EMPLOYMENT TRIBUNALS

Ms L Aboulossoud	**v**	Royal Borough of Greenwich (1) Ms Dawn Squires (2)
Claimant		**Respondents**

Heard at: **London South**
On: **24-27 July 2017 Part Heard: 12-13 October 2017**

Before: Employment Judge Nash
Dr S Chacko
Ms N O'Hare

Representation

Claimant: Mr Butler, Counsel
Respondent: Mr Cross, Counsel

JUDGEMENT

The judgment of the Employment Tribunal is as follows:

1. The complaint of religious discrimination succeeds.

2. The First and Second Respondents subjected the Claimant to unlawful harassment related to religion.

REASONS

Introduction

1. The originating application was presented to the Employment Tribunal on 21 December 2016. The response was submitted on 19 January 2017. At a Telephone Case

Management Hearing on February 15 2017 the parties were directed to agree a list of issues; this was agreed and presented to the Employment Tribunal by March 2017.

2. In respect of witnesses the Tribunal heard from the Claimant herself, from Mr Murphy, her union representative, from Ms Scott, Ms Phillips and Ms Cook all of whom work with the Claimant. From the Respondent the Tribunal heard from Ms Squires herself, Mr Dalley, who investigated the grievance, Mr Edmondson, who heard the appeal and who appeared by way of a witness order. The respondent also relied upon a statement by Mr Gregory, the Manager of the Claimant's workplace. Mr Gregory did not appear before the Tribunal and the Tribunal followed its normal practice of attaching little weight to the evidence of a witness who was not present before it.

3. The Tribunal had sight of the bundle of 247 pages and all references are to this bundle unless otherwise stated. The bundle included one item of late disclosure - an email exchange between the Claimant and her union representative in April 2016.

Preliminary Matters

4. Two preliminary matters took up most of the first morning of the hearing. Firstly there was an application by the Respondent to postpone because Mr Gregory did not attend due to the very recent death of his father. The Respondent contended that he was a crucial witness. The Tribunal had sight of an email saying that he could not attend due to mental health issues and his father's recent and unexpected death.

5. The Tribunal, with the parties, ascertained three ways of proceeding. The hearing could go ahead and it would be seen if Mr Gregory attended; the hearing could be postponed in entirety, and the Tribunal ascertained that there would be a delay of one year before the case could go back into the list; the hearing would go part-heard, the Tribunal would hear all the witness evidence, save Mr Gregory, and then postpone until October to finish the case including remedy if appropriate.

6. The Claimant objected to any postponement or going part-heard, predominantly on the

grounds of delay. The Tribunal considered the matter and applied the overriding objective. It found it difficult without having read the case to ascertain the importance of Mr Gregory but noted that the Respondent contended that he was material.

7. The Tribunal was concerned at delay. The material meeting had occurred in January 2016 so there had already been a one and a half year delay before coming before the Tribunal. The Tribunal did not find that a two and a half year delay would be conducive to justice. One witness was probably currently unavailable. However, in a year's time, there was no guarantee that there might not be further witnesses who were unavailable.

8. The Tribunal considered the position as of the day of the hearing: all witnesses save one, plus both Counsel and a three person Tribunal were all present at considerable cost and inconvenience. Further, the claimant was still employed and matters needed to be resolved promptly. The Tribunal considered the factors and concluded that it would hear the case as much as possible, as listed, and then go part-heard if necessary.

9. The second preliminary matter is dealt with below under "Issues".

10. On the morning of the second day, the Respondent made an application for a witness order in respect of Mr Edmondson under Rule 32 of the 2013 Rules of Procedure. The Tribunal accepted that Mr Edmondson who had heard the appeal could give relevant evidence. He was material to some of the allegations in the list of issues. Further, there was evidence that he was not willing to attend willingly. The Tribunal also noted that the Claimant did not object.

11. Accordingly the Tribunal made a witness order, although it was concerned that this had been done so late in the day and recognised it would be onerous for Mr Edmondson.\

<u>The Claims</u>

12. The claim before the Tribunal was for associative religious harassment under Section 26 of the Equality Act.

The Issues

13. These were as set out in the list of issues dated 17 March 2017.

14. However, this list was subject to a preliminary application made by the Respondent on the first day of Hearing. The Respondent made an application that the Claimant not be permitted to rely on about half of the acts of harassment as set out in the issues on the grounds that they were not set out in the originating application.

