Case Numbers: 3200658/2014

RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss V Wasteney**

Respondent: **East London NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **20-22 & 27 January 2015**
In chambers 10 February 2015

Before: **Employment Judge Foxwell**

Members: **Ms L Conwell-Tillotson**
Mrs S Taylor

Representation

Claimant: Mr P Diamond, Counsel

Respondent: Mr B Collins, Counsel

JUDGMENT

1. The Claimant's claims are not well-founded and are dismissed.

2. The provisional remedy hearing fixed for 28 May 2015 is cancelled.

REASONS

Introduction

1. The Respondent, the East London NHS Foundation Trust, is an NHS Trust providing mental health and community healthcare services to the City of London, and the London boroughs of Hackney, Tower Hamlets and Redbridge. It has approximately 3800 employees. It is a public sector employer.

2. The Claimant, Miss Victoria Wasteney, began working for the Respondent as Head of Forensic Occupational Therapy on 5 March 2007. Her main place of work was the John Howard Centre, which is a mental health services facility with secure

accommodation. The patients at this facility are admitted under the Mental Health Act 1983. The Claimant was responsible for the operational management of the Occupational Therapy service for medium and low secure forensic mental health services.

3. The Claimant describes herself as a *"born-again Christian"*. She told us that she became a Christian at the age of eight but for a long time had not lived a Christian lifestyle until she attended a service at the Christian Revival Church ("the CRC") in April 2011 at the invitation of a friend. She says that following this she rededicated herself to her faith. The Claimant described the CRC as an Evangelical Church. She told us that it has almost 3500 members in London alone and that its services are held at the O2 Arena. She said that she is now a regular churchgoer.

4. On 27 May 2014 the Claimant presented a claim to the Tribunal of unlawful discrimination and harassment because of religion or belief. The claim arises out of disciplinary proceedings that had been brought against her by the Respondent and which resulted in her being made subject to a final written warning, which was subsequently reduced to a first written warning on appeal.

The issues

5. Although this Tribunal was not involved in the earlier case management of this claim our understanding is that the process of identifying the relevant issues was not an easy one, requiring two telephone preliminary hearings in September 2014 before Employment Judge Brown. Following these hearings, the parties filed an agreed list of issues, titled *"Schedule of Issues in Dispute"* as directed by the Tribunal and in the following terms:

> *"The Claimant relies on the Christian faith as her religion or belief.*
>
> ***Harassment Claim:***
>
> *1. Did the Respondent engage in unwanted conduct related to a relevant protected characteristic, namely religion or belief?*
>
> *2. The Claimant relies on the following unwanted conduct:*
>
> *2.1 In breach of paragraph 1.4 of the Policy and good practice, at the first meeting between the Claimant and John Wilson ('JW') following the complaint by EN, JW provided an incomplete summary of EN's allegations, and required the Claimant to respond by written statement to such summary when JW was in possession of a written statement from EN.*
>
> *2.2 In breach of paragraph 1.4 of the Policy, failure to provide full allegations promptly to the Claimant – she was not given a copy of EN's full complaint until 4 October 2013.*
>
> *2.3 In breach of paragraph 6.1 of the Policy, failure to consider alternatives to suspension from duty such as redeployment of the Claimant*

or the allocation of a new manager to EN or her reinstatement to a same or different role following EN's departure from the Respondent.

2.4 In breach of paragraphs 6.1 and 6.8 of the Policy, failure to review the suspension at reasonable intervals and/or in accordance with the Policy and likewise to notify the Claimant.

2.5 In breach of the Policy in Particular Appendix 1, paragraph 1.6, and good practice, the appointment of Paul Gilluley as chair of the disciplinary hearing, Dr Gilluley having been provided with details of the allegations against the Claimant and after he had authorised her suspension.

2.6 Dr Gilluley maintaining his position as Disciplining Officer and Chair of the Disciplinary Panel after the Claimant's objection, which should also have been treated as a grievance under paragraph 14 of the Policy.

2.7 In breach of paragraph 9.6 and Appendix 4 of the Policy, the failure by the Respondent to inform the Claimant that the Investigation Officers would be calling witnesses and of their identities before the commencement of the disciplinary hearing.

2.8 Inordinate delay throughout disciplinary proceedings (the Claimant was suspended for almost 9 months before the disciplinary hearing).

2.9 An oppressive sanction applied in all the circumstances.

2.10 Reliance on events unrelated to EN's complaint – the Respondent raised the investigation into the Discover Life group with which the Claimant had been involved, even though the Claimant was not subject to any disciplinary action in that matter (including the fact that the group had been suspended and not reinstated more than a year earlier) and the fact that this had nothing to do with EN's complaint.

3. If the answer to paragraph 1 is yes, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, within the meaning of section 26 of the Equality Act 2010 ("EqA")?

4. In deciding whether conduct shall be regarded as having the effect referred to in 3 above, the following must be taken into account in line with s26 (4) of the EqA:

1. *The perception of the Claimant*
2. *The other circumstances of the case;*
3. *Whether it is reasonable for the conduct to have that effect.*

Human Rights:

5. Did the Respondent infringe the Claimant's rights under Articles 8, 9 and 10 of the European Convention on Human Rights in the following ways:

a) Breach of Article 8 (respect for private and family life)
- The Claimant was punished for inviting EN to events which happened outside of working hours, to which EN had willingly consented or alternatively, which she had encouraged by a failure to object.

b) Breach of Article 9 (holding and manifesting religious belief)
- The Claimant's right to manifestation of belief by sharing her faith with a consenting colleague. This was breached by disciplinary action being taken against her and a sanction imposed on her.

c) Breach of Article 10 (freedom of expression)
- Disciplinary action taken for conversations between consenting adults, even where conversations where encouraged and initiated by EN.

6. If so, did these infringements result in the Respondent breaching the Claimant's rights under section 6(1) of the Human Rights Act 1998.

Direct Discrimination Claim:

7. The Claimant's comparator is an employee of a different or no faith who enters into consensual discussions with, and provides support to, a colleague of a different faith or no faith.

8. The acts relied upon by the Claimant in support of her allegations of direct discrimination are:

a) Those acts set out in paragraphs 2.1 – 2.10 above;

b) The intimidation of and/or the improper pressure imposed on witness TI in relation to the making by him of a statement;

c) The failure of the Respondent to implement its mediation process; and

d) The negativity displayed and/or expressed by JW towards the Claimant on account of her Christian faith when: "he repeatedly referred to there needing to be a 'firewall' between my professional role and my 'religious beliefs'".

9. Did the alleged acts above amount to less favourable treatment of the Claimant because of her religion or belief compared to how the Respondent treated/would have treated someone in the same or not materially different circumstances who did not share the Claimant's religion (the comparator), in breach of s13 Equality Act 2010.

Indirect Discrimination Claim:

10. The provision, criterion or practice (PCP) relied on by the Claimant are:

10.1 The Policy; and

10.2 The Respondent's unwritten policies that:

a. *A religious discussion between a staff member on the one hand, and staff member of a different or no faith, is not permitted;*

b. *That invitations to a service or event at a place of worship by a staff member of one faith to a staff member of another faith are prohibited; and*

c. *That the dissemination of any literature or other media that promotes the Christian religion is prohibited.*

An ostensibly neutral criterion 'as applied' meant that the Respondent put the Claimant at a particular disadvantage when compared to persons not of the same faith or of no faith.

11. Has the Respondent applied the above PCP to the Claimant?

12. Has the Respondent applied the PCP to persons with whom the Claimant does not share the characteristic (s19(2)(a) EqA;

13. Do they put, or would put, persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it (s19(2)(b) EqA?

14. Do the PCPs put (or would put) the Claimant at that disadvantage s19 (2) (c) EqA?

15. The particular disadvantages relied on by the Claimant in respect of the first PCP (paragraph 10.1) are those acts set out in paragraphs 2.1 to 2.10;

16. The particular disadvantages relied on by the Claimant in respect of the second PCP (paragraph 10.2) are:

a. The Claimant as a Christian, and other Christian staff members, are under constant threat of disciplinary action and sanction for infringing the PCPs mentioned above, and specifically in circumstances where they might provide support to a Muslim staff member or, a staff member of a different or no faith, and by further example, giving or displaying invitations to annual carol services. In this case the Claimant was disciplined and penalised for providing support to EN, even though EN highly valued the Claimant's care and support. Staff members of another or no faith are not under the same disadvantage.

b. The Claimant was subjected to a long period of suspension, and a gruelling investigation, culminating in a disciplinary process and a penalty.

17. Can the Respondent show that the identified PCPs were a proportionate means of achieving a legitimate aim (s19(2) (d) EqA ?

Remedies:

Equality Act claims

18. If the Respondent is found to be liable for any acts of unlawful discrimination in respect of its treatment of the Claimant, what injury to feelings, if any, has been suffered by the Claimant?

19. If the Respondent is found to be liable for any acts of unlawful discrimination in respect of its treatment of the Claimant, has the Respondent acted towards the Claimant in such a way as to make it appropriate for the Tribunal to award aggravated damages?

Human Rights Act claim

20. If the Respondent is found to have acted in contravention of Human Rights Act 1998 / Convention Rights, does the Employment Tribunal consider it "just and appropriate" to make an award (s8 (1) HRA).

21. Is it appropriate for the Tribunal to make any recommendations?

Agreed 8 October 2014"

6. The policy referred to in this list of issues is the Respondent's Disciplinary Policy & Procedure (page 83).

7. As can be seen, in addition to the allegations of harassment and direct and indirect discrimination because of religion, issues are raised under the European Convention on Human Rights: this was the subject of a preliminary determination by the Tribunal as set out below. Staying with the issues for the time being however, it is our view that the agreed list of issues does not reflect fully the issues identified by Judge Brown in her second preliminary hearing on 22 September 2014 (page 49). At paragraph 5 of her preliminary hearing summary she said:

> *"The claim already brought was that the Respondent subjected the Claimant to harassment by applying its disciplinary policy to her and by the way in which it applied that policy in respect of the Claimant's practice of her Christian faith."*

8. Aspects of this formulation are reflected in the agreed list of issues, but not the fundamental allegation, applying the disciplinary policy in the first place, which we find is a justiciable issue in this case. We think that this finding is consistent with the claim as originally pleaded (albeit discursively) in the ET1. Accordingly, we have decided this issue too despite it not being set out in terms in the above list.

