EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Z De Groen	**v**	**Gan Menachem Hendon Limited**

Heard at: Watford **On**: 25-28 September 2017 and 31 October 2017 (in chambers)

Before: Employment Judge Andrew Clarke QC
Members: Ms S Hamil, Mr R N Ramgolam

Appearances

For the Claimant: Mr N Roberts, counsel
For the Respondent: Mr A Serr, counsel

JUDGMENT

1. The claimant was directly discriminated against by the respondent by reason of (a) her sex and (b) her religion and/or beliefs, both contrary to the Equality Act 2010 ("the 2010 Act").

2. The claimant was indirectly discriminated against by the respondent on the grounds of her religion and/or beliefs contrary to the 2010 Act.

3. The claimant was harassed by the respondent contrary to the provisions of the 2010 Act.

4. The employment tribunal will consider the appropriate remedies in respect of those acts of discrimination and harassment at a hearing on a date to be fixed.

REASONS

Introduction

5. The claimant was employed by the respondent from 1 September 2012 to 27 July 2016 as a teacher at its private nursery school. Latterly, she was employed as a team leader, being the person in charge of the team working in the classroom.

6. The claimant was dismissed, but has never claimed unfair dismissal. Rather she brought claims in relation to various acts of discrimination said to have arisen in the context of the events which led up to her dismissal.

7. The claimant was co-habiting with a man (who was eventually to become her husband) at the time of dismissal. The respondent is an Orthodox Jewish nursery school and maintains that its actions (culminating in dismissal) were motivated by its own and its parents' reactions to the co-habiting of unmarried persons and the consequent unsuitability of the claimant to be a teacher of the children of Orthodox Jews. It is not in dispute that many Orthodox Jews regard co-habitation prior to marriage as being contrary to their faith.

8. The original claim form relied upon various acts of direct and indirect discrimination and harassment. The respondent complained of a lack of particularisation. In February 2017 the claimant (now having had the benefit of legal advice) provided what were described as further and better particulars of her claim, but which actually amounted to a comprehensive restatement of her case.

9. Those particulars were served immediately prior to a preliminary hearing on 7 February 2017. At that hearing employment Judge Manley made various case management orders. One was for the parties to agree a list of issues to be tried at this hearing. On 20 April 2017 the claimant's solicitors produced the list which was eventually agreed. This hearing was designated as one to deal with liability alone. In the light of our findings it will be necessary for there to be a further hearing to deal with remedies.

10. The agreed list of issues carefully describes the various claims, identifying the relevant constituent elements. So far as the indirect discrimination claim is concerned, two Provisions, Criteria or Practices (PCPs) were then relied upon. As noted below, a third was added during the course of the hearing. The list of issues also set out the relevant component parts of the occupational requirement defence found in schedule 9 of the Equality Act 2010 ("the 2010 Act") which is relied upon by the respondent.

11. On the first day of this four day hearing the claimant made an application to amend her claim to add claims of victimisation. The employment tribunal heard detailed submissions and ruled on the application. The tribunal's reasoning and conclusions, as announced to the parties, appear as an appendix to these reasons.

12. As noted in paragraph 15 of the reasons given in relation to the application to amend, after the tribunal had ruled in the claimant's favour, but subject to the hearing being adjourned, the application to amend was abandoned.

13. The tribunal heard from four witnesses. The claimant gave evidence on her own behalf and that evidence was supported by the evidence of her husband, Mr Oz Waknin. The respondent called two witnesses, Mrs Dina

Toron (the Managing Director of the respondent) and Mrs Miriam Lieberman (the respondent's Nursery Manager).

Findings of fact

The claimant and her background

14. The claimant grew up in an ultra-Orthodox Jewish household. She was discontented in her community and moved to Israel when aged 16. She returned to the UK three years later, but she did not wish to return to a fully ultra-Orthodox way of life. She considered herself still to be a practicing Jew, but one who did not rigorously observe all of the practices which might be expected of an ultra-Orthodox Jew. However, she intended to be more Orthodox in her observance than she had been in Israel.

15. When she started work with the respondent in September 2012 (some three months after her return to the UK) she was a temporary member of staff. By this time she had resumed some limited contact with her family and it was her mother who introduced her to Mrs Lieberman (a friend of hers) as a prospective employer. She was not living with her family. She had a NVQ level 3 in childcare, but no teaching qualification and no teaching experience.

16. When she joined the nursery staff Mrs Lieberman and Mrs Toron both understood that she intended to return (gradually) to the fold of ultra-Orthodoxy. This they considered to be consistent with her desire to teach in an ultra-Orthodox nursery school. In fact, we consider (having heard evidence from the claimant) that the situation was rather more complex and confused. The claimant was then uncertain about herself and her religious beliefs. We accept that she was suffering from low self-esteem and perceived ultra-Orthodoxy as a belief system which had been forced upon her in the past by family and school, which led her to question aspects of it.

17. The claimant is now seeing a psychiatrist regularly and, although she declined to provide medical evidence, it was clear from the manner of giving her evidence that she is a vulnerable and disturbed person. She told us that in 2016, whilst employed, she was being helped and advised by a therapist and also by one or more counsellors or advisors. It is clear to us that even by the end of her employment in 2016 she was a vulnerable and disturbed person, although we are unable to assess the severity of her condition (then, or now) with any precision. She was struggling to establish her own set of life values within the spectrum of liberal to ultra-Orthodox Judaism. In particular, she was still trying to come to terms with what she saw as the harsh imposition of the standards of ultra-Orthodox Judaism upon her both at home and at school.

18. As the result of her upbringing to age 16, he claimant was fully conversant with the beliefs and practices of ultra-Orthodox Judaism. She understood their importance to the close knit community of which the nursery formed the part. She also understood the concern with which failing to live in accordance with those standards would be met by at least some members

of that community and the fact that information (and concerns) about individuals who manifested non-conformism would spread quickly through the community.

19. Whilst the claimant understood that some ultra-Orthodox Jews would see co-habitation outside of marriage as being contrary to a fundamental tenet of Jewish law (as they understood it), she did not herself believe this to be so. She believed that she should be perfectly entitled to co-habit if she so chose. She considered that to be part of who she was and not contrary to her belief system, even though she considered herself to be a practising Jew. As was pointed out by both sides in this case, different Jews hold different beliefs. By way of example we were told that ultra-Orthodox Jews believe that all religious festivals must be observed over a period of two days, whilst less Orthodox Jews would observe most festivals only for one day. Some consider co-habiting outside of marriage to be impermissible, others do not.

