EMPLOYMENT TRIBUNALS

Claimant: **Mrs Onuoha**

Respondent: **Croydon Health Services NHS Trust**

Heard at: **London South Employment Tribunal**

On: **4 – 14 October 2021**

Before: **Employment Judge Dyal, Miss Foster-Norman, Ms Forecast**

Representation:

Claimant: **Mr M Phillips, Counsel**

Respondent: **Mr B Jones, Counsel**

RESERVED JUDGMENT AND REASONS

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JUDGMENT

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    1.13. List of Issues 26 (x): Commencing the Second Investigation by letter dated 10 January 2020
    1.14. List of Issues 15 (cc): The contents of the Second Investigation Report provided in August 2020 in that it recommended further disciplinary proceedings.

2. The following complaints succeed as complaints of direct discrimination:

    2.1. List of issues 22 (a): the Claimant was singled out for an aggressive

application of the Dress Code and Uniform Policy

2.2. List of issues 22 (b): The Respondent failed to accommodate a reasonable manifestation of the Claimant's religion by an agreement envisaged in section 4.14 of the Dress Code and Uniform Policy

2.3. List of issues 22 (c): constructive dismissal

3. The complaint of victimisation at List of Issues 20 (a) succeeds in part, namely, the Claimant's initial redeployment away from Main Theatre was victimisation.

4. If and to the extent that the application of the provision, criteria or practices at List of Issues 29 was not directly discriminatory it was indirectly discriminatory.

5. The Claimant was constructively dismissed and the dismissal was unfair.

6. The claims otherwise fail and are dismissed.

REASONS

The issues

1. The parties were able to agree a list of issues at the outset of the hearing save for a very few minor disagreements. The tribunal adjudicated on those disagreements and the final list of issues is appended to these reasons.

The hearing

2. *Documents before the tribunal:*

   2.1. An agreed bundle of running to 1042 pages;
   2.2. Documents referred to by Ms Wright during her evidence which were not in the bundle were admitted by consent as p1043 – 1044;
   2.3. The evidence completed at the end of day 5. On day 6, the Claimant applied to adduce two categories of new documents. Firstly, some screenshots from her smartphone showing the dates on which certain photographs in the bundle were taken. These were admitted by consent. Secondly, some photographs from the Respondent's Twitter feed. The Tweets were generated over the course of the last 6 months. All save for one pre-dated the commencement of the trial. The Claimant said that the photos showed staff wearing jewellery in clinical areas. The Respondent objected to the admission of these documents and disputed that they showed what was alleged. The tribunal refused to admit these documents. If the documents had been admitted, fairness would have required giving the Respondent the opportunity to test the evidence and call further evidence. This would have seriously disrupted the timetable of the hearing. That was not in the interests of justice. All but one of the documents could have been adduced in advance of trial and we considered that there was no good reason why they had not been. We also considered it vanishingly unlikely the case would turn on these new documents.

3. *Witnesses the tribunal heard from*:

   3.1. For the Claimant:

      3.1.1. The Claimant
      3.1.2. Ms Linda Wong, Nurse (now retired)
      3.1.3. Dr Martin Parsons, Expert Witness (written evidence only)

   3.2. For the Respondent:

      3.2.1. Ms Jeanette Wright, Band 7 Clinical Lead Practitioner for Anaesthesia (now retired)
      3.2.2. Ms Janice Edmondson, Head of Theatres (gave evidence by CVP)
      3.2.3. Ms Janet Muchengwa, Matron
      3.2.4. Mr Stephen Lord, Associate Director of Nursing

3.2.5. Ms Maria Knopp, Associate Director of Operations for Adult Community Services
3.2.6. Ms Samantha Conran, Band 8 Senior Transfusion Practitioner
3.2.7. Ms Rosemary-Anne Haldane, Associate Director of Nursing

4. *Submissions*:

4.1. Mr Phillips produced detailed opening and closing skeleton arguments. Mr Jones produced a detailed closing skeleton argument. Both counsel made oral submissions on day 6 in line with their respective written arguments. We considered their arguments very carefully. We thank both counsel, who clearly worked hard in preparation for and in the conduct of this case, for their efforts.

Findings of fact

The parties

5. The Respondent is an NHS trust providing healthcare services in the London Borough of Croydon including at Croydon University Hospital.

6. The Claimant is a devout Catholic. One of her religious beliefs is that it is important to manifest her faith by wearing a cross. She has, since a young age done this by wearing a necklace with a cross pendant on it (we refer to this as a 'Cross-Necklace' hereafter).

7. The Claimant was employed by the Respondent from 1 November 2001 until 22 September 2020 when her resignation of 21 August 2020 took effect. She was employed latterly as a Theatre Practitioner (Band 5). That is a nursing role performed primarily in surgical theatre.

8. The Claimant's duties included the following:

8.1. To prepare patients for clinical/operative procedures, both in anaesthetics and surgery;
8.2. To provide assistance in clinical/operative procedures, both in anaesthetics and surgery;
8.3. To provide immediate post-operative care;
8.4. To provide initial emergency care as required.

9. In practice there were a number of elements to the Claimant's role, principally these:

9.1. Working as the circulating nurse in theatre. The circulating nurse ensures the smooth running of theatre. The circulating nurse ensures that all items needed in surgery are ready and ensures that the 'scrubbed in nurse' gets what she needs while anticipating what is required. The uniform worn when doing this work was simply blue scrubs. On the top half a V-necked, short sleeved tunic. On the bottom half, trousers.

9.2. Working as the scrubbed in nurse in theatre. This involves working very closely with the surgeon and anaesthetist with the patient on the table. When working in this role, the Claimant wore not only the scrubs described above but also a standard issue surgical covering that covered her from neck to wrist.

9.3. Working in recovery. This involved caring for patients immediately after surgery as they came around, ready to be discharged to wards. The Claimant wore scrubs in this role.

10. The Claimant spent around 70% of her duties in theatre. She found it hard to give an exact estimate of the split between working as a circulating nurse and working as a scrubbed in nurse but she spent more time scrubbed in than circulating.

11. The Claimant's Cross-Necklace was visible when she was wearing scrubs. However, it was not visible when she was working as scrubbed in nurse. It was covered by the neck to wrist surgical covering.

12. The Claimant's primary assignment was to the Day Surgery Unit (DSU). However, she also worked in the Main Theatre.

Dress code policy documentation

13. The Department of Health publishes the document *Uniforms and workwear: Guidance on uniform and workwear polices for NHS employers.* It's provisions include these:

13.1. *"The development of local uniform policies and dress codes remains the responsibility of individual organisations."* (This point is important: it reflects the fact that this document offers guidance only. It is and remains the responsibility of each trust to design its own appropriate policy.)

13.2. *"Patient safety: Effective hygiene and preventing infection are absolutes in all healthcare settings. Although there is no conclusive evidence that uniforms and workwear play a direct role in spreading infection, the clothes that staff wear should facilitate good practice and minimise any risk to patients. Uniforms and workwear should not impede effective hand hygiene, and should not unintentionally come into contact with patients during direct patient care activity. Similarly, nothing should be worn that could compromise patient or staff safety during care, for example false nails, rings, earrings other than studs, and necklaces. Local policies may allow a plain ring, such as a wedding ring."*

13.3. *"Staff comfort: As far as possible, subject to the overriding requirements of patient safety and public confidence, staff should feel comfortable in their uniforms. This includes being able to dress in accordance with their cultural practices. For example, although exposure of the forearm is a necessary part of hand and wrist hygiene during direct patient care activity, the uniform code should allow for covering of the forearm at other times."*

13.4. *"The legal context: The way in which local policies are designed and implemented can minimise the risk of any challenge to uniform and workwear codes. The key factors are:*
• clarity of meaning, supported by practical examples of what is required;
• consistency in the application and observance of dress codes; and
• robust reasons for each requirement of the policy."