The hearing

9. Judge Brown had listed the hearing over five days commencing on 20 January 2015. Unfortunately, the Tribunal could only offer four days due to conflicting judicial commitments and it did not sit on 23 January 2015. The parties were however able to complete the evidence and submissions in the four days available. The Tribunal reserved its decision and met in chambers on 10 February 2015 to consider it.

10. At the commencement of the hearing, the Tribunal gave a ruling that it had no jurisdiction to determine issues five and six in the list of issues brought as separate justiciable claims under the Human Rights Act 1998. In doing so, the Tribunal acknowledged the potential relevance of Convention rights to other issues in the case and that it should, as far as possible, interpret domestic legislation in a way which gives effect to those rights. Nevertheless, the jurisdiction of the Employment Tribunal is constrained by the domestic statutes under which it exists and this does not extend to the 1998 Act.

11. Mr Collins mooted but did not pursue an application for an anonymity order in respect of EN, the employee who complained about the Claimant, under Rule 50 of the Tribunal's Rules of Procedure. He withdrew the application as EN's name had already appeared in press reports and her identity was disclosed in the hearing. We nevertheless have referred to her by her initials in these written Reasons as there are references in the evidence to her health. The facts that EN is Muslim and of Pakistani heritage are agreed. For different reasons, we have chosen to refer to another relevant individual, TI, by his initials: he changed his account during the disciplinary investigation relevant to this claim. Like EN, TI's name was referred to in the hearing.

12. Upon Mr Collins' application, the Tribunal ruled on the admissibility of three witness statements which had been submitted as evidence by the Claimant on the second day of the hearing (the first day had been taken up with clarifying the issues and the Tribunal reading the statements and documents). The Tribunal found that the three statements were inadmissible on grounds of relevance and, in one case, lateness. The terms of our ruling were as follows:

1. This is a preliminary ruling in the case of Miss Wasteney against the East London NHS Foundation Trust. The Tribunal is concerned with the Claimant's complaint of unlawful discrimination because of religion or belief. An issue has arisen at the outset of the hearing as to the admissibility of three witness statements which she proposes to rely on and which have been submitted to us as part of her evidence. The statements have been made by Mr John Ponde, Dr Bayo Odedoyin and Ms Lileath James: we have considered the contents of these statements for the purpose of determining whether they are admissible in evidence.

2. The Claimant's claim concerns treatment she says she was subjected to in the period in and after 2012. Her allegations comprise complaints of direct discrimination, harassment and indirect discrimination and are particularly connected with a complaint apparently made against her by a colleague, EN, in 2013. The statements adduced in support of her claim from the three witnesses we have mentioned do not touch directly on these events but set out what those witnesses say were their own experiences as employees of the Trust. In Mr Ponde's case it is not clear when the events he alleges took place, but it does appear from the terms of the statement that it was several years ago. In Dr Odedoyin's case the events he recounts appear to have taken place either in 2005 or 2006. Ms James' statement does not provide a date for the matters she alleges. Additionally in Ms James's case, her statement was originally served upon the Respondent as an anonymous one and only recently has her name been revealed. In fact the Respondent's counsel, Mr Collins, was unaware that this had been disclosed until we began dealing with this application this morning.

3. The essence of Mr Collins' application is that these statements are inadmissible because they are irrelevant. He also argues that, because they are lacking in particularity, have not been supported by any disclosure of documents relevant to the allegations contained in them, and in the special case of Ms James because her name was unknown to the Respondent, it would be unjust for the Respondent to be required to cross examine these witnesses on their allegations. He also says that this course would inevitably lead to a postponement to enable the Respondent to adduce rebutting evidence if it can. His primary point however is that these statements simply do not take us very far.

4. Mr Diamond made two submissions in response. The first was a practical one and he put it frankly and succinctly in this way, that this evidence is "as good as it gets" and he pointed to the difficulty that claimants sometimes have in identifying and encouraging witnesses to give evidence on their behalf, particularly in Employment Tribunal proceedings which can be stressful, and occasionally high profile. He also suggested that there was some probative value in these statements because they illustrate that what the claimant complains of is something that others have experienced in their own different ways. He contended that this might be evidence showing group disadvantage for the purposes of the indirect discrimination claim.

5. In considering this application we have had regard to the Tribunal's Rules of Procedure and the underlying principles concerning proportionality and the admissibility of evidence. Proceedings must be conducted in a way which is proportionate to the issues. Evidence should be admitted if it is relevant to the issues and is likely to be probative of them. In our judgment, if there is any serious

doubt on that point, then a Tribunal should err in favour of admitting the evidence so that it may be considered. The distinction however, between admitting evidence and it simply having been submitted to the Tribunal is an important one as was explained in the recent case of ***Compass Group plc v Guardian News and Media [2014] UK/EAT/0441****. We should not admit evidence simply because it has been submitted to us; we should only admit evidence if it is relevant and likely to be probative and is not otherwise inadmissible (for example because of legal professional privilege).*

6. We have considered the three statements submitted by the Claimant in this case and we have come to the conclusion that they are not relevant to the issues and are unlikely to be probative. This is certainly so in our judgment in the cases of the witnesses Ponde and Odedoyin: they recount incidents said to have happened some years ago and it is unclear who the actors in those events were. What is clear is that they are unlikely to be the main actors in the case in front of us as they started with the Respondent altogether more recently. For example in Dr Gillulay's case, he joined the Respondent in 2012. So we are not convinced of the relevance of those statements to the issues we have to determine.

7. There is arguably more relevance in the statement of Ms James as she suggests facts which might show a more generous approach to time off for prayer for Muslims in comparison to Christians and this could be relevant to some of the issues before us. The additional difficulty, however, with Ms James' statement is that it remained anonymous until very recently and therefore presented the Respondent with difficulties in taking instructions effectively until the beginning of the trial. So, whilst there is marginally more relevance in this statement, the overriding objective of dealing with cases justly and in a proportionate way militates against it being admitted at this late stage.

8. So for these reasons we have come to the conclusion that the statements should not be admitted into evidence.

9. As far as the wider point that Mr Diamond made about evidence of group disadvantage, the Claimant can take some comfort from the fact that Mr Collins has acknowledged that she is certainly not the only practising Christian within the Respondent's organisation and that it will not be a difficult road for the Tribunal to travel to find group disadvantage were we to conclude that there was some particular disadvantage to the Claimant in the treatment afforded her by apparently neutral policies because of her Christian faith.

10. After giving these reasons, Mr Collins quite properly clarified one matter. He confirmed that he had been informed on Monday 19 January 2015 of the identity of the anonymous witness, Ms James, but had not seen the version of her statement bearing her name until today. We were grateful for that clarification but it does not change the underlying basis of our decision.

13. In light of this ruling, the only oral evidence for the Claimant was her own; that is by no means uncommon in discrimination claims and the Tribunal draws no inference from the number of witnesses a party calls.

14. The Respondent called the following witnesses:

John Wilson: Mr Wilson joined the Respondent in July 2009 and is the Associate Director - Head of Therapy Services. In this capacity he holds operational, financial and strategic responsibility for Forensic Directorates in the Trust. He was the Claimant's line manager. He has 14 years experience in working for the NHS.

Paul Gilluley: Dr Gilluley is a Consultant Forensic Psychiatrist. He joined the Respondent in December 2012 as Head of Forensic Services and is responsible for clinical and operational matters within the Forensic Directorate. Dr Gilluley told us that he is a Christian.

Carrie Battersby: Ms Battersby has worked for the Respondent since 2003. Her current role is as Director of Special Projects. She has worked in the NHS for over 33 years.

15. In addition to the evidence of these witnesses, the Tribunal considered the documents to which it was taken in an agreed bundle. References to page numbers in these Reasons relate to that bundle.

16. Finally, the Tribunal received written and oral submissions from both counsel and we shall deal with these in more detail below.

The legal principles

17. In this section of our Reasons we deal with the general legal principles applicable to the causes of action before us.

Direct discrimination

18. Section 13 of the Equality Act 2010 provides as follows:

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

19. Religion or belief are protected characteristics under section 10 of the 2010 Act and it is unlawful for an employer to discriminate against its employee under section 39(2) of the Act.

20. These provisions require a Tribunal to decide the following:-

20.1 Has there been treatment?

20.2 Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

20.3 Is the difference in treatment to the claimant's detriment?

20.4 Was that difference in treatment because of religion or belief?

21. These elements require further explanation. A comparator must be the same in all material respects, apart from the relevant religion or belief, as the claimant. There must

be some detriment to the claimant in the differential treatment and, whilst the threshold for this is low, minor or trivial matters may not cross it (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285). 'Religion' is not defined in any helpful sense in the 2010 Act but there can be no dispute that Christianity is a religion and the Evangelical Church is a strand of belief within it.

22. The determination of whether treatment is because of religion or belief requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that religion or belief formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan v London Regional Transport* [1999] ICR 877).

Harassment

23. Section 26(1) of the 2010 Act provides as follows:

> *"A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

24. It is unlawful for an employer to subject its employees to harassment (section 40(1) of the 2010 Act.)

25. A claim of harassment requires evidence of unwanted conduct which has the *'purpose or effect'* of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her because of a protected characteristic. A claim based on *'purpose'* requires an analysis of the alleged harasser's motive or intention. This can require the Tribunal to draw inferences as to what that true motive or intent actually was; the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. Where the claim relies on the effect of the conduct in question, the perpetrator's motive or intention, which could be entirely innocent, is irrelevant but the test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable for the complainant to consider that the conduct had that effect; the objective element. Overall, therefore, the test is an objective one (*Richmond Pharmacology v Dhaliwal [2009] ICR 724*). The fact that a claimant is peculiarly sensitive to the treatment accorded her does not *necessarily* mean that harassment will be shown to exist (*Driskel v Peninsula Business Services Ltd [2000] IRLR 151*). Finally, the treatment must be because of a protected characteristic for the claim to succeed: simple offensive treatment is not enough.

