



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Reverend J G Hargreaves

v

Evolve Housing + Support

Heard at: London Central

On: 24, 25, 26 and 27 February 2020

Before: Employment Judge Andrew James
Mr D Clay
Mr M Simon

Representation

For the Claimant: In person

For the Respondent: Ms C Urquhart, counsel

JUDGMENT

1. The claims for harassment related to religious belief (Equality Act 2010, sections 26 and 40) succeed in respect of the allegations that (1) Ms Akano ignored the claimant on 1, 2, 4 February, 24 and 26 April and 7 May 2019; and (2) the claimant was questioned during the grievance process about the claimant's social media posts about the Scottish Christian Party.
2. The claim for direct discrimination because of religious belief (Equality Act 2010, sections 13 and 39) succeeds in respect of the allegation that the claimant was questioned during the grievance process, about the claimant's social media posts about the Scottish Christian Party.
3. The claim for direct discrimination because of race (Equality Act 2010, sections 13 and section 39) succeeds.
4. All of the other harassment and direct discrimination claims and the claims for victimisation (Equality Act, section 27) do not succeed.

REASONS

The Issues in the case

1. By a claim form presented on 14 July 2019, Reverend Hargreaves, referred to in this judgment as 'the claimant', brought complaints of race discrimination, religion or belief discrimination and victimisation. The claim is about alleged race/religious belief harassment/direct discrimination of the claimant by a colleague, Ms E Akano, following a discussion about homosexuality and lesbianism and victimisation/direct discrimination by his employer in relation to the subsequent grievance process. The issues were agreed at a case management hearing on 20 December 2019 and are set out at Annex A.

The Hearing

- 2 The hearing took place over four days. Evidence and submissions on liability were dealt with on the first three days. On the fourth day the tribunal deliberated and Judgment was reserved.
- 3 The tribunal heard evidence from the claimant, and from Mr Amara Gegbai, a Night Concierge. We considered a written statement from Mr Albert Adesanya, Night Concierge. For the respondent we heard from Ms Elspeth Hayde, Director of People and Culture, from Mr Jon Deakin, Area Manager for Central Community Services and Ms Debra Ives, Director of Operations. There was an agreed trial bundle of about 400 pages.
- 4 At the outset of the case we were asked to rule on the admissibility of certain sections of the claimant's witnesses' statements. We ruled that paragraphs 5 and 6 of the statement of Mr Gegbai, paragraphs 3 and 6 of the statement of Mr Adesanya, and the whole of the statement of a Mr Blackman would not be considered because this evidence was not relevant to the issues. We were also asked to exclude the section of the claimant's evidence at page 13 of his witness statement, relating to a discussion at a team meeting on 19 June 2019, about Croydon Pride. Subsequently however it was agreed that we would consider that matter and the witnesses were questioned and cross-examined, relatively briefly, where appropriate, in relation to it.
- 5 Given that there was no opportunity for Mr Adesanya's evidence to be tested by cross examination, his evidence did not carry much weight with us.
- 6 We are grateful to the parties, witnesses and representatives, for helping to ensure that the hearing was conducted in a professional manner. This is particularly the case since we recognise that for the claimant and some of the witnesses, the issues raised by some of the evidence were painful to recollect and to discuss.

Fact findings

- 7 The claimant has been employed by the respondent as a Supported Housing Night Concierge, since 22 October 2018. He works at Beacon House, South Kensington. Beacon House houses 16 single homeless young people, with medium to high support needs, in self-contained flats. Also working at Beacon House on the day shift was a Support Assistant called Ms Akano. She is a young black woman in her twenties.
- 8 The claimant is Black British and a practicing Christian.
- 9 The respondent is a housing charity that provides housing and support to over 2,000 homeless young people in London each year. Some are members of the LGBT community and some have become homeless because they came out as gay to their parents.
- 10 The respondent was previously known as South London YMCA, and was, for over 150 years, affiliated to the National Council of YMCAs, a leading Christian youth charity. In 2015 the organisation rebranded and changed its name to Evolve Housing + Support. The respondent employs about 230 people in total. About ten people are employed to work at Beacon House.
- 11 The respondent has a diverse staff profile. 32% of their staff identify as White British. 47% of staff are of the Christian faith. The organisation has an Equality and Diversity Policy. We were not referred during the hearing to any specific paragraphs of the Equality and Diversity Policy but its existence is noted. Equality and diversity issues are covered in their induction process, together with their Code of Conduct and the claimant was made aware of both during his induction. It is likely that they were covered in Ms Akano's induction process but no evidence was provided regarding the nature or extent of that.
- 12 The relevant passages of the Code of Conduct read as follows:
 - 12.1 Paragraph 3.2 states: "Our reputation depends on mutual respect and co-operation among all its employees".
 - 12.2 Paragraph 4.1 states: "It is expected that you will set yourself high standards of conduct and behave politely, respectfully, reasonably and professionally to customers, colleagues and external partners at all times".
 - 12.3 Paragraph 20.1 states: "You must not promote your own political or religious views while engaged in work for us".
- 13 We were referred to a document headed 'Gross Misconduct Examples', which includes at paragraph 2.4: "Being untruthful, withholding information or misrepresenting facts or events in any circumstances related to employment, including in any investigation, grievance [etc]..." And at paragraph 4.4: "Making unfounded or malicious allegations against colleagues, customers or external partners".
- 14 The claimant's role involves the provision of a waking night service to residents, which means that he is expected to be up and active throughout the night. He works four nightshifts per week. As part of the role, it is expected that there will be a handover to those working on the morning shift, during a 30-minute crossover period.

