Appeal No. UKEAT/0059/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2018
Judgment handed down on 12 February 2019

Before

THE HONOURABLE MR JUSTICE SWIFT

(SITTING ALONE)

GAN MENACHEM HENDON LIMITED — APPELLANT

MS ZELDA DE GROEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN BOWERS QC (of Counsel) MR ASHLEY SERR (of Counsel) Instructed by: Direct Law & Personnel 331C Harrogate Road Leeds LS17 6QD
For the Respondent	MR ROBIN ALLEN QC (of Counsel) MR NATHAN ROBERTS Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

SEX DISCRIMINATION – Direct

SEX DISCRIMINATION – Indirect

RELIGION OR BELIEF DISCRIMINATION

HARASSMENT

The Appeal Tribunal dismissed appeals against findings that the Respondent had been subjected to direct sex discrimination and harassment. The Tribunal's findings of fact were a sufficient basis for its conclusions on each of these claims.

The Appeal Tribunal allowed the Appellant's appeal against the Tribunal's decision that there had been direct discrimination against the Respondent on grounds of religion or belief. The Employment Tribunal had incorrectly concluded that an employer acting because of its own religion or belief discriminated against its employees – **Lee v Ashers Baking Co Limited** [2018] 3 WLR 1294 applied. There was no sufficient evidential basis for any conclusion that the Appellant discriminated against the Respondent because of her religion or belief.

The Appeal Tribunal allowed an appeal against the Employment Tribunal's conclusion that there had been indirect discrimination on grounds of religion or belief. There was no sufficient evidence to support the Tribunal's conclusion that the Appellant had applied any provision criterion or practice to the Respondent – **Nottingham City Transport Limited v Harvey** (UKEAT/032/12) applied. Further, if the provision criterion or practice identified by the Employment Tribunal were applied, there was no comparative disadvantage – see section 19(2)(b), **Equality Act 2010**.

THE HONOURABLE MR JUSTICE SWIFT

Introduction

1. Zelda De Groen was employed by Gan Menachem Hendon Limited from July 2012 until dismissed by letter dated 27 July 2016. Ms De Groen brought claims of unlawful discrimination on grounds of sex and on grounds of religion and/or belief.

2. The Employment Tribunal found in her favour on all her claims:

> (a) on her claims of direct discrimination on grounds of sex, and on grounds of her religious belief (section 13 of the Equality Act 2010 – ("the 2010 Act") – read together with section 39 of that Act);
> (b) on her claim of indirect discrimination on grounds of her religious belief (section 19 of the 2010 Act read together with section 39); and
> (c) on her claim of unlawful harassment on grounds of sex (section 26 of the **2010 Act** read together with section 40 of that **Act**).

This appeal is directed to the Tribunal's conclusions on all these claims.

Context

3. The Tribunal's Judgment sets out the facts of the case clearly and in detail – see generally, paragraphs 5 and 56. A much shorter summary will suffice for the purposes of this appeal. Gan Menachem Hendon Limited runs a nursery – the Gan Menachem Kindergarten. (In this judgment, I will refer to Gan Menachem Hendon Limited and the Kindergarten interchangeably, as *"the Nursery").* Some 70 children attended the Nursery, and it employed 24 people. Ms De Groen was employed as a teacher, and was described as a team leader. The Nursery is a Jewish nursery, affiliated to the Chabad Lubavitch Hasidic movement. The

A Tribunal was told, and so was I, that it is run in accordance with ultra-orthodox Chabad principles.

B 4. The dismissal letter (dated 27 July 2016) told Ms De Groen she was dismissed with immediate effect, with pay in lieu of notice. The letter explained that disciplinary allegations made against her had been considered by a *"panel",* and that the panel had recommended that she be dismissed. In fact, the *"panel"* comprised Charlotte Rhodes, a representative of DAS C HR, an organisation retained by the Nursery to provide HR advice. The letter then stated that the

> **"… nursery has decided to adopt the recommendations please note that this was not an easy decision but something we had no choice to do" [sic].**

D Enclosed with the letter was a document headed *"Panel Discussions".* The last part of that document (part 7) stated the following, under the heading *"Recommendation":*

> **"Whilst it may have been possible to suggest that there was a change of position for [Ms. De** E **Groen] which may have satisfied the parents and allowed [her] to kept her employment and potentially her salary in place. Her actions and clear confirmation of her unwillingness to return to the nursery has meant that I cannot submit this as a recommendation. I am clearly of the opinion that should her employment be allowed to continue she would only resign once the summer holidays were over and she was paid but that this has been made very clear in writing.**
>
> **It is the basis of the same that I have no hesitation in recommending that [Ms. De Groen's]** F **contract with the nursery should be terminated on the grounds of SOSR and that notice should be paid." [sic]**

5. Other parts of the *"Panel Discussions"* document identified the complaints against Ms De Groen, and explained how the complaints had been considered. The document further G explained (at part 2, under the heading *"Allegations"*), what was meant in this case by *"on the grounds of SOSR"*, and thus the substance of the Nursery's stated reason for dismissal.

> **"It is alleged, as an act of SOSR (Some Other Substantial Reason) that you have allegedly;**
>
> H **1). Presented yourself in such a way as to prove you have acted or are acting in contravention of the Nursery's culture, ethos and religious beliefs;**
>
> **2). Through parental complaints have damaged the Nursery's reputation;**

3). Through such damage (point 2 above) your disclosure has potentially led to financial detriment of the Nursery and loss of income on the basis parents have threatened to remove their children from the business to prevent them being in your care.

It is alleged that you attended a communal BBQ affiliated to the Nursery with your partner where you openly discussed the fact you live together in Pimlico. Not only was the owner of the Nursery present but parents of children in your care also heard this conversation. As you are aware the nursery and its ethos, together with the culture and values we promote are essential to the successful running of the business. Your disclosure has resulted in third party pressure from parents threatening financial hardship to the business."

6. It was clear to the Tribunal (and it is equally clear to me) that the second and third numbered paragraphs referred to things said to be the consequence of Ms De Groen's actions, referred to in the first numbered paragraph. What had happened is referred to in the paragraph which follows the three numbered allegations. On 26 May 2016 Ms De Groen had attended a barbeque organised by a synagogue affiliated with the Nursery. She went to the barbeque with her boyfriend. Others present included parents of some children at the Nursery, and also Mendy Freundlich one of the Nursery's Directors. At the barbeque Ms De Groen's boyfriend fell into conversation with Mr Freundlich, and in the course of that conversation he mentioned that he lived with Ms De Groen. No particular attention seems to have been paid to the remark at the time, but it was this remark which led to a meeting between Ms De Groen, Miriam Lieberman (the Nursery's Headteacher), and Dina Toron (its Managing Director) on 27 June 2016, which set in train the events that led to the decision to dismiss.