13.5. *"Poor practice - evidence-based… Wear any jewellery, including a wrist-watch, on the hands or wrists during direct patient care activity (local policies may allow a plain ring such as a wedding ring). (For some clinical staff working outdoors, particularly ambulance teams, a wrist-watch may be essential. Where worn, these wrist-watches must be washable and be removed for hand washing.) Why? Jewellery and watches can harbour micro-organisms and make effective hand hygiene more difficult."*

13.6. *"Good practice: common sense… These are examples of good practice which need no evidence base. They simply serve the three objectives of patient safety, public confidence and staff comfort.… Where, for religious reasons, members of staff wish to cover their forearms or wear a bracelet when not engaged in patient care, ensure that sleeves or bracelets can be pushed up the arm and secured in place for hand washing and direct patient care activity. In a few instances, staff have expressed a preference for disposable over-sleeves - elasticated at the wrist and elbow - to cover forearms during patient care activity. Disposable over-sleeves can be worn where gloves are used, but strict adherence to washing hands and wrists must be observed before and after use. Over-sleeves must be discarded in exactly the same way as disposable gloves. Why: Hand hygiene is paramount, and accidental contact of clothes or bracelets with patients is to be avoided."*

13.7. *"Poor practice - common sense: These are examples of good practice which need no evidence base. They simply serve the three objectives of patient safety, public confidence and staff comfort:*

13.7.1. Wear neckties/lanyards (other than bowties) during direct patient care activity. Why? Ties have been shown to be contaminated by pathogens, and can accidentally come into contact with patients. They are rarely laundered and play no part in patient care.

13.7.2. Wear jewellery while on duty other than a smooth ring or plain stud earrings. Why? Necklaces, long or hoop earrings and rings present possible hazards for patients and staff. Conspicuous jewellery can be a distraction and at odds with presenting a professional image."

14. The Respondent had a Dress Code and Uniform Policy ('the DCU-P'). The version before the tribunal was issued in October 2016. The predecessor was in similar terms. Some of its material provisions are as follows:

14.1. *"A dress code is important for the Trust for the following reasons: It enables effective hand hygiene to prevent the spread of healthcare associated infection… It protects staff by ensuring that dress codes and uniform adhere to health and safety principles and guidelines"*

14.2. *"Scope: The policy applies to **all staff groups**, including those with honorary contracts, seconded, agency workers, bank workers, volunteers and students, including those on work experience when working on Trust premises."* [Emphasis added]

14.3. *"…Line managers/Senior Leaders are responsible for ensuring the Dress Code and Uniform Policy is adhered to at all times in respect of the employees they manage or lead."*

14.4. *"The general principles in relation to ensuring correct dress code and wearing of uniform includes the following: That all staff wear their Trust security identity badge displayed openly in a prominent position, at all times in all areas of the organisation for security and identity purposes. Staff identity badges should not be placed in pockets, they should be visible at all times. Staff will also be provided with a Hello my name is badge with their name and job title which needs to be worn and displaced prominently."*

14.5. *"… Badges should be avoided (other than ID or a maximum of 2 professional badges) as they can restrict movement in relation to moving and handling, and can also cause injury to patients/ clients."*

14.6. *"Long hair must be tied back neatly and appropriately fastened, and be off the shoulder to avoid risk of injury from patients/ clients and because patients would wish to be treated by staff who are smartly presented (DoH 2010)."*

14.7. *"Rings with ridges and stones must not be worn in a clinical area. A plain wedding band is acceptable. Jewellery should be kept to a minimum, with no wrist, neck or arm jewellery worn. Wrist watches must be removed during hand washing and whilst in all clinical areas. One set of small stud earrings are the only acceptable earrings (no other visible piercing)."*

14.8. *"Sacred threads should be pushed up the arm and secured in place for hand washing and direct patient care activity."*

14.9. *"Jewellery may be worn but kept to a minimum provided it does not compromise health and safety or hygiene pertinent to the particular activity being undertaken. Watches, bracelets and necklaces should be close to the skin and must be removed in the clinical area. In the clinical setting, a plain ring such as a wedding band is permitted whilst on duty; however care must be taken to ensure hands are thoroughly washed. Rings inset with stones e.g. diamonds are not permitted for*

clinical staff. In the clinical setting small stud earrings with no stones only are permitted (no larger than 0.5cm). Hooped or dangling earrings are not permitted."

14.10. *"Hair and beards. Hair should be neat, clean and tidy at all times; hair accessories when worn should be discreet. Headscarves worn for religious or medical purposes are permitted. Facial hair must be neat and covered where required for hygiene reasons. Hair and makeup should comply with the central principle of this policy in terms of professional image and health and safety."*

14.11. *"Religious dress requirements: The Trust welcomes the variety of appearances brought by individual styles, choices and religious requirements regarding dress; this will be treated sensitively and will be agreed on an individual basis with the Manager and Trust and must conform to health, safety and security regulations, infection prevention and control and moving and handling guidelines. The wearing of saris, turbans, kirpan, skullcaps, hijabs, kippahs and clerical collars arising from particular cultural / religious norms are seen as part of welcoming diversity. Where the nature of compliance is a result of personal, religious, cultural or medical significance, this should be raised with the local manager to Human Resources who will seek advice from relevant specialists as necessary, (Muslim Spiritual Care Provision in the NHS (MSCP) the Department of Health (2010)"*

Characteristics of the Cross-Necklace

15. The Claimant's evidence is that she wore a Cross-Necklace to work every day from the commencement of her employment onwards. We accept her evidence on this point which we found credible.

16. There was a significant dispute as to whether the Cross-Necklace the Claimant wore was always the same one and in particular whether it was the one that the Claimant wore throughout the trial and is pictured in a number of photographs in the bundle including this one:

17. The Claimant accepted in cross examination that she owned a number of different necklaces with cross pendants. The dispute was about whether she always wore the same necklace to work, or whether she wore different necklaces to work.

18. We find that the Claimant probably did wear more than one of her necklaces to work. She said in her witness statement "*The crosses I wear to work are always tiny"* [underlining added]. However, we find that the Claimant only rarely wore a different necklace to the one pictured and that from 2018 onwards, the necklace that she wore was always the one pictured above. That necklace has a very fine gold chain and a cross pendant which, going by eye, we estimate to be a little under an inch wide and little under an inch and half long.

19. There is only one relevant occasion on which the tribunal (by a majority) find that the Claimant wore a different necklace. Namely the occasion on which the Claimant was challenged about her necklace in 2016 by Ms Wright:

    19.1. The majority (Judge Dyal and Ms Forecast) on balance think that Ms Wright's recollection, that she saw the Claimant wearing a different necklace on that date, is accurate. Ms Wright's recollection of that occasion was vivid and we think it explains why she challenged the Claimant on that occasion. We accept the necklace on this occasion was of a rigid choker style and had a blue cross. However, we consider that the estimated size of the cross, 3 inches, is a significant over-estimate. It is improbable that the Claimant would have worn such a large cross. We accept her evidence that she would regard the same as unprofessional looking and inappropriate for laity. It is more likely that the pendant was an inch or two in size.

19.2. The minority (Miss Foster-Norman), on balance prefers the Claimant's evidence that she wore the cross pictured above on this occasion. Miss Foster-Norman considers it significant that management made no notes of the interactions with the Claimant and that their memories are likely to have faded. Miss Foster-Norman also considered it significant that the Claimant had a preference for wearing the pictured cross as it had been blessed.

Historical permission to wear the Cross-Necklace

20. In 2014, the Claimant was challenged by the then new Main Theatre Manager, Ms Walker about the Cross-Necklace. Upon being challenged the Claimant effectively refused to remove her Cross-Necklace and said words to the effect of '*what about hijabs, turbans and kalava bracelets?*'. Ms Walker said she would get back to the Claimant but did not do so.