20. In about January 2016 the claimant met the man she was ultimately to marry (in July 2017). Some time prior to 26 May 2016 they began living together. She was aware when she began to live with her (now) husband that it was likely that her co-habiting outside marriage would be seen by some members of the community of which the nursery formed a part as being contrary to their view as to the fundamental principles and practices of Judaism.

21. No one has criticised the claimant's performance as a teacher. On the contrary, it is clear that she greatly enjoyed teaching and that the respondent valued her as a very good teacher.

The Nursery

22. The nursery is a private institution owned by one or more of its trustees. One of those trustees is Mr Mendy Freundlich. The nursery is associated with a synagogue and community that carry the name and follow the guidance (on Jewish law and practice) of the Lubavicher Rebbe, a deceased Rabbi. Many (but not all) of its parents come from an ultra-Orthodox Jewish background and send their children to the nursery because it will teach and reflect their community practices and values. However, as the nursery's handbooks make clear, the nursery has pupils whose parents have a range of faiths, practices and backgrounds within the broader Jewish community. Hence, different parents were likely to have different views, beliefs and practices regarding aspects of Jewish law and differing levels of tolerance of those Jews who did not hold the same beliefs, or adopt the same practices as them.

23. The nursery is a small school and it is very much over subscribed, having a substantial waiting list for places. It has four classes each with a teacher (or team leader) and two assistants. The team leader is responsible for planning the day and organising the class. The day will include prayers and blessings, looking at and reading from carefully selected books (for

example, generally featuring only kosher animals) and studying (by hearing, singing and, perhaps, talking about) that week's passage of the Torah.

24. The handbooks makes clear that, in general terms, that part of the ethos of the nursery is the establishment in its children of the principles and practices of ultra-Orthodox Judaism. Both handbooks for teachers and parents and a job description mention the religious nature of the nursery in various places. However, none sets out that all staff must adhere to the beliefs and practices of the ultra-Orthodox community with which the nursery is most closely associated. Indeed, the respondent was at pains to point out that it was open to employing a non-Jew as a teacher provided that they had a sufficient knowledge of the principles of Judaism and adhered to key aspects of its fundamental principles (such as its dress code).

25. The lack of a clear statement of requirements and expectations leads to some difficulties which were illustrated in the cross examination of Mrs Toron. The nursery has a clear written policy on staff dress. That policy accords with the modest dress code which members of the community would expect themselves to see worn by women (all current staff are women) in their community. The policy does not state that it applies outside work. Therefore, the question arose as to whether it did and to what extent. That the answer to those questions (and similar questions regarding other religious practices) is somewhat subtle is shown by what happened in relation to the claimant's whatsapp photograph and her being spoken to on the subject of smoking in the vicinity of the school.

26. The claimant smoked in the vicinity of the nursery. For many, smoking is considered incompatible with ultra-Orthodox Judaism. She was asked not to do so again and agreed. The request was framed in terms of her not doing it where she might be seen: there was no suggestion that she should not smoke in private.

27. Her whatsapp picture was seen by some parents, as she used whatsapp to communicate with them. At least one commented on the fact that she was not dressed in the photograph in the prescribed modest manner to be expected of a member of the community. This was raised with her by the respondent and she changed the photograph. There was no suggestion that she must never dress like that again. In cross examination the claimant agreed that the nursery's behaviour was appropriate and that staff had to be sensitive to the expectations of the community and the fact that whatever she (or any other member of staff) did which might be contrary to ultra-Orthodox practice could, if seen, be fed back as a matter of concern by a parent. She recognised both in relation to dress code and smoking that she should seek to keep her private life private to the extent that it did not accord with the principles and practices of ultra-Orthodoxy.

28. The claimant regarded the required approach to such matters as being one of the application of common sense. As we have already noted, the respondent made no attempt, either in print or when speaking to the claimant, to suggest the application of any hard and fast rule, for example

about how far away from the school she might be allowed to smoke or on what occasions she might be allowed to dress other than in accordance with the code for teachers.

26. Indeed, Mrs Toron explained the nursery's expectations in realistic terms. She told us that she did not see herself as being a judge in these matters, but that where the standards of teachers (viewed against the norms of the community) were seen to slip, then she would need to address this in a sensible way. She emphasised that she had no wish to prescribe how an individual should behave in private: she herself believed that Jewish law should be followed on all occasions, but whether others followed it to the letter in private was a matter between them and their god.

The Barbeque

27. On 26 May 2016 the claimant attended a barbeque with her boyfriend, with whom she was living in Pimlico. This was to celebrate a Jewish holy day and trustees of the nursery (including Mr Freundlich) and some parents were present. The event was not organised by the nursery and the claimant was invited by friends and not was attending in her capacity as a nursery teacher.

28. A number of those present (including some parents) knew that the claimant was living with her boyfriend. She and her boyfriend socialised with them. None of those parents had raised this as a concern with her or with the nursery.

29. The claimant introduced Mr Waknin to Mr Freundlich as her boyfriend. Mr Freundlich asked him various questions about himself, including asking where he lived. He replied that "*we live in Pimlico*." Having been brought up in Israel he did not think that making this statement was a matter of any consequence.

30. Whether Mr Freundlich told others that the claimant was living with her boyfriend, whether one or other of the claimant or Mr Waknin told others at the barbeque that they lived together, or whether others overheard the conversation with Mr Freundlich, overheard other conversations or were given the information by others who attended the barbeque who knew that the claimant and Mr Waknin were co-habiting, are all matters on which we heard no evidence and can, therefore, reach no conclusion. We have not heard from Mr Freundlich, therefore we do not even know whether he was himself concerned about this incidence of co-habitation before learning of parental concerns.

31. The claimant and Mr Waknin certainly made no secret of their relationship either at the barbeque or more generally. Equally, they made no secret of their living together. It was clear from the claimant's evidence that she was extremely happy to think that she had entered into what she believed was to be a long term relationship, was proud of her boyfriend and quite possibly told others that they were living together.

26 May to 27 June 2016

32. The claimant continued to work at the nursery as before during this period. No one spoke to her about the information regarding co-habitation given to Mr Freundlich (and perhaps others) at the barbeque.

33. At some point in time during this period one, or possibly two, parents spoke to someone at the nursery about the fact that the claimant and her boyfriend were living together, as had been revealed at the barbeque. We do not know who those people were, or what they said. The respondent declined to name them and despite careful cross examination, exactly what they said remained unclear. Subsequently, but again we do not know when, one parent suggested that they might not allow their child to return to the nursery the following year if he or she was to be taught by the claimant. In total the respondent referred to complaints by "four or five parents", but their identity and the timing and content of what they said was unclear, save as set out above.