15. The Tribunal noted that all of the acts of harassment in the list of issues were referred to in the originating application albeit not in so much detail. Paragraph 29 of the originating application stated that the "treatment referred to above was the harassment relied upon". The Tribunal found that that paragraph 29 was sufficient to cover all of the acts listed in the list of issues. Ideally, the ET1 could have been drafted so that all of the acts of harassment were set out in the list of issues. However, the parties were ordered, as common in discrimination cases, to agree a list of issues, and they did so in very good time for the Hearing and within a few days of the return date of the Order. At no time, from March until the beginning of the Hearing, did the Respondent, who was legally represented throughout, object. The Tribunal thought it telling that this had been read only at the very last minute and that the Claimant was accordingly at a disadvantage. The late raising of the matter indicated to the Tribunal that the Respondent did not see itself as having been subjected to any significant disadvantage.

16. The Respondent also relied on the case *Chandhok v Tirkey [2015] IRLR 195* which cautions Tribunals against permitting unbridled licence to claimants who seek to change their cases. The Tribunal noted that *Tirkey* was a case in which the allegations had originally been listed as a generic race complaint and was then particularised to include caste. The amendment in *Tirkey*, (the case which established that caste discrimination may be

unlawful as being race discrimination), accordingly both particularised the instant case and potentially widened the scope for race discrimination law; this would accordingly likely require very different evidence. The Tribunal noted that employment tribunals are enjoined to avoid formality in proceedings. High Court pleadings are not the norm and not desirable. According to *Tirkey*, the essence of the respective case should be in the pleading, and the Respondent did not contend that the essence of this case was not in the pleading.

17. For the sake of clarity, and bearing in mind that the case might well go part-heard, the Tribunal found that the wisest course was to amend the originating application to include all acts set out in the list of issues as acts of harassment relied upon.

The Facts

18. The Respondent is a London Local Authority employing about 10,000 people. The Claimant started work as an Admin Officer at Eltham Crematorium on 1 September 2011. She is of mixed heritage and her late father and a number of her family are Muslim. She met Ms Squires, the Parks and Open Spaces Manager during recruitment and there was discussion that the Claimant's father was a Muslim. The Tribunal accepted the Claimant's account of this meeting because it was detailed and plausible - she was likely to recall a personal and memorable meeting. The Tribunal also accepted Ms Squires's evidence that she did not recall this conversation, as there was no particular reason that she would do so. After this, the Claimant and Ms Squires's paths rarely crossed in the course of their duties.

19. In October 2015, a new manager, Mr Gregory, was appointed to the crematorium. The Respondent issued a notice in April 2015 putting an end to a local working arrangement at the crematorium whereby staff could leave early. The staff were unhappy at this. Mr Gregory also introduced new practices and procedures; as a result the staff were concerned that they were losing custom to what might, in a different sector, be referred to as a rival facility, Kemnal Park. This has a large dedicated Islamic section in its cemetery. As a result of these concerns a meeting with Ms Squires as Head of Service was set up for

all of the staff at the crematorium.

20. We now turn to the events material to the claim. There was a meeting on 8 January 2016 to discuss staff concerns and new procedures. Present were the Claimant, Ms Phillips, Ms Scott, Ms Cook, Mr Gregory - and possibly Ms Hartley, although little turned on the latter's participation. According to all participants the meeting started calmly. The Claimant was, in effect, acting as spokesperson for the staff. She set out staff concerns about the other facility taking away business and income from their own crematorium. Ms Squires sought to persuade the staff that the other facility was not a threat.

21. The Claimant then stated that Ms Squires became angry and red-faced and said the following words, or words to the effect of, "Do they (the Kemnal Park management) really think that the residents of Bromley would want to be buried next to a Muslim. No offence to the Muslim community but that's what the Muslims do, they move in and take over." Ms Squires admitted that she may well have stated that white British people might well complain about loved ones being buried next to a Muslim but she said, "I do not believe that I would say that Muslims move in and take over".

22. The Tribunal considered the conflict of evidence. They considered the evidence of those witnesses who appeared before it. Ms Scott said that Ms Squires had said that the people of Bromley would not want to go to Kemnal Park because they were doing a lot for the Muslim community. Ms Phillips recalled the comment that the residents of Bromley would not want to be buried next to a Muslim. Ms Cook thought the comment was that the blue blooded residents of Bromley would not want to be buried next to a Muslim, and that Ms Squires had made the, 'we all know what happens when they get in, they take over', comment.

