racist expressing hateful views and a person of religious conviction expressing their beliefs, however unwelcome.

126. That is not to suggest, however, that the inappropriate expression of religious beliefs that may appear discriminatory would receive special protection under the law. The respondent quite rightly placed considerable reliance on Bull v Hall [2013] UKSC 73 and we give the full passage here

> "To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation)

> because of a belief, however sincerely held, and however based on the biblical text, would be to do just that."

Freedom of Movement

127. The claimant suggested that the "widely held" view across Europe was that the UK legal system prioritised rights relating to sexual orientation over those of religious conviction and that this therefore hindered the right to freedom of movement.

128. Whilst the claimant's contentions with regard to this fundamental freedom of the EU were intriguing and innovative, there was no evidence before us of any actual barrier to the freedom of movement of EU workers. The only real evidence in support of the notion that there was an effective barrier to such a freedom came in a statement from an Irish member of the clergy who did not appear before us.

129. Essentially the claimant contended that the "widely held view" that the UK favoured the rights of homosexuals over those religious observers acted as a barrier to Christians from other EU states coming to the UK to live and work.

130. The issue of whether that basic premise of favouritism contention has merit has been addressed and rejected by the higher courts in cases such as McFarlane, Bell and Eweida.

131. In any event, the only actual evidence we have is that the UK has positive net migration from the EU every year and, regarding the movement of Christians, we have the claimant who came here as a Christian and remains in the UK, knowing more than most about the jurisprudence in this area.

Harassment

132. Taking the harassment allegation first, the claimant's own evidence when asked what the effect was on her of the allegations against her stated:

> "It was great. I could tell the gospel. It was an opportunity to establish who I am."

133. That was an attitude and approach she adopted throughout both the internal and these proceedings

134. In those circumstances it seems to us that she cannot succeed with her complaint of harassment as the conduct does not appear to have been unwanted. That, of course, will also be relevant to considerations of any alleged injury to feelings.

135. There was no evidence in any event to suggest that the claimant's dignity had been

violated or that she had been subjected to an intimidatory or hostile work environment.

136. It is, perhaps, worth adding under this heading that were we hearing a [f] complaint of harassment brought by ** arising out of the same facts we would not be able to uphold it on the facts considered at the disciplinary hearing. The law would fall into disrepute if an individual could ask a question, knowing the likely response and, on receiving it, however genuinely upset, claim it was unwanted contact and, hence harassment. Could they then repeat the exercise and claim again? It may have been unwelcome but on the facts of this case it could not be said to have been uninvited.

137. ** would not have ventured into this arena of discussion again. The claimant, whilst confirming that she had no regrets and would do the same again, believed, wrongly, that she was effectively being asked to renounce her faith. She was also clear that she would not force her views on others and would only communicate them 'if approached'. There was no exploration of whether a clarity of approach could have been agreed whereby, for example, the claimant agreed not to discuss her beliefs at work and, if 'approached' to arrange a discussion in her own time.

Unfairness

138. The claimant did not have qualifying service with regard to claiming unfair dismissal. However, she was not treated fairly.

139. She was not given the detail of the allegations in advance of the disciplinary hearing, nor warned that it could result in her dismissal. There was no investigation. TC was, at the very least, heavily involved in both the original decision and appeal. EN was a material witness but was present at the disciplinary hearing, on the one hand suggesting that she was merely a notetaker, whilst also stating that the decision was discussed and agreed. A number of the findings at the disciplinary stage was unreasonable on the evidence before the respondent at that time.

140. Given that the respondent's position was that they did not investigate because they were able to dismiss on the claimant's account alone, they had no basis for concluding that the claimant had specifically targeted ** because:

140.1 it was based on the claimant having made inappropriate comments to ** once she discovered she was a lesbian. No such comments were put to the claimant at the disciplinary. Only one was referenced before us. The claimant denied saying it and ** took no offence

140.2 the unsolicited gift of the bible was assumed to have been related to **'s sexual orientation. That point was not specifically put to the claimant at the disciplinary. She denied it before us and ** did not perceive it as such at the time. No action was taken then and the claimant believed the gift had been well received.

140.3 it ignored the gift of Christian literature to another member of staff and the claimant openly discussing her faith with other colleagues.

141. Moreover, to conclude the claimant had had specifically targeted ** on 6 January would mean that TC, contrary to her evidence before us, had formed a view about who instigated the discussion and took it into the arena of religion and sexuality and it was the claimant. The respondent stated they accepted the claimant's version of events which was that **

141.1.1 first raised the claimant's church

141.1.2 first raised her own sexuality and lifestyle

141.1.3 asked if she would be welcomed at church and,

141.1.4 specifically asked what [the claimant believed] God thought about her living arrangements.