34. In this context it is important to note that Mrs Toron was at pains to point out that some parents complain about matters which many others might regard as trivial. For example, they complain when a child has not eaten all of his or her food, or is thought not to have been given a long enough sleep during the day. All such matters are then discussed with the teacher concerned. The matter is then discussed with the parents. There are some serial complainers.

35. Without knowing who complained, in what terms and when, it has been impossible for the claimant to suggest (for example) that the particular parents concerned were among those who constantly raised matters, but did not press them thereafter, or that the parent who had threatened to withdraw his or her child had made similar (or other) threats in the past, but never carried them through.

Meeting of 27 June 2016

36. The claimant was asked to attend a meeting on that day with Mrs Toron and Mrs Lieberman. The first she knew of this intended meeting was when she was approached in her classroom. She went straight down to the meeting, which took place in the staff room. That room was regularly used for meetings, but they would be interrupted as people came in to get things. This would happen even if a "do not disturb" notice was on the door, which it was not for this meeting.

37. There is considerable dispute about precisely what was said at the meeting, but none about its broad themes. Its initial subject matter was the claimant's statement at the barbeque about living together with her boyfriend. Initially the claimant denied having made such a statement, but then accepted that such a statement had been made. It was clear to her that she was in trouble and soon became very upset and tearful. She said that her "*big mouth*" had got her into trouble. We note that the accusation put to the claimant was that she had made the statement, whereas the evidence to us was that it was her boyfriend.

38. Mrs Toron and Mrs Lieberman both told us this was intended to be a friendly meeting to explore how the problem, as they saw it, might be resolved. What is clear to us is that they had given little or no thought to how such a resolution might be achieved. In their evidence they both talked, but in very vague terms, about the possibility of changing the claimant's duties. They speculated that they might have been able to adjust her duties as a team leader, or to have her revert to being an assistant, but they had not even begun to think this through before the meeting commenced and had no concrete proposals in mind.

39. It was initially unclear to us what the purpose of the meeting was. That either the claimant, or Mr Waknin, had told Mr Freundlich at the barbeque that they were living together was, so far as they were concerned, already clearly established. Having heard from both of them, we concluded that the intention of Mrs Toron and Mrs Lieberman was to discuss the matter of co-habitation with the claimant and see what happened.

40. No doubt because the respondent had not planned the meeting, or worked out what they wanted to achieve, it quickly moved to being an unfocussed discussion of the claimant's personal life. Having heard from all three of those present and having looked both at the very brief note produced by Mrs Toron and Mrs Lieberman on 29 June and at the contemporaneous documents from both sides produced in the short period up to the claimant's dismissal, we conclude as follows:

    40.1 The meeting lasted for well over an hour. The conversation about whether the claimant had said something at the barbeque lasted for a very few moments at the start.

    40.2 What followed felt to the claimant to be an echo the kind of comments and criticisms that she had been subjected to at home and at school before she left for Israel and profoundly upset her.

    40.3 The constantly recurring themes of what was said to the claimant throughout the majority of the conversation were that living with a man to whom you were not married was wrong, that having children outside wedlock was wrong (and that the claimant would be dismissed if this happened), that the claimant was already 23 and time was passing for her to have children, that if the claimant had a problem with the idea of marriage she should seek counselling and that Mrs Toron and Mrs Lieberman understood that the claimant had had problems (of an unspecified kind, but which reflected badly upon her) during her time in Israel.

    40.4 We have no doubt that Mrs Toron and Mrs Lieberman were sincere in what they said and that what they said echoed their own beliefs. We also have no doubt that they appreciated just how extremely upset the claimant was by this conversation. She revealed to them (very unwillingly, but feeling that she must given their persistent

questioning) that she was concerned about marriage and commitment and was already seeking counselling. We accept that Mrs Lieberman was herself very upset and made this clear.

40.5 There is some dispute as to whether the respondent suggested in this meeting that one way out of the problem was for the claimant to tell them that she was not living with Mr Waknin, knowing full well that she was. The respondent disputed this. However, it features in the documents summarising the reasons for the termination of her employment (as we shall explain below) and the original notice of appearance. Hence, for some considerable time it was part of the respondent's own case. However, the claimant did not give evidence of it being said. We consider that Mrs Toron and Mrs Lieberman did deliberately indicate at the meeting that this might provide an acceptable solution to the problem. However, the claimant failed to understand that this is what the respondent wanted because lying is contrary to Orthodox Jewish beliefs (and her own beliefs) and she simply did not expect either of those two ladies to be asking her to lie. The fact remains that they were.

40.6 After the meeting ended the claimant was in a very tearful and distressed state. She retreated to the toilets and remained tearful throughout the day. The effect on her of the meeting was profound: she felt that she should not have been subjected to such a meeting by her employer and was determined that it should not happen again. She only continued with her employment after the meeting because she loved working with the children.

41. Mrs Toron and Mrs Lieberman both told us that they considered the meeting to have been a success, because an amicable way forward seemed possible. Save in the vaguest terms, what that might have consisted of had not been considered by them, other than in terms of the claimant telling them that she was not living with her boyfriend. There was no other discussion of what the solution might be at the meeting. The claimant did not pick up on the suggestion that she should lie. The respondent did not consider with her how her duties might be adapted to make her continued employment (and continued co-habitation) acceptable.

42. We are satisfied that Mrs Toron and Mrs Lieberman behaved in this meeting, as was suggested in evidence, as a rather overbearing mother and elder sister. They were dispensing wisdom (and some sympathy) as they saw it. However, in reality they were seeking to impress upon the claimant (and, if they could, impose upon her) their system of beliefs. They would not have so behaved towards a male teacher. Both accepted that had they attempted to do so, they would have expected a man to have got up and walked out shortly after the meeting started. Furthermore, they accepted that certain questions and comments would not have been asked of, or made to, a man.

29 June Meeting

43. As Mrs Toron was not at work on 28 June, the 29 June was the first opportunity for the claimant to speak to the two ladies. She was very nervous and shaking, but she told them that she wanted a written apology and a promise that she would not be harassed in that way again. She said that she had taken some legal advice and she referred to the possibility of an employment tribunal claim for discrimination if matters could not be resolved by way of an apology.

44. Mrs Toron and Mrs Lieberman referred to the claimant as being threatening and aggressive at this very short meeting. We do not consider that she displayed either characteristic, but she was clear and firm. The two ladies were disappointed in what they saw as a change of attitude and they cut short the meeting. They told us that they no longer saw an amicable solution as being possible. Of course, they had no such solution in mind (save in the most general terms) other than the claimant stating that she no longer lived with her boyfriend.