- 15 At the time, the claimant's line manager was Eleanor Bayes. Elizabeth Akano's line manager was Claire Footitt. Until 14 January 2019, there were no significant issues between Ms Akano and the claimant.
- 16 On 14 January 2019, the claimant had a conversation with Ms Akano. We find on the balance of probabilities that during that meeting Ms Akano commented to the claimant "you're one of those black men who like white women". Ms Akano then made a reference to the claimant having a mixed-race son and he replied: "You don't know me". He pointed out that his late wife of 17 years standing was a black Jamaican woman. This is a crucial piece of evidence and our reasons for that finding are as follows.
- 17 Ms Akano did not deny when questioned at the grievance investigation that there had been any such conversation. Rather, she put a particular gloss on it.
- 18 Mr Gegbai gave evidence to the effect that Ms Akano had said to him on one occasion that she did not like black people. It was suggested that it would be unlikely that a black woman would say that to him. However, it seems no more likely that Mr Gegbai, as a black man, would say that to a black woman. Ms Akano's allegation against Mr Gegbai in that regard was made in response to the allegation that had been made against her. We accept Mr Gegbai's evidence on this matter.
- 19 We find that the comment that the claimant was said to have made in relation to 'DL' (see the next paragraph) was not made. For all of these reasons, we preferred the evidence of the claimant on this point, rather than Ms Akano's version, which was not tested in evidence before us as she was not called as a witness.
- 20 It was alleged by Ms Akano that during this conversation, the claimant made a comment about a resident in Beacon House, who we will refer to as DL, to the effect of: "Look at DL and what she's doing with that little girl, it's disgusting". The implication was that DL was in a lesbian relationship with the other girl referred to and that the claimant was disgusted by that. We find that this conversation did not happen as alleged by Ms Akano. The claimant gave evidence before us, that he and his co-workers were heartened by the relationship between DL and the other girl. DL was quite a challenging individual. Her behaviour, and her general outlook improved, during that friendship. We accept his evidence in this respect which is not consistent with what Ms Akano alleges he said about DL on 14 January 2019.
- 21 Ms Akano then shifted the conversation to what the Bible says about homosexuality. During the conversation Ms Akano made a comment to the effect that 'people are born gay'. The claimant replied to the effect that paedophiles make the same argument, that they are born that way. The claimant went on to state that even if people are born with a condition, that does not put it beyond God's ability to change or 'heal' it.
- 22 The claimant stated in cross examination that by saying the above words, he was not alleging or suggesting that homosexuals are paedophiles. He did not consider that the comment would be offensive, or what he said was rude. When looking back at the conversation later, following the ignoring of him by Ms Akano, as set out below, he thought that the offence taken by Ms Akano may have been because of him quoting from the Bible. He stated that from a biblical perspective, one starts from the assumption that 'man is born in sin and shaped

in iniquity'. He did not think that anything that he had said was in any way offensive, from that perspective. This is a matter of some importance and we return to it in our conclusions.

- 23 Following her conversation with the claimant on 14 January, Ms Akano carried out an on-line search in relation to him. She came across on-line material showing his religious views on homosexuality. She was, Mr Deakin told us, confused and shocked by what she saw.
- 24 On 1 February 2019, the claimant said good morning to Ms Akano when she arrived at Beacon House. She was wearing headphones at the time, which she took off and said to the claimant's colleague Mr El Sheikh "I couldn't hear a word you said". Mr El Sheikh repeated: "Good morning", to which Ms Akano responded: "Good morning". When the claimant said good morning to Ms Akano again, his greeting was ignored. When the claimant challenged Ms Akano about ignoring him, and the need for colleagues to be respectful towards each other, Ms Akano said that she did not respect him. The claimant told Ms Akano that he would be making a report to his manager about what had happened. He did not however indicate that he would be raising with his manager a complaint of discrimination, contrary to the Equality Act.
- 25 It was suggested that Ms Akano had started her menstrual cycle, and that was the explanation for her comments and behaviour. We do not accept that explanation, since her behaviour did not end there. Also, she ignored the claimant but not Mr El Sheikh and so was selective. What happened subsequently cannot reasonably be put down to Ms Akano's menstrual cycle and therefore on balance, nor can what happened on 1 February.
- 26 It appears that following this conversation on 1 February, Ms Akano spoke to her manager Ms Footitt. The same day, Ms Footitt emailed Ms Bayes. Ms Footitt referred in her email to reports from three different members of staff about alleged comments by the claimant about homosexuality. However, as will become clear from what follows, only Ms Akano's allegations were investigated, although Mr Deakin did speak to the other two members of staff.
- 27 On 2 February 2019, during the handover, the claimant again said hello to Ms Akano and she effectively ignored him. The claimant emailed Ms Bayes following this incident.
- 28 On 4 February 2019 another interaction took place at the evening handover. When the claimant spoke to Ms Akano at 9 pm he was again ignored by her. He complains that she had in effect "sent him to Coventry". He removed himself to the lounge area. At 9:30 pm he returned to the office and asked Ms Akano for the handover. She started to do so but when his colleague Mr El-Sheikh arrived, Ms Akano turned her attention to Mr El-Sheikh, making eye contact with him only. She answered questions regarding the handover from the claimant but otherwise did not engage with him. He again complained to his line manager Ms Bayes by email and referred to Ms Akano's behaviour as being "a continuation of the pattern of abuse that I have reported to you and that we discussed yesterday". Again, he did not use the term discrimination or similar words in that email.
- 29 On both 5 and 8 February 2019 Ms Footitt spoke to Miss Akano. The purpose of those conversations was to advise Ms Akano that however angry she felt about anything that the claimant had said to her, she: "Must not ignore GH or

anyone in the workplace as this is seen as bullying and [she] needs to remain professional at all times". On 8 February, a similar conversation took place. Ms Akano clearly stated that she was not happy that she had to suppress her emotions as the claimant "was the one in the wrong". Ms Footitt's note continues: "I made it clear that no matter who is right or wrong, we all have to remain professional and filter/channel these emotions in a way that does not compromise our work practice and that of others".

- 30 On 10 February 2019 the claimant emailed his manager Ms Bayes requesting that the CCTV footage for the night shift handover on 1, 2 and 4 February be retrieved and stored. That was copied to Clare Footitt, who confirmed she would view the relevant footage. It is apparent from a later email dated 15 February 2019 sent by Ms Footitt to Mr Deakin that she did so. She questioned whether the dates given by the claimant were accurate as the earlier dates showed no interaction between the claimant and Ms Akano. As for the footage from 4 February she said: "[It] does not show anything unjust - but we have it if we need to review it during the investigation". The claimant was not shown or sent that email so was not aware that the dates given by him had been questioned.
- 31 On 11 February 2019 the claimant asked for safeguarding measures to be put in place, so that he did not have to "cross paths" with Ms Akano. Ms Bayes emailed the claimant back the same day, to state that he should: "Leave the handover to your night concierge colleague, whenever your shifts coincide with those of Elizabeth Akano, you may base yourself in the manager's office until EA has left the building, or it is your time to leave in the morning". He was advised to only communicate with Ms Akano in writing if possible. If it was necessary to speak to Ms Akano, he was told to ensure that a third party was present.

The claimant's formal grievance, 12 February

- 32 On 12 February 2019 the claimant submitted a formal grievance against Ms Akano to Taffy Madjgara (who works in HR) and to Ms Bayes. The grievance mentioned the incidents on 1, 2 and 4 February 2019. He stated at the end of his grievance that the last incident had "left me in no doubt that there was, and is, a case of discrimination to answer". We understand the claimant to be referring to religious belief discrimination.