21. At some point shortly thereafter, the Claimant attended a meeting of Day Surgery and Main Theatre staff. The events of this meeting are disputed. We find as follows: someone at the meeting (not the Claimant) asked whether it was acceptable for a student nurse to wear a hijab (it was). The Claimant raised her hand and said words to the effect of *"may I wear my cross?"* Ms Walker responded, "*Mary, you can wear your cross*." We make this finding because we think the Claimant's evidence of this meeting is the best evidence we have on the matter and it stood up to scrutiny.

22. In 2015, Ms Eapen, Matron, asked the Claimant to wear a longer chain to conceal the cross under her uniform. The Claimant responded by asking why she should hide her faith while others were allowed to show their own. Ms Eapen did not take the matter any further.

List of Issues 15(a): In late 2016, Ms Wright demanded that the Claimant remove her cross, and threatened to "escalate it" if the Claimant did not comply

23. In late 2016, Jeannette Wright saw the Claimant wearing a Cross-Necklace in a clinical area (Main Theatre). On the majority's finding this was a blue cross and was more conspicuous than the Cross-Necklace the Claimant usually wore. This is why, in the majority's view Ms Wright noticed it. On the minority view, the Cross-Necklace was the one pictured above.

24. Ms Wright instructed the Claimant to remove the necklace. She said it was due to infection risk and that if the Claimant refused she would "*escalate it*". The Claimant declined to remove the Cross-Necklace. She made clear that it was a religious item. She referred to others being allowed to wear religious items and said she thought there was an unfair difference of treatment.

25. Ms Wright offered the Claimant the following compromises:

25.1. pin the cross to the inside her top (it would thus not have been visible);
25.2. wear crosses as stud earrings. These would have had to have been 5mm or less in size. The crosses would thus have been barely visible/ identifiable as symbols of Christ save, at best, at very close range.

26. The Claimant declined to compromise. Ms Wright escalated the matter to Helen Dighton, Theatre Manager (Main Theatre), Ms Dighton came to speak to the Claimant in Theatre 2. She asked the Claimant to remove the Cross-Necklace because she said it was an infection and health and safety risk. The Claimant refused. Ms Dighton suggested she pin it to the inside of her scrubs instead. The Claimant declined and said she was not happy to hide her cross whilst people of other faiths were allowed to wear items such as Turbans, Hijabs and Kalava bracelets. There can be no doubt that it was clear that the Claimant wore the Cross-Necklace as a manifestation of religious belief rather than as a simple piece of jewellery.

27. Ms Dighton did not take the matter any further. She moved to the role of General Manager for Surgery in September 2016 and it was no longer her responsibility to manage day to day issues unless they were escalated to her.

CQC inspection and response

28. In October and November 2017, the Respondent was the subject of a CQC inspection and subsequent report. The report included the following:

    28.1. *Staff did not always adhere to trust policies and guidance on the use of personal protective equipment (PPE), to help prevent the spread of infection or the uniform dress code. We saw one nurse in theatre wearing jewellery that did not conform to trust policy. We observed theatre staff not wearing over gowns when entering the main hospital area and several staff brought their personal bags into the main theatre and anaesthetic rooms.*

    28.2. *We saw variable compliance amongst staff with infection control and uniform policies. For example we observed one member of staff wearing a stoned ring and four clinical staff from other areas of the hospital not comply with the bare below the elbow or handwashing policy. Two visiting clinicians were also wearing wristwatches. We did not see unit staff challenge this in any instance. In addition, we saw it was common practice for staff to take bags, coats and jumpers into the clinical area.*

    28.3. *Some staff did not adhere to the trusts policy and guidance on the use of personal protective equipment (PPE), to prevent the spread of infection. We saw staff wearing jewellery not in line with trust policy and not all staff wore over gowns when leaving theatres to enter the main hospital. We saw personal staff bags were brought into the main theatres and anaesthetic rooms.*

29. In response to the CQC report, an *Integrated Surgery, Cancer, and Clinical Support Directorate Action Plan* was formulated.

30. In the summer of 2018, there were a number of meetings with managers directing them to brief their staff on the DCU-P. In essence, it would be enforced more strictly going forwards.

31. On 7 July 2018, a news item appeared on the intranet drawing attention to the DCU-P and notifying staff that events would be held to enforce the DCU-P in the

coming weeks. It reminded staff members that it was everyone's responsibility to ensure the policy was upheld.

32. Over the course of that summer, there were a number of meetings with staff and managers briefing them on the DCU-P. The Claimant suggested that she was unaware of this at the time and did not attend any such briefing. On balance, we think the Claimant is mistaken about that and in fact did receive such a group briefing. There is clear evidence that such briefings were happening and the notes of the grievance meeting record the following exchange: "*JM: Are you aware that the dress code policy was reviewed this year? MO: Yes. JM: It came about as there were a lot of breaches and it was relaunched and part of that is to undertake audits around dress code. MO: What I saw is that diversity is welcome, however Christianity is left out."* We accept these notes are materially accurate.

33. However, beyond briefings and the efforts stated in our findings below, we find that very little was done to actually enforce the DCU-P across the Respondent trust so far as the wearing of jewellery is concerned.

34. The most compelling evidence of this are the results of an informal audit the Claimant herself conducted. Her audit reveals very widespread, repeated non-compliance with the DCU-P including the wearing of jewellery (including necklaces) in clinical areas. We defer detailed discussion of that informal audit until later in our findings. However, there is some other evidence that is also worth mentioning here.

35. On 27 June 2018, Mr Knights (HRBP) wrote to Jolita Zarnarni, suggesting a form of words to use where there was a concern about a member of staff's non-compliance with the DCU-P as follows (p348):

> *Dear (name)*
>
> *Re: Dress Code Policy*
>
> *I am writing to advise that it has come to my attention that you were not complying with the Trust's Dress Code Policy whilst working in XXXXXXXX on date. This is a note of concern which will remain on your file, I would therefore like to advise you of the following;*
>
> *INCLUDE DETAIL/POINTS YOU WISH TO NOTE*
>
> *ADD ANY RECOMMENDATIONS AND DATE THEY NEED TO BE ACHIEVED BY*
>
> *Briefing on DCU*
>
> *Should there be further instances of you not complying with the Dress Code Policy, this will be investigated formally in line with the Trust Disciplinary Policy as a conduct issue.*
>
> *Yours sincerely*

36. The Claimant's solicitor made specific disclosure requests that would have captured any correspondence from management/HR to the Respondent's employees along the above lines. There is not a single such piece of correspondence whether in the above terms of similar ones save for those to the Claimant and a stern email to one other employee VR – see below. The most likely explanation for this, given the Claimant's informal audit which revealed very widespread non-compliance with the DCU-P including the wearing of jewellery (including necklaces) in clinical areas, is that little was actually done to enforce the DCU-P beyond general briefings.

37. We further note that one of the action points of the *Integrated Surgery, Cancer, and Clinical Support Directorate Action Plan* was to "*Audit compliance with uniform policy".* August 2018 was identified as the date for completion of this action point and the status of it was (as at 26 September 2018 – the date of the document in the bundle) "*complete*". The comment box indicates: "*Medical staff non-compliant as evidenced by infection control audits. Weekly audits undertaken as part of the Perfect Ward quality rounds* (p366)." We think this all supports the Claimant's evidence that there was widespread non-compliance with the DCU-P among medical staff (n.b., the Claimant's evidence, however, is not limited to medical staff).

38. A further stark point must be made. The Respondent at all relevant times conducted regular audits of the hospital including 'Perfect Ward' audits. The audits included monitoring compliance with the DCU-P. In the course of the hearing, through Mr Jones, the Respondent acknowledged that the results of those audits existed. However, no audit was disclosed either by list (e.g. indicating the date of the audit) or copy document. Nor was any proper analysis of any of the audit findings given (again save for what is said in the above paragraph).