45. The two ladies did not apologise. Instead, they said that they told the claimant that they should not have been so nice to the claimant at the previous meeting and made clear to her that they considered they had sufficient "*ammunition*" to deal with any claim that she might bring. The respondent had previously taken advice from DAS (to whose HR service the respondent subscribed) and had been told that they could commence disciplinary proceedings on the basis of what had happened at the barbeque.

The letter of 30 June

46. The respondent's response to the request for an apology was to send a letter commencing disciplinary proceedings. It was written by DAS, but following instructions from someone, who is not clear, on behalf of the respondent and the respondent approved the contents and handed it to the claimant.

47. The letter is rather confused. The allegations against the claimant are described as "*an act of SOSR (some other substantial reason)*". The allegations relied upon are said to be acting in contravention of the nursery's ethos and religious beliefs, damaging the nursery's reputation and risking loss of income by parents withdrawing children. It was said that attempts had been made to deal with the matter informally, that the claimant had never been asked about her personal life, that in alleging that this had been done she was manipulating the facts and that she had closed off any avenue of informal resolution. In fact, she had been asked about her personal life and the closing off of any possibility of informal resolution was a decision taken by the respondent. The claimant was invited to a disciplinary hearing on 5 July.

48. The impression created by the letter was that it had already been found that the claimant had misrepresented the meeting on 27 June. She had not done so. However, more importantly, the only matter which really needed

investigation was how a sensible solution might be found, but neither the respondent (nor DAS) was not addressing its mind to that. The hearing on 5 July should sensibly have been focussed on that. We note that a written statement from Mrs Toron which accompanied the letter did refer to finding a solution, but (save for the suggestion that the claimant should lie) none had been put forward and none was subsequently put forward.

The period to dismissal

49. The claimant asked to be given more time and the meeting was postponed to 12 July. The claimant continued working until signed off from 11 July (to 24 July) with stress by a fit note of that date. The hearing was again postponed to 25 July.

50. The claimant sent written comments on the allegations against her to DAS by an email of 11 July. She gave an account of the material events which we consider to be broadly accurate.

The dismissal

51. The claimant's dismissal followed a hearing by a "disciplinary panel" in her absence on 26 July. In fact, the panel consisted of Charlotte Rhodes of DAS. She made a written report to the respondent. The respondent adopted that report and dismissed the claimant based upon its conclusions.

52. Mrs Toron told us that she read the report before endorsing it. However, having been shown various passages from the report in cross examination she suggested that her reading had been rather cursory. Both she and Mrs Lieberman struggled to explain how several of its conclusions could be justified on the basis of the facts as they claimed them to be.

53. In particular the report states that the solution proposed at 27 June meeting was that:

> "[the claimant] needed to confirm that she was no longer living with her boyfriend in order that they could tell parents or anyone concerned that this was what they were informed by [the claimant]. Again they made it clear that "what she did in private was of no concern to the nursery". Both staff, Mrs Lieberman and Mrs Toron were happy with this as a sensible and positive outcome even though in effect they were allowing her/asking her to "lie" to them they understood this was none of their business."

54. In cross examination the hypocrisy of encouraging the claimant to lie (a breach of a fundamental tenet of Judaism) in order to cover up her breach of what was (according to the respondent) a further fundamental tenet of Judaism was explored. No satisfactory answer was provided.

55. The reports suggested that the claimant's account of the meeting in her email was contradictory (it was not) and inaccurate (we find it was accurate). The report concluded, inter alia, that the claimant was not a reliable and truthful witness and that she was seeking "*to manipulate a case against her employer rather than address the relevant issues.*" In addition to her alleged lies, the fact of her becoming ill only just before the hearing and her

failing to resign were also said to support this conclusion. How was not explained in the letter and the respondent's evidence did not assist in this regard.

56. That the DAS report might reasonably be said to display incompetence and inaccuracy on the part of its author hardly assists the respondent. The respondent's employees (and trustees) were the source of the factual information and they adopted its conclusions in their entirety when they adopted the recommendation that she be dismissed, which she was with effect from 27 July 2016.

The Law

57. We set out below the law applicable to each of the claims made by the claimant. Where there was any dispute between the parties we indicate that and explain its resolution.

Burden of proof

58. Section 136 of the 2010 Act provides that:

> "(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 …..."

59. The EAT has recently stated that the burden of proof should be interpreted in the following way. There is no initial burden of proof on the employee: see Efobi v Royal Mail Group Ltd [2017] EAT 0203/16 [at paragraph 78 and following]. Instead the tribunal must consider "*all the evidence from all the sources*" on the basis of a neutral burden.

60. Hence, we approach the matter on the basis of the guidance found in Igen Ltd v Wong [2005] ICR 931, CA [at paragraph 76] as clarified by Efobi:

    60.1 First a neutral burden applies in establishing the primary facts.

    60.2 The tribunal should therefore consider, on the basis of a neutral burden and in the absence of other explanation, whether it could conclude that the employer has committed an act of discrimination.

    60.3 The word "*could*" should be emphasised. The tribunal does not need to reach a determination on the established facts that there was discrimination. At this stage the tribunal does not consider whether there is an adequate explanations for those facts.

    60.4 The burden then shifts to the employer. The employer must show on the balance of probabilities, that the treatment was in no sense whatsoever motivated by discrimination and that discrimination was not a ground for the conduct.

Causation

61. The causation test is a broad one. The discriminatory reason does not need to be the main reason for the treatment. It must, however, have a "*significant influence*" on the reason for the treatment: see Nagarajan v London Regional Transport [1999] IRLR 572 [at 576].

62. A "*significant*" influence is an influence which is "*more than trivial*": see Igen [at paragraph 37]. The detrimental treatment motivation must be "*in no sense*" whatsoever motivated by discrimination [see paragraph 76 of Igen].

Direct religious discrimination

63. Sections 4, 10 and 13(1) of the 2010 Act provide that "religion or belief" is a protected characteristic and that:

> "10. Religion or belief
>
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristic of religion or belief:
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."
>
> "13. Direct discrimination
>
> (1) 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."

64. The respondent sought to draw two distinctions in this context:

64.1 Between belief, or lack of it, and the manifestation of such a belief or lack of belief.

64.2 Between situations when an individual is treated less favourably because of their belief and where they are treated less favourably because of their failure to adhere to a belief shared with the respondent.

65. In other words, the respondent submitted that if the claimant lacked a belief in the Jewish law forbidding co-habitation and that was a relevant lack of belief for the purposes of the 2010 Act (which the respondent disputed) a detriment sufficiently connected to that characteristic would be protected. On the other hand, the respondent suggested that if the claimant held the belief that co-habiting was contrary to Jewish law, yet nevertheless co-

habited and suffered a consequential detriment that could not be protected, because she would lack a relevant belief or relevant lack of belief.