Indirect discrimination

26. Section 19 of the Equality Act 2010 provides as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

27. This provision requires a Tribunal to decide the following:-

27.1 Has the employer applied a provision, criterion or practice ('PCP') to the employee?

27.2 Has or would the employer apply the PCP to persons who do not share the employee's protected characteristic?

27.3 Does the PCP put persons who share the employee's protected characteristic at a particular disadvantage compared with persons who do not?

27.4 Does the PCP put the employee at that disadvantage?

27.5 If the answer to the foregoing questions is yes, can the employer nevertheless show that the PCP is a proportionate means of achieving a legitimate aim?

28. All of the above requires further explanation. Lady Hale in *R (On the application of E) v Governing Body of JFS and others [2010] IRLR 136* described indirect discrimination as follows (see paragraphs 56 to 57):

"The basic difference between direct and indirect discrimination is plain: see Mummery LJ in R (Elias) v Secretary of State for Defence [2006] EWCA 1293, [2006] 1 WLR 3213, para 119. *The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on*

their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."

29. Similarly, in *Homer v Chief Constable of West Yorkshire* Police *[2012] IRLR 601*, Lade Hale said at paragraph 17:

"The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic ... The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified ..."

30. We have reminded ourselves that indirect discrimination can be intentional or unintentional (*Enderby v Frenchay Health Authority [1993] IRLR 591*) and that a 'PCP' is no more than a way of doing things: it may or may not be a written process or policy (see *British Airways plc v Starmer [2005] IRLR 862*). It is for a claimant to identify the PCP that he or she relies on and the question whether it is, in fact, a PCP is one of fact for the Tribunal (see *Allonby v Accrington and Rossendale College[2001] IRLR 364, CA* and *Jones v University of Manchester [1993] IRLR 218*). There is no need for a claimant to show that a person who shares his or her protected characteristic cannot comply with the PCP. The PCP being complained of must be one which the alleged discriminator applies or would apply equally to persons who do not have the protected characteristic in question: it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its effect would have been if it had been applied.

31. It is necessary for a claimant to adduce evidence tending to show that persons who share her protected characteristic (though not necessarily all of them) are placed at a particular disadvantage by the PCP and that the claimant is also at that disadvantage. This may involve consideration of pools of employees, statistical evidence or such like but the notion of *'particular disadvantage'* is not confined to this. What constitutes a *'disadvantage'* depends on the facts of the case and is not defined in the Equality Act but we draw assistance from those cases which shed light on the meaning of the word *'detriment'* in the Act (see, for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285*). We have borne in mind that an individual may suffer a detriment even though, at the time when action is taken against her, she is unaware of the employer's prejudicial behaviour.

32. It is for a respondent to establish the defence of justification but, as the Respondent does not raise this defence, we do not set out the relevant principles here.

The burden of proof in discrimination claims

33. Section 136 of the 2010 Act provides as follows:

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

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

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

34. These provisions require a claimant to prove facts consistent with her claim: that is facts which, in the absence of an adequate explanation, could lead a Tribunal to conclude that the respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the claimant does this then the burden of proof shifts to the respondent to prove that it did not commit the unlawful act in question (*Igen v Wong [2005] IRLR 258*). The respondent's explanation at this stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of religion or belief.

35. We have borne this two stage test in mind when deciding the Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. Save where the contrary appears from the context, however, we have not separated out our findings under the two stages in the reasons which appear below. In any event detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

36. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see *Anya v University of Oxford* [2001] IRLR 377). We have considered the guidance given by Elias J on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (*Madarassy v Nomura International plc* [2007] IRLR 246).

Time limits for claims of discrimination

37. The primary time limit for complaints of discrimination is three months from the date of the act complained of (see section 123 of the 2010 Act). Where there are a series of acts constituting a continuing act the three month period runs from the date of the last act in the series. If a claim is presented out of time the Tribunal may nevertheless extend time for bringing it if it considers that in all the circumstances it is just and equitable to do so. A failure to deal with a situation can constitute a continuing act (see *Littlewoods Organisation v Traynor* [1993] IRLR 154). We have reminded ourselves, however, that we must not conflate a series of isolated, separate acts with a continuing act even if those

separate acts have common features. A continuing act is an ongoing situation or state of affairs so, in the leading case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, the ongoing state of affairs was that the Commissioner allegedly allowed a culture to continue in which discriminatory acts were tolerated: it was the culture which was the continuing act, not the individual actions of numerous police officers over many years.

38. Should we find that this claim or aspects of it have been presented out of time, we have considered two cases concerning the just and equitable extension of time. Firstly, *Robertson v Bexley Community Centre* [2003] IRLR 434 in which the Court of Appeal emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the Tribunal's discretion in a Claimant's favour unless there are grounds for not doing so, rather the Court thought that this would be the exception rather than the rule. Secondly, *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 in which the Court of Appeal emphasised that none of the *dicta* in *Robertson* fettered the Tribunal's judicial discretion when considering this point. In our judgment the important thing for us is to weigh all the circumstances and reach a just conclusion whilst bearing in mind that it is for a Claimant to establish the Tribunal's jurisdiction.

The scope of our findings

39. The Tribunal heard a substantial amount of evidence in this case. Issues were tested and explored by the parties through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings on the balance of probabilities and unanimously. In doing so we have borne in mind that unlawful discrimination or harassment can be subtle and may not be consciously motivated. We have considered whether inferences can and should be drawn from the primary facts in deciding whether the Respondent has engaged in unlawful conduct under the 2010 Act.

Findings of fact

40. As noted above, the Claimant's employment with the Respondent began on 5 March 2007. Mr Wilson became her Line Manager in July 2009 when he joined the Trust. Our impression is that the Claimant and Mr Wilson had a good professional working relationship.

41. In or about May 2011 the Claimant approached Mr Wilson with a suggestion that the Trust could provide a Christian Worship Service at the John Howard Centre. She explained her involvement in the CRC to him and said that the Church was willing to provide volunteers to give such services. She also said that she had discussed this proposal with Nigel Copsey, head of the Trust's Department of Spiritual Religious and Cultural Care ("DSRCC"). Mr Wilson subsequently spoke to Mr Copsey who confirmed this and said that he had attended a CRC service and spoken to the Church Minister. In these circumstances Mr Wilson agreed to approve a pilot scheme but subject to the new group being a broadly based, ecumenical worship group meeting the needs of service users across a range of Christian denominations. He also stipulated that the services, although provided by the CRC, were to be overseen by the DSRCC.

42. The pilot was established for an initial three month period and the new services were advertised on the Trust's events timetable under the name "Discover Life". They subsequently became known as the "Discover Life Group". The first services took place on 2 November 2011 and there were weekly services thereafter.

43. Mr Wilson did not attend the services and had no first-hand knowledge of them. On 16 January 2012 he received an email of concern from Kim MacGillivray, a Modern Matron, who reported that staff escorts were being made to feel uncomfortable at the services because of alleged pressure to participate in them or provide personal details, (pages 185 – 186); she suggested that this blurred professional boundaries. Ms MacGillivray attached an email she had received from a staff member who described the services as ones in which the congregation "waved their hands in the air, hopped, jumped and danced". This description is broadly consistent with the charismatic style of worship at the CRC which the Claimant described to us. It is notable that Ms MacGillivray said in her email that she had not discussed this matter with the Claimant: this shows that the Claimant's connection with the Church was well known in her department. In any event, Mr Wilson said that he would look into matters before discussing them with the Claimant.

44. A further issue was raised with Mr Wilson by Dr Philip Baker, a Consultant Psychiatrist, on 1 February 2012. Dr Baker said that the Claimant's interaction with a service user for whom she had no direct clinical responsibility but who had attended the CRC services with her was troubling nurses on the ward. We shall refer to this patient as "RH". Dr Baker asked to speak to Mr Wilson about his concerns (page 191). Dr Baker expressed the view to Mr Wilson that there was a potential conflict of interest between the Claimant's professional status and her personal religious convictions. As we understand it the Claimant had been acting as an escort for RH when she attended the CRC services notwithstanding that the Claimant had no direct involvement in RH's care.

45. Mr Wilson met the Claimant for a routine supervision meeting on 7 February 2012. He covered a number of topics in this meeting but one of them was the concerns raised by other members of staff noted above. His notes of this point in the supervision record reads as follows:

> *"Phil Baker met with John re Victoria's input into RH's CR church attendance (ensuring nursing escort is available, previously assisting with escorting. Receiving RH at church). The MDT and nursing team expressed concern that Victoria is involved with this aspect of RH's care as she is not a member of RH's care team and is an active member of the CR Church. There is not an MDT issue re RH being able to attend the CR Church services but Victoria cannot be considered to be a neutral party in this and her ongoing involvement therefore represents a conflict of interest between her professional status and her personal religious convictions. John of the view that it does represent a potential conflict of interest and that in the event that a complaint was subsequently made, Victoria would be vulnerable to the allegation that she has a personal, vested interest in RH's attendance at CRC. It was therefore agreed that Victoria would separate herself from any further involvement in the arrangements or escorting of RH to CR Church services. Victoria noted that she was able to maintain professional boundaries in this matter but acknowledged the potential and perceived conflict of interest involved her continuing to be involved with RH. She therefore agreed to withdraw from this with immediate effect."*

46. On the following day the Claimant emailed Mr Wilson questioning the concerns raised so, she said, she could understand them. Mr Wilson replied as follows:

> *"You should refrain from direct clinical input with an individual service user where the input involves attendance at, or involvement with CRC, on the grounds that you are an active member of that church*
>
> *You would not be considered neutral specifically in relation patient attendance, at or involvement with CRC. This does not apply to spiritual care provision more generally although the spiritual care leads for the Trust would be that main authority in relation to this*
>
> *No-one in the MDT has described your relationship with RH as inappropriate, simply that there is a conflict of interest between your professional status and your active membership of CRC. You would be deemed to have a vested interest in RH's attendance."*

47. It is clear from this exchange that Mr Wilson was telling the Claimant not to involve herself in the clinical care of the service user RH who was also a member of her church because of the potential for the Claimant's motives to be misconstrued. In practical terms this meant that the Claimant was to desist from acting as escort for RH at the CRC services.