Ms Akano's formal grievance 13 February

- 33 On 13 February 2019 Ms Akano emailed Dominika Blaszczyk to say that she wished to make a formal complaint. Ms Blaszczyk replied to the effect that if she wished to do so, she needed to put her complaint in writing. Ms Akano submitted a formal written grievance against the claimant on the same day about the claimant's comments on 14 January. She included as potential witnesses, Poonam Pankhania, Mr El- Sheikh, and Mr Gegbai.
- 34 Mr Deakin was appointed to investigate both grievances. He was advised by Taffy Madjgara to meet with Savannah and Georgia, the two other females who were referred to in Ms Footitt's email of 1 February to Ms Bayes. He did so but did not prepare any formal statements.
- 35 A meeting took place between Mr Deakin and Ms Akano on 18 February 2019 to discuss her grievance against the claimant. What Ms Akano told Mr Deakin broadly follows what she alleged in her grievance hearing, which is set out below.

- 36 John Deakin met with the claimant about his grievance on 25 February 2019. At that meeting the claimant noted the apparent reluctance of his colleagues Mr Pankhania and Mr El-Sheikh to get involved and mentioned that: "Her demeanour is very much evident on the CCTV footage". At the conclusion of the meeting, Mr Deakin confirmed that he would carry out a full investigation and speak to all the witnesses including Mr Gegbai, who was present at the meeting as the claimant's representative. At the meeting, the claimant handed over a written grievance note, which included, at the end, a reference to his colleagues Mr Gegbai and Mr Adesanya, having related to him "their own experiences of rudeness from Ms Akano. This included that Ms Akano had told Mr Gegbai that "she doesn't like black people".
- 37 Both the claimant and Ms Akano were told of the other's grievance and invited to investigatory interviews. Those took place on 4 March as planned. The claimant presented a written response to Ms Akano's grievance at his interview, as well as answering questions about it. He again reiterated the importance of checking the CCTV footage in relation to the interaction between him and Ms Akano on 1, 2 and 4 February 2019. Prior to the meeting, Mr Deakin was advised by Ms Blaszczyk not to speak to the claimant about his views on the Bible, other online material he had printed off about the claimant, or the interviews with Savannah and Georgia. Despite having been so advised, Mr Deakin did question the claimant at the meeting about his membership of the Scottish Christian party. The claimant objected to this line of questioning, and Mr Deakin was advised by Ms Blaszczyk to stop it.
- 38 At her meeting with Mr Deakin, Ms Akano was asked about the comment to the claimant about him "liking white women". She said that there was a conversation but: "Not the way he said it ... Maybe this was about the picture he showed me. The mother of his child was white and I referred to myself that I date white guys and that we have something in common." Mr Deakin stated that it was alleged that she had said she did not like black people. She replied: "I didn't say that to him". When asked if she had ever mentioned that to anyone she said: "No this came from Amara Gegbai and he made this comment towards me". Mr Deakin told us and we accept that when she was being questioned about these allegations, she became visibly upset, she was distraught and he had to stop the meeting for a while. She told Mr Deakin she had no issues with the claimant being religious and that religion "fascinates her".
- 39 Following those interviews on 4 March 2019, Mr Deakin emailed Eleanor Bayes asking when Mr Gegbai was available as he needed to speak with him. He also asked for confirmation as to what was said in the initial interview with the claimant, about his religious beliefs, when he was applying for a job. Ms Bayes emailed back on 6 March 2019 to confirm: "After George made reference to his church during one of his answers to the interview questions, Ade and I subsequently asked him whether he was confident that he could present an entirely neutral demeanour regarding religion/personal views if employed by Evolve as we as a company do not condone sharing/ encouraging or preaching any religious views within the workplace". The claimant had confirmed that he had no issues with that instruction. This is consistent with the evidence before us which showed that, apart from the one conversation on 14 January 2019, which Ms Akano had initiated, the claimant did not share his religious views at work.

- 40 The minutes of the grievance meeting were sent to the claimant by Ms Blaszczyk. He did not agree them because he did not “see any report of Mr Deakin referring to the content of the Scottish Christian Party manifesto, which I found highly inappropriate and, indeed, led me to call on your intervention during the hearing. I believe that this needs to be included, as I would certainly refer to it in the event that I had to appeal against a negative outcome of the grievance proceedings”.
- 41 Following the meeting Mr Deakin decided not to interview Mr Gegbai. We deal with the reasons for that below. He also decided not to speak to Mr El-Sheikh. His explanation for that, which we accept, was that Mr El Sheikh did not see what the claimant alleged happened on 1 February. What happened on 2 and 4 February was not in dispute.
- 42 As for the CCTV footage, it appeared to Mr Deakin from the email sent to him by Miss Footitt on 15 February that the footage from 4 February did not show anything untoward. But in any event, what happened on 4 February was not in dispute. It was in particular Ms Akano’s demeanour towards the claimant on 1 February that the claimant took issue with, but the 15 February email from Ms Footitt made clear that she had not found any CCTV footage showing the claimant interacting with Ms Akano on 1 or 2 February.
- 43 Mr Deakin produced the outcomes to both grievances on 25 March 2019 and they were sent to the claimant and Ms Akano on 26 March 2019. The grievances were not upheld.

The outcome of the claimant’s grievance

- 44 In relation to the allegation against Ms Akano that she ignored the claimant Mr Deakin concluded: “EA states that at this time she did not feel she respected him due to his views on homosexuality and religion. EA stated she felt very uncomfortable around DH and did not want to engage with them. EA found his comments around linking homosexuality in the same sentence to paedophilia, homophobic”.
- 45 In relation to the allegation that Ms Akano said to the claimant “you’re one of those black people who likes white women” he concluded: “EA does not accept that she stated this but did refer to her own relationships. There is no evidence in speaking to EA that what she said implied she did not like black people or was racist. There are no witnesses to any conversation so it is not possible to say one way or another”.
- 46 Mr Deakin recommended that Ms Akano be given management guidance “with a subsequent file note made as part of her 1:1 meetings regarding remaining professional and courteous at all times. Any further discussion on disciplinary measures to be had by managers and HR should this continue. EA to attend E&D training if not completed within previous year”. The management guidance was duly given.