66. The respondent's first distinction is wrong in law. Mr Serr contended that "*holding a religious belief but not adhering to a particular manifestation of it is not an absence of religion or belief within the meaning of the Act.*" That is either an assertion that the law does not protect manifestations of belief, or an assertion that an individual who identifies as a Jew (or Christian) cannot then claim that their failure to adhere to some aspect of the set of beliefs which others consider make up that religion is a protected characteristic. Neither assertion is correct.

67. As to the former, discrimination in relation to a manifestation of a belief (or lack of belief) will be direct discrimination where the detrimental treatment is done because of the manifestation of that belief (or lack of belief). Belief includes the manifestation of belief and a lack of belief includes the manifestation of that lack of belief. For example, whilst a ban on the use of headwear could be an act of indirect discrimination, a ban on niqabs is an act of direct discrimination. This is expressly confirmed by the CJEU in Achbita and another v G4S Secure Solutions NV [2017] C-157/15, at paragraph 28 and in Bougnaoui and ADDH v Micropole SA [2015] CJEU C-188/15, at para. 30. In Bougnaoui the Muslim employee had been dismissed for wearing a headscarf. The CJEU found that this constituted direct discrimination in this regard, on the facts of that case. We were also assisted by the comments of the EAT in Azmi v Kirklees MBC [2007] ICR 1154 [at paragraph 76] where it was stated that there is "*no reason for there to be a priori position that a "manifestation" of a religious belief always has to be dealt with as indirect discrimination.*" We were also assisted by R (Amicus – MSF Section) v Secretary of State for Trade and Industry [2007] ICR 1176, at paragraph 29, where the court, in the context of article 8 of the European Convention on Human Rights, noted the lack of a necessary distinction between sexual orientation and its manifestation in sexual behaviour. The recent case of Pemberton v Bishop of Southwell and Nottingham [2017] ICR 929 (upon which the respondent relied) does not suggest otherwise. Mr Serr did not take us to any particular passage in support of this assertion.

68. As to his second assertion, this assumes that it is possible to define Judaism by reference to all possible laws and practices of the ultra-Orthodox and not otherwise. In fact, neither the respondent (nor any other individual or organisation) can hold a monopoly of Jewish beliefs. Neither Judaism, nor Orthodox Judaism, are homogenous religions. The claimant can properly be said to subscribe to the Jewish faith whilst holding different particular religious beliefs from some other Jewish believers. The effect of the respondent's interpretation would to permit theocracy within religious organisations. They could dismiss employees for not, in the view of the organisation, following each and every belief and practice which the organisation considered to be part of the religion.

69. There was also a dispute as to the appropriateness of the claimant's comparator. The claimant relies upon a hypothetical comparator who is an employee who believes that co-habitation is contrary to Jewish law, or morally impermissible. The respondent says that the appropriate comparator is someone who was subject to parental complaint for reasons other than their co-habitation, or some other absence of belief. So far as we could understand it, the basis for the respondent submission was one or both of the assertions with which we have dealt above. Hence, we reject the respondent's case in this regard.

70. The claimant provided a further answer to the respondent's arguments in relation to the absence of a protected characteristic. The claimant pointed out, correctly in our view, that it is unnecessary to focus on the claimant's belief. The law also permits reliance upon the respondent's belief.

71. This is because direct discrimination does not require the employee to have the protected characteristic in question. Rather, the detrimental treatment relied upon should have been *"meted out"* because of a protected characteristic. This language is expressly and deliberately broader than that found in the 2003 regulations, under which a successful claim required the employee to be discriminated against on the basis of his or her own religion or belief (see regulation 3).

72. Accordingly, it is open to an employee to bring a claim where that employee has been discriminated against because they are wrongly perceived to have a protected characteristic. They can also bring a claim where they do not have the protected characteristic, but are associated with someone who does have the relevant protected characteristic.

73. The protected characteristic relied on in this argument is the respondent's religious belief that co-habitation is wrong or impermissible. Those positive beliefs about the wrongness of co-habitation clearly satisfy the definition of a religious belief. Hence, we agree with the claimant that the respondent treated her in the way that it did not only because of her own beliefs, but also because of those religious beliefs which it held.

Indirect religious discrimination

74. Section 19 of the 2010 Act requires an employee to identify one or more PCPs applied to her in a discriminatory way. Those PCPs must be applied to persons who do not share the protected characteristic and persons who do share the characteristic must be put at a particular disadvantage compared to those who do not.

75. If such disadvantage is established then the respondent may justify the imposition of the PCPs by showing them to be a proportionate means of achieving a legitimate aim.

76. Whilst there were disputes as to which, if any, of the three PCPs relied upon were actually applied and whether the claimant had demonstrated the

existence of a sufficient pool of potentially disadvantaged persons, the basic law was not in dispute.

77. In so far as the respondent sought to suggest that, as a matter of law, the pool of disadvantaged persons was too small, or insufficiently evidenced, we need not deal with those points. We were satisfied that there was a substantial pool of persons disadvantaged. Even if one defined the pool as a proportion of those of the Jewish faith, we were satisfied on the unchallenged evidence of the claimant and Mr Waknin that there is a significant body of Jews who do not regard co-habiting outside marriage as contrary to their beliefs.

Justification

78. So far as detriments other than dismissal are concerned the law is clear and undisputed. There is, however, a specific justification defence available in respect of the detriment of dismissal. This is found is schedule 9, paragraph 3, of the 2010 Act. That paragraph states:

> "Other requirements relating to religion or belief
> A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work:
>
> (a) it is an occupational requirement
> (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
>
> (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets is)."

79. In considering what is required to satisfy this particular genuine occupational requirement defence, we have taken into account the following:

79.1 The Equal Treatment Directive 2000 provides:

> "4.2 Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."

Hence, the occupational requirement must be genuine, legitimate and justified having regard to the religion's ethos.

79.2 When the Human Rights Joint Committee produced its 26th report scrutinising the Equality Bill on 27 October 2009, it stated as regards the Schedule 9 (3) defence that:

"It is very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than for ministers or religion."

Having adopted that statement, which had emanated from the Government, the Committee concluded that the legislation should be *"construed strictly"* on the basis that represents *"a derogation from the principle of equal treatment."*

79.3 The equality in Human Rights commission statutory code of practice (to which we must have regard) states:

"13.17. To rely on the exception, the employer must be able to show that their ethos is based on a religion or belief, for example, by referring to their founding constitution. An "ethos" is the important character or spirit of the religion or belief. It may also be the underlying sentiment, conviction or outlook that informs the behaviours, customs, practices or attitudes of followers of the religion or belief.