142. Before us ** admitted taking the conversation into the arena of religion and sexuality, however innocently, and any reasonable investigation would have concluded the same.

143. We would emphasise, however, that unfairness does not, of itself, make out a claim for discrimination.

Indirect

144. In the alternative, the respondent accepted that they applied the PCP contended for.

145. Common sense, the case law and our experience demonstrate that such a PCP would have a disparate impact on Christians, holding similar views to those of the claimant on the biblical teachings on practising homosexuality. That is not merely because a significantly higher proportion of Christians would hold such views but also because many evangelical Christians feel their faith compels them to share it.

146. The respondent's aim of providing their services in a non

discriminatory way (for the benefit of staff, infants and their families alike) and in accordance with the early years framework was a legitimate one. Had the claimant apologised and confirmed there would be no repeat, dismissal would not have been a proportionate response as it would be unnecessary to preserve the aim.

147. It was not necessary for us to consider the indirect discrimination case in relation to the promotion of single sex families, which would be a factual matrix more akin to Ladele and McFarlane.

148. It may be that the respondent would have been justified in dismissing for the claimant's refusal to actively engage in reading certain literature or otherwise promoting family units other than those formed by husband and wife. It was unclear how likely it was that such a need may ever have arisen in the baby room (under 1 year old) and/or at Shepherd's Bush. Whether it was justified would involve consideration of the claimant's position on this issue, as best detailed in her appeal, and the effect on her of the loss of her employment and performing the balancing exercise to determine whether dismissal was a proportionate means of achieving the respondent's legitimate aim.

149. It was clear, however, that this was not the principal reason and, but for the events of 6 January, she would not have been dismissed at that time.

150. Such an issue may have arisen as a remedy point but we consider that for the respondent to have dismissed on this ground, the claimant would have been warned and consulted and the process would have been concluded in the same timescale as the appeal. However, by that stage the claimant had already secured equivalent alternative employment and so there would be no ongoing loss.

Direct Discrimination

151. We first need to consider whether the claimant has established facts from which we could conclude that discrimination has occurred.

152. Her evidence was that she believed she was dismissed for both holding and expressing her belief. The respondent suggested that the dismissal was only for expressing the belief.

153. We are satisfied that the claimant has established facts capable of shifting the burden to the employer to prove that discrimination did not play a part in the decision, consciously or otherwise.

154. The claimant was dismissed for allegedly targeting ** because she was a lesbian, yet the respondent had little or no evidence to support that view, certainly as at the time of dismissal.

155. They formed views on allegations that weren't even put to her, such as the disputed, inoffensive (according to **) comment, not comments as claimed, in September. No challenge was made by TC to the fact that the only relevant log entry

appeared to have been added after the others. EN was actively present at the disciplinary hearing which is unwise when also a witness of disputed fact. The supervision note that allegedly referenced it was not at the next supervision and vague to the point that the claimant would not have related it to **, sexuality or faith.

156. It seems that, in the context of this case, there may have been stereotypical assumptions about the claimant and her beliefs such that anything that could be considered to relate to **'s sexuality would not only be construed as such, but construed both negatively and related to the belief.

157. The claimant was not asked whether the gift of the bible was related to **'s sexuality and it was not, initially, received as such. It was upheld as part of the allegation of targeting, notwithstanding those factors and the fact that the claimant had given a gift of a Christian book to a heterosexual colleague. That latter point was omitted from the dismissal letter. It clearly didn't fit the hypothesis.

158. That is not to say that any such assumptions were necessarily wrong, merely that relying on them without investigation, or an opportunity to respond, indicates pre judgment that may infer discrimination.

159. At the disciplinary hearing, there were a number of questions that were related to the claimant's belief, not what she may have said or done. Most notably the final enquiry - 'do you think ** is wicked?' There were also references to "forcing" her belief on others which was, at best, not neutral and overstated the position.

160. It seems to us that can only be a question of what the claimant believed. The choice of language was related to her religious belief.

161. The response was equivocal - 'yes, we are all wicked'. There was no reference to sexuality in either the question or response. There was no suggestion the claimant had ever used the word 'wicked', save in response to this question.

162. There was no good reason for asking the question and yet the response, somehow interpreted as related solely to ** and her sexuality, was relied on in the decision to dismiss.