23. The Tribunal also considered whether there was any more contemporary account in the documents. The nearest account in time was found in Mr Dalley's investigation in June 2016. The accounts given to Mr Dalley in June 2016, and the accounts before the Tribunal were broadly consistent. Essentially the witnesses said the same thing then as they said before us. The Tribunal also noted that the Claimant had sent an email in April 2016 to

her union representative where she had set out a consistent account of what she said Ms Squires had said. Further, there was wide agreement amongst the witnesses that Ms Squires was agitated - the word "rant" was used by more than one witness. The evidence was that the attendees at the meeting were taken aback by Ms Squires's manner. This was not conventional workplace behaviour. It was out of the ordinary and they say it made them feel uncomfortable.

24. Based on this evidence, the Tribunal found that Ms Squires did say what the Claimant alleged, or words to that effect. The Tribunal noted Ms Squires accepted that she had said words to the effect of, 'white people would not want their loved ones buried next to Muslims'. In the view of the Tribunal, this was an emotive way of putting it. It was not, for instance, a neutral comment that different communities might want dedicated burial areas, and giving precedence to one group might have the effect of alienating another. In the view of the Tribunal this was, to some extent, of a piece with the comment of 'Muslims taking over'. The Tribunal was also bolstered in its finding by the fact that this was consistent with the findings of Mr Dalley when he heard the grievance; Mr Daly had found that the comments were said.

25. As a result of this meeting the Tribunal accepted the Claimant felt distress, and the Tribunal further accepted the Claimant believed that when Ms Squires made these comments they were aimed at her. There were reasons for the Claimant to believe this because she was the person speaking and she was the only person, on the evidence before the Tribunal, with a personal Muslim connection. However, the Tribunal did not accept that Ms Squires's comments were intentionally aimed at the Claimant because of the Claimant's Muslim associations. It was not likely, in the view of the Tribunal, that Ms Squires would recall that the Claimant had Muslim associations. Further, and more importantly, there was a more credible reason for Ms Squires to be irritated by the Claimant; she was the spokesperson for a group who, in Ms Squires's view, were taking an unreasonable position.

26. Following the meeting the Claimant was concerned about how to proceed. She spoke to her manager, Mr Gregory, on 21 March 2016. There was then a discussion between Mr

Gregory and the Claimant. Previously there had been friction between Mr Gregory and the Claimant over another matter when he called her a militant.

27. On or around 23 March Ms Squires visited the crematorium and called the Claimant into an impromptu meeting. She discussed the meeting on 8 January. The Claimant said that she felt that Ms Squires's comments had been directed at her. Ms Squires stated that the opinion had not been her personal opinion; she was speaking from the point of view of the "true blue Tory" residents of Bromley. She said that the Claimant was a valued member of staff. The Claimant stated that she did feel better to hear that she was a valued member of staff but still felt uncomfortable in the meeting.

28. The Claimant consulted her union and on 4 April told the Union in the email about Ms Squires's comment. The Claimant then raised a grievance against Ms Squires on 15 June 2016. Mr Dalley was appointed to investigate the grievance. He met with the Claimant on 22 June 2016. He also met and interviewed Ms Cook, Ms Scott, Ms Phillips, Ms Squires, Ms Hartley, and Mr Gregory. In effect, all those present at the meeting, or alleged to have been present at the meeting.

29. The Tribunal considered the minutes of Mr Dalley's meeting with Ms Squires. In evidence before them Mr Dalley stated the notes were not accurate. However, he was unable to assist the Tribunal as to how they were inaccurate. Accordingly, the Tribunal found that the notes of the meeting were an accurate reflection of the interviews, whilst not necessarily verbatim. According to the notes, Mr Dalley made comments such as, "It looks to me as though the Claimant takes things very personally and when you look at it in context, you can tell it wasn't meant that way". He also stated, "people don't like change". This meeting was held before he had made the decision. Mr Dalley then prepared his report, on page 131, on 27 July 2017.