13.19. A failure to comply with the statutory conditions described above could result in unlawful direct discrimination. Some of the issues that an employer may wish to consider when addressing the question of whether the application of an occupational requirement is proportionate to a legitimate aim are:

Do any or all of the duties of the job need to be performed by a person with a particular characteristic?

Could the employer use the skills of an existing worker with the required protected characteristic to do that aspect of the job?

13.20. Employers should not have a blanket policy of applying an occupational requirement exception, such as a policy that all staff of a certain grade should have a particular belief. They should also re-assess the job whenever it becomes vacant to ensure that the statutory conditions for applying the occupational requirement exception still apply."

79.4 The code gives an example of a Humanist organisation which promotes humanist philosophies and principles which might lawfully apply an occupational requirement for the Chief Executive to be a Humanist.

79.5 The explanatory notes to the 2010 Act (at para. 796) provide the following example:

"A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have in-depth understanding of the religion's doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief."

79.6 The ACAS Guide "Religion or belief and the workplace" provides that the requirement must be (see paragraph 20):

(a) Crucial to the post, not just one of several important factors.
(b) Related to the job, not just to the organisation,
(c) A proportionate means of achieving a legitimate aim,
(d) Further, the requirement must be "reassessed" on each occasion of recruitment.

79.7 In Jivraj v Hashwani [2011] 1 WLR 1872 the Supreme Court reviewed the legacy legislation. The facts of the case are extremely peculiar. Lord Mance JSC summarised the law as he understood it. We need not set out his summary, but we do note that he considered that the requirement does need not to be shown to be a necessary one. He does not explain how this approach is to be reconciled with the materials to which we have referred above and we were invited to reject his comment as *obiter dicta* inconsistent with those materials and with well established law in relation to the defence of justification. We consider that he could not have meant to reformulate those legal principles (of which necessity form a part). However, given our findings of fact and the way we deal with this defence, it is unnecessary for us to reach a final conclusion on this.

79.8 It is not disputed that the Human Rights Act is engaged. The claimant has a right to freedom of thought, conscience and religion and a right to respect for her private and family life. Those rights are not absolute, as the rights and freedoms of others are also engaged. In that regard, we were referred to Fernandez Martinez v Spain [2014] 56030/07 and other cases before the European Court of Human Rights.

86. In the light of all of those materials we consider the appropriate approach to this specific defence to be as follows. It is for the respondent to prove that:

86.1 It had an ethos based on religion or belief.

86.2 It applied a genuine occupational requirement.

86.3 Having regard to that ethos and to the nature and context of the claimant's work:

86.3.1 The requirement was an occupational requirement. Such a requirement must be legitimate and justified – an objective assessment for the tribunal. The requirement must be necessary (or at least crucial) for the claimant's personal employment. This exception should be construed narrowly. The occupational requirement must be connected directly to the claimant's work. Lifestyles and personal beliefs are

almost always excluded for the scope of an occupational requirement (in particular see the directive and legislative history). The greater the interference with the claimant's human rights the more stringent the test should be.

86.3.2 The application of the requirement must be in pursuit of aachieving a legitimate aim.

86.3.3 The application of the requirement must be a proportionate means to achieving that aim. There should not be a blanket policy and the tribunal should ask itself whether all of the duties need to be performed by someone with that particular characteristic or whether others could "fill in the gaps".

86.3.4 The respondent reasonably believed that the claimant did not meet the requirement.

Direct Sex Discrimination

87. The pattern of the law follows that for direct religious discrimination and there was no dispute between the parties.

Harassment

88. Harassment on the grounds of sex and religious belief are both relied upon. The law in each case is the same, so far as material. It is set out in section 26 of the 2010 Act. The following must be considered:

88.1 Was the conduct relied upon unwanted by the claimant?

88.2 Was it conduct "related to" either relevant protected characteristic. This is a broad test as is illustrated by the example to be found in paragraph 7.10 of the EHRC Code, namely the example of a woman whose work is criticised in an offensive manner because the harasser suspects she is having an affair and the affair is connected to her sex.

88.3 The conduct must have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

88.4 The factors referred to in section 26(4). The respondent laid emphasis on the objective factor of whether it is reasonable for the conduct to have the effect complained of.

The ACAS Code

89. The claimant relies upon the ACAS code on disciplinary and grievance procedures in order to justify an uplift of any remedy of a financial kind. There must be a failure to comply with the code and that failure must be unreasonable.

Application to the law to the facts

Direct religious discrimination

90. Here, as elsewhere, the claimant relies upon eight detriments as follows:

    1. Not giving notice at the 27 June meeting.
    2. Holding that meeting in a public space.
    3. The conduct of 27 June meeting.
    4. The content of 29 June meeting.
    5. The commencing of the disciplinary proceedings.
    6. The failure to conduct a disciplinary investigation.
    7. Dismissal of the claimant.
    8. The criticisms of the claimant and the dismissal letter which adopted the DAS summary.

91. We first have to consider whether there is material from which we could conclude that the burden of proof has been placed on the respondent pursuant to section 136 of the 2010 Act. We consider that the following are facts which are taken together or individually could lead us to decide that the burden was placed on the respondent:

    1. The failure to call evidence from Mr Freundlich, who was not only at the barbeque and the only person known to have discussed the claimant's co-habitation, but who Mrs Toron and Mrs Lieberman told us was involved in the process of consulting with and instructing DAS and in deciding to dismiss. The nature of his involvement was never explained in any greater detail.

    2. The failure to evidence exactly what was said by parents in respect of any concerns as to co-habitation, why they raised the matter, in what terms, when and what was said to them as well as their identity.

    3. The lack of any clear plan as to how to conduct 27 June meeting and the lack of any thinking as to the possible outcomes which the respondent could accept, this despite the considerable passage of time since the barbeque. This is coupled with the fact that (a) in the meeting on 27June Mrs Toron and Mrs Lieberman made numerous references to their beliefs in relation to co-habitation and pressed the claimant as to her plans in relation to marriage and having children without any focus on how this might assist in relation to the problems as they perceived them, (b) the fact that the respondent's witness statements do not deal with the majority of the claimant's allegations with respect to 27 June meeting as set out in her emails in July 2016 and her ET1.

92. Had the matters set out in sub-paragraph 3 above stood alone, they would have led us to place a burden on the respondent in accordance with section 136.

93. We then must ask ourselves whether the respondent has satisfied the burden in respect of each of the eight detriments. We deal with each in turn:

    1. The respondent has not satisfied the burden. On the contrary, even without the burden being placed on the respondent we consider that a significant influence on the decision to call the meeting was the claimant's lack of belief in the Jewish law forbidding co-habitation and the respondent's belief in that law. The respondent understood the claimant to have such a lack of belief as a result of her co-habitation.