The outcome of Ms Akano’s grievance

- 47 As for the grievance against the claimant, Mr Deakin concluded that whilst he had potentially breached paragraph 20.1 of the Code of Conduct because he did promote his own religious or political beliefs, that was in the context of a discussion which had been started by Ms Akano. Although the discussion did impact on Ms Akano, there was no intent to breach policy. In the conclusion

section, he found that whilst the claimant did share strong personal beliefs that caused mental distress, the allegation was not proved. Further, whilst the claimant “may have discussed views and ideas which are at odds with EA’s, there is no evidence that those views directly breach Evolve’s Code of Conduct or Equality and Diversity Policy”. There was a specific finding, in relation to the alleged comments about the customer DL, that since there were no witnesses, it was not possible to prove or disprove what was said. In the recommendations section it was recommended that the claimant be given management guidance regarding expectations of conduct in the workplace, together with management guidance regarding Evolve’s expectations in terms of online presence and external activity. Again, management guidance was duly given.

- 48 The claimant appealed against the grievance outcome on 2 April 2019. The grievance appeal was heard by Debra Ives on 17 April 2019. During the appeal the claimant told Ms Ives: “In discussion with Jon, the investigator, he says about linking homosexuality with paedophilia. As I pointed out, it is reasonable for me to say, in response to Liz and anyone who says that ‘people are born gay’, that paedophiles would also say that they were born that way. This is my standard response to the argument about people being born as homosexual. It is not illegal to put the two words in the same sentence”. Later in the meeting he is again recorded as saying: “I have a standard response about people saying that people are born homosexual and that is ‘paedophiles also say that’”. As stated above, this is a matter of some importance and we return to it in our conclusions.
- 49 On 24 April 2019, the claimant reported to Ms Hayde that Ms Akano had started to repeat the same behaviour of ignoring him but acknowledging the greeting of his colleagues. On 26 April 2019 he provided further details about the incident and on the same day he reported that Ms Akano had repeated the same behaviour.
- 50 In response to these further allegations, on 26 April 2019, the same day, Ms Footitt informed Ms Akano that she was being moved to a mid-shift as a result of the further allegations from the claimant. This reduced the possibility of the claimant having to interact with Ms Akano.
- 51 In an email dated 28 April 2019 to Ms Footitt and others, Ms Akano issued a further grievance, in which she alleged that the claimant was being petty and hostile towards her and he had put up a Palm Sunday cross in the office.
- 52 Ms Akano was sent a notice of investigation that she was failing to act respectfully and professionally towards the claimant, on 3 May 2019.
- 53 On 5 May 2019 of Mr Akano resigned on notice. It was not made clear to us when her notice expired.
- 54 Both the claimant and Ms Akano attended a training event on 7 May 2019. In an email dated 9 May 2019 to Ms Bayes, the claimant complained that Ms Akano: “Continued her abusive behaviour of ignoring me completely on Tuesday, whilst engaging with everyone else on the course”. We accept the respondent’s explanation that the claimant and Ms Akano were put on the same course due to a mistake. It was not down to any deliberate intent.
- 55 On 8 May 2019, Debra Ives interviewed Mr Deakin. She then interviewed Ms Blaszczyk on 13 May 2019. Amongst other things, Ms Blaszczyk confirmed that she had advised Mr Deakin not to include the statements from the two members

of staff, Savannah and Georgia at Beacon House. She also confirmed that she did not instruct him that he should not take statements from the Night Concierge staff.

- 56 Ms Ives raised that with Mr Deakin who emailed her on 15 May 2019 to say: “I was subsequently advised by Dom that I could not use the views of others to inform the investigation as they had not put in a grievance. This was in relation to the use of Savannah and Georgia to support one side and I applied it to [Mr Gegbai] out of fairness and non-bias of the investigation for George. I mentioned this to Dom at the time. George did not witness what Amara had stated he had heard. Without interviewing all staff to see if anyone else had observed Elizabeth to be racist and added with her genuine distress and shock when questioned about this, I felt that I would also not be able to prove or disprove this part of the investigation. I recommended at the time that further investigation should occur on issues raised after this investigation was completed.”
- 57 As part of her investigation, Ms Ives also interviewed Miss Bayes and Ms Footitt, although their statements were not referred to and do not assist us.
- 58 Ms Ives provided the claimant with his grievance appeal outcome on 22 May 2019. The grievance was rejected, save that Ms Ives considered that Mr Deakin should have communicated to the claimant that he did not intend to interview the witnesses because the behaviour alleged, which they witnessed, was not denied.
- 59 Due to the comments the claimant made during the grievance appeal meeting Ms Ives also considered it appropriate to provide the claimant with further management guidance in the appeal decision letter as follows:
- “During the grievance appeal hearing on 17th April you made a comment regarding homosexuality and sexual orientation. [Ms Ives then quoted the comment referred to above] ... I need to address this. This statement, by drawing a comparison between gay persons and paedophiles, can be interpreted as negative in relation to people who identify as gay. I am fully aware that this is a topic which is a matter of much commentary and debate, but, objectively, the vast majority of people would find it offensive to be compared with a paedophile ... As previously made clear, it is not appropriate to discuss matters of religion, sex and sexuality at work and I trust that you will bear this and the above points in mind (as well as the management guidance previously issued) in relation to your conduct going forward”.
- 60 Ms Ives told us that her motivation in giving this guidance to the claimant was that if he continued to make such statements he would be in breach of the respondent’s policies and procedures and could be subjected to disciplinary action. The claimant accepted that what was said was appropriate guidance but did not feel it was appropriate to give the guidance in this letter, about a ‘protected conversation’. Meaning that in his view, since his grievance was about alleged discrimination, what he said during that grievance process was ‘protected’.
- 61 Jenny Blake, Area Manager, investigated the claimant’s further complaint about Ms Akano’s behaviour towards him in April and May 2019. Her report was produced on 5 June 2019. She recommended that the matter proceed to a

disciplinary hearing. However, since Ms Akano was leaving, that was not proceeded with any further.

62 It appears that Ms Akano's further grievance was dealt with in her absence since she did not attend the meeting. It was rejected. Ms Akano was informed of that on 13 June 2019.

63 On 19 June 2019 a team meeting took place at Beacon House, which the claimant attended. At that meeting, a woman called Alice attended to discuss attendance at a Croydon Pride event. Other events were also discussed, including attendance at museums, a football match, a trip to Hyde Park, paintballing, a trip to Brighton, and a pizza night out. We also understand that a gospel choir was invited to attend. (For some unknown reason the claimant was not told about that but in the absence of any further detail as to why that was the case, it does not assist us any further).