7. On 27 June 2016, and without prior notice, Ms De Groen was asked to attend a meeting with Mrs Lieberman and Mrs Toron. The meeting took place in the staff room. The *"Panel Discussions"* document described what happened at this meeting as follows:

"In the meeting the company's position was clearly set out to Zelda. This position and a potential solution was to ask Zelda to confirm her she didn't live with her boyfriend. She was told clearly "what she did in her private life was of no concern to the nursery" and that her "private life was of no concern to them" however she needed to confirm 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 Zelda. 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 non of their business. No more

> **questions would be asked. This was considered morally justifiable and would be an end of the matter. Whilst not an ideal situation this was considered a way to avoid disciplinary action." [sic]**

The Tribunal made detailed findings about what happened at the 27 June meeting – see paragraphs 36 – 42 of its Judgment. The Tribunal concluded that the meeting, which lasted for well over an hour, initially concerned Ms De Groen's remark to Mr Freundlich at the barbeque, but quickly became a wide-ranging (in the view of the Tribunal *"unfocussed"*) consideration by Mrs Lieberman and Mrs Toron of the Claimant's personal life. Both expressed the view that co-habitation outside marriage was wrong, that having children outside marriage was wrong, that (at age 23) time was passing for Ms De Groen to have children, and that if Ms De Groen had problems with the idea of marriage she should seek counselling. The Tribunal accepted that Mrs Lieberman and Mrs Toron spoke sincerely and on the basis of their own beliefs; however, the Tribunal accepted Ms De Groen's evidence that she became very upset, tearful and distressed. So far as concerned Ms De Groen's living arrangements, the Tribunal's finding was as follows (Judgment, paragraph 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 [her boyfriend], knowing full well that she was. … we consider that Mrs Toron and Mrs Lieberman did deliberately indicate at the meeting that this might provide an acceptable solution to the problem."**

Thus, as the Tribunal later explained at various points in its Judgment, Mrs Toron and Mrs Lieberman wanted Ms De Groen to lie to them and tell them that she did not live with her boyfriend.

8. On 29 June 2016 there was a further meeting between Ms De Groen, Mrs Lieberman and Mrs Toron, this time initiated by Ms De Groen. She had had time to reflect on what had been said on 27 June, and was upset. The Tribunal concluded that Ms. De Groen

> **"… told them she wanted a written apology and a promise that she would not be harassed in that way again. She said 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."

As the Tribunal describes (Judgment, paragraphs 44 – 45), there was no apology. Instead, Mrs Lieberman and Mrs Toron made clear to Ms De Groen that they considered they had *"sufficient ammunition to deal with any claim that [Ms De Groen] might bring"*. The meeting had only served to make matters worse.

9. The next day (30 June 2016), DAS wrote to Ms. De Groen informing her that there was to be a *"formal disciplinary hearing"*. This letter set out disciplinary allegations materially the same as those later repeated in the 27 July 2016 letter (see above at paragraph 6). The letter enclosed a statement made by Mrs Toron which referred to the Nursery coming *"... under third party pressure from parents whom are threatening to remove their children ..."*, and described Ms De Groen's remarks as *"... now having a detrimental impact of the reputation of the business and our credibility as a religious Nursery"*. The sequence of events from then up to the decision to dismiss is covered by the Tribunal's findings at paragraphs at 49 – 50 of its Judgment. At Ms De Groen's request the disciplinary hearing was postponed from 5 July 2016 to 12 July 2016; it was then postponed again until 25 July 2016 because Ms De Groen was signed off work sick from 11 July to 24 July 2016. The *"panel"* – i.e. Ms Rhodes – considered the disciplinary allegations on 26 July 2016. Ms De Groen was not present, but Ms Rhodes took account of written representations which had been made on 11 July 2016.

The issues in the appeal

10. The appeal against the conclusion on the direct sex discrimination claim, and the appeal against the conclusion on the harassment claim on grounds of sex, raise familiar points about whether the decision of the Tribunal is sufficiently reasoned and in particular whether the

Tribunal has properly considered or properly explained why the less favourable treatment and/or unwanted conduct relied on was sufficiently connected to the protected characteristic of sex.

11. The challenge to the conclusion on the indirect discrimination claim concerns two matters: (a) whether the Tribunal was entitled to reach the conclusion it did on the existence of a provision, criterion or practice; and (b) the Tribunal's decision under section 19(2)(b) of the **2010 Act** – i.e. on whether the provision etc. it had identified gave rise to a relevant *"particular disadvantage"*.

12. The challenge to the direct discrimination claim based on religion or belief concerns (a) whether the Tribunal was right to conclude that a direct discrimination claim can be sustained simply on the basis that an employer acted because of its own religious belief; (b) if that conclusion was wrong, the extent to which it affected the Tribunal's reasoning in this case; and (c) in any event whether the protected characteristic at section 10 of the **2010 Act** covers circumstances in which the Claimant and Respondent are of the same religion but the Claimant is less favourably treated because of her lack of belief on a point the Respondent considers to be a tenet of that religion. This part of the appeal also includes a challenge to the Tribunal's decision on the application of paragraph 3 of Schedule 9 to the **2010 Act**, concerning occupational requirements.

Decision – the direct discrimination claims

(1) The Tribunal's conclusions

13. At paragraph 90 of its Judgment the Tribunal listed the eight detriments that were the basis for each of Ms De Groen's claims.

> **"1. Not giving notice [of] the 27 June meeting.**
>
> **2. Holding that meeting in a public space.**
>
> **3. The conduct of the 27 June meeting.**
>
> **4. The content of the 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."**

(In this Judgment I will refer to these as "Detriment 1", "Detriment 2", etc.).

14. The Tribunal concluded that the burden of proof had shifted to the Nursery in accordance with the provisions of section 136 of the **2010 Act**. Then (Judgment, paragraph 93), the Tribunal stated its conclusions on the claim of direct discrimination on grounds of religion or belief.

> **"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 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 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 to investigate the possibility of an amicable resolution and to make further 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 on 27 June and the claimant's lack of belief and the 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 wildfire. Hence, once 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 a 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 that 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 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 accepted if the respondent had disagreed with them."

Thus, the Tribunal found in favour of Ms De Groen on six of the eight claims of less favourable treatment.

15. So far as concerned Detriment 7 (dismissal) the Tribunal considered the Occupational Requirements provision at paragraph 3 of Schedule 9 to the **2010 Act**. The Tribunal concluded that the requirement of paragraph 3 of Schedule 9 were not met. It accepted that the nursery had a religious ethos, but rejected the contention that the dismissal had been the result of the application of an occupational requirement. The Tribunal considered two possible occupational requirements. The first was *"a requirement that [Ms De Groen] not co-habit"*. The Tribunal concluded that no such requirement had been applied: the nursery's evidence as to the 27 June 2016 meeting had been that it was not concerned with Ms De Groen's private life; and the

Tribunal had already concluded that the nursery's stance at the 27 June 2016 meeting was to the effect that it would be sufficient for Ms De Groen to say that she was not living with her boyfriend, even if she continued to live with him. The second occupational requirement considered was *"a requirement that [Ms De Groen] not do anything which brought her co-habitation to the attention of either parent or parents who might object to co-habitation"*. The Tribunal concluded that no such requirement had been applied. The Tribunal went on, in any event, to conclude that neither of the suggested occupational requirements was a proportionate means of achieving a legitimate aim.