    2. We are satisfied that the reason for having the hearing in the staff room was that it was room always used even for confidential meetings, Hence, the burden is satisfied.

    3. The respondent has not satisfied the burden. Our conclusion is as for the first detriment. The principle reason for the making of the statements and the asking of the questions in relation to the claimant's co-habitation was her lack of belief and the respondent's corresponding belief.

    4. The respondent has not satisfied the burden. We accept that Mrs Toron and Mrs Lieberman acted as they did in part because of what they perceived as a change of approach on the part of the claimant, but their course of conduct is inextricably linked to their discriminatory behaviour on 27 June. Furthermore, we are satisfied that their refusal further to investigate the possibility of an amicable resolution and to make statements about having the ammunition to fight any claim was influenced by the claimant's lack of belief and the respondent's belief.

    5. Our conclusion and reasoning is the same as set out above in relation to the fourth detriment.

    6. We are satisfied that no further investigation was carried out because the respondent left the matter in the hands of DAS and DAS did not suggest any further investigation. Whilst the whole process would not have started but for the claimant's lack of belief and the respondent's contrasting belief, we do not consider that the conduct of the disciplinary process was influenced by that lack of belief or belief.

    7. The respondent has not satisfied the burden. Firstly, as set out above, the fact that there was a disciplinary process and its conclusion are both inextricably linked with the events of 27 June and the claimant's lack of belief and respondent's belief. In any event, we are satisfied that those beliefs did amount to the most significant influence upon the decision to dismiss. In our view, the claimant was not dismissed because her conduct posed some

threat to the economic wellbeing of the respondent; no such threat has been demonstrated to us. In that regard, we note that both parties told us that in this close-knit community information would spread like wild fire. Hence, one month after the barbeque and some time after the first of any complaints were made, the respondent was faced, at most with four or five concerned parents one of whom had suggested that her child should not be in the claimant's class next year. That hardly supports the view that this highly popular nursery was under serious economic threat as result of the claimant's behaviour. Rather, we consider that the claimant was dismissed because she had co-habited, something contrary to the beliefs of some (at least) of those responsible for the management of the respondent and because she would not (untruthfully) say that she was no longer co-habiting. We note that the respondent says it could have possibly redefined her role so as to permit her to continue, but it chose not even to investigate whether this was possible. We conclude that because she continued to co-habit, contrary to their beliefs, and did not respond to their conduct on 27 June by offering them a solution of lying to them, the respondent took this no further.

8. The respondent has not satisfied the burden of proof. No sensible and credible explanation has been put forward for how the several untrue and hurtful statements in the DAS report and findings could have been made and then adopted. DAS may have been incompetent, but their basic information must have come from the respondent and the summary and conclusions need not have been adopted if the respondent had disagreed with them.

Justification

94. Only the detriment of dismissal can be justified, as a matter of law. This would be by the respondent satisfying us that the requirements of schedule 9 are met. In that regard, we consider below each of the elements of that test which we have set out above.

    1. The respondent plainly had a religious ethos.

    2. Was a genuine occupational requirement applied? Two are relied upon and we consider each in turn. In that context we note that the two are advanced in the alternative, but that the respondent cannot say which it applied of its self appears to us to cast doubt upon whether either was applied. Turning to the two alleged occupational requirements:

        (a) The first is a requirement that the claimant not co-habit. Having accepted the claimant's case as to the nature of her belief (or lack of it) being a protected characteristic, it is plain this could be an occupational requirement, but was it applied? It is equally plain to us that it was not. No such requirement is spelt out in any document and the

respondent's case is that is was not concerned with her private life, all that it wanted was the appearance of compliance (or that the claimant did not suggest non-compliance). Furthermore, the respondent was prepared, at least initially, to consider retaining her in employment with varied duties.

(b) The second is a requirement that she not communicate her co-habitation to parents. Although this is how the occupational requirement is put, we are not sure that this accurately captures what the respondent might be said to have required. We consider that it is more that she would not do anything which brought her co-habitation to the attention of parents, or possibly parents who might object to co-habitation, seeing as no one suggested that she had done wrong in allowing parents who were friends to know of the co-habitation. The difficulty in producing a workable formulation of the occupational requirement itself casts doubt upon whether this was required as a matter of fact. We do not consider that the respondent has shown that it was. In any event, any requirement of that sort is not a requirement that she have "a particular protected characteristic", as schedule 9 requires. It is not a belief or absence of belief in co-habitation (whether as part of the Jewish religion or as a code of morals), that is in issue. Whatever the claimant might believe she would simply be required to conceal her co-habitation.

95. In case we are wrong we turn to the two tests of legitimacy. First, was the occupational requirement legitimate and justified, that is to say crucial to enable the claimant's employment? Secondly, was the application a proportionate means of achieving a legitimate aim?

96. The respondent has not shown the dismissal of the claimant following the application of either requirement to be a proportionate means of achieving a legitimate aim. The respondent has not spelled out its legitimate aim and we consider that whilst religion was a factor in the events leading to dismissal the dismissal was actually triggered by (a) the making of parental comments (although precise role these played is impossible to determine), (b) the fact that Mrs Toron and Mrs Lieberman reacted as they did to the claimant's demand for an apology, itself consequent upon their behaviour on 27 June, (c) the findings of the DAS report, many of which were confused and inaccurate and (d) a failure of the claimant to take up the suggestion that she should simply lie as to whether she was continuing to co-habit.

97. Furthermore, it is dismissal which must be justified. Yet, we know that the respondent considered that this might be avoided by redefining her role. Having failed properly to consider that, the defence would inevitably fail. Yet again, we consider the evidence of any need to do so (the alleged parental complaints) to be so thin and uncertain that it could not properly be relied

upon to establish the need to take action which would deprive the claimant of basic human rights and would permit that which would otherwise amount to unlawful discrimination.

98. Finally, did the claimant actually fail to meet the requirement? It is clear that this is so as regards the first suggested occupational requirement, but what of the second? The only evidence that we have as to failure is the telling of one person (Mr Freundlich). It was accepted by the respondent's witnesses that as the question was asked the answer could not be a lie. Although there were periodic suggestions in the respondent's case that it believed that she might have told others, the only two instances of either her or her boyfriend giving the information were (1) to Mr Freundlich where the information had to be given or a lie told and (2) to their friends, in respect of which it was never suggested that the giving of the information was in anyway improper. Hence, if the second way of putting the occupational requirement is indeed an occupational requirement for the purposes of schedule 9 and it can be justified, we do not consider that there was a failure to meet it.