64 The claim form was received by the tribunal on 14 July 2019. A preliminary hearing took place on 20 December 2019, at which the issues in the case were identified. Amended Grounds of Resistance were subsequently filed on 8 January 2020.

Relevant Law

Direct Discrimination

65 Under s13(1) of the Equality Act 2010 read with ss9 and 10, direct discrimination takes place where person A treats person B less favourably because of race/religious belief than person A treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

66 In many direct discrimination cases, it is appropriate for a tribunal to consider, (1) whether the claimant received less favourable treatment than the appropriate comparator; and (2) whether the less favourable treatment was because of the protected characteristic. In some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' person B claimant was treated as she/he was.

Burden of proof

67 Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

68 Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

- 69 The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

- 70 Further, it is important to recognise the potential limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Victimisation

- 71 In order to succeed in a victimisation claim, a claimant must demonstrate that he/she did a protected act. This includes making a complaint of discrimination covered by the Equality Act. The claimant must then show that she/he was subjected to a detriment as a result (S.27 EQUA).

Harassment

- 72 Section 26 Equality Act 2010 reads:

26 Harassment

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3)
- (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.

- 73 A harassment case involves five questions. First, did the conduct took place at all. Second, was the conduct unwanted? Third, was the conduct related to sex? Fourth, did the person responsible for the conduct have the proscribed purpose.

Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

- 74 We were referred to the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which Underhill J (as he then was) said at paragraph 15:

A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to ... the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt

- 75 We also refer to Land Registry v Grant [2011] ICR 1390 in which the head note records:

When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

The European Convention on Human Rights, Article 9 - Freedom of Thought, Conscience and Religion

- 76 Article 9 reads:

- (1) *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- (2) *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic*

society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

- 77 The courts have often had to consider the potential “clash of rights” between the protected characteristics of religious belief and sexual orientation.
- 78 The case of *Ladele v London Borough of Islington and Liberty [2009] EWCA Civ 1357*, concerned a registrar who refused to conduct gay civil partnerships due to her religious belief that marriage should be between a man and a woman. She was dismissed. Although she succeeded in her claims of discrimination in the employment tribunal, the decision was overturned by the EAT and Court of Appeal and was not restored at the European Court (in the linked hearing with *Eweida* and others). The Master of the Rolls concluded that Mrs Ladeles’s “*proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington’s concern to ensure that all its registrars manifest equal respect for the homosexual community*” (paragraph 55).
- 79 In *McFarlane v Relate Avon Ltd 2010 EWCA Civ 880*, Mr McFarlane was dismissed for refusing to offer counselling to same sex couples on sexual matters despite that being within his job description as a counsellor. His discrimination claims went to the Court of Appeal and Europe but did not succeed. In his renewed application for permission to appeal to the Court of Appeal, Laws LJ said: “*In a free constitution such as ours there is an important distinction to be drawn between the law’s protection of the right to hold and express a belief and the law’s protection of that belief’s substance or content. The common law and ECHR art 9 offer vigorous protection of the Christian’s right and every other person’s right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.*”
- 80 In *Haye v Lewisham 2010 (ET case number 2301852/2009)*, an employee emailed the Lesbian and Gay Christian Movement saying that being gay was a sin and urging them to “*repent and turn from your simple ways before it’s too late... Hell is not a nice place*”. She was dismissed as a result. Her discrimination claim failed. The tribunal held: “*It was not the claimant’s religious views, per se, but the manner in which she expressed them that led to her dismissal. Having read the email in question, we are satisfied that on any objective view, it is highly offensive, homophobic and the language is aggressive and violent*”. (Paragraph 36)
- 81 In *Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch)*, the High Court held that a Christian Housing Manager had been wrongfully dismissed when he was demoted and given reduced pay because of a news article he posted on his personal Facebook page, outside work hours, about gay church marriages and which noted his objections in moderate terms. Nor were his views considered disrespectful or liable to cause offence.
- 82 Likewise in *Ngole v University of Sheffield [2019] EWCA Civ 1127*, a mature student posted on Facebook comments such as “*same-sex marriage is a sin*”, “*homosexuality is a sin*” and that God will “*judge all those who indulge in all forms of wicked acts such as homosexuality*”. The Court of Appeal held that the

University's decision to remove him from the social work course was too harsh. The University had not considered how he might be given guidance to express his views more moderately.

83 Ms Urquhart submitted that the following principles can be drawn from these authorities, which we accept;

83.1 the right to believe whatever a person wishes to believe is unfettered (*Article 9 (1)*);

83.2 the right to manifest or express that view is however qualified (*Article 9 (2); McFarlane; Hays*);

83.3 the right to express your religious beliefs must be balanced with the right to avoid discriminating against another group (*Ladele*);

83.4 Employers have to consider whether such expressions offend their codes of conduct and/or bring their business into disrepute (*Smith, Ngole*).

Conclusions

84 We now apply the law to the facts to determine the issues.

85 In reaching our conclusions, we have considered applying the burden of proof under the Equality Act 2010. We have however, in all of the matters considered, been able to arrive at clear conclusions on the facts without applying them in strict sequence, See *Hewage* above.

Equality Act 2010, section 26 and section 40: harassment related to religious belief

86 There are three allegations of harassment. We deal with them in turn.

Issue 1.1 – Ms Akano 'sending claimant to Coventry' – 1 Feb to 7 May 2019

87 We have found as a fact that Ms E Akano did ignore the claimant, by refusing to interact with him, either at all, or by only interacting with him on a very limited basis, on 1, 2 and 4 February, and on 24 and 26 April 2019, during handovers or when arriving at Beacon House. She would greet others but ignored the claimant's greeting. On 7 May 2019, Ms Akano ignored him at a training event they both attended.

88 The conduct of Ms Akano was unwanted by the claimant. He did not want to be ignored.

89 As to whether her conduct was related to religious belief, we find that it was. It arose out of Ms Akano's conversation with the claimant in the middle of January 2019. She was clearly upset by the claimant's comment which appeared to make a link between paedophiles and the gay community. We say more about that comment when considering issue 1.3 below. It is sufficient to record at this point that we consider Ms Akano's concerns about this comment were understandable. However, matters did not end there. Following their conversation, Ms Akano made internet searches about the claimant. She did not like what she saw relating to his religious beliefs. The initial conversation took place on 14 January. Ms Akano started to ignore the claimant on 1

February, over two weeks later. We therefore conclude that it was the claimant's religious views and in particular his religious views about homosexuality, and not simply the comment about paedophiles, that influenced her subsequent refusal to interact with him. Her conduct towards the claimant was therefore related to religious belief.