48. On 7 March 2012 Mr Wilson received a further email from Dr Baker informing him that the Claimant had been on the ward the previous Sunday enquiring about escorting arrangements for RH. Dr Baker also expressed a concern related by one of the Occupational Therapy Trainees that the *"external facilitator"* at the Discover Life Group (a CRC member) had set service users the *"homework"* of trying to encourage other people to join the group *"to find the love of God"*. The trainee was concerned about the impact of this on the Trust's service users who are potentially vulnerable. Dr Baker also forwarded a further email he had received from Ms MacGillivray dated 2 March 2012 recounting an instance when an escort said that he or she had felt uncomfortable at a CRC led service (page 196).

49. On 15 March 2012 Mr Wilson received further complaints from two senior Occupational Therapists, Jemma Payne and Karen Hogan, that they felt that service users were being pressurised to dance, sing and clap at Discover Life Group Services, that they were being encouraged to donate to the CRC rather than to charity, that negative views had been expressed about other religions and that the services involved the laying on of hands and speaking in tongues. The two therapists also referred to the *"homework"* allegation and said that escorts were under pressure to participate in the service and were routinely asked to attend other CRC services in the community.

50. Mr Wilson spoke to Mr Copsey to get feedback on the Discover Life Group. Mr Copsey said that John Sahatundo, a Minister with the DSRCC, had been attending the services on behalf of the Department and had raised concerns that the CRC was promoting a particular strand of Christian worship and teaching.

51. Mr Wilson's evidence to us was that against this background he decided to suspend the Discover Life Group pilot. He announced this decision to the CRC in an

email dated 19 March 2012 page 200). He also met with the Claimant that day to discuss the concerns that had been raised. He summarised the meeting in a letter to the Claimant dated 22 March 2012 (pages 203 to 204). He said in particular as follows:

> *"At our meeting on 19 March I confirmed that the same underlying principle should apply to your working relationship with staff in your department; that is, you should not invite or communicate with your staff in relation to attendance at events associated with your personal spiritual beliefs. You noted that you made these invites in good faith and did not apply any pressure to attend. However, given that the relevant staff are managerially accountable to you, I highlighted that they may feel compelled to attend on the basis that you are an active member of CRC."*

52. Mr Wilson undertook an investigation into the concerns raised by staff about the Discover Life Group. He worked with Raphael Zernoff, a Spiritual Care Co-ordinator in the DSRCC in compiling this report (pages 206 to 214), which is dated 30 April 2012. It is beyond the scope of these reasons to analyse the details of this report but our impression is of a balanced and thorough investigation. Many of the allegations raised against the CRC were not accepted or not accepted in full by the investigators. Nevertheless the report recommended that future provision needed to be broad based and ecumenical so as to meet the needs of all Christian denominations. One factor raised in the report is of particular importance in this case: the authors highlighted that junior staff had felt under pressure not to respond negatively to invitations to participate in the Discover Life Group's activities (page 212). The authors referred expressly in this context to the fact that the Claimant was head of the department and an active member of the CRC.

53. The Claimant's first response to this report was in an email dated 1 May 2012; she described it as *"an exceptionally well put together report"*. Following the publication of the report, a copy was sent to the CRC and it was asked whether it wished to participate in redesigned services meeting the broad based and ecumenical objectives: the CRC declined. Mr Wilson agreed however that it could provide a letter to service users explaining why the Discover Life Group had stopped. Subsequently the Claimant brought in a number of packs from the Church for distribution: these included flyers, a DVD and sweets. Copies of the flyers appear at pages 222 to 235 together with covering letters. We have looked at this material and agree with Mr Wilson's evidence that this was not the letter of explanation that he had envisaged from the Church. Mr Wilson chose not to distribute this material.

54. The Claimant provided some detailed comments on Mr Wilson's and Mr Zernoff's report in a letter dated 8 May 2012 (pages 216 to 219). Once again she described the report in positive terms, *"thorough and professional"*. She asked questions about the report's recommendations that the practices of laying on of hands and speaking in tongues should not be engaged in on Trust sites. The letter shows that the Claimant was well aware of the recommendations in the report.

55. We have set out this passage of events in some detail as, whilst it does not give rise to specific justiciable issues of discrimination or harassment, it is said by the Claimant to be evidence of a general hostility to Christianity in general and the CRC in particular within the Trust. We do not accept this. The evidence shows that the Respondent was receptive to the idea of establishing regular Christian worship at the John Howard Centre: it was the way in which that worship was conducted which gave rise to allegations of improper pressure on staff and service users. It is notable in this context that service

users are vulnerable persons with mental health conditions. Furthermore, there was cogent evidence that services were not broad based and ecumenical as the Respondent had requested but were more narrowly focused on the Charismatic and Evangelical strands of Christian belief. Mixed in with all of this, was the Claimant's own conduct in respect of RH which she persisted in despite being told by her line manager to desist because of a potential conflict of interest.

56. We are unsurprised therefore that the Claimant received counselling and an informal warning from Mr Wilson in February and March 2012 respectively about the boundaries between her spiritual and professional life. We are also unsurprised that the Discover Life Group was suspended.

57. It is notable that the CRC was invited to remodel its services so that they could continue but the CRC declined to do this. This is not consistent with a conscious or subconscious anti Christian animus. Nor do we find that the Respondent was against the CRC in particular, it merely wished that when on its premises, the Church acted in a way which was multi-denominational rather than confined to its own regular style of worship.

58. We turn then to the events which lie at the heart of this claim. On 30 July 2012 EN joined the Respondent as a Band 5 Occupational Therapist on a 12 month fixed term contract. This was her first placement as an Occupational Therapist following her training. EN is a young woman (although we do not know her precise age) and, as noted above, she is Muslim and of Pakistani heritage. She is from Birmingham and her placement in London was, we believe, the first time she had spent an extended period away from home. The Claimant was not EN's manager although she had indirect management responsibility for her as Head of Occupational Therapy.

59. On 6 June 2013 Mr Wilson received an email from EN asking if she could meet him. Mr Wilson's initial response was that she should raise any issues she might have with her line manager (page 237). EN replied saying that the issue concerned the CRC and asked if her approach to him could be kept confidential. Mr Wilson then agreed to meet and this meeting took place on 13 June 2013.

60. EN attended the meeting with two colleagues, Helen Scott and Corrinne Spearing. She told Mr Wilson that she felt that she had been bullied and harassed by the Claimant who she said had been trying to impose her religious views on her. She claimed that the Claimant had been doing this by inviting her to attend events and services at the CRC and by giving her CRC literature and DVDs. She said that the Claimant had routinely asked EN to pray with her and that there was one occasion when the Claimant had laid hands on her. EN alleged that the Claimant's conduct was causing her stress and had affected her health.

61. EN had come to the meeting with a typewritten statement but Mr Wilson asked her to insert the dates of the alleged events into this and then submit it to him by email. At the conclusion of the meeting Mr Wilson assured EN that her complaints would be investigated. His handwritten note of the meeting is at page 696.

62. Following this meeting Mr Wilson took advice from Malcolm Galea an HR Director. Mr Galea's view was that the allegations amounted to bullying and harassment under the Trust's Disciplinary Policy and that therefore Mr Wilson should undertake a preliminary investigation. Under the Trust's Disciplinary Policy a preliminary investigation merely

seeks to establish whether there is a case to answer. If so, it is then referred to a formal disciplinary investigation (the Disciplinary Policy is at pages 83 to 116). Mr Wilson also asked Mr Galea what information he needed to give the Claimant at this stage and in particular whether she should be provided with a copy of EN's statement which he was then expecting. Mr Galea advised him that at this stage the Claimant need only be told sufficient information to be able to respond to the allegations.

63. EN emailed her statement to Mr Wilson later that day. The statement was an eight page document (pages 350 to 357). EN said that when she had first began working for the Trust the Claimant had asked her if she was religious and she had said that she was a practising Muslim. She claimed that the Claimant had invited her to events at the Claimant's Church but that she had never attended and always said that she was busy. She said that the Claimant's attention had began to make her feel ill. She referred to receiving DVD's from the Claimant and tickets to Church events. EN also referred to an incident on 12 March 2013 when she alleged that the Claimant had discussed EN's health and said that she needed to *"invite Jesus to come into her spirit"* and told her to say the following words *"I believe you are the son of God Jesus, I believe in you and your power, come into me and heal me"*. EN said that the Claimant told her to *"let Jesus in"* and that people *"have a choice but only one opportunity to be saved"*. She referred to another occasion on 17 April 2013 when she met her new supervisor, TI, and the Claimant, who are both members of the CRC. EN said that when she told the Claimant that she had Crohn's disease the Claimant had replied that the disease did not exist because it was not in the Bible and that only Jesus could heal her. EN asserted that on 22 April 2013 the Claimant had given her a book about a Muslim Pakistani woman had who converted to Christianity (the book's title is *"I Dared to Call him Father"*). EN said that she accepted the book but did not read it. EN said that on her return to work following surgery she had met the Claimant in her office and the Claimant had prayed over her and laid hands on her by touching her knee. EN said that the prayers lasted about 10 minutes and that the Claimant told her to *"ask Jesus to come into you"*. EN said that she was upset by this and went to the toilet to hide her distress but was followed by the Claimant who asked if she was alright. EN alleged that the Claimant had *"completed ruined her first year of practice"*. She also alleged that TI had been selected by the Claimant as her supervisor as he was also a member of the CRC. EN said that she felt that she had been *"groomed"* by the Claimant as the Claimant had initially supported her and gained her trust and that she believed this was an abuse of the Claimant's position as her manager.