Indirect religious discrimination

99. The claimant originally relied upon two alternative PCPs, a third was then added after the respondent's evidence and in order to take account of it. The three PCPs are as follows:

    99.1 To conduct their private lives in a manner which complies with or adheres to all and/or any religious principles within Judaism which would prevent them from co-habiting on an unmarried basis with a chosen life partner.
    99.2 To be prepared to make a dishonest statement about their relationship and/or private life, in order to remain employed.
    99.3 Not to disclose their relationship or private life to parents, in order to remain employed.

100. Plainly, each of those PCPs related to a protected characteristic and would put at a disadvantage someone who did not have the religious belief or principle with regard to not co-habiting before marriage.

101. Did the respondent apply any of those PCPs? We consider each in turn:

    101.1 This is very close to (if not identical to) the first of the alternative occupational requirements that the respondent relied upon under schedule 9. We have already found that it was not applied.

    101.2 We have found that the respondent (through Mrs Toron and Mrs Lieberman) did suggest that the claimant should make a dishonest statement about her not continuing to co-habit and that this could have provided a solution. Whether it would have done so (given that some parents with whom she was friendly might well know the truth) seems to us immaterial. We consider that the respondent was

indicating that this was a way of keeping her job. Hence this PCP was applied.

101.3 The third suggested PCP is similar, in all material respects, to the second alternative occupational requirement relied upon. We do not consider that it was applied. The first time that the matter arose was after the disclosure had already been made at the barbeque.

102. The same particular disadvantages, namely the detriments discussed above, are relied upon here. So far as material we have already set out our findings on them.

103. We now turn to justification. We have already considered the specific justification defence provided by schedule 9. We have found the only PCP to be applied to be the second of those advanced. It is repugnant to generally accepted standards of morality to require someone to lie, especially about matters so concerned with their protected human rights. We doubt that such a requirement could be justified, save perhaps in the most exceptional circumstances involving threats to life and limb. In any event, no attempt was made to justify that PCP, its application being denied.

104. If we are wrong as to the application of either of the other suggested PCPs, could their application be justified? We consider not, for similar reasons to those set out when rejecting the defence in relation to schedule 9. Even assuming that a legitimate aim of protecting the ethos of the organisation could be established, we are not satisfied that either PCP would represent a proportionate means of achieving it. The respondent's own evidence shows that it could well be possible to do this by adjusting job duties, or relocating children to other classes, or even talking to the parents who were concerned. Furthermore, we do consider that the respondent has actually established the legitimacy of the stated aim, given that it was accepted that the religious belief of the parents of children at the school varied widely and we know that several had no objection to the claimant's co-habiting and few complained, even on the respondent's own case.

Direct sex discrimination

105. We consider that the burden of showing the respondent's conduct complained of to be unrelated to sex has become that of the respondent pursuant to section 136 of the 2010 Act. This is because we consider that we could conclude that the respondent had committed an act of sex discrimination from the following:

105.1 The way the claimant was treated on 27 June. We have set out our findings on this meeting and concluded that Mrs Toron and Mrs Lieberman would not have so treated a man.

105.2 Many of the comments those ladies made at the meeting were specifically related to women, referring to pregnancy outside marriage, questioning her about her age and intentions with regard to

child bearing, which matters the two ladies accepted they would not have raised with a man.

106. The respondent must then satisfy us that sex was in no way linked to these detriments. We look at each detriment separately:

106.1 The burden is not satisfied. We consider that her sex was related to the decision to call the meeting. Mrs Toron and Mrs Lieberman wished to talk to the claimant, but as we have already found, it was not clear exactly what they wanted to talk about save that they wished to discuss her co-habitation, possible marriage and possible pregnancy and child bearing in general terms.

106.2 The burden is satisfied for the same reason as set out in relation to the direct religious discrimination claim.

106.3 The burden is not satisfied. Indeed, on our findings as to the content of the meeting we have concluded that a man would not have been so treated – many of the comments and questions were made and asked because the claimant was a woman.

106.4 The burden is not satisfied. Our reasoning is the same as in respect of the direct religious discrimination claim. The meeting of 29 June is closely linked to that of 27 June and the content closely linked to the discriminatory conduct displayed at that meeting.

106.5 Our conclusions and reasoning are the same as before.

106.6 We find the burden to be satisfied our reasoning is the same as that in respect of this detriment when considered in the context of the other direct discrimination claim.

106.7 The burden is not satisfied. The dismissal is related to the claimant's attitude to co-habitation and her response to the respondent's concerns raised on 27 June, both on that date and 29 June the contents of the meetings cannot be shown to be unrelated to the claimant's sex.

106.8 The burden is not satisfied our reasoning is materially the same as in respect of this detriment as set out when considering it in relation to the other direct discrimination claim.

Harassment

107. We have set out above our findings as to whether the statements made on 27 and 29 June relied upon as acts of harassment were made. The remaining alleged acts of harassment are in writing. In effect, the claimant relies upon the conduct already relied upon as amounting to detriments.

108. The impact of section 136 on the burden of proof has already been considered. Hence, with two exceptions, the acts of detriment have been made out. Indeed, we have made clear that we would have found some made out (especially relating to the 27 and 29 June) and the report leading to dismissal in any event (i.e. without the intervention of section 136).

109. The conduct was plainly unwanted and related to the protected characteristics. This follows from our previous findings.

110. In deciding whether that conduct had the prescribed effect we must have regard, under section 26(4) of the 2010 Act to (a) the claimant's perception; (b) the other circumstances; (c) whether it was reasonable for the conduct to have the prescribed effect.

111. The claimant was a young woman, known to be somewhat vulnerable (especially after the conversation on 27 June). She was dealing with senior managers who were behaving rather like an overbearing mother and elder sister. We say no more about the purpose of the respondent's conduct. The effect was undoubtedly humiliating, degrading and offensive. The claimant was distraught during and after the 27 June meeting and reasonably so. She was being probed about her private life in ways which suggested that she was behaving badly and foolishly. She felt as if she was back at school or being probed and questioned by her ultra-Orthodox mother.

112. The conduct of the respondent after that meeting was equally offensive and hurtful to the claimant and continued her humiliation and degradation. Co-habitation was turned into a disciplinary matter and she was accused of lying, misleading and so forth all of which were untrue. Again, we note that this may owe much to the ineptitude of DAS, but that does not lessen the impact on the claimant and the respondent adopted their work wholesale.

ACAS Code

113. We have been invited to consider an uplift in any award by the maximum permitted 25% under section 207a and schedule A2 of the Trade Union and Labour Relations Consolidation Act 1992. We consider that this a matter best dealt with when we consider remedy.

_____
Employment Judge Clarke QC

Date: ……14/11/2017……..

Sent to the parties on: .....

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For the Tribunal Office