30. There was a further meeting between staff and management at the crematorium on 1 August 2016. This was to discuss the local agreement as to hours being brought to an end with one month's notice. This caused a conflict between management and staff. The witnesses gave evidence, which was unchallenged, that Ms Squires spoke sarcastically to

the Claimant including asking her if she was dehydrated or thirsty, and stated that she was smiling and looking outside. The evidence from most staff was that Ms Squires's conduct made them uncomfortable. The Tribunal accepted this account of of the meeting as it was agreed upon by most members of staff present.

31. On 3 August the Claimant discovered that Mr Dalley had partly upheld her grievance. He had found that the comments were made but he made no mention of religious harassment or equality or diversity or discrimination. In effect, whilst he upheld the claim, he did not explain why, and he could not satisfactorily explain, in the view of the Tribunal, why he was upholding the claim. He did say clearly that he had not upheld it in full because, while the comments were made, they were not aimed at the Claimant.

32. Mr Dalley went on to say that he would arrange a meeting for Ms Squires to apologise to the Claimant. Then Ms Squires was referred to the Senior Assistant Director, Mr Peter O'Connell, to decide about further action. Mr O'Connell met with Ms Squires and consequently, on 25 August, and at his advice, she was left to identify a course on valuing equality and diversity in the workforce by way of a letter of 12 September. No further steps occurred.

33. On 10 August 2016, the Claimant appealed against the result of her grievance, at page 147. Mr Edmondson was appointed to hear the appeal. On 24 October the investigation officer report was provided. This was well outside of the twenty day timetable in the Respondent's grievance procedure. The Claimant and her union representative had chased the Respondent during this time and the Respondent had apologised about the delay. When the Claimant received the appeal bundle she said that it, "felt like an attack". This was because it revealed that Ms Squires and others had, when speaking to Mr Gregory, made criticisms of the work performance of the Claimant and her colleagues. There was a further delay as the Claimant went on annual leave.

34. The appeal meeting finally took place on 18 November 2016. Prior to the appeal meeting, the Respondent had accepted evidence from the Claimant about the 1 August meeting. The Claimant had thus been led to believe that she could rely on this evidence and raise

matters that had occurred on 1 August at the appeal. In reliance on this, she did not put in a separate grievance relating to the events of 1 August, although the three month procedural deadline was approaching. (The respondent required employees to submit a grievance within three months of the act complained of.)

35. To her surprise, at the hearing, Mr Edmondson on the advice of HR, refused to consider matters relating to 1 August despite the fact that the three month deadline had by then passed. The Claimant became very distressed. She also made inaccurate comments at the beginning of the meeting, stating that Ms Squires had referred to Muslims as 'invaders' or 'Muslim people who had died were trash'. The meeting also raised the issue of whether or not the comments made by Ms Squires and others about staff performance were relevant, and Ms Scott attended the meeting, which all took a good deal of time.

36. On 21 November 2016 Mr Edmondson found that the Claimant's appeal was not upheld. He gave the same reasons as Mr Dalley. Finally, Ms Squires attended, on 9 March 2017, a course on valuing equality and diversity, a manager's course, as a result of Mr O'Connell's intervention. The Claimant by this time had applied to the Employment Tribunal.

The Applicable Law

37. The applicable law is found at Section 26 of the Equality Act as follows:-

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

....

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

Submissions

38. Both parties provided helpful and extensive written submissions to the Tribunal.

Applying the Law to the Facts

39. The Tribunal went through each of the allegations relied on in the list of issues to consider whether any or all of them met the statutory definition of harassment at Section 26.

40. In the view of the Tribunal, allegation a) and b) were best looked at together. These were the comments made by the second Respondent at the meeting on 8 January 2016: "Let me tell you a thing or two about Kemnal Park. No offence to the Muslim community but what do the Muslims do? What they always do, move in and take over" and "did (the management of Kemnal Park) really think the residents of Bromley would want to be buried next to a Muslim" and Ms Squires's being angry whilst saying this. The Tribunal found that this did meet the statutory definition of harassment. It was unwanted conduct relevant to the protected characteristic of religion, which was unwanted because it had caused distress to the Claimant; it was conduct that violated the Claimant's dignity and/or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant whose late father was a Muslim. The Tribunal found that Ms Squires was not aiming the conduct at the Claimant because she had a Muslim association; the comments were made generally.