16. The Tribunal considered the same eight allegations of less favourable treatment for the purposes of the sex discrimination claim, and reached the following conclusions (at Judgment, paragraph 106).

> **"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 exactly clear 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 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 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."**

(2) Direct discrimination on grounds of religion or belief

17. The Nursery's challenges to the conclusion that Ms De Groen had been subjected to direct discrimination on grounds of religion or belief concern the following. First, the Tribunal's conclusion between paragraphs 70 and 73, that the religion or belief protected characteristic (section 10(1) of the **2010 Act**) applied because Ms De Groen had been less favourably treated by reason of the Nursery's religious belief. Second, if the Tribunal was wrong on that issue, the extent of the effect of that error on the Tribunal's reasoning. Third, whether the protected characteristic at section 10 of the **2010 Act** covers circumstances in which the Claimant and Respondent are of the same religion but the Claimant is less favourably treated because of her lack of belief on a point the Respondent considers to be a tenet of that religion. The Nursery further appeals against the Tribunal's conclusion that on the facts of this case, the Nursery could not rely on the occupational requirement provisions in paragraph 3 of Schedule 9 to the **2010 Act**.

18. As to the first of these points, at paragraphs 70 – 73 of its Judgment, the Tribunal stated the following.

> **"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 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 against the wrongness of cohabitation 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 religious beliefs, but also because of those religious beliefs which it held."**

19. In his submissions on behalf of Ms De Groen, Mr Allen QC (who did not appear below) contended that in this passage the Tribunal referred to the Nursery's religious belief (perhaps more accurately, the beliefs of Mrs Toron, Mrs Lieberman, and the beliefs of the others responsible for the Nursery's management), only to distinguish them from Ms De Groen's own religious belief. I do not accept that submission. On any fair reading, in the passage I have set out above, the Tribunal is setting out a basis for its conclusion on the application of section 10(1) of the **2010 Act**.

20. The conclusion that section 10(1) of the **2010 Act** prohibits less favourable treatment by an employer on the basis of its own religion or belief is wrong. It is a conclusion that cannot survive the reasoning of Baroness Hale in her judgment in **Lee v Ashers Baking Co. Limited** [2018] 3 WLR 1294, at §§42 – 45 (handed down after the Tribunal's Judgment in this case). In that case, a bakery had refused to supply a cake iced with the message "*support gay marriage*". The provisions in issue were in the **Fair Employment and Treatment (Northern Ireland) Order 1998** (which prevented discrimination on grounds of religious belief or political opinion), and the **Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006** (which prevented discrimination on grounds of sexual orientation). On the facts found, the bakery had refused to supply the cake because of its owners' objection on religious grounds to gay marriage. In the context of the claim under the **1998 Order**, one aspect of the argument before the Supreme Court was the contention that the District Judge who had heard the case had been wrong to conclude that under the **1998 Order** discrimination could take place on the grounds of the discriminator's religious belief and political opinion.

21. In material part, article 3 of the **1998 Order** provided as follows:

> **"(1) In this Order *"discrimination"* means —**
>
> **(a) discrimination on the ground of religious belief or political opinion; or**

(b) discrimination by way of victimisation;

and *"discriminate"* shall be construed accordingly.

(2). A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, other than a provision to which paragraph (2A) applies, if—

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; …"

Baroness Hale's conclusion was that the District Judge had been wrong. The purpose of discrimination law, she said, was the protection of a person who had a protected characteristic from less favourable treatment because of that characteristic, not the protection of persons without that protected characteristic from less favourable treatment because of a protected characteristic of the discriminator. Any conclusion to the contrary would run against the principle that a discriminator's motive for the less favourable is immaterial. More importantly any direct discrimination claim that rested on the discriminator's protected characteristic would be doomed to fail because any comparison between the person receiving the less favourable treatment and "*other persons*" would always produce the result that there had been no difference in treatment since it could safely be assumed that a discriminator acting on the grounds of his own political (or religious) belief would act in the same way regardless of who was affected.

22. In the present case, the Tribunal also refers to associative discrimination as a reason for its conclusion that a claim could be founded on the Nursery's religious belief. That is a non-sequitur. Classic instances of associative discrimination include (a) situations where a Claimant is treated less favourably because of her connection to a person who has a protected characteristic (for example, **Coleman v Attridge Law** [2008] ICR 1128); and (b) situations in which the discriminator wrongly believes that the Claimant has a protected characteristic (for example, **English v Thomas Saunderson Blinds Ltd** [2009] ICR 543). But no claim asserting associative discrimination rests on the premise that the discriminator is acting because of his

own protected characteristic; nor could any claim of associative discrimination rest on an association of the Claimant with the discriminator's protected characteristic.

23. Lastly on this point, the Tribunal attached significance to the fact that article 3 of the **Employment Equality (Religion or Belief) Regulations 2003** ("the 2003 Regulations") "… *required the employee to be discriminated against on the basis of his or her own religion or belief*" but those words (said the Tribunal) had ceased to be in the legislation, making room for discrimination claims where the discriminator had acted on the basis of its own religion or belief. However, those words (and their absence in the **2010 Act**) cannot bear the weight the Tribunal sought to attach. Neither the presence nor absence of such words is capable of undermining Baroness Hale's reasoning in **Lee v Ashers** (above).

24. I move now to the second of the issues summarised at paragraph 17 above. Given the error that is apparent from paragraphs 70 – 73 of the Judgment, to what extent did that affect the Tribunal's conclusions at paragraph 93 of the Judgment1? Based on the Tribunal's own findings, I do not consider that it was either correct or sustainable as a conclusion reasonably available, for the Tribunal to characterise the less favourable treatment as treatment afforded to Ms De Groen because of her lack of religious belief. In a number of places in paragraph 93 the Tribunal refers collectively to "*the claimant's lack of belief and the respondent's belief*", without attempting to distinguish between the two. But when dealing with Detriment 7 (the decision to dismiss), the Tribunal identifies the reason for dismissal saying:

> **"… 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 she was no longer co-habiting."**

[1] See above at paragraph §14 of this Judgment.

A This is significant. It rings entirely true that the Nursery acted because of its own beliefs, and Ms De Groen's non-compliance with those beliefs. A conclusion that the Nursery acted because of Ms De Groen's belief (or rather, what she did not believe) is an entirely implausible conclusion. The motive of the discriminator is irrelevant. But on the facts of the present case, a conclusion that the Nursery acted because of Ms De Groen's lack of belief presupposes that Mrs Toron's and Mrs Lieberman's concerns extended well beyond that which they saw as harm or the risk of harm to the Nursery's reputation, and reached a free-standing concern that Ms De Groen's beliefs were not the same as their own. The Tribunal made no express finding on this point. The material part of the Judgment is paragraphs 22 – 56. There is nothing in those paragraphs that is capable of supporting any such conclusion. At paragraph 42 of the Judgment the Tribunal stated:

> **"We are satisfied that Mrs Toron and Mrs Lieberman behaved in this meeting [i.e. the 27 June 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 on her) their system of beliefs."**

Yet, even if this assessment is taken at its highest, it falls well short of supporting the conclusion that Mrs Toron and Mrs Lieberman acted because of Ms De Groen's non-belief rather than their own belief.