List of Issues 15(b): On 7 August 2018, Ms Wright demanded that the Claimant remove or conceals her cross, and threatened to "escalate it" and initiate disciplinary proceedings

39. On 7 August 2018, there was in interaction between the Claimant and Ms Wright. The details of it are disputed. We make the following findings:

    39.1. The Cross-Necklace the Claimant was wearing was the one pictured above. Although in her witness statement Ms Wright suggests that the Claimant was wearing a "*fairly large, enamel Christian cross on a wire choker chain around her neck*", on this occasion we prefer the Claimant's evidence. It was clear from Ms Wright's oral evidence that her recollection of the necklace she saw the Claimant wearing in 2018 was poor.
    39.2. Ms Wright required the Claimant to remove the Cross-Necklace. This was a demand in the sense that it was not optional but an instruction.
    39.3. Ms Wright offered a compromise. As to what the compromise was and the number of compromises offered, there is a bit of a discrepancy between Ms Wright's witness statement and her email of 9 August 2018 (described further below). We prefer the account in the email as it is much more contemporaneous. The compromise offered was to wear a longer chain so that the pendant did not sit in the 'V' of the V-neck but inside the top.

39.4. The Claimant refused to remove her Cross-Necklace or to wear it on a longer chain inside her top.

39.5. Ms Wright's evidence is that she advised the Claimant that this was not acceptable and that she would seek advice from HR and come back to the Claimant on the issue. However, on balance we find that Ms Wright went a bit further than at and said to the Claimant words to the effect that she would escalate the matter to HR and disciplinary proceedings may be initiated. At this point Ms Wright was uncertain of next steps and her intention was indeed to take advice from HR.

39.6. We find that Ms Wright was aware that the Claimant wore the Cross-Necklace as an item of religious significance not simply as a piece of jewellery. The Claimant had always been very clear about this including with Ms Wright and in any event it was an obvious religious symbol.

40. On the same day Ms Wright spoke to VR, a Hindu member of staff who wore a Mangalsutra - a necklace of religious significance in Hinduism. She required VR to remove her necklace or accept the same compromise as she had offered to the Claimant. VR accepted the compromise.

41. Also on 7 August 2018, Ms Wright wrote to HR and asked for their advice. The HR officer responded the following day quoting the DCU-P but offering little actual advice in relation to the Claimant.

List of Issues 15 (c - e): email of 9 August 2018 and chasers, and coffee room interaction

42. On 9 August 2018, Ms Wright spoke to two other members of staff in Main Theatre who were wearing jewellery; they removed it immediately without protest.

43. On 9 August 2018, Ms Wright emailed the Claimant. She gave an account of the discussion of the necklace on 7 August 2018 and recorded that she had given the option of wearing a longer chain so the necklace was out of sight but that the Claimant had refused. She said that the matter had been escalated to HR and the Head of Nursing for advice. She said that the advice was that the policy was clear and the Claimant was at risk of disciplinary action. Ms Wright said that she accepted that the Claimant wore a necklace for religious reasons. She said she was prepared to offer a compromise. The cross could be worn on a longer necklace so that it was below the 'V' of the neckline of the scrubs and out of reach of potential angry or agitated patients. Alternatively, the Claimant could wear a high necked t-shirt / vest top under her scrubs to cover the necklace. She gave the Claimant a week to make arrangements and think about the matter. She stated that if the Claimant continued to wear the necklace visibility to patients and other staff in clinical areas: "*I will have no option but to discipline you for not following the Dress Code and Uniform Policy".*

44. On the same day, Ms Wright emailed VR in materially identical terms.

45. On 9 August 2018, Ms Wright asked the Claimant if she had read the email. The Claimant said she had not and went into theatre.

46. On 13 August 2018, Ms Wright handed the Claimant a hardcopy of the email of 9 August 2018.

47. 15 August 2018, the Claimant responded to the email stating that it was only handed to her on 13 August 2018 and asked for a couple of days to deal with the matter. Ms Wright responded on the same day, allowing the Claimant an extra two days to comply with her requests failing which further action would be taken.

48. On 20 August 2018, there was an interaction between the Claimant and Ms Wright in the coffee room. At the time, the Claimant was wearing her necklace. There are competing accounts of this interaction:

    48.1. The Clamant says that Ms Wright approached her while having a cup of tea and angrily asked if she had read her email yet, said that she would ensure that the Claimant was disciplined and abruptly walked away.
    48.2. Ms Wright says that she asked the Claimant why she had not complied as the necklace was still visible and said that "*I would have to take further action*."
    48.3. On balance we find that Ms Wright was exasperated in her manner and that she did says words to the effect that the Claimant would be disciplined. The chain of events shows that Ms Wright was anxious to receive a response and in her own correspondence of 9 August 2018 she had said: "*I will have no option but to discipline you for not following the Dress Code and Uniform Policy".*

49. The Claimant emailed Ms Wright later that day, complaining that Ms Wright had approached her in an intimidating manner that verged on harassment and asked for further contact to be by email.

List of Issues 15 (f): Ms Edmondson walking into the operating theatre where the Claimant was in charge, while a patient was on the surgery table, on 21 August 2018

50. On 21 August 2018, Ms Wright noticed the Claimant wearing the Cross-Necklace. She therefore escalated the matter to Ms Edmondson and HR to begin a disciplinary process.

51. The Claimant had an interaction with Ms Edmondson that day the detail of which is disputed:

    51.1. Ms Edmondson's evidence was that she went to theatre in order to conduct a Perfect Ward Audit. However, we think it is more likely that she went to theatre in order to speak to the Claimant upon Ms Wright escalating the matter to her.
    51.2. Ms Edmondson came to Theatre 3 where the Claimant was working and where there was a patient on the table. She asked the Claimant to join her in the preparation room for a discussion. There was a discussion about who was in charge of the theatre and at that time it was the Claimant. Ms Edmondson made an arrangement for someone else to cover the theatre so she could immediately speak to the Claimant in the preparation room. In the preparation room there was a heated discussion in which Ms

Edmondson told the Claimant to remove her necklace to comply with the DCU-P. We find that both parties to the discussion were heated.

51.3. The Claimant refused to remove or cover the Cross-Necklace and said she had been wearing it since the outset of her employment and that it was not fair to require her to remove the cross while others wore religious symbols.

51.4. The Claimant says that Ms Edmondson said words to the effect of "*I am in charge"* and *"I am not interested"* in response to the Claimant's protestations. Ms Edmondson does not specifically recollect the words she used but says she chose them carefully. On balance, we find that Ms Edmondson did use those words. She was trying to exert her authority and was surprised and exasperated by the Claimant's position.

51.5. Ms Edmondson suggested that the Claimant wore a second scrub top but backwards to cover the necklace or alternatively a blue jacket to cover the necklace. The Claimant refused.

51.6. There is a dispute as to whether the blue jacket was an item that had previously been banned. In fact there are two types of blue jacket and we are satisfied that the one Ms Edmondson had in mind was the short-sleeved one that was permitted.

51.7. The Claimant's evidence, which we accept is that in theatre at that very time, there was an anaesthetist wearing a turquoise pendant on a metal chain around her neck and dangling earrings. She was left unchallenged by anyone.

51.8. The exchange ended with Ms Edmondson agreeing that the Claimant could remain in theatre but saying she wanted the necklace off by 13.30.

52. The Claimant did not remove the Cross-Necklace.

List of Issues 15(g): Commencing the disciplinary investigation in early October 2018

53. On 28 September 2018, Mr Lord commissioned an investigation to report (p373) on allegations that the Claimant had:

53.1. *Failed to adhere to the Dress Code Policy;*

53.2. *Failed to adhere to reasonable management instruction in respect of complying with the Dress Code Policy.*

54. Ms Muchengwa, Matron, was appointed as the investigating officer. It was the first investigation that she had ever carried out. She had received general equal opportunities training and a day of training on disciplinary proceedings.