64. Mr Wilson asked EN to provide copies of text messages she had exchanged with the Claimant. EN provided these and they are at pages 245 to 247. The messages date from August and September 2012 and, whilst friendly in tone, are consistent with EN finding excuses not to attend Church or Church-related events to which she had been invited by the Claimant. In fairness to the Claimant, there are some mixed messages in the texts in that they suggest in parts that EN welcomed discussion of religion.

65. Mr Wilson met the Claimant on the afternoon of 14 June 2013 to inform her of EN's allegations and to tell her that she was suspended pending a preliminary investigation. We have no doubt that this came as a shock to the Claimant. Mr Wilson provided the Claimant with his handwritten note of his meeting with EN but not her full typewritten statement.

66. The decision to suspend the Claimant had been made by Dr Gilluley. The issue had been referred to him by Mr Wilson and Mr Galea as authority to suspend lay with

Trust Service Directors and, therefore, with him as Head of Forensic Services. Dr Gilluley's evidence, which we accept, is that he was simply provided with a broad outline of the allegations in order to make a decision. He said that he concluded that suspension was appropriate because of the nature of the allegations (essentially placing improper pressure on a junior member of staff) and because of the Claimant's senior managerial responsibilities. We accept that evidence. Dr Gilluley was asked about whether the Claimant could have been redeployed; he said that he considered this but thought it unlikely that there were suitable senior posts without management responsibility which matched the Claimant's skills. We accept that evidence too.

67. The Respondent has a suspension check-list (page 116); Dr Gilluley said that he did not complete one of these as he was unaware of its existence at the time. We note that he had only been with the Trust since December 2012 and accept his explanation. He also told us that he conducted monthly reviews of the Claimant's suspension rather than fortnightly reviews as provided for in the Respondent's Disciplinary Policy (page 89: in fact, the Policy refers to the Director of HR conducting such reviews and this would have been Mr Galea). Dr Gilluley told us that he performed the reviews as he was the one with authority to suspend. We find that there was a breach of the Respondent's procedure in failing to conduct fortnightly reviews of suspension. We accept however the Respondent's explanation of why reviews were done by Dr Gilluley rather than Mr Galea. There is nothing to suggest that fortnightly reviews of the Claimant's suspension would have led to any different outcome, namely the Claimant remaining suspended until her disciplinary hearing.

68. We return then to the progress of the disciplinary investigation. The Claimant sent a written response to EN's allegations to Mr Wilson on 20 June 2013 (pages 252 to 259). She alleged that she had open and consensual discussions with EN about their respective religious beliefs. She also referred to EN's interest in campaigns against human trafficking and said that she had invited EN to events in connection with this. She asserted that EN told her that others had warned EN about the Claimant because of her involvement in the Discover Life Group and that one individual had told EN to complain about her. She acknowledged giving EN the book *"I Dared to Call Him Father"* which she said was about a Pakistani woman's *"journey of discovery"*. The Claimant then referred to performance and relationship issues which she said had affected EN's work. She confirmed that there was an occasion when she had offered to pray for EN's health and had explained the laying on of hands and that EN had then agreed to this: the Claimant said that she had put her hand on EN's knee and that the context was that EN had told her that she felt *"as if she was dying"*. The Claimant accepted that she had shared her experience of faith with EN but wholeheartedly denied attempting to convert EN to Christianity. She confirmed giving EN a DVD called *"Nefarious"* about human trafficking.

69. Although the Claimant complains about not receiving EN's typewritten statement until much later in the disciplinary process, the detail of the Claimant's letter of 20 June 2013 demonstrates to us that she had a good understanding of what was being alleged against her.

70. Mr Wilson also obtained a statement from TI who was the supervisor present on one of the occasions alleged by EN (page 379). TI said in this statement that there was an occasion when the Claimant had prayed for EN when EN had said that she felt that she was dying and he quoted the Claimant as saying *"if you accept an opportunity to be prayed for and give your life to Christ it is certain God would answer and heal you"*. He

described his and the Claimant's actions as ones of support, solidarity, sympathy and encouragement for EN.

71. Mr Wilson set out his findings from the preliminary investigation in a letter to Dr Gilluley dated 26 June 2013 (pages 260 to 265). He described the allegation against the Claimant as *"engaging in acts of proselytising"*. He concluded that there was a case to answer and recommended a full disciplinary investigation. Mr Wilson played no further part in the disciplinary proceedings until he attended as a witness at the disciplinary hearing.

72. Dr Gilluley accepted Mr Watson's recommendations and appointed Lorraine Sunduza, Head of Nursing, and Bradley Mann, a Consultant Clinical Psychologist, to investigate. He requested fortnightly updates on the progress of this investigation. Dr Gilluley notified the Claimant of the decision to begin a formal investigation by letter dated 27 June 2013.

73. As noted above, Dr Gilluley conducted monthly reviews of the Claimant's suspension but was not otherwise involved in the investigation. He told us, and we accept, that the investigators did not tell him anything during the investigation which might have affected the appropriateness of suspension. We note too that the Claimant was informed on a number of occasions of her right to have a formal review of her suspension but did not seek such a review.

74. Dr Gilluley told us, and we accept, that he gave specific consideration to ending the Claimant's suspension at a meeting with Mr Galea on 21 August 2013 as by this time EN had left the Respondent's employment. He concluded however that suspension should continue because of the possible effect of the Claimant's return to work on other potential witnesses.

75. Ms Sunduza's and Dr Mann's report was not published until early November 2013; this was significantly later than the 60 day timeframe for such investigations contained in the Respondent's Disciplinary Procedure. The Claimant has also complained that she did not see EN's full written complaint against her until October 2013. The Respondent's case is that this was disclosed in August 2013. It is not clear to us why the investigation took as long as it did. We note from the appendices to the investigators' report that witnesses were interviewed in June, July, August and September and we accept that some consideration time would have been required. We note too that the investigators requested an extension of time to complete their report on 23 September 2013 saying that there had been some delay in getting an agreed statement back from the Claimant. Dr Gilluley agreed to this request. Mr Diamond argued that this had been done with little consideration to the effect on the Claimant. We find that the publication of the investigation report took longer than it should have done and we have considered whether this is a primary fact from which any inference can be drawn.

76. The investigation report is thorough; it is some 25 pages long and contains 28 appendices many of which are notes of interview with various witnesses. The authors concluded that there was evidence that the Claimant's action had blurred the boundaries between manager and subordinate. We note in this context that when the Claimant was interviewed by the investigators in July 2013 she acknowledged that praying with or over EN might be considered *"outside her remit"* but added that she was on her lunch break at this time and would ordinarily be praying (page 396). A witness, Helen Scott, alleged in

her interview that the Claimant *"targeted newly qualified people"*. One other notable piece of evidence from the investigation was that TI changed his account of the meeting he had attended with the Claimant and EN; whereas previously he had described to Mr Wilson prayers of healing he now said that there was no praying rather the Claimant had simply discussed her own ill health and personal faith. Having considered the contents of the investigation report, we are unsurprised that the investigators concluded that there was a disciplinary case to answer.

77. Dr Gilluley sent the Claimant a copy of the investigation report by letter dated 14 November 2013 which invited her to a disciplinary hearing on 4 December 2013 (pages 314 to 316). The letter set out eight allegations which were to be considered under the Respondent's disciplinary policy and procedure as follows:

1. *Encouraging EN since January 2013 to transfer her medical treatment from Birmingham to London with a view for your church to provide her with ongoing support.*

2. *Asking EN at 1:1 meeting on 12 March 2013 to pray with you.*

3. *Inviting EN at 1:1 meeting on 12 March to attend a healing session at your home.*

4. *Inviting EN on the day of her return from sickness absence, 17 April 2013 to pray and be prayed for in relation to her physical health.*

5. *Provided Christian literature to EN by giving her a book which promotes conversion to Christianity on 22 Aril 2013.*

6. *Praying for EN during a 1:1 early in May 2013 including laying hands on her person.*

7. *Provided Christian literature to EN by giving her a DVD which promotes Christianity some time during January – June 2013.*

8. *Inviting EN on several occasions, from September 2012 attended functions at your church.* [sic]

78. Dr Gilluley told the Claimant that he would chair the disciplinary panel accompanied by Kate Williams, Occupational Therapist Lead, and Lisa Baker, Head of HR for the Forensics Directorate. He said that Ms Sunduza and Dr Mann would present their report and that the Claimant could call witnesses but would need to arrange their attendance. The Claimant was notified of her right to be accompanied.

79. On 26 November 2013 the Claimant emailed requesting a postponement so that her trade union representative could attend. This was agreed and the meeting rearranged for 20 December 2013. Dr Gilluley sent the Claimant a revised invitation letter which included a paragraph stating that the outcome of the allegations, should they be found to be proved, could include dismissal (pages 551 to 552).

80. The Claimant attended the disciplinary hearing on 20 December 2013 accompanied by her trade union representative, John Peers. At the commencement of

the hearing the Claimant and Mr Peers asked whether any witnesses were to be called by the Respondent and Dr Gilluley confirmed that three would be. The Claimant then asked for the hearing to be adjourned as she had not been given advance notice of this. There is no requirement in the disciplinary procedure for the Respondent to give notice that it intends to call witnesses but Dr Gilluley nevertheless acceded to the Claimant's request. He confirmed the outcome in writing that day (pages 553 to 554). Subsequently the Claimant provided details of four witnesses she intended to call.

81. The disciplinary hearing was rescheduled for 24 February 2014. Dr Gilluley's evidence was that an earlier date could not be found because of the number of people now involved. The Claimant was informed of the new date by letter dated 14 January 2014 (pages 564 to 565). The letter identified the witnesses each party intended to call.

82. The disciplinary hearing went ahead on 24 February 2014 and the minutes are at pages 578 to 591. The Claimant was accompanied by Mr Peers and the management case was presented by Ms Sunduza and Dr Mann. The investigators called two witnesses, Mr Wilson and TI; the Claimant had been informed in advance that a third proposed witness would not be giving evidence after all as she had left the Respondent. The Claimant did not call any witnesses. EN was not a witness at the hearing. Part-way through the hearing Mr Peers objected to Dr Gilluley chairing the panel as he had authorised the Claimant's suspension. No such objection had been made previously notwithstanding that the Claimant was well aware of Dr Gilluley's role in the disciplinary process. Dr Gilluley took a short adjournment to consider this with his fellow panel members. Upon reconvening he told the Claimant and her representative that he intended to proceed.