163. Similarly, characterising responding to an enquiry about faith, as harassment by the responder, suggests the perceived unpalatable nature of the belief itself played a part in the decision.

164. We highlighted in our reasons various other procedural failings that could contribute to an inference of discrimination in the absence of alternative explanation.

165. It is difficult to construct a hypothetical comparator when some of the facts we have found are so intrinsically linked to the claimant's belief. But for the number of cases on the conflict between the competing rights in this case we would feel

that such a link would render it unnecessary to attempt to construct a hypothetical comparator.

166. The respondent sought to suggest the appropriate comparator was a non Christian who expressed negative, homophobic or discriminatory views about practising homosexuals. That obviously relates to the manifestation of the belief. Such an individual would have been dismissed. They would not, plainly, have been asked questions about the word 'wicked', nor would they use the word sin.

167. It seems unlikely that all of the evidential and logical leaps taken by the respondent in construing the claimant's motive as targeting ** because of her sexuality can be explained, other than as arising from a stereotypical assumption about evangelical Christians. In the absence of such a stereotype for a secular comparator they would surely have had to investigate and make findings about the earlier allegations. The reality, as indicated by the claimant throughout, was that she would seek opportunities, wherever they arose but not if somebody did not want her to.

168. It is worth noting that the claimant, whilst unrepentant about her beliefs, always qualified their expression by emphasising that, for example 'we are all sinners'. She was adamant that she never sought to force her views on others and there was no evidence that she did, although she was enthusiastic about sharing them, perhaps overly so.

169. Moreover, whilst possible that a comparator may have offered a secular book as a gift with a few small negative references to homosexual living, it would be unlikely to be subsequently interpreted as an attempt to encourage a change of lifestyle. If it had been, it is difficult to imagine ** subsequently chatting with such a person and asking their views on homosexuality or whether she would be welcome at some secular meeting where only heterosexual relationships were considered acceptable.

170. Of course, on the case the respondent claimed to be considering, the claimant was not asked for her view. Rather, she was asked what God thought. It is impossible to construct a direct comparator for that key question, save for perhaps some secular sense of subjectively viewed objective morality.

171. In addition, it appears, according to the respondent's assertions, that they took the claimant's evidence at its highest regarding the events of 6 January. That would mean they would have no reasonable alternative but to conclude that ** had instigated the conversation and taken it into the territory of religion and sexuality. This would be a breach of the respondent's procedures and, as ** arguably challenged the doctrine of the church, could have caused offence to some Christians, although not the claimant, who was grateful for what she saw as an opportunity to share.

172. Whilst we understand **'s feelings, it was common ground that such a conversation was inappropriate in the work place. The respondent took no action against ** and so she is the nearest we have to an actual comparator. She was not even placed in the incident log, nor spoken to at a formal supervision.

173. That is not to negate **'s genuine upset at the claimant's response. Having had a catholic upbringing and, it seemed, some challenges when 'coming out' she felt judged. Nor, indeed, do we equate the comments made by each. It was not suggested in terms before us, although it could have been, that the discussion was effectively ** saying 'your church/God/beliefs are wrong about homosexuality' and the claimant replying 'practising homosexuality is wrong in the eyes of God'.

174. It was far from clear how TC got to a position of classifying this brief invitation for an opinion as targeted harassment. ** asking 'if she would be welcome in church and if God is OK with what she is doing?' and receiving a response that was along the lines of the claimant's understanding of Christian teaching - you would be welcome but 'God is not OK with what you do'

175. In terms of the respondent proving no discrimination whatsoever, they have failed to satisfy us for the same reasons that the claimant was able to establish a potential case.

176. She offered no explanation for the belief based questions or the findings that weren't put to the claimant, nor how she reached her conclusions that were contrary to the claimant's evidence at the time.

177. For what it is worth we do not consider TC could have made the findings that she did purely on the basis of the claimant's evidence. She had obviously received information from EN and, perhaps, others to form those views. Either way, she either pre-judged the outcome accepting unchallenged evidence that supported the stereotypical assumption and/or interpreted the claimant's evidence in an almost impossible way.

178. In the context of the manifestation of the belief, it seems to us that, whilst keen to proselytise her faith, all the claimant did, on the respondent's case as at the disciplinary, as opposed to additional matters presented before us, was based on one comment in September that did not offend, 2 book gifts, including one to a heterosexual colleague and an honest response to a question from **.