25. In the premises, the way in which the conclusion on Detriment 7 is put by the Tribunal, is telling. Detriment 7 was the single most significant act of less favourable treatment, and given that each of the Detriments was an aspect of a single course of events, starting on 27 June 2016 and ending with the dismissal at the end of July, I can see no logical reason for drawing any distinction between Detriment 7 and any of the other Detriments. For this reason (taking account also, the reasons above at paragraphs 18 – 23), the Nursery's appeal against the conclusion of direct discrimination on grounds of religion or belief succeeds.

26. If my reasoning at paragraphs 24 – 25 above is correct, the third of the issues mentioned at paragraph 17 above, does not arise. I address that issue in case my earlier conclusion is wrong.

27. The Tribunal concluded that Ms De Groen had been less favourably treated because of her lack of religious belief – that she did not accept the prohibition against co-habitation outside marriage. Mr Bowers QC who appears for the Nursery in this appeal (but, like Mr Allen QC, did not appear below) contends that in a case like this where both Claimant and Respondent are members of the same religion, if a Claimant did not accept a particular tenet of her religion, and for that reason was less favourably treated by an employer, that was not treatment because of a "*lack of religion*" or "*lack of belief*" for the purposes of section 10(1) and/or (2) of the **2010 Act**.

28. Mr Allen QC's submission in response fell into two broad parts. The first part was to the effect that protection under international human rights standards (namely, article 9 of the **European Convention on Human Rights** ("ECHR") which protects the rights to "*freedom of thought*, *conscience and religion*" and to "*manifest [a] religion or belief in worship teaching practice and observance*"; and article 18, in the **International Covenant on Civil and Political Rights**("ICCPR"), a corresponding provision) extended well beyond protection for traditional, organised religion. He also relied on commentary by the **UN Human Rights Committee** on article 18 of the **International Covenant on Civil and Political Rights.** The content of article 18 of the **ICCPR** broadly corresponds to article 9 **ECHR**. He relied on **CCPR** General Comment No. 22, adopted by the **Human Rights Committee** in July 1993. In the course of that Comment, the point is made that article 18 protection is not limited to "*traditional religions*", but equally applies to religions that are *"newly established, or represent religious minorities that may be the subject of hostility on the part of the predominant religious*

community". The Comment goes on to point out that freedom of religious belief includes *"the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another, or to adopt atheistic views"*. Reference was also made to the **Equal Treatment Directive** (2000/78/EC), in particular to articles 1 and 2, and recital 1. Drawing these points together, Mr Allen QC's submission was that the international standards provided for protection of a person's "*personal religion*". He submitted that section 10 of the **2010 Act** should be construed to the same effect.

29. Detailed though it was, this line of submission misses the mark. It is correct that non-religious belief and lack of belief are protected by **ECHR** article 9, and that religious and other beliefs and convictions are an integral part of any person's personality and individuality. See, for example the Judgment of the House of Lords in **R(Williamson) v Secretary of State for Education** [2005] 2 AC 246 per Lord Nicholls at §§15 and 24; and **Kokkinakis v Greece** (1994) 17 EHRR 397, Judgment of the **European Court of Human Rights**, at §31. But that does not meet the issue in this case; this is not a case about whether or not a non-religious belief is a belief which is protected. I do not disagree with anything stated in the parts of the Commentary on article 18 of the **ICCPR** relied on, but those parts do not address the point in this appeal which is whether the religion or belief protected characteristic in the **2010 Act**, so far as it protects lack of religious belief, is apt to apply to a member of a religion who lacks belief in one part of the religion's teaching. Nothing in the Equal Treatment Directive takes matters further.

30. This is a case about differing religious belief within a religion. Ms De Groen is Jewish; she considers herself a practising Jew. It is not her case that her belief is either novel or outside the scope of Judaism. For the purposes of this part of my judgment I must assume (contrary to

what I have said above at paragraphs 24 – 25) that the root cause of the events that resulted in her dismissal was the disagreement about whether adherence to Judaism excluded cohabitation outside marriage. The Tribunal recorded that some Jews consider cohabitation outside marriage to be impermissible, but others do not. In the course of this appeal, neither party sought to persuade me otherwise. Disagreements on such matters are not exclusive to Judaism. It is entirely possible in any organised religion that disagreements exist as to whether some or other practice or value is an important part of the religion, or to the extent of its importance. It is in the nature of many organised religions that there will be differences of opinion. Members of the religion may disagree but, absent schism, they remain members of the same religion.

31. The second part of Mr Allen QC's submission rested on principles of legislative construction closer to home. At the hearing I asked the parties to research relevant pre-legislative materials that might cast light on the proper approach to section 10 of the **2010 Act**. The Explanatory Notes to the **2010 Act** describe section 10 as replacing "*similar provisions*" in the **2003 Regulations** and the **Equality Act 2006**. For the purposes of claims in an employment context, article 3 of the **2003 Regulations** was the relevant predecessor. Prior to its repeal in April 2010, article 3 was as follows (so far as it concerned direct discrimination)

> **"(1). For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if–**
>
> **(a) on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than he treats or would treat other persons; or**
>
> **…**
>
> **(3). A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."**

This version of regulation 3 had been inserted by section 77 of the **Equality Act 2006** ("the 2006 Act").

32. The further material provided to me by Mr Allen QC included *Hansard* material concerning section 77 of the **2006 Act**, and also section 45(1) of the **2006 Act**, a provision in materially identical terms to regulation 3, directed to discrimination outside the field of employment. He submitted that this material made it clear that regulation 3, as amended, was intended to cover situations such as the present case. Mr Bowers QC objects to the admission of the *Hansard* material on the ground that **Pepper v Hart** conditions are not met (see [1993] AC 593). I agree. There is no ambiguity in section 10 of the **2010 Act**. The fact that the effect of a provision in particular circumstances may not be obvious, does not mean that its meaning is ambiguous in the **Pepper v Hart** sense. However, there is no need to resort to the *Hansard* material. Even if is ignored it is readily apparent from regulation 3 as made, that the prohibition against direct discrimination did cover instances where (to use the abbreviations in the regulation) A and B are members of the same religion, and B treats A less favourably because of either A's religious belief or his lack of belief[2]. See the words in the brackets in regulation 3(1)(a).

33. The issue is whether any significance is to be attached to the different way in which section 10 of the **2010 Act** formulates the prohibition formerly set out in regulation 3. I attach no significance to this difference. The Explanatory Notes to the Bill for the **2010 Act** included the following:

> **"10. The Bill has two main purposes — to harmonise discrimination law, and to strengthen the law to support progress on equality.**
>
> **11. The Bill will bring together and re-state all the enactments listed in paragraph 4 above and a number of other related provisions. It will harmonise existing provisions to give a single approach where appropriate. Most of the existing legislation will generally be repealed. …"**

[2] The interpretation provisions at regulation 2 of the **2003 Regulations** are to the same effect as section 10(1) and (2) of the **2010 Act**.