41. The Tribunal then moved to consider allegations c) through to e). These three allegations involved the meeting on 23 March and the Tribunal again found it appropriate to look at these together as separating them would be an artificial exercise. Ms Squires stated in clear terms that the views she had expressed in the January meeting were not her opinion, they were those of the so called 'true blue Tory residents of Bromley'. She apologised for any misunderstanding. She said she was not saying anything offensive because the things she had said were not her opinion. The Tribunal accepted that it was unwanted conduct because the Claimant was called into an meeting, with no warning,

with a senior manager. However, Ms Squires's comments were not intimidating, hostile, degrading, humiliating or offensive; neither did the comments violate the Claimant's dignity. She told the Claimant that she was stating a view that was not her own opinion. The Tribunal found that Ms Squires had not handled this meeting well, but the Tribunal could not find that the statutory definition of harassment was met.

42. The Tribunal then went on to consider the Claimant's grievance, being issues f) to h) including the outcome of the Claimant's grievance dated 3 March 2016. Again the Tribunal considered these issues together. The Tribunal noted that although the grievance had been partially upheld, the Claimant contended that the treatment of and outcome of the grievance amounted to unwanted conduct. The Tribunal found that the unwanted conduct in respect of the grievance was the Respondent's failure to recognize, in the conduct complained of, the fact of religious associative discrimination and harassment and the impact of this on the Claimant. The grievance outcome was that the statements, in effect, should not have been made, but because were not aimed at the Claimant there was no adverse impact upon her. There was no evidence that the Respondent thought any further about the subject of the grievance after coming to this conclusion. There was no evidence to suggest that the Respondent had engaged with the concept of religious harassment. To the Tribunal's mind, it was indicative of the confusion on the Respondent's part that, despite questioning by the Tribunal, Respondent witnesses were incapable of explaining clearly why part of the grievance *had* been upheld ie that the statements were unlawful religious harassment. The Tribunal noted that Respondent witnesses were not employment lawyers and could not be expected to carry out the type of forensic legal analysis of the facts required of this Tribunal. However, Mr Dalley was not able to say something to the effect of – these statements were derogatory of Muslim people and that is wrong or against Council policy or against the law. The respondent's unwanted conduct in respect of the grievance outcome was its failure to identify the fact that the statements were derogatory to Muslim people and the fact that this could amount to unlawful conduct even if the statements were not aimed at an individual.

43. As to whether the unwanted conduct amounted to statutory harassment, both parties

relied on the EAT case of *Unite the Union v Nailard* 121 2017 ICR. *Nailard* was a sexual harassment case concerning a (contended) inadequate investigation**.**

44. The Tribunal considered paragraph 100 of *Nailard* as follows:-

"The Equality Act requires the Employment Tribunal to focus upon the conduct of the individual or individuals concerned and asked whether their conduct is associated with the protected characteristic. It is not enough that an individual has failed to deal with sexual harassment by a third party unless there is something about its own conduct which is related to sex."

45. The Employment Appeal Tribunal stated at paragraph 101 that a Tribunal must ask whether that conduct is related to the protected characteristic. Further, at paragraph 102:-

"… if inaction is due to illness or incompetence, or some real, non-discriminatory constraint upon action, one would not naturally say that it was related to (the protected characteristic) but if inaction or a cold shoulder is really indicative of silently taking sides with the perpetrator, even without encouraging the perpetrator, one might well say that it was related to sex, or the protected characteristic." The focus would be on the person against whom the allegation of harassment is made and his conduct or inaction. Further, the role of the Tribunal focuses on the conduct of the alleged perpetrator himself. It would be a matter of fact whether the conduct is related to a protected characteristic."

Further, at paragraph 104, the EAT found that the Employment Tribunal had fallen into error because it had thought that because the complaints were plainly related to the protected characteristic, the inaction of the decision makers must also be related to the protected characteristic. Again, this does not follow.

46. The Tribunal found that the circumstances of *Nailard* – where there was "inaction" by the Respondent – were somewhat different from this case. In this case, the Respondent *had* taken action - the unwanted conduct. The Tribunal found accordingly that this was not a case of "inaction or a cold shoulder". The question for the Tribunal, pursuant to

paragraph 102 of *Nailard*, was whether the conduct of the Respondent was indicative of taking sides with the perpetrator and, therefore, if so, whether, "one might well say that this was related to (the protected characteristic)".