83. During the course of his evidence to the disciplinary panel Mr Wilson referred to the need for managers to keep a *"firewall"* between their personal beliefs and their role at work. The Claimant immediately objected to the use of the word *"firewall"* and Mr Wilson apologised. According to the minutes the Claimant did not explain in the meeting why the word was inappropriate but she told us that it implied that her faith was infected like a computer might be if it were unprotected by a firewall.

84. Two passages stand out in the minutes both of which occurred when the Claimant was answering questions from the panel, they are as follows (page 590):

> "[Dr Gilluley]*: Reflecting back now, when you prayed on EN whilst touching her knee, do you think this is appropriate, particularly given your seniority?*
>
> [Claimant]*: Upon reflection and from my perspective, I made a judgement call at the time. I felt I wasn't in my senior role when I did this but I have learnt from this. I do not say that this was the right thing to do. I do not think this was appropriate given the circumstances."*

and

> "[Dr Gilluley]: *In section 21.6 (page 24) of the report, can you see how physical contact can be misinterpreted?*
>
> [Claimant]*: I was trying to offer reassurance. On reflection it was unhelpful and I would not do it again."*

85. Dr Gilluley set out the panel's findings in a letter to the Claimant dated 28 February 2014 (page 592 to 596)). The panel did not uphold the first four and the seventh of the eight allegations the Claimant faced: these related to matters that EN had described but about which there was no other evidence. The remaining three allegations were upheld: they flowed from admissions made by the Claimant or, in the case of the text messages, the content of the messages themselves; it could be said therefore that in these respects there was some corroboration of EN's account. The panel noted that the Claimant had no previous disciplinary warnings but that she had received clear guidance from Mr Wilson in March 2012 on how to conduct herself in connection with her personal spiritual beliefs when dealing with staff. The panel said that a relevant factor was that this had not simply been a one-off incident and that it was particularly worried about the laying on of hands. The panel summarised its concerns as follows (page 595):

> *"Everyone has their own beliefs; however the panel felt that given the seniority of your role, staff may find it difficult to refuse your invitations and discussions regarding your personal beliefs, as such professional boundaries should be maintained at all times within the workplace."*

86. The panel imposed the sanction of a final written warning which was to last for 12 months, saying that this would have been longer but for the Claimant's lengthy period of suspension. The Claimant was asked to arrange a meeting to discuss her return to work and was notified of her right of appeal.

87. Mr Diamond drew our attention to the fact that the panel had not upheld the seventh allegation against the Claimant, the gift to EN of the DVD *"Nefarious"*, on the basis that the DVD did not *"promote Christianity"*. He contended that this showed that the Respondent's underlying concern was with anything that promoted Christianity rather than simply dealing with inappropriate behaviour between a manager and her subordinate. We do not accept this. The evidence showed that EN and the Claimant had a shared interest in campaigns against human trafficking, the subject matter of this film. In these circumstances the panel's finding that the gift of this DVD was not unwanted conduct was consistent with the evidence. In contrast EN had given examples of unwanted conduct by the Claimant which was specifically Christian in nature (praying over her and the laying on of hands) and the Claimant had accepted that with hindsight this had been inappropriate.

88. The Claimant returned to work on 18 March 2014.

89. The Claimant appealed against the panel's decision by letter dated 10 March 2014 (pages 597 to 599). The grounds of appeal focused on the procedure and process used in arriving at the panel's decision and asserted that a final written warning was disproportionate and unwarranted given the evidence she had supplied. The grounds concluded that the Claimant had been *"the victim of direct religious discrimination based largely on the written uncontested evidence of a disgruntled employee EN and the discriminatory actions of JW* [John Wilson] *and other members of the JHC* [John Howard Centre] *team"*. There was a slight delay in acknowledging this appeal because of a technological glitch (page 602) but an acknowledgement was sent on 27 March 2014. By letter dated 11 April 2014 the Claimant was invited to an appeal hearing fixed for 12 June 2014. She was told that the appeal panel would be chaired by Carrie Battersby supported by Jane Rennison, professional advisor to the panel, and Susie Crawley HR advisor to the

panel. The Claimant was also informed that the management case would be presented by Dr Gilluley and Ms Baker and she was notified of her right to be accompanied.

90. The Claimant issued her Tribunal claim on 27 May 2014.

91. On 12 June 2014 the Claimant attended the appeal with Mr Peers. Minutes are at pages 741 to 756. These show that the Claimant had the opportunity to put her case to the appeal panel fully and in summarising it she read from a prepared text. Notably she said in this:

> *"I have never done anything with malicious intent. On several occasion I did consider EN to be vulnerable. I will definitely learn lessons from this process. With hindsight I would be aware of the danger of the situation. I have never been told that this was a disciplinary issue or a breach of trust policy. At the time EN was in tears and was concerned about her own behaviour. I have never set out to cause offence. EN requested in her letter that it could have been resolved in another way. I feel that I have been characterised as a bully and a predator. This has affected how I feel in myself as a person and in the organisation."*

92. Ms Battersby set out the appeal panel's decision in a letter to the Claimant dated 19 June 2014. The appeal panel expressed sympathy with the Claimant's case that the investigation was unnecessarily long and that in these circumstances she had experienced her suspension as punitive. It also criticised the fact that the Claimant had not been redeployed to a non-clinical role outside the Forensic Department during the period of her suspension. The appeal panel nevertheless upheld the disciplinary panel's conclusions on the three allegations which were found to be proved. The appeal panel said as follows (page 760):

> *"Your contention that "only" three of the allegations were upheld and that this meant the transgression was somehow lesser misses the point; it is the quality as much as the quantity of transgressions that are considered. The panel unanimously agreed that the disciplinary panel's decision to uphold the three allegations was reasonable, not least as you admitted these matters.*
>
> *The appeal panel noted that concerns about your behaviour in this area had previously been raised and a letter was written to you by John Wilson that you agreed was effectively a management instruction. The disciplinary panel's belief that these matters collectively constituted serious misconduct was also felt to be reasonable by the panel. Your response to a junior member of staff in distress, praying and touching her was unanimously agreed by the appeal panel to be especially serious. You are a senior member of staff and so in a position of authority and your interaction with subordinate staff should not give cause for concern or place you in what you acknowledged were vulnerable circumstances."*

93. The appeal panel did not find that the absence of the complainant EN invalidated the disciplinary panel's findings. It nevertheless decided to reduce the sanction to a first written warning with a recommendation for training. That concluded the Respondent's internal process.

The parties' cases

94. Mr Diamond argued that this case raised important points of principle arising from Article 9 of the European Convention on Human Rights which provides as follows:

> ***Article 9 – Freedom of thought, conscience and religion***
>
> *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.*

95. Mr Diamond contended that Article 9 of the Convention gives individuals the right not only to display their religious belief by what, for example, they wear but also to talk about their belief to others even if this might constitute proselytising (although he did not accept that this was what the Claimant was doing here). He argued that these Convention rights apply to the workplace and that, as a public body, the Respondent had a particular duty to implement them. He maintained that the Respondent's approach failed to recognise and give effect to the Claimant's Convention rights in a case which he said was *"all about religion"*. As we understand it, Mr Diamond means by this that the Respondent's failure to acknowledge the Claimant's Convention rights under Article 9 pervades the case and that this is powerful, if not irrefutable evidence of direct or, at the very least, indirect discrimination because of religion or belief.

96. In developing his argument, Mr Diamond referred us to the European Court of Human Rights (ECHR) decision in the case of *Kokkinakis v Greece [1993] 17 EHRR 397*. This was a case concerning the Greek criminal law under which, as it stood then (we assume it is different now), it was a criminal offence to proselytise. A Jehovah's Witness had been prosecuted by the Greek authorities for attempting to proselytise the wife of a Cantor in the local Orthodox Church. She was described as *'vulnerable'* and the Jehovah's Witness as a *'serial proselytiser'*. Mr Diamond referred us to paragraph 31 of the Court's judgment, where it held that the right under Article 9 to manifest one's religion relates not only to what people wear or how they conduct themselves in society but *"includes in principle, the right to convince one's neighbour"*. This was the basis of the Court's finding of a breach by Greece of Article 9 in prosecuting Mr Kokkinakis under its criminal law.

97. In reply, Mr Collins drew our attention to the restrictions on this right referred to in paragraphs 33, 48 and 49 of the *Kokkinakis* judgment; for example the Court held at paragraph 33 that:

> *"The fundamental nature of the rights guaranteed in Article 9 (1) is also reflected in the wording of the paragraph providing the limitations on them. Unlike the second paragraphs of Article 8, 10 and 11, which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to 'freedom to manifest one's religion or belief.' In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be*

necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."

98. Mr Diamond referred us to paragraph 79 of the ECHR's decision in *Eweida & others v United Kingdom [2013] ECHW 37.* This case famously concerned the British Airways employee who was prohibited from wearing a discreet cross by its dress code and registrars who objected on religious grounds to conducting same-sex ceremonies: the British Airways employee succeeded and the registrars failed. Mr Diamond drew our attention to the fact that the Court cited *Kokkinakis* when setting out the vital elements of Article 9. He also referred us to paragraph 104 of the judgment to show that the relevant comparator in a discrimination claim based on religion or belief is someone with no religious objection (in that case to conducting same-sex ceremonies) rather than someone with a different religious faith.