List of Issues 15 (h): Sending the Claimant a letter stating she was required to submit a statement by 8 October and to attend the investigation meeting on 12 October while the letter, misleadingly dated 2 October, was only posted on 8 October and received on 10 October 2018

55. By letter dated 2 October 2018 (p379), the Claimant was invited to an investigation meeting to consider the disciplinary allegations. The letter asked the Claimant to provide a written statement by 8 October 2018 to help with the investigation and scheduled the meeting for 12 October 2018. The letter was franked 8 October 2018 and sent second class.

56. Ms Muchengwa's oral evidence was that she emailed this letter to the Claimant on 2 October 2018. She did not get a response so arranged for it to be posted to the Claimant on 8 October 2018. The email is not in the bundle. However, we accept Ms Muchengwa's evidence. We think Ms Muchengwa was a truthful witness as evidenced by her willingness to make concessions under cross-examination.

57. The letter was not backdated and it was not misleading. The date on the letter was the date it was written not the date it was posted and there was nothing to suggest anyone was purporting otherwise. The envelope of the letter is franked with the date it was posted.

58. The meeting was rescheduled to 18 October 2018 at the Claimant's request in order to ensure her representative could attend. It is true that no new date was fixed for sending in a statement in advance of the meeting but in our view it was obvious that the Claimant could do so if she wanted to.

Grievance: protected act

59. On 16 October 2018, the Claimant raised a formal grievance complaining of discrimination because of race and religion under the Equality Act 2010 and being exposed to hostility and threatening behaviour in the workplace. This related in essence to the efforts that had been made to get her to remove or cover her necklace and the way in which the managers who dealt with her had gone about it.

Interview with Ms Muchengwa

60. On 18 October 2018,, Ms Muchengwa interviewed the Claimant and Ms Edmondson. On 19 October 2018 she interviewed Ms Wright.

61. The Claimant was represented by a trade union representative at her interview. Ms Muchengwa suggested that the representative take notes rather than the Claimant. This was to leave the Claimant free to focus on questions and answers. There was also an HR note-taker.

62. The Claimant's basic point was that she wanted to wear the cross because of her religious beliefs and that she considered people of other faiths were able to wear symbols of their religions such as hijabs, turbans and Kalava bracelets. She thought it was discriminatory and unfair that she was unable to manifest her religious belief in her chosen way while others were allowed to.

63. The Claimant also referenced the fact that when Ms Wright had challenged her in 2018, an anaesthetist in theatre had been wearing a necklace and was left unchallenged. In response to that Ms Muchengwa said "*We are only talking regarding you.*" This rather missed an important point.

List of Issues 15(i): Ms Edmondson's comment "We are still waiting for the hearing regarding the one on your neck"

64. The Claimant attended a meeting on 25 October 2018 with Ms Edmondson and Ms Amanda Belgrove. The meeting was unrelated to the Claimant's wearing of the cross.

65. At the meeting, Ms Edmondson did ask the Claimant to remove her earrings. We find that this was because the earrings were not in compliance with the DCU-P. In cross-examination, the Claimant initially denied that the earrings were non-compliant. However, a few answers later, she said that the earrings had stones set in them. The DCU-P requires that any earrings are no larger than 0.5cm and also that they have no stones in them. The Claimant did remove the earrings upon request.

66. We accept the Claimant's evidence that in the discussion about the earrings, Ms Edmondson said "*we are still awaiting the hearing regarding the one around your neck".* This was in the presence of Amanda Belgrove who was not involved in the disciplinary process regarding the Cross-Necklace. Ms Edmondson herself could not recall whether or not she had said this. We regarded the Claimant's evidence as the best evidence on point.

List of Issues 15(j): Stephen Lord's letter to the Claimant dated 20 November 2018, including accusation of "continued failure to comply with the Dress Code and Uniform Policy"

67. On 20 November 2018, Mr Lord asked to meet with the Claimant. She asked to be accompanied, but her trade union representative was unavailable. Mr Lord wanted to proceed in any event. The Claimant refused to proceed. Later that day, Mr Lord gave the Claimant a letter which:

    67.1. Notified her that the disciplinary investigation would be paused so that the same investigatory team could consider her grievance;
    67.2. That the grievance report and disciplinary investigation report would be provided at the same time.

68. The letter also notified the Claimant that she was to be redeployed. It said as follows:

> *I have also decided that in the face of your continued failure to comply with the Dress Code and Uniform Policy and the request that has been made of you by the leadership team in theatre, to temporarily redeploy you to non-clinical duties where you will be able to wear your necklace without breaching the Trust policy.*
>
> *I have made this decision based on your continued failure to comply with policy; the potential harm to patients through your own behaviour or those of others who follow your lead; the reputational risk to the organisation of your continued failure to follow policy; the risk to the wider effectiveness of your colleagues who are aware of your decisions regarding the request to follow policy; and in order to allow a fair investigation without hindrance of your decision to refuse to follow policy and reasonable management requests. Please note that this is not a sanction and does not imply right or wrong in advance of the investigation outcome.*

List of Issues 15(k): re-deployment of the Claimant to various non-clinical roles since 28 November 2018

69. The Claimant's initial redeployment was to the role of receptionist in the Main Theatre. Mr Lord volunteered in his oral evidence that this was a poor choice on his part. Firstly, because it meant that the Claimant would be still be working in a clinical area, though in a non-clinical role. Secondly, because it meant that he was redeploying the Claimant to Ms Wright's department putting the Claimant and Ms Wright, against whom the Claimant had raised a grievance, in closer daily contact than had been the case.

70. It is clear that Ms Wright was very unhappy that the Claimant had been redeployed to the department that she oversaw. In her evidence to the tribunal she said this was because:

    70.1. she found it hard to work with the Claimant because the Claimant was breaching the DCU-P and this showed a lack of respect for her authority;
    70.2. the Claimant had raised a grievance against her which she made a point of not discussing, whereas the Claimant was talking about it with a lot of other nurses who in turn began asking why they needed to comply with DCU-P if the Claimant did not.

71. However, we think that Ms Wright's email of 5 December 2018 to Mr Lord is revealing. She wrote:

> *I would however like to ask why, considering that Mary has taken out a grievance against me she is now working in a non-clinical role in the department that I oversee on a daily basis. I feel this is most inappropriate and totally against the hospitals own policy.*

72. In terms, Ms Wright's concern as expressed in the email was that the Claimant had made a grievance against her. She did not reference any other matter and in particular did not suggest that the Claimant had been indiscrete about the grievance or had been causing problems in the department.

73. In cross-examination, the case put to the Claimant was essentially that she had been redeployed because the organisation did not want her to have no work and in order to keep in compliance with the DCU-P this needed to be non-clinical work. It was not suggested to the Claimant that she had been indiscrete about her grievance or caused difficulties in Main Theatre by talking about it. However, in her answers in cross-examination, the Claimant did say (and we paraphrase) that the allegations that she had been talking about her grievance were unfounded. That was not challenged.

74. On balance, we find that the Claimant was not indiscrete about her grievance and was not generating employee relations problems in main theatre by talking about her grievance. We also find and infer that a key reason why Ms Wright did not want the Claimant to work in her department was that the Claimant had raised a grievance against her and done so in the terms she had.

75. In response to Ms Wright's complaint, Mr Lord decided to further redeploy the Claimant. In his witness statement, Mr Lord denied that his decision to redeploy the Claimant was related to the Claimant's grievance. However, in his oral evidence, having been reminded of Ms Wright's email to him of 5 December 2018, and then asked, "*What role if any did the Claimant's grievance have in your decision to re-deploy the Claimant away from Jeanette Wright's department?"* he answered: "*So [the] grievance had a big impact on the decision to redeploy her away from department."* His oral evidence was, in our view, accurate.