47. The Tribunal found that Mr Dalley in effect did take sides with Dawn Squires. This finding was based on a reading of the minutes of his investigation meeting with her (at page 111). Most of the investigation interviews carried out by Mr Dalley were made up of neutral questions and appeared impartial. However, he made statements and gave his opinion when he was interviewing the subject of the grievance, Ms Squires. For instance, he said, "this obviously prompted you to reassure the staff and the Claimant took offence as to how you explained everything"; this statement went to the crux of the grievance – why Ms Squires acted as she did and what effect it had. This was a meeting between two senior managers discussing the issues when managing junior staff. Mr Dalley prompted Ms Squires during this meeting. Further, there was evidence that Mr Dalley treated the Claimant and Ms Squires differently during the investigation meetings. He asked Mr Gregory, the Claimant's line manager whether she was good at her job. He made no such investigation into Ms Squires's competence in her role.

48. Thus, according to paragraph 102 of *Nailard*, it may well be that the conduct related to the protected characteristic. The question for the Tribunal was - was the conduct and outcome of the grievance of the grievance connected to this protected characteristic? It was conduct that, in effect, failed to understand, and take sufficiently seriously, religious harassment.

49. The Tribunal did not view this as a personal failing of Mr Dalley. He had evidently taken a lot of time over this investigation and interviewed all possible witnesses. However, the Respondent had failed to provide him as investigating office with the tools to do the job.

50. According to the evidence before the Tribunal, the Respondent's policies in respect of discrimination, harassment, diversity and equal opportunities, amounted to a single Equal Opportunity Policy, which was a page and a half long; this failed to mention the word 'harassment' or provide any definition thereof. The Tribunal had sight of an extensive

bundle and heard evidence from several Respondent witnesses (including managers and from HR). There had been a three day hearing before this Tribunal during which the Respondent was professionally represented; questions had been specifically asked of witnesses as to the policies of the Respondent. The Respondent had raised the issue of its policies in its reasonable steps defence, showing it had addressed its mind to its policies, at least by the time of these proceedings. Nevertheless, there was no mention of any guidance or support for managers in discrimination or equality issues, save the page and a half policy during a grievance procedure and appeal which had taken many months. From the evidence before the Tribunal, all that hard-pressed management, in times of austerity, were aware of, was this page and a half policy.

51. The Tribunal would also like to record that in the experience of its lay members this was an unusual failure by an employer to understand its responsibilities under the Equality Act. This was particularly noteworthy, as the Respondent is subject to the public sector equality duty.

52. The Tribunal considered whether, as contended by the Claimant, the Respondent would have taken this matter more seriously if it had not been an equality issue. The first point to make here is that this is not a direct discrimination claim. In a harassment claim there is no need for a comparator. Nevertheless, the Tribunal agreed that this might be a useful question to ask to help clarify whether or not the conduct of the grievance amounted to harassment under the statutory test.

53. Tribunals must take into account any part of the EHRC Code that appears to them relevant to any questions arising in proceedings. Paragraph 7.1 of the Code concerns the relationship between the tests for direct discrimination and harassment. It provides that there is a difference between the test “because of” in direct discrimination and the test “related to in harassment. The example in the Code is very different from the example before this tribunal. It is an example of a worker who harasses a fellow worker because of a suspected affair; this is related to her sex (hence harassment) but it is not because of her sex (hence not direct discrimination). Accordingly the definition of ‘related to’ is, in appropriate circumstances, wider than that of ‘because of’.

54. In submissions, the Claimant stated that the Respondent would take, for instance, a racial complaint or a complaint of violence more seriously. The Tribunal did not accept that this Respondent would have taken a complaint in respect of race more seriously. The Tribunal found that the Respondent's failures were linked to equality, diversity and discrimination in general; there was no evidence that managers were given more support in discrimination complaints under different protected characteristics including race.

55. However, the Tribunal found that, had the claimant's grievance been, for instance that that they had suffered mistreatment from another employee - for instance dishonesty, violence, insubordination and the like - this would have been taken more seriously and would have been identified. The Tribunal's reasons for this finding are that the Respondent appeared to have a well-functioning grievance procedure and HR department. There was no suggestion before the Tribunal that this Respondent had failed to deal effectively with other performance or employee matters. Indeed there was evidence that they were, at the same time, dealing with the local grievance dispute about working practices.

56. Taking all the above into account and considering the matter holistically, the Tribunal found that the unwanted conduct did relate to the protected characteristic and accordingly met the statutory definition of harassment.