A The "*enactments listed in paragraph 4*" included the 2003 Regulations. The Notes to Clause 10 also referred to the provision as replacing "*similar provisions*" in the 2003 Regulations. Insofar as the **2010 Act** was an exercise in restatement, it is a fair assumption that there was no intention that there should be any material change in the scope of protection. Section 10 as B enacted, as a matter of ordinary language, is certainly capable of being construed as applying to situations where both the Claimant and the Respondent are members of the same religion and the latter less favourably treats the former because of her lack of religious belief on an aspect of C the (otherwise) shared faith. That being so, my conclusion is that section 10 of the **2010 Act** should be read to that effect.

D 34. In light of the conclusions at paragraphs 24 – 25 above, my conclusion on the meaning and effect of section 10 of the **2010 Act** does not affect the outcome of this appeal.

35. The Nursery's final grounds of challenge to the conclusion on the occupational E requirement defence (i.e. the application of paragraph 3 of Schedule 9 to the **2010 Act**). If my conclusions at paragraph 24 – 25 above are correct, there is no need to deal with this point.

F 36. The Tribunal's reasoning on the occupational requirement defence is at paragraphs 94 – 98 of the Judgment. Its primary conclusion was that no occupational requirement was applied. It stated the following at paragraph 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.**
>
> **2. Was a genuine occupational requirement applied? Two are relied on 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 itself 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 that 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 it was not concerned with her private life, all that it wanted was the appearance of compliance (or that the claimant did not**

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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 views to parents. Although that 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 on 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."

37. The Nursery relies on various points, but the key contention is that the Tribunal was wrong to conclude that no occupational requirement on non-cohabitation was applied, when earlier (at paragraph 93(7) of its Judgment) the Tribunal had concluded that Ms De Groen had been dismissed because she cohabited. I reject this submission. It rests on only part of the reason for dismissal stated by the Tribunal at paragraph 93(7). I have set out the material passage above, at paragraph 25. The reason for dismissal in full was not just that Ms De Groen lived with her boyfriend, but also her failure to say she was no longer living with her boyfriend. There is no inconsistency between this conclusion (when it is read in full), and the conclusion that there was no occupational requirement not to cohabit.

38. Were it necessary to decide the Nursery's appeal against the conclusion on the occupational requirement defence, I would reject that part of the appeal. However, as matters stand, for the reasons I have already explained, the Nursery's appeal against the conclusion that it directly discriminated against Ms De Groen because of the religion or belief protected characteristic, succeeds.

(3) Direct discrimination on grounds of sex

39. The Nursery's case criticises the Tribunal's analysis and/or explanation of the reasons at paragraph 106 of the Judgment – where the Tribunal concluded that six of the eight detriments listed at paragraph 90 of the Judgment amounted to less favourable treatment of Ms De Groen because of her sex.

40. In its Skeleton Argument, the Nursery challenged the conclusions on each of the six matters found by the Tribunal to amount to less favourable treatment. In argument before me, the submission was pursued only in respect of Detriment 1 and Detriment 7. This was the right approach to take. In the context of this case, any challenge to the Tribunal's explanation and/or analysis will depend on sensible consideration of the Tribunal's reasons, taken as a whole. The room for intervention by this Tribunal will exist only where the Tribunal's findings of fact lack proper evidential foundation, or where the Tribunal's assessment of fact goes beyond anything reasonably open to a Tribunal on the findings of fact made.

41. In the context of the direct discrimination claims, the Tribunal's conclusions on Detriments 3 – 5 and 8 – namely that each did amount to less favourable treatment and was because of Ms De Groen's sex – were conclusions that the Tribunal was entitled to reach. In some instances, it is clear from the face of the Judgment that the conclusion reached was one reasonably open to the Tribunal. For example, Detriment 3 concerns the conduct of the 27 June 2016 meeting. The Tribunal made specific findings about what did happen (see paragraphs 40 – 42), and stated a clear conclusion (based on evidence given by Mrs Toron and Mrs Lieberman) that many of the comments made during the meeting were made because Ms De Groen is a woman (Judgment at paragraphs 42 and 106.3).

42. In other instances, the conclusion that the Tribunal was entitled to reach the conclusion it did, is readily apparent from context. Detriment 8 is a case in point. That concerned detriment arising from comments in the dismissal documents (i.e., the letter of dismissal and the enclosed "*Panel Discussions*" document). In practice it is not possible to separate criticisms set out in those documents from the context provided by events starting with the 27 June 2016 meeting. The Tribunal characterised what happened at the 27 June meeting as happening because Ms de Groen is a woman; there was direct support for this conclusion in the evidence available. The dismissal documents include repetition of some of the matters raised with Ms De Groen during the 27 June meeting (which the Tribunal concluded were discriminatory), and then repetition of later criticisms of Ms De Groen which were a direct consequence of how she had responded to the discriminatory events of 27 June. In the circumstances of the present case, it would be entirely artificial to distinguish between the sequence of events starting with the 27 June meeting and the conclusions stated in the dismissal documents. It is plain from the authorities that where (as in the present case) under section 136 of the **2010 Act** the burden has shifted, the "*because of*" question posed by section 13(1) of the **2010 Act**, means asking whether the discrimination was a "*significant influence*", having well in mind that for this purpose "*significant*" means anything more than trivial. See for example, **Villalba v Merrill Lynch and Co Inc** [2007] ICR 469 per Elias P at §§79 – 84. All this being so, it is clear to me that here the Tribunal was entitled to conclude that Detriment 8 amounted to less favourable treatment of Ms De Groen, because of her sex. It is entirely possible that when the Tribunal comes to consider remedies, it might conclude that (for example) Detriment 8 adds little to the harm already inflicted by what happened at the 27 June meeting (i.e., Detriment 3). Whether or not that is so is a matter of evaluation for the Tribunal. But none of that detracts from the fact that the conclusion it reached on Detriment 8, was a conclusion reasonably open to it.

43. Turning to the points that remain in issue, the first is that the Tribunal has failed to explain why Detriment 1 ("*not giving notice [of] the 27 June meeting*") was less favourable treatment because of Ms De Groen's sex; the second goes to the conclusion on Detriment 7 (the decision to dismiss), and is to the effect that in concluding that the dismissal was because of sex, the Tribunal has confused the reason for dismissal with events prior to the dismissal (i.e. events starting with the 27 June 2016 meeting).

44. I reject the Nursery's submission in respect of Detriment 1. In context, the Tribunal was entitled to conclude that the decision on the part of Mrs Toron and Mrs Lieberman to call the 27 June meeting without notice to Ms De Groen could not be separated from what it was they wanted to discuss with her. The Tribunal concluded (Judgment, paragraph 39) that Mrs Toron and Mrs Lieberman embarked on the meeting "*to discuss the matter of cohabitation with [Ms De Groen] and see what happened*". At paragraph 106.1 the Tribunal went on to say that it had concluded that Mrs. Toron's and Mrs Lieberman's intentions in advance of the meeting included discussion of "*possible marriage and possible pregnancy and child bearing in general terms*". These findings are sufficient to support the conclusion that the decision to call the meeting was because of her sex. They are also sufficient to support the same conclusion in respect of the fact that the meeting was called without prior notice to Ms De Groen (a difference which I suspect on the facts of this case, is marginal). As I have stated already, in a case such as the present where the burden of proof has moved, the issue is whether the Claimant's sex was a "*significant influence"* (as explained in *Villalba*, above) on the treatment afforded to her. That being so, there is a sufficient basis for the Tribunal's conclusion.