76. The Claimant was further redeployed to a different department in January 2019. She was then further redeployed on several occasions between then and her resignation. Each of the roles that she was redeployed to was a non-clinical role and therefore did not use her main skills as a Theatre Practitioner.

77. Mr Lord's evidence was that ideally he would have redeployed the Claimant to work involving the use of clinical skills but that did not involve working with patients (and thus he would have been content with the Claimant wearing her Cross-Necklace). In principle there were a few such roles but in practice none were vacant. We accept that evidence.

Grievance interview

78. The Claimant attended a grievance interview with Ms Muchengwa on 5 December 2018. Ms Wright produced a statement in reply.

Early conciliation

79. Early conciliation started and finished on 12 December 2018.

List of Issues 15(l): Being approached by Mr Duymun on 31 January 2019 to demand that the Claimant removes or conceals her cross

80. On 29 January 2019, the Claimant was redeployed to ward Q1. In this role, the Claimant was working as a ward clerk so was not in uniform. She wore her Cross-Necklace over her top.

81. On the morning of 31 January 2019, the Claimant's actual first day on that ward, Ms Wright came to the ward and spoke to the ward manager, Mr Duymun. As soon as Ms Wright left, Mr Duymun approached the Claimant and asked her to conceal her cross.

82. The Claimant explained to Mr Duymun that the whole reason for her redeployment to that department was so that she could continue working whilst wearing her Cross-Necklace. Mr Duymun did not take the matter further with the Claimant herself, however he decided that the Claimant could not work on his ward any longer after the end of the week.

83. The Claimant believes that Ms Wright had spoken to Mr Duymun about her wearing the necklace in the meeting referred to above. Ms Wright denies this.

However, we think on balance she probably did speak to Mr Duymun about the Cross-Necklace. Firstly the chronology of events tends to suggest this. Secondly, in our view it is clear that Ms Wright was significantly exercised by the issue.

84. It was again unfortunate that the Claimant had been redeployed to this role because it was a non-clinical role but in a clinical area which meant that technically the Claimant was bound by the usual dress code requirements for clinical settings.

Claim issued

85. The Claim was issued on 11 February 2019. Note that the claim was subsequently amended and re-amended and thus includes many matters that post-date its issue.

List of Issues 15 (m): The contents of the Investigation Report and the Grievance Report provided to the Claimant on 14 February 2019

86. On 14 February 2019, Ms Muchengwa handed the Claimant a bundle of papers including the disciplinary investigation report and the grievance investigation report. The cover letter from Mr Lord required the Claimant to attend a meeting on 20 February 2019 (p450).

86.1. Disciplinary Investigation report, dated 2 November 2018 (which had 11 appendices); 403
86.2. Grievance investigation report, January 2019, (which had 10 appendices).

92. The investigation report states:

> *5.5 The investigatory team contacted infection control to find out if there is evidence stating you cannot wear jewellery within a clinical area due to infection control, they only came back verbally and said there was nothing.*

87. Ms Muchengwa explained this more in her oral evidence. In the course of investigating the Claimant's grievance, Ms Muchengwa spoke to Joyce (surname unknown), a Senior Infection Control Nurse. Joyce told her there was no evidence about the infection risk presented by necklaces.

88. The disciplinary investigation report asserted that the Claimant was in breach of DCU-P. It also gave a significant amount of background including that the non-compliance resulted from the Claimant's wishes to display the cross as part of her faith. It explained that 'compromises' had been offered but were unacceptable to the Claimant because they involved hiding her faith.

89. The Claimant alleges that the notes of the investigatory meeting of 18 October 2018 were inaccurate. However, the Claimant has not explained what in particular was inaccurate. In the absence of particulars and evidence supporting the same, we find that the notes of the meeting although not verbatim were broadly accurate. We do acknowledge that Claimant was not sent the notes contemporaneously to check or amend them, though that is a different point.

90. The Grievance report did, as alleged, essentially find that the grievance was unfounded.

91. The Claimant was required to attend a disciplinary hearing and was required to attend a grievance hearing.

List of Issues 15 (n – p): The disciplinary hearing on 13 March 2019; Refusal to postpone the disciplinary hearing until the Claimant's witness comes back from stress leave; Refusing the Claimant's request for permission to tape-record the disciplinary hearing

92. The disciplinary meeting was initially scheduled for 20 February 2019. It was rescheduled to 13 March 2019 having been postponed at the Claimant's request. The hearing was chaired by Mr Lord.

93. Both in advance of the hearing and at the hearing itself, the Claimant asked for the hearing to be postponed for a colleague MB to attend. MB had witnessed the exchange between Ms Edmondson and that Claimant in theatre. This request was refused because MB was on long term sick leave and it was unclear when he would return. Mr Lord wanted to progress matters.

94. The Claimant also asked to record the proceedings but this was refused as it was not in keeping with trust practice and the Claimant had a union representative at the meeting.

95. At the conclusion of that meeting Mr Lord decided that the allegations were well founded and gave the Claimant a final written warning. He told that Claimant that he expected her to return to her clinical role on 1 April 2019 following her planned annual leave. She was to report for duty without the necklace or to comply with one of the compromises previously offered.

List of Issues 15 (q – r): The contents of the outcome letter of 28 March 2019, finding the Claimant guilty of the disciplinary allegations against her; Imposing the sanction of final written warning on 28 March 2019

96. In the outcome letter Mr Lord confirmed the final written warning (p465), which was given for:

    96.1. Failure to obey a lawful and reasonable management instruction;
    96.2. Failure to follow safety instructions, policies or procedures;
    96.3. Failure to comply with acceptable standard of dress.

97. The letter went on: *I added that you have had a number of occasions to comply which you have not done despite being moved into non-clinical duties, and unfortunately I believe it is highly likely you will continue to breach the policy and your behaviour will not change. After giving my decision, both Martin and I advised you to reflect on this and to consider the possible future implications of failing to comply as requested.*

98. We find that it is factually correct, as alleged at paragraph 26E of the Particulars of Claim, that: *"The effect of the decision was to put the Claimant under a constant threat of a prompt dismissal. That put the Claimant under increased pressure (a) not to manifest her religious beliefs by visibly wearing a crucifix, and/or (b) to accept any further re-assignment to a non-clinical role notwithstanding her job description as a theatre practitioner."*

List of Issues 15 (s): Dismissing the Claimant's grievance in April-May 2019

99. On 11 April 2019, the Claimant's grievance hearing took place, chaired by Mr Lord. Grievance was dismissed (p492). This was confirmed in writing by letter dated 8 May 2019 (p492).

100. In April 2019, the Claimant returned to work following a period of annual leave and reported to Mr Lord. She was wearing her Cross-Necklace. Mr Lord said that she would continue to be redeployed to non-clinical roles. He was unable to find her a role for that day so sent the Claimant home on full pay. The Claimant was then further redeployed to the patient safety team (PALS) from 15 April 2019 carrying out clerical duties in a non-clinical area.

101. On 5 June 2019, the Claimant commenced a period of sick-leave. An Occupational Health (OH) appointment was arranged for 25 June 2019. The Claimant was seen by an OH advisor on that date who produced short report noting that the Claimant complained of work-related stress. The OH advice was that the sooner the work-related issues were resolved the sooner the Claimant's symptoms would resolve.

102. From 26 July 2019 onwards the Claimant was placed within the Productivity Team (p520), carrying out the role of Assistant Patient Pathway Coordinator.

List of Issues 15 (t): Dismissing the Claimant's disciplinary appeal, by letter dated 16 August 2019

103. Claimant appealed her final written warning by a letter dated 23 April 2019. A management statement of case was produced in response. The Claimant was invited to an appeal hearing to take place on 20 May 2019. The Claimant asked to postpone the meeting and it was postponed until 24 July 2019 and further postponed until 15 August 2019.