99. Mr Diamond relied on the case of *Fuentes Bobo v Spain [2001] EHRR 50* to illustrate that Convention rights are protected in the workplace even if this means that an employer must have broad shoulders. That case concerned an employee of the Spanish state television service who was dismissed for intemperate remarks about senior employees made during radio interviews in the context of an industrial dispute. His dismissal was found to be a breach of his Article 10 right to freedom of expression. Mr Diamond developed his argument further by reference to *Schűth v Germany [2011] 52 EHRR 32*. In that case a Catholic parish dismissed its organist after he separated from his wife and moved in with his partner who then became pregnant. His acts were contrary to the teaching of the Catholic Church. The decision of the ECHR was that his dismissal infringed his right to family life under Article 8. Mr Diamond's point was that even an *'ideological employer'* (his term) such as a Church is obliged to respect Convention rights. The Tribunal notes the passage at paragraph 71 of this judgment which gives the nub of the decision and refers to an important potential restriction on this Convention right; it says as follows:

"The Court accepts that when signing his contract of employment, the applicant assumed a duty of loyalty towards the Catholic Church that limited his right to respect his private life. To some extent contractual limitations of this kind are permitted by the Convention provided that they are freely accepted. However, the Court is of the view that the applicant's signature cannot be understood as an unequivocal personal obligation to live a life of abstinence in the event of a separation or divorce. Such an interpretation would strike at the very heart of the right to respect the applicant's private life, particularly as the Labour Court held the applicant was not subject to extended obligations of loyalty. On this point, the applicant claims that he had been unable to avoid the separation from his wife for strictly personal reasons and that it was not possible to him to live in abstinence until the end of his life as required by the Code of Cannon Law."

100. Mr Diamond also provided us with a copy of *Veraart v Netherlands [2006] ECHR* but did not refer to this case in his oral or written submissions.

101. As far as domestic cases are concerned, Mr Diamond referred us to *Preddy v Bull [2013] 1 WLR 3741, Mba v Merton LBC [2014] 1 WLR, Garry v LB of Ealing [2001] EWCA Civ 1282* and *Nagarajan v London Regional Transport* to which we have already referred above. The cases of *Preddy* and *Mba* illustrate that Convention rights can be relevant to the issue of proportionality where an employer is running a justification defence. Mr

Collins conceded this point but reminded us that the Respondent is not arguing justification in defence to the indirect discrimination claim (the defence has no application to the claims of direct discrimination or harassment). As Mr Diamond reminded us, *Nagarajan* is authority for the proposition that direct discrimination or harassment will be established if a protected characteristic is a reason for the treatment even if it is not the sole or principal reason. Mr Diamond referred to *Garry* as an example of a case where the Court of Appeal upheld a finding by a Tribunal that a long delay in a disciplinary investigation was an act of race discrimination.

102. Mr Diamond's factual submissions were, in essence, that there was no or insufficient evidence of harassment of EN by the Claimant to justify the disciplinary investigation and sanction imposed by the Respondent. Alternatively, this was a case which ought to have been dealt with through workplace mediation. He also relied on procedural errors and delay in the disciplinary process as evidence from which he says an inference of discrimination because of religion or belief can be drawn.

103. Some of the matters raised in Mr Diamond's written submission as issues were not set out in the agreed list of issues, namely that the Respondent had investigated complaints against the Claimant when they were out of time under its Dignity at Work procedure, that the Respondent had used the wrong policy when dismissing the Claimant and an allegation of breach of confidentiality based on evidence at paragraph 46(d) of the Claimant's witness statement. Mr Diamond urged us to rule on these matters on the basis that they had been dealt with in the evidence. Mr Collins disagreed with this approach. We have considered these matters as part of the general background to the claim and with regard to the context in which each has been raised but we have not treated them as justiciable issues as they have not been pleaded. No application to amend the claim was made to us or otherwise granted.

104. Mr Collins argued that there was no European dimension to this case, on the contrary he contended that the Tribunal was simply engaged in a factual enquiry (albeit a difficult one) to determine whether the events alleged by the Claimant to be discrimination or harassment happened and, if so, whether this was detrimental and less favourable treatment or treatment affecting her dignity in the workplace because of religion or belief. In other words, the issue as far as these claims are concerned is simply, why did the employer do what it did? As far as the claim of indirect discrimination is concerned, whilst Mr Collins acknowledged that the European jurisprudence might be relevant to a defence of justification as noted above, he argued that the issues in this case were simply whether the PCP's alleged by the Claimant existed and whether they imposed some group disadvantage on people sharing the Claimant's faith.

105. Mr Collins contended that the Claimant's treatment was not because of religion or belief but because of her admitted errors of judgment in her relations with a junior employee falling within the scope of her line management: matters pertaining to religion were merely the context of her errors. He acknowledged some shortcomings and delay in the application of the Respondent's policies but argued that, without more, this is not evidence of treatment because of religion or belief. He also argued that there was simply no evidence to show that the Respondent's policies placed people sharing the Claimant's faith at some group disadvantage. He said that there was no evidence to support the existence of the other PCP's upon which she relies.

Conclusions

106. We have set out Mr Diamond's legal submissions in some detail to show that we have engaged with them and, hopefully, understood them. Nevertheless, we agree with Mr Collins that consideration of the European Convention or cases decided under it takes us no further than ordinary domestic principles in this case. The right under Article 9 is a qualified one and Article 9(2) refers expressly to the fact that restrictions may be necessary to protect the rights and freedoms of others. Additionally, although the case of *Schüth* concerned an Article 8 right, the restriction in Article 8(2) is in materially identical terms to Article 9(2), and there the Court recognised that the terms of an employment contract may restrict Convention rights. We do not accept, therefore, that the Convention gave the Claimant a complete and unfettered right to discuss or act on her religious beliefs at work irrespective of the views of others or her employer. In fact, we do not think that the Claimant believes that she has this right. In our judgment this case is simply about what happened and why and whether the Respondent had policies or ways of doing things (PCP's) that put Christians (though not necessarily all of them) and the Claimant in particular at some group disadvantage.

107. We should also make clear at the outset of our conclusions that we are not judging the Claimant's beliefs or the beliefs and practices of the CRC. They are simply the context of the issues we have had to consider.

108. The fundamental contention in the Claimant's complaints of harassment and direct discrimination is that the Respondent treated her in the various ways alleged <u>because of religion or belief</u>. We have considered the primary facts with care but have found no basis upon which to draw this conclusion. The context of the disciplinary process against the Claimant was religious acts but the reason for her treatment was because these acts blurred professional boundaries and placed improper pressure on a junior employee rather than that they were religious acts. We have no doubt that the employer would have taken a similar approach had, for example, the Claimant being pressing a particular political point of view of a view. We note in passing that the distinction between cases where religion is the reason for treatment and cases where it is merely the context was confimed by the EAT in the case of *Chondol v Liverpool City Council [2009] UKEAT 0298*. It is clear to us that this distinction is one that the Claimant has difficulty understanding: we have no doubt that she felt and feels that what she did was with EN's best interest at heart and that she was simply sharing with EN her positive experience of Christian belief.

109. Against this background we turn then to the specific allegations of harassment and direct discrimination.

110. Firstly, we reject the Claimant's case that it was an act of harassment or direct discrimination because of religion or belief to instigate disciplinary proceedings against her based on EN's complaint. EN's complaint was a serious one on any view and there was some evidence to support it. Subsequently the Claimant made some admissions consistent with the complaint. The Respondent would have been rightly criticised if it had not taken the complaint seriously and investigated it. This claim fails on the facts.

111. We turn to the specific allegations of harassment/direct discrimination in the list of issues.

Issue 2.1 In breach of paragraph 1.4 of the Policy and good practice, at the first meeting between the Claimant and John Wilson ('JW') following the complaint by

EN, JW provided an incomplete summary of EN's allegations, and required the Claimant to respond by written statement to such summary when JW was in possession of a written statement from EN.

112. This allegation concerns Mr Wilson simply providing the Claimant with his handwritten note of EN's allegations at the preliminary investigation stage rather than EN's full typewritten statement. We do not find that this was an act of harassment or direct discrimination because of religion or belief. In our industrial experience it is commonplace for employers not to provide full details of a complaint at the preliminary investigation stage as often a matter will go no further than this if there is insufficient evidence. It is undesirable in these circumstances for the full written complaint to move into the public domain. In any event we find that Mr Wilson's approach was based on HR advice and had nothing to do with religion or belief. We have no doubt that he would have taken a similar approach when dealing with allegations of harassment or bullying in a non-religious context. The claim fails on the facts.

Issue 2.2: In breach of paragraph 1.4 of the Policy, failure to provide full allegations promptly to the Claimant – she was not given a copy of EN's full complaint until 4 October 2013.

113. There was significant delay in the investigation of the allegations against the Claimant and we accept her evidence that she did not receive EN's written complaint until October 2013, after her last interview with the investigators which took place on 18 September 2013. The investigation was in the hands of Ms Sunduza and Dr Mann at this time and it has not been suggested by the Claimant at any stage that their acts were motivated consciously or unconsciously because of religion or belief. In any event we do not find on the facts that this was an act of harassment or direct discrimination because of religion or belief. We accept that the investigation was handled poorly in the sense that it was delayed but we cannot find without more that this is a basis for inferring that this was treatment of the Claimant because of religion or belief. The claim fails on the facts.

Issue 2.3: In breach of paragraph 6.1 of the Policy, failure to consider alternatives to suspension from duty such as redeployment of the Claimant or the allocation of a new manager to EN or her reinstatement to a same or different role following EN's departure from the Respondent.

114. We accept Dr Gilluley's evidence that he did consider alternatives to suspension. He acknowledged in evidence that the Claimant's suspension lasted too long and that he could have done more to look in other directorates for suitable alternatives. We echo the appeal panel's criticism of this. Nevertheless this is a long way from a finding that this was treatment of the Claimant because of religion or belief. We note in this context that Dr Gilluley had no idea or way of knowing that the suspension would last as long as it did when it was first imposed. Furthermore, there is no point in the sequence of events where the evidence shows any change affecting the original reasons for suspension. This claim fails on the facts.