45. I also reject the Nursery's submission on Detriment 7. At paragraph 96 of its Judgment, in the context of its decision on the religion/belief direct discrimination claim, the Tribunal stated:

> **"… whilst religion was a factor in the events leading to dismissal, the dismissal was actually triggered by (a) the making of parental comments (although the 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."**

This reasoning was expanded at paragraph 106.7 of the Judgment (see above, at paragraph 14). Overall, applying the "*significant influence*" approach, there is a sufficient basis for the Tribunal's conclusion, which rests on its own evaluation of the evidence it heard.

46. For these reasons, the Nursery's appeal against the decision on the claim of direct sex discrimination, fails.

Decision – the harassment claim

47. The Tribunal addresses the harassment claim at paragraphs 107 – 112 of its Judgment. It is not entirely clear what matters, beyond the events of the meetings on 27 and 29 June 2016, were said to be the acts of harassment. The Tribunal stated (Judgment, paragraph 107) that the "*remaining acts of harassment are in writing*", and I assume this is a reference to Detriment 8 (the contents of the dismissal documents). There is no dispute that all the matters claimed as acts of harassment amounted to "*unwanted conduct*" for the purposes of section 26(1)(a) of the **2010 Act**; and there is no challenge to the Tribunal's conclusion that the requirements of section 26(1)(b) of the **2010 Act** were met on the facts of this case. The target of the Nursery's appeal is the conclusion that the unwanted conduct "*related to*" Ms De Groen's sex (the other component of section 26(1)(a) of the **2010 Act**). The Nursery contends that the Tribunal has failed to explain its conclusion.

48. The Tribunal's explanation for its conclusion is at paragraph 109 of the Judgment, where it refers back to its earlier conclusions on the direct sex discrimination claim at paragraph

106. As I read the Judgment, the Tribunal found in favour of Ms De Groen on the harassment claim on the basis of Detriments 3, 4, and 8; the reasons for that conclusion on those claims includes the Tribunal's reasoning at paragraph 106, so far as it concerns those Detriments. At the hearing, the Nursery did not pursue its appeal in respect of the sex discrimination finding in respect of Detriment 3. I consider that was the right approach, and as I have indicated above (see paragraph 41), had that appeal been pursued, I would have rejected it. The part of the appeal against the harassment decision that concerns Detriment 3 fails for the same reasons. The part of the appeal that concerns Detriment 8 also fails – this time for the reasons above at paragraph 42. The Tribunal was entitled to conclude that those matters happened because Ms De Groen is a woman; for the same reasons, the conclusion that those matters were "*related to*" Ms De Groen's sex, was a conclusion reasonably open to the Tribunal. This leaves Detriment 4 ("*the content of the 29 June meeting*"). The relevant reasoning here is what the Tribunal says at paragraph 106.4 of the Judgment. That is a sufficient explanation of why those matters related to Ms De Groen's sex.

49. For these reasons, the Nursery's appeal against the harassment decision, also fails.

Decision – the indirect discrimination claim

50. The first matter addressed by the Tribunal was the three things relied on by Ms De Groen as amounting to a provision, criterion or practice. These were as follows (see Judgment at paragraph 99):

> **"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."**

A The conclusion was that only the second of these was a provision, criterion or practice applied by the Nursery.

B 51. As to the requirement for "*particular disadvantage*" (section 19(2)(b) of the **2010 Act**), the Tribunal stated (at paragraph 102):

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

C This is not particularly helpful. The "*detriments discussed above*" must be the eight matters listed at paragraph 90 of the Judgment, in the context of the direct discrimination claim. In the context of that claim, the Tribunal had made clear findings on whether Ms De Groen had been

D subjected to each of these detriments (at paragraph 93 of its Judgment). But those findings are less helpful in the context of the requirement prescribed by section 19(2)(b) that the provision criterion or practice *"... puts or would put, persons with whom [Ms De Groen] shares the*

E *[protected] characteristic at a particular disadvantage when compared with persons with whom [Ms De Groen] does not share it"*. The Tribunal's findings do not address the existence of particular comparative disadvantage. Moreover, only one part of the reasoning at paragraph 93 addresses detriment arising from the provision, criterion or practice which the Tribunal

F concluded was operative for the purposes of the indirect discrimination claim: see paragraph 93(7) where the Tribunal stated:

> **"… we consider that [Ms De Groen] was dismissed because she had co-habited, something contrary to the beliefs of some (at least) of those responsible for the management of [the Nursery] and because she would not (untruthfully) say that she was no longer co-habiting."**

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52. It is no surprise that the Tribunal concluded that a requirement to lie was not justified. In the course of paragraph 103, it put the matter as follows:

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> **"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."**

53. The Tribunal's conclusions on the indirect discrimination claim are the subject of appeal by the Nursery and cross-appeal by Ms De Groen. The Nursery contends (1) that the Tribunal incorrectly formulated the relevant provision, criterion or practice which in fact comprised a requirement that Ms De Groen be discreet about her living arrangements; (2) that whatever the Nursery had required of Ms De Groen was not a provision, criterion or practice for the purposes of section 19(1) of the **2010 Act**, but rather a simple response to one-off circumstances; and (3) that in any event, the Tribunal's conclusion on section 19(2)(b) (specifically the conclusion on comparative disadvantage) was flawed. The cross-appeal is to the effect that the Tribunal was wrong to conclude that the Nursery had not applied the provision criterion or practice at paragraph 99.1 of the Judgment (conduct of private life in accordance with the prohibition against co-habitation outside marriage).

54. I do not consider there is any substance to the Nursery's first contention. The formulation of a provision, criterion or practice is a matter of fact for the Tribunal, depending on the evidence at hand. There will be some instances where identifying the provision, criterion or practice turns on the meaning of statements in a document or a formal policy. That is not this case. In this case identification of the provision criterion or practice rested on the Tribunal's evaluation of the evidence from Mrs Toron and Mrs Lieberman – in particular what either had said in the course of the 27 June 2016 meeting. I can see no basis to go behind (a) the Tribunal's finding that at that meeting Mrs Toron and Mrs Lieberman did indicate that the way out of the situation was for Ms De Groen to tell them she did not live with her boyfriend (Judgment, paragraph 40.5); and (b) its conclusion (Judgment, paragraph 94.7) that Ms De Groen was dismissed because she would not say she was no longer co-habiting. The Nursery's first contention comes to no more than an argument that the Tribunal "*got the facts wrong*". That is not a valid ground of appeal to this Tribunal; there is no suggestion that the conclusion

that the Tribunal did reach was not an available conclusion on the evidence it heard. This is underlined by the Nursery's case as to the provision, criterion or practice that the Tribunal should have identified – a requirement for discretion about living arrangements. On the facts of this case, as found by the Tribunal, the distinction between a requirement on those lines, and the provision criterion or practice found by the Tribunal to exist is vanishingly small. If the Nursery contends that the conclusion it advances was a permissible conclusion, it is impossible to say that it was not also permissible for the Tribunal to reach the conclusion it did.