57. The Tribunal then went on to consider allegation g) which relates to the 1 August meeting. The Tribunal accepted the Claimant's evidence as to the conduct of Ms Squires. However, the Tribunal did not find that this meets the statutory test because it was not related to religion. Dawn Squires, the Tribunal found, was irritated by the complaint, but she was irritated also by the local arrangement conflict, and this was her primary concern. This was a conflict over staffing issues, and it was not statutory harassment.

58. The Tribunal then went on to consider the issues in respect of the appeal. They are as follows: at l) failing to include two of the three witness statements supplied by the Claimant in the appeal bundle; k) the contents of the witness statements supplied as part

of the appeal bundle; j) convening the appeal hearing so as to take place shortly after the Claimant's annual leave; i) the delay in convening the Claimant's grievance appeal hearing; m) failing to consider the 1 August 2016 incident as part of the Claimant's grievance appeal; o) censoring the Claimant's participation in the grievance appeal hearing; p) failing to uphold the Claimant's grievance on appeal. Again the Tribunal found that it was appropriate to consider all of these matters together as they formed a coherent whole.

59. Firstly, the Tribunal considered the delay, including the annual leave point. The Tribunal found that this, although it was unwanted conduct, was not related to religion. The primary reason for the delay for the appeal was that one of the respondent's responsible staff had suffered a personal and serious physical illness. Accordingly, as this was not related to the protected characteristic, the statutory definition of harassment was not made out in respect of the delay of the appeal.

60. The Tribunal then considered allegation k) - the contents of the witness statements supplied as part of the appeal bundle. This, the Tribunal understood, related to the performance criticism made of the Claimant during Mr Dalley's investigation. The Tribunal found that these did not relate to religion. Those were the views of the management of the Claimant's performance.

61. The Tribunal then considered allegation l) - the failure to include two or three witness statements supplied by the Claimant in the appeal bundle. In the view of the Tribunal this also fitted with allegation m) - failing to consider the 1 August incident, and o) - censoring the Claimant's participation. The Tribunal understood all of these three allegations to refer to the same matter, the failure of the appeal to consider the 1 August meeting. The Tribunal found that whilst this was unwanted conduct, but it was not related to religion. The reason that the Respondent took this course was that it wanted to save time, particularly that of senior management. Whilst the Tribunal was mindful that the test is not that of direct discrimination and no comparator is required, it found that the Respondent, at this late stage in the process, would have treated any other complaint in the same way. By this stage in the process, the Tribunal was not persuaded that the

conduct of the Respondent, in the person of the HR decision-makers and Mr Edmondson, related to religion. The employer was at this stage running through its procedure and it did not wish to have this made more complicated.

62. The Tribunal then considered the allegation of failing to uphold the Claimant's grievance on appeal. The Tribunal noted that the Claimant started the appeal meeting with emotive and less than scrupulously accurate remarks. She claimed that the matter had been racist and she made comments about Muslims as 'invaders' and 'trash'. The grievance had gone on for so long by this stage, that this may well have been the genuine belief of the Claimant. However, in the view of the Tribunal this cannot but have undermined her case before Mr Edmondson who had no previous involvement. Further, Mr Edmondson then became involved in lengthy discussions about whether or not the events of 1 August should be dealt with. Later, Ms Scott attended the appeal hearing, so Mr Edmondson had to deal with the issues surrounding the questioning of her work performance that had arisen in Mr Dalley's investigation. Essentially, in the view of the Tribunal, the appeal became bogged down in procedure and a number of satellite issues.

63. The Tribunal considered whether or not, following the tests laid down in *Nailard*, the appeal and its result were related to religion. The Tribunal could not find that Mr Edmondson was silently taking sides, or that there was action that was really indicative of him silently taking sides. The Tribunal reminded itself that considering how he might have treated a different allegation - such as violence - is not the correct test in a harassment case. However, as before, the Tribunal found that this was a useful way of shedding some light whether or not the conduct was related to religion. The Tribunal found that on the balance of probabilities, Mr Edmondson would not have treated an allegation relating to a matter such as violence, dishonesty or insubordination, more seriously. It is a different matter to decide if a grievance is upheld, rather than to review that original decision as to whether it should stand. Further, as the Tribunal could see little evidence that Mr Edmondson was taking sides with Ms Squires. Accordingly, the Tribunal found that the failure to uphold the Claimant's grievance on appeal did not amount to statutory definition of harassment.