90 Ms Akano subsequently told the claimant that she did not respect him. We conclude from this comment that her purpose in ignoring him, was to create a humiliating etc environment for him. In any event, we conclude that the effect of her ignoring him was to create such an environment. The claimant was not being over-sensitive. He was genuinely upset by Ms Akano's treatment of him, which created a hostile environment for him, albeit at the lower end of the scale of seriousness. This claim therefore succeeds.

Issue 1.2 – Jon Deakin's investigation

91 There are three aspects to this allegation. These are whether Jon Deakin carried out the investigation into the claimant's grievances in a biased and partial or otherwise detrimental manner, including by him (a) questioning the claimant, during the grievance process, about social media posts by the claimant about religious matters; (b) by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and (c) in relation to the grievance outcome?

92 As to (a), the claimant's online presence was not part of Ms Akano's grievance. The claimant has a right to freedom of expression which includes the right, in certain instances, including his personal online presence, to make comments which others may find offensive. The right to freedom of expression is however a qualified right. This means that due regard has to be had to the rights and freedoms of others. Freedom of expression, and the corresponding freedom to offend, is not open-ended.

93 We have found as a fact that Mr Deakin questioned the claimant at the grievance hearing on 4 March 2019 about posts relating to his association with the Scottish Christian Party. Since this was not a matter raised in Ms Akano's grievance Mr Deakin was advised by HR not to question the claimant about the Bible, or about his online activity. When he was questioned at the meeting about the Scottish Christian Party, the claimant objected to that line of questioning. Mr Deakin was advised by the HR representative Ms Blaszczyk to cease that line of questioning. The minutes of the meeting do not include reference to the questions asked, even though the evidence shows that such questions were asked. The absence of that line of questioning from the minutes is further confirmation, in our view, that it was not appropriate.

94 Having concluded that the factual elements of this claim are made out, to the extent set out above, we also conclude that the questioning of the claimant was unwanted. He was upset by it. He asked HR to intervene; and he asked for the minutes to be corrected.

95 This line of questioning was directly related to the claimant's religious belief since the claimant's involvement with the Scottish Christian Party is related to his religious beliefs (regardless of whether it also relates to his political beliefs).

96 Finally, we conclude that questioning the claimant about these matters at the grievance hearing was not done with the purpose of creating a hostile or humiliating environment. Nevertheless, it had the effect of doing so and it was

reasonable for it to have that effect. The claimant was not being oversensitive. This claim therefore succeeds.

97 As to (b), the factual elements of this claim are made out - some of the witnesses were not spoken to. We conclude that not doing so could amount to 'unwanted conduct'. We have found as a fact however that the reason Mr Deakin did not speak to the witnesses had nothing to do with the claimant's religious belief. It was because he did not think anything they might have to say would take matters any further. We disagree with him in relation to the reasons he gave for not interviewing Mr Gegbai. To his credit, during the hearing Mr Deakin accepted in hindsight that he should have done so. We conclude however that Mr Deakin's view at the time was a genuine one. That view was not related to the claimant's religious belief. We further conclude that not speaking to the witnesses did not create a humiliating etc environment. Indeed, we struggle to see how such an allegation could succeed as a harassment claim at all. This claim therefore does not succeed.

98 As to (c), we do not consider that the grievance outcome was biased, partial or otherwise detrimental. We consider that both of the grievance outcomes were reasonable and expressed in measured terms. If Mr Deakin was biased against the claimant, to the extent claimed, he would have been likely to have arrived at a different conclusion on Ms Akano's grievance against the claimant. Both her and the claimant were subject to what we conclude was reasonable management guidance. See further on that our conclusions regarding Issue 1.3 below.

99 Further, we conclude that the grievance outcome was not related to the claimant's religious belief. The questioning of the claimant about his online presence, including his membership of the Scottish Christian Party did not form any part of the findings on the grievance, or the grievance outcome letters.

100 Finally, in arriving at the grievance outcome, we conclude that it was not the purpose of Mr Deakin to create a humiliating etc environment. Further the grievance outcome could not reasonably have had that effect.

Issue 1.3 - Alleged 'castigation' - appeal outcome letter – 22 May 2019

101 The management advice set out by Ms Ives in the grievance appeal decision letter was in response to the claimant saying to her at their meeting that it was reasonable for him to say: "*in response to Liz and anyone who says that 'people are born gay', that paedophiles would also say that they were born that way. This is my standard response to the argument about people being born as homosexual. It is not illegal to put the two words in the same sentence*".

102 The claimant is correct to say that it is not illegal to use those words together, in the sense that it is not a criminal offence. Many people however, whatever their sexual orientation, who do not share the claimant's deeply held and genuine religious beliefs, would find the use of those words in that context to be offensive. Ms Akano found them offensive, as did Mr Deakin and Ms Ives. The members of this tribunal understand why they would do so. Indeed, making such a remark in a work context could well amount to harassment related to sexual orientation.

103 We accept that those words were said by the claimant in the context of a confidential discussion about his grievance appeal. The claimant having made those remarks in the grievance appeal hearing, we consider that it was entirely

appropriate for Ms Ives to provide him with management guidance in the grievance appeal outcome letter.

104 Further, the way that Ms Ives expressed herself did not in our view amount to 'castigation' of the claimant. We consider that both the words used by her and the context in which they were used were entirely appropriate and reasonable. By using those words, Ms Ives was pointing out to the claimant, in measured terms, the possible adverse consequences to him of using those words in a work context. By so doing she was also protecting the respondent from potential claims of harassment by other staff who might reasonably be offended by such remarks. She was not criticising his right to hold, privately, religious beliefs.

105 Since those words do not amount to castigation, the factual elements of this claim, arguably, are not made out. If they were, then we accept that, from the claimant's perspective, the management guidance was unwanted.

106 However, the guidance given was not related to religious belief. It is of course true that the words used by the claimant arose in the context of a discussion about religious belief. However, the claimant's religious beliefs do not require him to express himself in a way which draws an apparent comparison between paedophiles and the gay community. Many people would find such a comparison offensive, whatever their sexuality.

107 Finally, in relation to this issue, we do not consider that the management advice given to the claimant about the words used in the grievance appeal meeting created a humiliating etc environment for him. They were certainly not used with the purpose of creating such an environment. Nor do we consider that they could reasonably have had the effect of creating such an environment.