55. The same reasoning also disposes of Ms De Groen's cross-appeal. She argues that the Tribunal ought to have formulated the provision, criterion or practice on the lines of a requirement to comply with the prohibition against co-habitation outside marriage. Yet the Tribunal specifically concluded that when it came to that the prohibition, the Nursery was more interested with appearance than actuality. That conclusion rested on its evaluation of what had happened on 27 June, and gained support from the Nursery's own description of that meeting in the "*Panel Discussions*" document that accompanied the letter of dismissal. It was a conclusion on an issue of fact that was reasonably available to the Tribunal based on the evidence before it. The cross-appeal therefore fails.

56. The Nursery's second contention is that its treatment of Ms De Groen was not the consequence of the application of any provision, criterion or practice, rather it was no more than a specific response by Mrs Toron and Mrs Lieberman, to the circumstances as they saw them.

57. Where it arises from conduct (and not a formal statement of practice or policy) the line between a provision, criterion or practice on the one hand, and a simple response to events in hand, can be difficult to draw. Two cases illustrate this point. In **Nottingham City Transport**

Limited v Harvey UKEAT/0032/12 the Appeal Tribunal considered circumstances in which it was contended that the provision, criterion or practice (in that instance in the context of the duty to make reasonable adjustments under section 20 of the **2010 Act**) arose from the way in which a disciplinary process had been handled. The Employment Tribunal had concluded that a provision, criterion or practice did exist. Langstaff P, giving the judgment of the Appeal Tribunal, disagreed, saying the following in the course of his reasons:

> **"17.… Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer and tracing it back to its cause, as Mr Soor submitted was indicated by Maurice Kay LJ in *Smith v Churchill's Stairlifts PLC* [2005] EWCA Civ 1220, it is essential, at the end of the day, that a Tribunal analyses the material in the light of that which the statute requires; *Rowan*[3] says as much, and *Ashton*[4] reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in Rowan. It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. …**

58. In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the **Act** does not define "*provision, criterion or practice*" bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "*Practice*" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the **1995 Act** itself in its original form, where certain steps had been identified as falling within the scope to make reasonable

[3] *Environment Agency v Rowan* [2008] ICR 218
[4] *Royal Bank of Scotland v Ashton* [2011] ICR 632

adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned.

> "…
>
> **20. We turn to paragraph 14 and the central reasoning of the Tribunal. The words used are that the practice was "the application of the Respondent's disciplinary process". A one-off application of the Respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least. However, making due allowance for the words used by a Tribunal, whose Judgments, we must remember, should not be analysed as if they were the finest products of elaborate and accurate legal draughtsmanship, what appears missing is a clear identification of what the practice was, which caused disadvantage that was substantial to the Claimant in respect of which there might have been a reasonable adjustment; rather, the paragraph suggests that as a matter of desirability the employer might have behaved by taking into account mitigation and conducting a reasonable investigation.**
>
> **21. Given that and our acceptance of the submissions made by Mr Soor, it seems plain to us that the Tribunal erred in law by identifying the particular flawed disciplinary process that the Claimant underwent as being something that fell within the heading "provision, criterion or practice", and, as Mr Soor points out, as showing that because of his disability those aspects caused a disadvantage over others who were not disabled, when it may seem obvious that a failure to consider mitigating circumstances and a failure reasonably to investigate is likely to cause misery whoever is the victim. Accordingly, as it seems to us, the appeal must be allowed."**
>
> **58. In Pendleton v Derbyshire County Council [2016] IRLR 580 an employee had been dismissed from her position as a primary school teacher when she decided to stay with her husband notwithstanding his conviction and imprisonment for offences of possessing indecent images of children, and voyeurism. A claim of indirect discrimination which was dismissed by the Employment Tribunal. Mrs. Pendleton appealed; the school cross-appealed. In the context of the cross-appeal, the Appeal Tribunal considered whether the Employment Tribunal had been right to conclude that a provision, criterion or practice had been applied. HHJ Eady QC rejected this part of the cross-appeal, stating as follows:**
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> > **"35. The Claimant had complained of the operation of a practice of regarding as gross misconduct/SOSR a choice not to end a relationship with a person convicted of making indecent images of children and voyeurism. The Respondents had given evidence through Mr Greensmith – the relevant decision maker - that this is how they would have treated anyone in those circumstances. Further, as the ET found, the Respondents operated a closed mind to the Claimant's specific circumstances, taking the view there could be no alternative to dismissal. Although the facts were highly unusual, that does not mean the Respondents' response could not amount to the operation of a practice or policy, and I do not read the EAT's Judgment in *Harvey* as ruling otherwise. Indeed, I consider that the Respondent's reading of *Harvey* confuses an isolated failure to follow a policy (that case) with a decision that flows from the application - however rare - of a practice or policy (as here). The Respondents' policy or practice was to dismiss any employee who elected to stand by their spouse or partner in the circumstances that had faced the Claimant. The Respondents might not have had to apply that policy or practice previously but the ET was entitled to conclude (given the Respondents' own evidence) that this is how they would respond in those circumstances.**
> >
> > **36. Thus, the ET had regard to the PCP as identified by the Claimant and made a permissible finding (given the Respondents' evidence, as apparent from Mr Greensmith's witness statement, and the ET's findings on the unfair dismissal case) consistent with that case. That was to the effect that the Respondents were adopting and applying a policy or practice that they would apply again should the circumstances arise. Section 19 permits an ET to look forward as well back and the finding by the ET was permissible both on the case as run before it and on the evidence and its findings of fact."**

59. So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. What is relied on must have what Langstaff P referred to as "*something of the element of repetition about it*". In **Pendleton**, there was direct evidence. That distinguished the position in that case from the position before the Appeal Tribunal in **Harvey**, where there was no evidence beyond evidence that the employee had been badly treated and that he would not have been so treated had he not been disabled.