104. The appeal hearing took place on 15 August 2019. It was chaired by Ms Knopp, who sat with Sabrina Easy (General Manager) and Allan Morley (Director of Estates and Facilities). The Claimant asked for permission to audio-record the meeting. This was refused for the same reasons as above. The Claimant was represented at the meeting by her trade union.

105. The Claimant's appeal was dismissed by letter dated 16 August 2019 (p549).

List of Issues 26 (u), (w): Mr Lord's demand at the meeting in late August 2019 that the Claimant removes her Cross-Necklace before going back to work in the Theatre, and the threat to call the security to remove Claimant from the Theatre; Failing to confirm the contents of the meeting in late August 2019 by a letter to the Claimant, despite the Claimant's repeated requests

106. In late August 2019, following her sickness absence and a period of annual leave, the Claimant returned to work. She was by now allocated to the admin hub.

107. Mr Lord met her and said that as her appeal against the disciplinary action had been dismissed he wanted her to return to work in theatre. He asked if she would comply with the DCU-P and gave her the option of wearing cross-shaped stud earrings. The Claimant, refused and said she would continue to wear her Cross-Necklace in the usual way.

108. On balance, we think Mr Lord did say something to the effect that if the Claimant returned to theatre without complying with the DCU-P then he would have to ask security to remove her which would be embarrassing for all concerned. Mr Lord initially disputed this in cross examination but on further questioning essentially accepted that he said something along these lines.

109. Mr Lord wrote a letter dated 16 September 2019, recording the discussion that was had at this meeting. On it's face it says '*by hand'*. The Claimant says that she chased Mr Lord repeatedly for this letter but did not receive a copy until a late stage (the exact moment is unclear but well into 2020). Mr Lord recollects the Claimant chasing him for the letter but not specifically when the Claimant was given it. He believes that he would not have left her waiting for the letter since he worked in close proximity to her, but he does not actually recollect when or by whom the letter was given to the Claimant.

110. On balance with think that the most likely course of events is that Mr Lord delegated the task of giving the letter to the Claimant, that task was overlooked, and that there was indeed a long delay before the Claimant got that letter. It seems highly improbable that the Claimant would either forget receiving the letter or alternatively, make up an allegation that she had not received when in fact she had. Equally, we think it highly implausible that Mr Lord would pretend to have given the Claimant this letter knowing he had not. The most likely explanation is therefore an administrative mix up.

List of Issues 26 (v): Continued re-deployment to non-clinical duties since August 2019

111. The Claimant did remain redeployed to non-clinical duties from August 2019 onwards. At this point she was deployed to the productivity team in the administration hub.

List of Issues 26 (x): Commencing the Second Investigation by letter dated 10 January 2020

112. Mr Lord commissioned a second investigation by a letter dated 23 September 2019.

113. Ms Conran was appointed as the investigating officer.

114. In an email dated 19 December 2019, Ms Conran emailed Chris Terrahe (Deputy Director of Nursing) as follows (558): "*I have spoken with Hilary Frayne about monitoring and audits for compliance to uniform and dress code policy and was advised that this is captured as part of quality rounds. I would appreciate an opportunity to discuss this further with a view to acquiring some further data which will contribute as evidence for an internal investigation pertaining to non-compliance with said policy."*

115. In her oral evidence, Ms Conran was asked whether she ever found out what the result of the audits were. The answer was no, she did not. Curiously, she satisfied herself that audits were undertaken and considered that sufficient; she thought it unnecessary to find out what the results of the audit were or to conduct or obtain any analysis whatsoever of them.

116. By letter dated 10 January 2020, Ms Conran wrote to the Claimant inviting her to a further investigation meeting (p559).

    116.1. *Continued failure to adhere to the Dress Code Policy*
    116.2. *Continued failure to adhere to reasonable management instruction in respect of complying with*
    116.3. *The Dress Code Policy Failure to comply with the terms of a formal warning.*

List of Issues 15 (y, z, aa): The investigatory interview on 10 February 2020; Refusal to permit audio-recording of the investigatory interview on 10 February 2020; Inaccurate and incomplete notes of the investigatory interview on 10 February 2020

117. The investigation meeting took place on 10 February 2020. The Claimant asked to make an audio recording of the proceedings but Ms Conran refused, for the same reasons this request had previously been refused. The Claimant was again accompanied by a trade union representative.

118. On 10 March 2020, Ms Conran sent the Claimant a copy of the minutes of the meeting though the Clamant did not receive these until May 2020.

119. The Claimant complains that these notes are inaccurate. The primary complaint as stated in her witness statement is that the notes erase discussion of pre-2019 events, in particular the Claimant's case that she was given permission to wear her cross repeatedly.

120. The notes of the meeting in fact repeatedly record that the Claimant's case was that she had been given permission to wear her cross, that she had worn it for a very long time at work, and that it had been unproblematic. We do not accept that the notes erased the Claimant's defence. No doubt they were not verbatim; but they make the Claimant's position reasonably clear. We do not

accept that that there was any attempt to distort what had been said at the meeting. In our view the notes are reasonably accurate and are a good faith effort at recording the meeting.

121. On 15 May 2020, the Claimant told Ms Conran by email that there were two individuals in the Day Surgery Unit who had witnessed Ms Walker giving her permission to wear her necklace: Ms Wong and Sally (a reference to Salome Boakye-Danquah).

122. Ms Conran contacted Ms Wong and Ms Boakye by email on 6 July 2020 and provided a response on 14 and 15 July 2020). The Claimant says that Ms Conran framed her email inappropriately and that this explains the lack of support for the Claimant's position in the responses from the witnesses. We do not agree. Ms Conran's email was framed in a fair way.

123. On 12 June 2020, Ms Conran contacted Reverend Andrew Dovey to ask for his input. She set out some of the provisions of the DCU-P and posed the general question as follows: "*Clinical staff are required to remove necklaces in clinical areas. Would you consider this to be a form of religious discrimination?"* This was an odd question to ask. The answer to this, the final question, was one of fact and law rather than religious expertise.

124. Ms Conran interviewed Reverend Dovey on 19 June 2020. Among other things Reverend Dovey said that the wearing of a cross in the Christian faith was optional not mandatory. He said, that it was not discriminatory to require a necklace to be removed in a clinical area and he asserted that the chain, if on display could be an infection risk and/or health risk.

125. In the course of the investigation the Claimant provided Ms Conran with a report by a Microbiologist, Dr Ian Blenkharn. The report had been obtained for the purpose of this litigation but the Claimant also wanted it be considered internally. Ms Conran's report, noted the fact of Dr Blenkharn's report and that the Claimant wished to rely on it, but did not otherwise engage with it. In essence, Dr Blenkharn's view was that there was no good reason from a microbiology point of view to prohibit the Claimant's wearing of the necklace in the circumstances.[1]

Stress leave

126. The Claimant was on work related stress leave from 1 June 2020 onwards and was unable to return to work throughout June – August 2020.

List of Issues 15 (bb): the contents of the letter of 17 August 2020, requiring the Claimant to attend the disciplinary hearing on 26 September (despite her being on stress leave) and threatening to proceed in her absence

[1] Note that at a Preliminary Hearing on 17 September 2019, Employment Judge Dyal ruled that Dr Blenkharn's report was inadmissible as expert evidence in the proceedings. However, the parties agreed that the report could nonetheless be included in the bundle because it was a contemporaneous document considered in the internal proceedings. In that capacity it is before the tribunal.

127. On 17 August 2020, Ms Haldane wrote to the Claimant, inviting her to a disciplinary hearing to consider allegations of:

127.1. Continued failure to adhere to the Dress Code and Uniform Policy;
127.2. Continued failure to adhere to a reasonable management instruction in respect of complying with the Dress Code and Uniform Policy;
127.3. Failure to comply with the terms of a formal warning.