108 As to the comparison between homosexuality and paedophilia, such comparisons have been drawn in the past, to the detriment of the gay community. It was not so long ago that employees could justify dismissing gay employees on the basis of the prevailing view at the time that gay men were a potential threat to children. See for example *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174, a case concerning a claimant employed as a maintenance handyman at the respondents' children's camp. The Employment Tribunal, however, found that the dismissal was for a substantial reason within the meaning of s.57(1)(b) of the Employment Protection (Consolidation) Act and that it was fair. That finding was upheld on appeal.

109 In the UK at least, such views are no longer widely held and employers acting on the basis of such views today would be acting unlawfully, both under unfair dismissal law and discrimination law.

Equality Act 2010, section 13; Equality Act 2010 section 39: direct discrimination because of religious belief; detriment

110 There are two elements to this claim, which are dealt with under the two sub-headings below.

Issue 5.1 - did Clare Footitt or others encourage Ms Akano to raise a counter-grievance against the claimant in February 2019?

111 We refer to our findings of fact above. We have found that neither Claire Footitt nor any others encouraged Ms Akano to raise a counter-grievance against the claimant.

112 Since the factual elements of this claim are not made out, this part of the claim fails.

Issue 5.2 – Jon Deakin’s grievance investigation

113 Again, there are three elements to this claim. Namely, did Jon Deakin carry out the investigation into the claimant’s grievances in a biased and partial or otherwise detrimental manner, including by him (a) questioning the claimant, during the grievance process, about his social media posts about religious matters; (b) by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and (c) in relation to the grievance outcome?

114 As for (a), a claimant cannot succeed in relation to both a harassment claim and a direct discrimination claim on the same set of facts – see S212(1) and (5) Equality Act 2010. Section 212(1) provides that ‘detriment’ (for the purposes of s39) does not, subject to subsection (5) (which is not relevant here), include conduct which amounts to harassment. What follows would only therefore be relevant if our findings in relation to harassment were subsequently found to be wrong.

115 We refer to our conclusions above in relation to the harassment allegation at Issue 1.2 (a). We adopt that reasoning here as well. As a matter of fact, the claimant was asked about his online posts relating to the Scottish Christian Party at the grievance meeting with the claimant on 4 March 2019.

116 As to whether that was less favourable treatment, we conclude that it was. We conclude that a hypothetical comparator who did not hold the claimant’s religious beliefs would not have been questioned in the same way by Mr Deakin about their personal online material; and nor would their personal online material have been likely to have been searched at all.

117 We conclude that the reason for those questions was the claimant’s religious belief. We conclude that Mr Deakin was offended by the online material he found which set out the claimant’s religious beliefs. Because of that, he pursued an inappropriate line of questioning of the claimant during the grievance meeting. Mr Deakin may also have been influenced by the comment made by the claimant to the effect that “paedophiles also say they are born that way”. That is not a religious belief. It is an argument used by the claimant in relation to his religious beliefs which could well cause offence to others, including Mr Deakin, as acknowledged above. But that comment did not require Mr Deakin to question the claimant about his involvement with the Scottish Christian Party at the grievance hearing. We conclude that it was the online searches that caused him to do so. This claim would therefore have succeeded as a direct discrimination claim, were it not for it having already succeeded as a harassment claim.

118 As to (b) and (c), we refer to our above conclusions on the harassment claim, issues 1.2 (b) and (c). The test in a harassment claim as to whether or not a person’s actions are related to religious belief, is wider than the test in a direct discrimination claim as to whether conduct is because of religious belief. Logically, if a causal connection is not made out in a harassment claim, the

necessary causal connection cannot be made out under the stricter 'reason why' test which is applicable in a direct discrimination claim. We conclude that both Mr Deakin's decision not to speak to certain witnesses, and his decision in relation to the grievance outcome, did not amount to less favourable treatment. Nor were they because of religious belief.

Issue 5.3 - alleged castigation by Ms Debra Ives in grievance appeal outcome decision letter

119 Again, we refer to our findings and conclusions above in relation to this allegation in the context of the harassment claim. We adopt the same findings and conclusions. The claimant was not castigated by Ms Ives. In any event, the management guidance given to him in the grievance appeal outcome letter was appropriate and reasonable, for the reasons set out above. It was not less favourable treatment. Nor was it because of religious belief.

EqA, section 13; EqA section 39: direct discrimination because of race; detriment

120 There is just one element to this claim, which is whether Ms Akano said to the claimant on 1 February 2019: "You're one of those black men who like white women"? We have found as a fact that those words were used by her. The use of those words amounted to less favourable treatment since Ms Akano would clearly not have used those words to a white colleague. By definition, those words were used because of the claimant's race. This claim therefore succeeds.

Equality Act, section 27: victimisation

121 The first matter we have to determine is whether the claimant did a protected act and/or whether the respondent believed that the claimant had done or might do a protected act. The claimant relies upon his complaint that Ms Akano was treating him differently because of his race and/or his religious belief, as set out in an email dated 4 February 2019 to Eleanor Bayes; in his formal grievance dated 12 February 2019; and during the grievance and grievance appeal process.

122 We refer to our findings of fact above. The contents of the email of 4 February 2019 did not suggest that the claimant was doing (or was about to do) a protected act. There is no reference in the email to his religious belief or to his race. By contrast, his grievance of 12 February 2019 did raise such issues and he continued to do so during the grievance and grievance appeal process. Those were protected acts.

123 There are three claims under this head, which we deal with in turn below.

Issue 12.1 - did Clare Footitt or others encourage Ms Akano to raise a counter-grievance against the claimant in February 2019?

124 As with the direct discrimination claim in relation to the same matter, the victimisation claim necessarily fails because the factual elements of this claim are not made out. Ms Footitt did nothing between 12 and 13 February to encourage Ms Akano to take out a grievance. Ms Blaszczyk advise her of her right to do so, which does not amount to encouragement. In any event, that had nothing to do with the raising in the claimant's grievance of a complaint of discrimination on 12 February.

Issue 12.2 – Jon Deakin's investigation

125 We refer to our above conclusions and reasoning in relation to the harassment and direct discrimination claims regarding the investigation of Mr Deakin. Even assuming that each of the elements of (a), (b) and (c) amounted to detrimental treatment, we conclude that Mr Deakin's actions/inactions had nothing whatsoever to do with the raising in the claimant's grievance of a complaint of discrimination and his maintenance of that argument during the grievance process. This claim therefore does not succeed.

126 Issue 12.3 - Alleged 'castigation' in grievance appeal outcome letter – 22 May 2019

127 Again, we refer to our findings and conclusions above. The claimant was not castigated by Ms Ives. In any event, the management guidance given had nothing to do with the protected act detailed above. It was for the reasons given. This claim therefore does not succeed.