60. In the present case, the Tribunal did not address this point in terms. The inevitable inference from paragraphs 99 – 101 of the Judgment is that the Tribunal did think that the response from Mrs Toron and Mrs Lieberman at the meeting on 27 June was indicative of some form of general approach. But there is no reasoning that explains this conclusion. Moreover, such a conclusion is at odds with other points made in the course of the Judgment. It is clear from paragraphs 38 – 39 that the Tribunal considered there had been a lack of thought prior to the 27 June meeting – neither Mrs Toron nor Mrs Lieberman went into that meeting with any considered plan of action. The meeting itself was described by the Tribunal as an "*unfocussed discussion of [Ms De Groen's] personal life*" – see Judgment at paragraph 40. The "*solution*" that Mrs Toron and Mrs Lieberman latched onto during the meeting – that Ms De Groen should tell them she was not living with her boyfriend (even though she was) so that if parents asked, the Nursery could say Ms De Groen had told them she did not live with her boyfriend – was somewhat Heath Robinson. If the reputation of the Nursery were under threat, the chances that this strategy would save the day were remarkably slim. All this points to the conclusion that what was found by the Tribunal at paragraph 101.2 of its Judgment to be a provision, criterion or practice, was actually no more than an *ad hoc* measure. The fact that this same "*solution*"

may have been re-stated in the course of events after 27 June and leading to the decision to dismiss, does not make it any the less *ad hoc*. One further point is that the approach taken by Mrs Toron and Mrs Lieberman on 27 June 2016 is in sharp contrast to the handbook and policies referred to by the Tribunal at paragraph 24 of its Judgment, instances where the Nursery clearly did formulate matters of general practice.

61. Looking at the Tribunal's Judgment in the round, there is no sufficient evidential basis for the conclusion that there was a provision, criterion or practice that employees *"... be prepared to make a dishonest statement about their relationship and/or private life, in order to remain employed"*. There was no direct evidence to that effect, and no sufficient evidence from which an inference could be drawn. The findings of fact made by the Tribunal all point against any such inference. The Tribunal's conclusion was an error of law. Moreover, it is an error of law that means the conclusion on the indirect discrimination claim cannot stand. The Nursery's appeal on this point succeeds.

62. The Nursery's third contention is directed to the Tribunal's further conclusion, at paragraph 102 of the Judgment on the issue of *"disadvantage"* for the purposes of section 19(2)(b) of the **2010 Act**. At paragraph 77 of the Judgment, the Tribunal appears to identify (to use the language of section 19(2) of the **2010 Act**) the group of *"persons with whom B shares the characteristic"* as *"Jews who do not regard co-habiting outside marriage as contrary to their beliefs"*. Thus (again in the terms put by section 19(2)) *"persons with whom B does not share the characteristic"* must have been either all other Jews, or (less likely) all other persons. The issue then was comparative disadvantage. The Tribunal did not address this at all – see my comments on paragraph 102 of the Tribunal's Judgment at paragraph 51 of this Judgment.

63. Had the Tribunal sought to address comparative disadvantage it would have been bound to do so by reference to the provision, criterion or practice it had found to exist – i.e., being *"prepared to make a dishonest statement about their relationship and/or private life, in order to remain employed"*. The Tribunal formulated the provision criterion or practice in generic terms. Perhaps this was to underline its view that it was addressing a practice which existed independent of the specific circumstances of the case before it. Be that as it may, once the provision, criterion or practice was formulated in this way, it required account to be had of any situation in which the need for a person to make a dishonest statement about her private life comes into conflict with one of her sincerely held religious beliefs.

64. On this basis I cannot see how it could have been open to the Tribunal properly to conclude that the provision, criterion or practice it had identified would give rise to any particular comparative disadvantage for Ms De Groen and other Jews who shared her belief that cohabitation outside marriage was not contrary to their faith. True it is, that on the Tribunal's analysis of the protected characteristic of religion or belief, the practice applied by the Nursery required Ms De Groen to make a statement at odds with her religious belief. As the Tribunal saw it, she was asked to be dishonest to fit in with the differing religious beliefs – either of those who ran the Nursery, or of parents of children at the Nursery, or both. But persons in the comparator group (regardless of whether that group were other Jews, or all other persons) would be disadvantaged in equal measure if required to say something not true to their religious beliefs in order to retain their employment. That would be so regardless of whether the disadvantage is seen to be in the lie itself (truthfulness being a virtue promoted by all religions and most if not all non-religious belief systems), or in a requirement that the person disavow an aspect of her private life that reflected religious belief.

65. Put another way, once the Tribunal had formulated the provision criterion or practice in the way it did, there was no rational basis on which the indirect discrimination claim could meet the requirements of section 19(2)(b) of the **2010 Act**.

66. Stepping back from the detail, I do not find it at all surprising that the indirect discrimination claim fails. Analysis of the facts of this case in terms of indirect discrimination has an air of unreality. The temptation to place a single series of events simultaneously in various different legal categories is, for lawyers at least, ever present. But there will be occasions where this is artificial. The laws prohibiting discrimination throw up a range of considerations, and forms of analysis that non-lawyers regard as unduly technical – particularly the provisions dealing with indirect discrimination. Such "*technicalities*" are unavoidable in light of the way in which the legislative provisions need to be framed. But there is no virtue in applying the rules that prevent unlawful discrimination to situations where their application is detached from reality. Claims will not necessarily be improved by the number of different ways they are pleaded. The analysis of the facts of this case – the events of the meeting on 27 June, and the events that followed and resulted in the Nursery's decision to dismiss Ms De Groen – as an instance of indirect discrimination, was an exercise in over-analysis. The focus should have remained on the direct discrimination claims; those claims represented a realistic "*fit*" to the events that had happened.

Overall conclusion, and disposal

67. For the reasons set out above (a) the Nursery's appeal against the conclusion on the claim of direct sex discrimination is dismissed; (b) the Nursery's appeal against the conclusion on the harassment claim on grounds of sex is dismissed; (c) the Nursery's appeal against the conclusion on the claim of direct discrimination on grounds of religion or belief is allowed; (d)

the Nursery's appeal against the conclusion on the claim of indirect discrimination is allowed. Ms De Groen's cross-appeal is dismissed.

68. The consequence of the conclusions I have reached is that the claim should be remitted to the Employment Tribunal for consideration of remedy on the claims of direct sex discrimination, and harassment on grounds of sex. So far as concerns the claims of direct discrimination and indirect discrimination on grounds of religion or belief, I do not consider that anything remains to be remitted. The reasons set out in this Judgment are sufficient to dispose of those claims, for all purposes.

69. After this Judgment was provided to the parties in draft, it became apparent that there is disagreement between the parties as to the grounds on which the harassment claim was addressed by the Employment Tribunal in its Judgment. The Nursery's position is that the Employment Tribunal's findings at paragraphs 107 – 112 of its Judgment concerned only the claim of harassment on grounds of sex, and did not concern a claim of harassment on grounds of religion or belief (albeit that such a claim was part of Ms De Groen's pleaded case). It was for that reason, said the Nursery, that only harassment on grounds of sex was in issue in the appeal before me. Ms De Groen's position is that a harassment claim on grounds of religion or belief was part of her claim before the Employment Tribunal, and was addressed at paragraphs 107 – 112 of the Tribunal's Judgment.

70. The appeal before me was conducted on the basis that only harassment on grounds of sex was in issue. That is the premise of the reasoning at paragraphs 47 – 49 above. Strictly speaking, whether the Employment Tribunal's Judgment went beyond that is for the Employment Tribunal to decide. Be that as it may, it is not obvious to me that paragraphs 107 – 112 of the Employment Tribunal's Judgment do include findings on harassment on grounds

A of religion or belief. If those paragraphs do include conclusions on that claim, I do not see those conclusions could stand in light of the conclusions set out in this Judgment, at paragraphs 18 – 25 above.

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