Issue 2.4: In breach of paragraphs 6.1 and 6.8 of the Policy, failure to review the suspension at reasonable intervals and/or in accordance with the Policy and likewise to notify the Claimant

115. The Claimant's suspension was reviewed regularly and the Claimant notified of the outcome. It is notable that she was also informed of her right to request a hearing to review her suspension but did not do so. Reviews were not as frequent as required under the Disciplinary Policy (monthly rather than fortnightly) but there is no evidence to suggest that more frequent reviews would have led to a different outcome. In any event we are satisfied by Dr Gilluley's evidence that the reason for the Claimant's treatment in this respect had nothing to do with religion or belief. This claim fails on the facts.

Issue 2.5: In breach of the Policy in Particular Appendix 1, paragraph 1.6, and good practice, the appointment of Paul Gilluley as chair of the disciplinary hearing, Dr Gilluley having been provided with details of the allegations against the Claimant and after he had authorised her suspension.

116. We do not find that there was any breach of the Respondent's procedures by Dr Gilluley taking the decision to suspend the Claimant and then acting as chair of the disciplinary panel. There is a significant difference between him being given an outline of the allegations upon which to base a decision to suspend and him chairing a disciplinary hearing after the completion of a full investigation and where the employee has the chance to put forward her own case. We reject the Claimant's case therefore that this was improper treatment of her or treatment because of religion or belief.

Issue 2.6: Dr Gilluley maintaining his position as Disciplining Officer and Chair of the Disciplinary Panel after the Claimant's objection, which should also have been treated as a grievance under paragraph 14 of the Policy.

117. We reject the first part of this allegation for the same reasons as Issue 2.5. We do not find that Mr Peer's objection was a grievance under the Respondent's Grievance Policy rather it was a procedural point taken and determined within a disciplinary process. What is surprising about this allegation is that it was not raised at any time prior to 24 February 2014 notwithstanding the Claimant's knowledge of Dr Gilluley's role in events.

118. The reference to paragraph 14 of the policy should, we believe, be to paragraph 13 (page 98) concerning grievances: it is clear from this paragraph that grievances are to be put in writing and the Claimant never did this.

119. We reject the Claimant's case that this was treatment of her because of religion or belief.

Issue 2.7: In breach of paragraph 9.6 and Appendix 4 of the Policy, the failure by the Respondent to inform the Claimant that the Investigation Officers would be calling witnesses and of their identities before the commencement of the disciplinary hearing.

120. Mr Diamond conceded in argument that the Disciplinary Policy did not impose the obligations to disclose the fact of witnesses and their identities contended for. It is notable however that Dr Gilluley granted the Claimant's application for a postponement when she complained that she had not been told in advance of the names of witnesses to be called by the Respondent. It is difficult to see therefore how this was less favourable or unwanted treatment of her. In any event we are satisfied that it was not treatment of the Claimant because of religion or belief.

Issue 2.8: Inordinate delay throughout disciplinary proceedings (the Claimant was suspended for almost 9 months before the disciplinary hearing).

121. We agree with Mr Diamond's submission that there was unimpressive delay in dealing with this disciplinary matter. Dr Gilluley accepted that the process took too long and some things were done incorrectly. In some cases this might be a basis for inferring harassment or direct discrimination but unreasonable or inept behaviour is not necessarily proof of either. We are satisfied on the evidence that the delays were not because of religion or belief. Some of the delay, albeit a small part, is attributable to the Claimant herself. This claim fails on the facts.

Issue 2.9: An oppressive sanction applied in all the circumstances.

122. We reject this allegation on the facts: the sanction was not oppressive, the Claimant had been accused of serious misconduct amounting to a misuse of power. Furthermore we reject the Claimant's case that the imposition of a final written warning or its replacement with a first written warning was treatment of her because of religion or belief.

Issue 2.10: Reliance on events unrelated to EN's complaint – the Respondent raised the investigation into the Discover Life group with which the Claimant had been involved, even though the Claimant was not subject to any disciplinary action in that matter (including the fact that the group had been suspended and not reinstated more than a year earlier) and the fact that this had nothing to do with EN's complaint.

123. We reject this allegation on the facts: it was plainly relevant for the investigators, the disciplinary and appeal panels to know that the Claimant had been previously counselled and advised to maintain proper professional boundaries between her personal beliefs and her role at work. It is fanciful to suggest that this had *"nothing to do with EN's complaint"*. This was not treatment of the Claimant because of religion or belief.

124. We turn then to those matters which are pursued simply as allegations of direct discrimination because of religion or belief and not as allegations of harassment.

Issue 8(b): The intimidation of and/or the improper pressure imposed on witness TI in relation to the making by him of a statement.

125. We do not find that TI was intimidated or placed under improper pressure to be a witness as alleged or at all. We accept Mr Wilson's evidence that TI provided his first statement (page 379) voluntarily and we find that the Respondent was understandably surprised and concerned when he changed his account so substantially when interviewed by the investigators. This was the subject of a further investigation after the internal procedure affecting the Claimant had been concluded but this did not result in disciplinary action against TI. We do not find this passage of events was treatment of the Claimant in any sense because of religion or belief.

Issue 8(c): The failure of the Respondent to implement its mediation process.

126. The mediation process is contained in the Respondent's Dignity at Work Policy and not its Disciplinary Policy although we accept that there is some overlap between the two.

The mediation procedure under the Dignity at Work Policy is at page 134; in the introductory paragraphs it says as follows:

> *"Mediation is particularly appropriate when there is willingness to resolve the issues by both parties and when there is an ongoing working relationship."*

127. Those conditions did not apply here. EN complained shortly before she was due to leave the Respondent. She described considerable distress and characterised her treatment as *"grooming"*. In those circumstances, and given the corroboration found in the Claimant's admissions and TI's first statement, we do not find that it was unreasonable to treat this as a disciplinary issue rather than a workplace grievance to be resolved by discussion. We bear in mind that the Claimant had been counselled about what was appropriate in the workplace before. We reject the claim therefore that this was less favourable treatment of her because of religion or belief or that a hypothetical comparator of a different or no faith would have been treated differently in similar circumstances.

Issue 8(d): The negativity displayed and/or expressed by JW towards the Claimant on account of her Christian faith when: "he repeatedly referred to there needing to be a 'firewall' between my professional role and my 'religious beliefs'".

128. We reject this claim on the facts. According to the minutes we have seen Mr Wilson used the word *"firewall"* once and when the Claimant objected he immediately apologised. Whilst this has not been raised as an allegation of harassment, we observe that a person could not reasonably construe the word *"firewall"* in the context in which Mr Wilson used it as being insulting to Christianity in particular or religious belief in general. Mr Wilson was simply making the point that a senior employee must separate her strongly held personal beliefs from her role in the workplace where others may have different or conflicting views. In the context of a direct discrimination claim we are satisfied that Mr Wilson would have used the same expression in the case of a comparator with no religious belief but who, for example, had expressed strong views about a political matter or on the place of some groups in the workplace or society. This claim fails on the facts.

129. We turn then to the claims of indirect discrimination.

Issue 10.1

130. We accept that the Disciplinary Policy referred to in Issue 10.1 is a PCP for the purposes of a complaint of indirect discrimination but have found no evidence to show that this Policy imposed a group disadvantage on Christians or people of faith more generally. The mere fact that the Claimant was dealt with under this procedure and feels hard done by because of the outcome is not evidence of any group disadvantage caused by it. This claim fails at that hurdle.

Issue 10.2(a): The Respondent's unwritten policy that a religious discussion between a staff member on the one hand, and staff member of a different or no faith, is not permitted;

131. There was no evidence adduced to show that this PCP existed. For example, the Claimant was not disciplined simply for having a discussion about faith with EN; she was disciplined for subjecting a subordinate to unwanted conduct which went substantially

beyond a *"religious discussion"* without having regard to her influential position and despite previous counselling and instruction to the contrary.

Issue 10.2(b): The Respondent's unwritten policy that invitations to a service or event at a place of worship by a staff member of one faith to a staff member of another faith are prohibited

132. There is no evidence to support the existence of this PCP either. It was suggested, for example, that the Respondent would prohibit invitations to a Christmas carol service: there was no evidence of this. In fact, on the contrary, the Discover Life Group was advertised on the Respondent's events calendar.

Issue 10.2(c): The Respondent's unwritten policy that the dissemination of any literature or other media that promotes the Christian religion is prohibited.

133. There is no evidence to support this PCP. The Claimant was censured for giving one book to EN which plainly had a proselytising message which EN appeared to find unwelcome. Mr Wilson decided not to distribute a pack for the CRC which, rather than explaining why the Discover Life Group had stopped, sought to advertise and encourage people to attend the Church's other services. These facts do not establish that the dissemination of <u>any</u> literature or media promoting Christianity was prohibited. Once again an example of a carol service being prohibited was suggested but there was no evidence to show that this had ever occurred.

134. As the Claimant has failed to establish evidence consistent with the Respondent's disciplinary policy causing group disadvantage to Christians or people of faith and as she has failed to establish evidence consistent with the existence of the other PCP's which she has asserted, her complaints of indirect discrimination because of religion or belief fail.

135. The Claimant suggested that she and other Christians are at *"constant threat of disciplinary action"* as evidence of the particular disadvantage she says she was subject to because of the PCP's alleged. We heard no evidence to support this broad proposition and reject it on the facts. We find that any senior manager who fails to maintain an appropriate boundary between their personal beliefs and their role in the workplace such that junior employees feel under pressure to behave or think in certain ways is likely to be the subject of disciplinary proceedings. This is not without more evidence of unlawful treatment of such a manager by the Respondent.

136. The only instance of different treatment because of religion or belief unrelated to the Claimant's activities about which we heard some evidence concerned a perception amongst some Christian employees that the Respondent made greater efforts to respect Muslims' observance of Friday prayers than the attendance of Christians at Sunday services. We found it unnecessary to make any finding on this allegation in order to determine the justiciable issues raised in this case.

137. For the reasons given above we find the Claimant's claims are not well founded and they are dismissed. The provisional Remedy Hearing fixed for 28 May 2015 is cancelled.

G Foxwell 26 February 2015

Employment Judge Foxwell

JUDGMENT, & BOOKLET SENT TO THE PARTIES ON

27 February 2015

E Cabey

FOR THE TRIBUNAL OFFICE