128 It was also apparent from the evidence which the claimant gave that it was his view that whatever he said in the grievance process was "protected". That is not correct. If an employee, for example, makes racist remarks during a grievance hearing into alleged racist behaviour towards them, the employee could well be disciplined for that. They would not be protected in the grievance hearing from disciplinary action against them arising out of discriminatory language used by them in the grievance hearing itself, regardless of whether their own grievance is a protected act. We trust that on reflection the claimant will be able to understand the distinction.

Statutory defence

129 In relation to all of the above matters the respondent relies on the statutory defence contained in section 109(4) Equality Act 2010. We heard limited evidence in relation to this issue. We note that the respondent's employees have an induction and that the respondent has an Equality and Diversity Policy to which employees are referred during their induction. They also provide some equality and diversity training. However, we have not been provided with any of the material used in such training, in relation to Ms Akano or Mr Deakin. There was no detail provided about what is said in the induction process. Following the incident on 26 April, Ms Akano was moved to a different shift. However, due to a genuine error, she was then placed on the same training course as the claimant.

130 The onus is on a respondent who wishes to rely on the statutory defence, to provide sufficient evidence in relation to it. We do not consider that the limited evidence which was presented to us goes anywhere near to enabling the respondent to establish the statutory defence, in relation to the discrimination we have found occurred in this case.

Additional comments

131 We find for the claimant, as set out above. The other claims fail.

132 We would like to add the following. First, in finding as we have in relation to Issues 1.2 (a), it appears to us that Mr Deakin allowed his personal objections about some of the content of the claimant's online presence to cloud his judgment in one respect when it came to the claimant's grievance. We are confident that Mr Deakin will be willing to reflect on this, in the same way that he was willing to concede during his evidence that his decision not to interview all of the claimant's witnesses was, in hindsight, a mistake.

133 Second, this case raises extremely difficult questions about the balancing of legal rights to freedom of speech, freedom of expression, religious belief and sexual orientation. Balancing those rights is not easy and navigating between them can result in employers walking something of a legal tightrope.

134 Our findings in this case do not detract from the fact that the respondent provides a valuable service for vulnerable young people and the claimant, who is by all accounts a competent employee, assists the respondent to provide that service. It is our sincere hope that the parties will be able to learn from what has happened and quickly put it behind them so that the valuable service they provide is not adversely affected.

Employment Judge Andrew James
London Central Region

Dated ...18 May 2020.....

Sent to the parties on:

19 May 2020

For the Tribunals Office

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ANNEX A – LIST OF ISSUES

Equality Act 2010, section 26 and section 40: harassment related to religious belief

- 1 Did the respondent engage in conduct as follows:
 - 1.1 Did Ms E Akano ignore the claimant, in effect ‘sending him to Coventry’, between 1 February and 7 May 2019 including ignoring him at a training event at Beacon House in April/May 2019?
 - 1.2 Did John Deakin carry out the investigation into the claimant’s grievances in a biased and partial or otherwise detrimental manner, including by him questioning the claimant, during the grievance process, about social media posts by the claimant about religious matters; by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and in relation to the grievance outcome?
 - 1.3 Did Ms Debra Ives castigate the claimant in the decision letter on the claimant’s appeal against the grievance outcome.
- 2 If so was that conduct unwanted?
- 3 If so, did it relate to the protected characteristic of religious belief? It is the claimant’s case that on 1 February 2019 Ms Akano initiated a discussion with him about his religious beliefs about homosexuality and lesbianism. During that conversation, Ms Akano referred to herself as a lesbian. The claimant expressed the Christian religious belief that Jesus Christ can heal anything, in response to the suggestion by Ms Akano that people are born homosexual; and that it did not matter whether somebody was born with a particular condition, that condition could still be changed. He referred for example to John, Chapter 8, in which a man who was born blind was healed by Jesus Christ.
- 4 Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act 2010, section 13; Equality Act 2010 section 39: direct discrimination because of religious belief; detriment

- 5 Has the respondent subjected the claimant to the following treatment?
 - 5.1 Did Clare Footitt or others encourage Ms Akano to raise a counter-grievance, against the claimant in February 2019?
 - 5.2 Did John Deakin carry out the investigation into the claimant’s grievances in a biased and partial or otherwise detrimental manner, including by him questioning the claimant, during the grievance process, about his social media posts about religious matters; by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and in relation to the grievance outcome?

5.3 Did Ms Debra Ives castigate the claimant in the decision letter on the claimant's appeal against the grievance outcome?

- 6 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.
- 7 If so, was this because of the claimant's religious belief and/or because of the protected characteristic of religious belief more generally?

EQaA, section 13; EQaA section 39: direct discrimination because of race; detriment

8 Has the respondent subjected the claimant to the following treatment?

8.1 Did Ms Akano say to the claimant on 1 February 2019 "you're one of those black men who like white women"?

- 9 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.
- 10 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Equality Act, section 27: victimisation

11 Did the claimant do a protected act and/or did the respondent believe that the claimant had done or might do a protected act? The claimant relies upon his complaint that Ms Akano was treating him differently because of his race and/or his religious belief, as set out in an email dated 4 February 2019 to Eleanor Bates, in his formal grievance dated 12 February 2019, and during the grievance and grievance appeal process.

12 Did the respondent subject the claimant to any detriments as follows:

12.1 Did Clare Footitt or others encourage Ms Akano to raise a counter-grievance, against the claimant in February 2019?

12.2 Did John Deakin carry out the investigation into the claimant's grievances in a biased and partial or otherwise detrimental manner, including by him questioning the claimant, during the grievance process, about his social media posts about religious matters; by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and come to a biased or unreasonable decision on the claimant's grievance?

12.3 Did Ms Debra Ives castigate the claimant in the decision letter on the claimant's appeal against the grievance outcome?

13 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act? The claimant will say in response, amongst other things, that he asked Ms Akano to be placed on a difference shift to him in or about February 2019; and that she attend a different training course to him in April/May 2019.

Statutory defence

14 In relation to all of the above matters the respondent will rely on the statutory defence contained in section 109(4) Equality Act 2010.

Remedy

15 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. The claimant's claim for compensation is likely to be limited to a claim for injury to feelings. The claimant has been told that if he wants to argue that his health was adversely affected by any of the alleged acts of discrimination, medical evidence is likely to be required. It is unlikely that the claimant will be putting forward medical evidence. If he changes his mind, he must let the Employment Tribunal know as soon as possible.