179. To characterise her response, in line with her faith, however upsetting to some, and acknowledging **'s resulting distress as harassment reminded us of the decision in Grant v Land Registry [2011] EWCA Civ 769 where a homosexual employee who 'came out' at his place of work but then transferred and was 'outed'.

180. There the disclosure would still in fact have been unwanted by the claimant, and no doubt the claimant would have been equally upset by the fact that he was deprived of the opportunity to divulge this information in his own way and in his own time. But it would 'make a mockery of discrimination law to impose liability in these circumstances. A defendant would be liable for discrimination for doing something which the claimant had reasonably led him or her to believe would not cause the claimant concern.'

The implications of a finding of discrimination in these circumstances would be far reaching. Similar concepts of direct discrimination and harassment are found in other discrimination legislation, relating to such areas as sex, religion, race and disability. An individual may choose to make generally known in the workplace certain aspects of his or her private life if that information is discussed in the course of conversation, even in idle gossip, provided at least there was no ill intent, that would not make the disclosure of that information an act of discrimination. That is so even if the victim is upset at the thought that he or she will be the subject of such idle conversation. By putting these facts into the public domain, the claimant takes the risk that he or she may become the focus of conversation and gossip.'

181. It seems there must be a parallel with an individual asking a colleague a question about their otherwise protected private life, half expecting that they will not like the answer, particularly when one or more protected characteristics are engaged.

182. We stress once more that whilst those were the facts on which TC stated she based her decision, and hence it is that which primarily concerns us, we do not believe the exchange was so clear cut. **, unwisely, and contrary to her contemporaneous claim by email, took the conversation into the arena of what she perceived as a conflict between the teaching of the church and her living arrangements with her partner. The claimant saw that as an opportunity to 'share her gift'. The claimant referenced sin, both hers and **'s, albeit we would acknowledge the difference, even offence, of likening acts of will and choice to those of sexual orientation. The claimant did endeavour to communicate a message of welcome and inclusivity as well but that was, unsurprisingly, not what ** focused on. It would be to overstate matters to suggest that the claimant had ill intent.

Indirect Discrimination

183. We feel, for all the above reasons, that even the manifestation of the belief in this case, given the respondent's evidence that they accepted the claimant's version of events, which could be characterised as an honest response to an inappropriate enquiry, this is a case of direct discrimination.

184. We would acknowledge, however, that Article 9(2) and Eweida suggest manifestations of belief should ordinarily be considered under the test for indirect discrimination.

185. Given our unanimous findings that takes us to the issue of proportionality.

186. The respondent's aim was both legitimate and important.

187. It was not proportionate to rely on allegations from the previous year without investigation. However, on the basis of the agreed PCP, the respondent would still have dismissed on the 6 January events alone.

188. So was it proportionate to dismiss in circumstances where the claimant would not apologise or promise no repeat?

189. It was regrettable that the claimant seemed to believe she was being asked to denounce her faith and to promise to not offer her 'gift' when approached. Had the respondent clarified and suggested an appropriate form of words for an apology, such as one reflecting the inappropriate nature of such conversations at work and acknowledging the effect on **.

190. The respondent should, perhaps, have involved ** as well as the claimant, when considering responsibility for taking the conversation into an inappropriate arena. Both could have been asked to confirm that discussing matters of religion, sex and sexuality at work was inappropriate and would not be repeated.

191. Had the respondent done so and the claimant refused, several authorities confirm dismissal would most likely have been proportionate.

192. But this situation would not happen again as ** would not take the conversation into the arena and the claimant would not go there unless approached. ** was not suggesting the claimant be dismissed.

193. In those circumstances and

193.1 in the absence of any equality of treatment with ** for their respective parts in engaging in inappropriate discussions at work

193.2 without further exploration of an agreement about appropriate conduct going forwarded and

193.3 without it being made clear that dismissal would result from any repeat of upsetting comments about and

193.4 an express instruction not to discuss such matters in the workplace was either breached or

193.5 a clear indication was given that such an instruction would not be obeyed

It was not proportionate to dismiss.

194. It is probably apparent from all of the above that we consider that there was a possibility of a dismissal in circumstances that would not have been discriminatory. There is also an argument for contributory conduct

195. We are aware the claimant swiftly secured equivalent work and she gave evidence of little injury to her feelings

196. It is hoped that the parties may be able to resolve these and other remedy matters. If not they should provide dates of availability for August - Ovctober by no later than 12 June 2015.

Employment Judge Broughton

Date: 21 May 2015

Sent to the parties on: 4 June 2015

For the Tribunal Office.