64. The penultimate allegation was that the minutes of the appeal hearing were not sent to the Claimant. Whilst this was not denied, and the Tribunal accepted that this was unwanted conduct, the Tribunal did not find that this was related to religion. This was simply a matter of poor procedure on behalf of the Respondent rather than something that was related to religion.

65. The final issue for the Tribunal was that of confidentiality. The Tribunal understood this allegation to be related to the fact that Mr Gregory had met with Ms Scott following the appeal about matters that had arisen during the appeal meeting. The Tribunal noted that this issue was not raised in the Claimant's submissions. The Tribunal found that these actions did not meet the statutory definition of harassment. The Tribunal could not find that this was related to religion. This matter related to criticism of an employee's performance, which happened to have occurred during a grievance, which was about religious harassment. It was well removed from any relation to religion.

66. The Tribunal, having made its findings on the various issues, considered the emphasis put by the Respondent in its submissions on the context of the conduct complained of. In the view of the Tribunal this was a mistaken emphasis. Case law tells us that when considering what constitutes statutory harassment it may be appropriate to take into account the context. For instance, in an environment where workers are used to robust teasing, it might not be expected that an employee would genuinely take offence because they had participated in the past. However, this was a different scenario - a senior manager in a formal meeting about something not connected to religion. There was nothing in the context that might prevent this being unlawful harassment. The Tribunal, for the avoidance of doubt, found that the context of the meeting was a genuine attempt to reassure staff. In the view of the Tribunal, the emphasis by the Respondent on context was an emphasis on intent and this is only part of the statutory test for harassment; one must also consider purpose or effect. In effect the Respondent's emphasis on intent before the Tribunal echoed its emphasis on intent during its internal investigation.

67. The Tribunal then considered whether or not it had jurisdiction to consider those acts of harassment it had found or whether they were out of time. The Tribunal considered

whether all of the acts of harassment were within time or in the alternative constituted, what is known (for shorthand) as a continuing act. The Tribunal found that all the unwanted conduct stemmed from a single incident. This was the meeting of 8 January and all other acts flowed from and were entirely the product of this. It is true that different people were involved but that was because the Respondent, a large local authority, was following its grievance procedure.

68. However, none of the unlawful harassment was within time. Therefore, in the alternative, the Tribunal found that it was just and equitable to extend time for it to hear the Claimant's complaint. The reason for this was that the Tribunal accepted that the Claimant hesitated in starting her grievance because she was a junior employee compared to the subject of her complaint. She then went through the Respondent's own procedure: she raised a grievance that was investigated; she was dissatisfied; she raised an appeal; there was considerable delay, and then the Respondent rejected her appeal. It was only at this point, once she had exhausted the internal procedure, that she turned to the Employment Tribunal. Again in the view of the lay members in particular, this Tribunal would not wish to penalise a worker who, because they had taken advantage of an employer's internal procedure, did not bring a tribunal complaint within the statutory time limit. It is, in the view of the Tribunal, usually in the interest of good industrial relations to encourage employees and employers to seek to resolve their differences by means of their internal procedures, particularly where a Local Authority employer has a well set out grievance procedure, before placing the matter before the Tribunal. It would accordingly be unjust to prevent the Claimant from relying on the meeting of 8 January. The tribunal therefore exercised its discretion to extend time so as to consider the complaint.

69. Finally, the Tribunal considered the Respondent's reasonable steps defence under section 109(4). For a respondent to take advantage of this defence, it must show that it took all reasonable steps to prevent the harasser from carrying out the harassment or anything of that description.

70. Before the Tribunal the only evidence of respondent policies on equal opportunities,

harassment, diversity and the like, was the page and a half Equal Opportunity Policy. There was a suggestion that Ms Squires had undergone some training but there was no evidence before the Tribunal of its content. There was no evidence before the Tribunal that the respondent had provided Ms Squires or Mr Dalley with any adequate and accessible definition of or training about discrimination or harassment.

71. The Tribunal further noted in the Code at paragraph 10.47 that it could be a reasonable step for employers to put policies into practice and to provide appropriate training on equality law. There is no evidence that the employees here were made aware of any policies or that there was sufficient help and support for employees to ensure that they complied with equality legislation. Accordingly, the Tribunal found that the Respondents had not taken reasonable steps to prevent the discrimination and accordingly could not take advantage of this defence.

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Employment Judge Nash

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Date 7 January 2017