128. Ms Haldane enclosed a copy of Ms Conran's investigation report. The letter warned the Claimant that the hearing may lead to disciplinary action up to dismissal. The letter did indicate that if the Claimant did not attend the hearing might proceed in her absence and if so, would be based on the information available.

129. At this point in time the Claimant had been on sick leave since the beginning of June 2020. However, although she had provided fit-notes for her absence (which was genuine and related to stress at work), she had not been very cooperative with the Respondent's efforts to understand and manage her absence:

129.1. On 22 June 2020, the Claimant was asked to fill out a stress-questionnaire and attend a long term sickness absence review meeting. The Claimant declined both and indicated that she did not want to discuss work;
129.2. On 26 June 2020, the Claimant was referred to Occupational Health. The referral sought advice on the Claimant's fitness to work and fitness to attend a long-term sickness absence review meeting (the Claimant having declined to attend such a meeting);
129.3. An appointment for the OH consultation was made for 16 July 2020. The Claimant did not attend that appointment and a further appointment was made for 6 August 2020;
129.4. On 6 August 2020, the OH advisor telephoned the Claimant but she did not answer.

List of Issues 15 (cc): The contents of the Second Investigation Report provided in August 2020, in particular (i) the alleged 'false' denial that any permission had been previously given to the Claimant to wear her crucifix and (ii) the recommendation to proceed to a disciplinary hearing.

130. In relation to whether the Claimant had been given permission historically to wear the cross necklace, Ms Conran's investigation report broadly recorded the Claimant's case and then in the conclusion section said this:

> *7.14 MO states that she was given permission to continue to wear her cross in clinical practice and provided contact names of two colleagues in which she stated would verify that she was granted permission to continue to wear her cross in clinical practice. No written documentation or risk assessment for example has been evidenced to substantiate this discussion. Such evidence would serve to record the agenda and outcome of such discussions and is advised.*

7.15 Statements from both witnesses do not support MO's argument: both members of staff did not verify that they had witnessed any such discussion

7.20 What is also apparent from the evidence presented and cannot be explained is that MO claims she has been wearing her necklace/cross since her employment with the Trust began in 2001, which has never been challenged before now.

131. The report did not actually reach a finding one way or the other as to whether the Claimant had been given permission to wear the Cross-Necklace, but if anything tended to imply she had not. This was not the product of any 'falsity' on Ms Conran's part, but a good faith analysis of the material generated through her investigation.

132. In her investigation report, Ms Conran also made a number of recommendations:

- *It is my recommendation, based on the evidence, that this case should be heard at a formal hearing.* [This was a way of saying that the disciplinary allegations appeared to be well founded so should be heard at disciplinary hearing].
- *A risk assessment form be devised and included in the appendix of the Dress Code and Uniform Policy to allow for individual circumstances and requests to identify potential "reasonable" risk mitigations in respect of facilitating compliance with the Dress Code and uniform Policy. This is to be used in circumstances where individual members of staff feel they cannot do so or for example have a religious requirement not to do so.*
- *For the sake of clarity an addendum is made to the Dress Code and Uniform Policy, section 4.14 "The wearing of saris, turbans, kirpan, skullcaps, hijabs, kippahs, a cross/crucifix pendent necklace and clerical collars arising from particular cultural /religious norms are seen as part of welcoming diversity."* [underlining added to highlight the proposed amendment]

133. In her oral evidence, Ms Conran was asked to explain her recommendations by the tribunal and in particular whether the recommendations envisaged employees automatically being allowed to wear a Cross-Necklace in clinical areas. Her evidence was that this was not what she intended by the recommendations. Her intention was, rather, to make clear at paragraph 4.14 of the policy that the wearing of a Cross-Necklace was a religious norm that was seen as part of welcoming diversity. In order for it to be worn in a clinical area, the employee would need to go through risk assessment.

Resignation and termination of employment

134. The Claimant resigned by letter dated 21 August 2020 on notice to take effect on 22 September 2020. She complained in terms of constructive, discriminatory dismissal. The reason for the notice period was that the Claimant was signed off sick until early September and then had annual leave to use.

135. The Claimant's employment thus ended on 22 September 2020.

What became of Ms Conran's recommendations?

136. The Respondent did not volunteer any evidence about what had become of Ms Conran's recommendations as to changes to the DCU-P. Ms Conran herself did not know what had become of the recommendations. Ms Haldane was, however, able to speak to the issue. Her evidence, which we accept, was that she escalated the recommendations to Chris Terrahe (Deputy Director of Nursing) who has some responsibility for the DCU-P itself. The DCU-P is currently being reviewed and a new version of it, which was not before, is under consideration.

137. However, Ms Haldane reported that Ms Conran's recommendations have been rejected and no material changes to the DCU-P are proposed. This, she said, was because Mr Terrahe considered that there was no need to add express reference to a Cross-Necklace at paragraph 4.14 of the policy since the list there was non-exhaustive. The recommendation that the DCU-P include a risk assessment form was also rejected. Ms Haldane said this was because the current policy already permits risks to be assessed.

Claimant's informal audit

138. Between September 2018 and February 2019, the Claimant made contemporaneous notes when she saw other members of staff wearing either jewellery or religious items in clinical areas. She has included the data she gathered as an appendix to her witness statement. Her evidence in this regard was unchallenged and we accept that she observed what she says she observed.

139. The Claimant observed a *very* large number of people wearing jewellery that was not permitted by the DCU-P in clinical areas, including (indeed especially) necklaces.

140. Each day was different but an example of a day on which there was a large number of people wearing jewellery in the clinical area the Claimant observed is 23 January 2019. The Claimant observations were as follows:

- 08:25—A. (Medical STD) with Mr S (silver chocker/ round pendant TH4
- 08:28 --Dr. M and ODP W. (scarf hijab
- 08:44 -- S (personal cream theatre hat)
- 09:16 -- HCA eye day care (large silver necklace and earring)
- 09:30—D. ODO (heavy silver chocker)
- 09:40—S. DSU Red thread bracelet on left wrist
- 09:47—K. ODP (personal colourful theatre hat)
- 09:48 – R. ODP (gold neck chocker with pendant/ earring
- 09:50 -- female Rep theatre 9 (silver chocker/ ball pendant
- 09:50—R. theatre 3 (chain)
- 11.15--Mr. M (gold chain)
- 12:25-- Dr. S (silver chocker/ blue pendant

- 12:46-SHO x 2 (silver chocker)
- 12:47 --SHO walked TH 9 (Chain)
- 14:22-- SHO TH6 (chain/pendant)
- 14:47-- HCA from AC ward (Hijab black)
- AM/PM -- MS M. (light/dark brown flower scarf)
- PM --SHO TH7 T., AY (chain)
- PM-- AS, S TH7 (chain)
- 16:15 new ortho consultant P (gold chain).
- PM --CR TH5 (chain)
- ?PM --CH TH9 (chain)

141. The majority of the people wearing jewellery were doctors / anaesthetists. However, there were a significant number of nurses and other non-doctor/non-anaesthetist staff too. Further, many of the colleagues whom the Claimant noticed wearing jewellery that was non-compliant with the DCU-P did so on multiple occasions.

142. The Claimant's audit tends to show that non-compliance with the DCU-P was genuinely rife and that very many employees continued to wear jewellery, including necklaces, after the re-briefing of the dress code policy through the summer of 2018.

143. The Respondent did not suggest that compliance with the DCU-P was perfect. There was evidence of some of the Respondent's witness challenging other employees who were non-compliant with the DCU-P from time to time. However, it is notable that:

143.1. There is virtually no evidence of any member of staff other than the Claimant being subject to any significant management action in respect of wearing jewellery that was non-compliant with the DCU-P following the re-briefings in the summer of 2018. The exceptions are VR (referred to above) and handful of other unnamed employees whom a few of the Respondent's witness spoke to. One possibility, is that this is because everyone else who was non-compliant, was only non-compliant occasionally and/or corrected their ways upon being spoken to by management. We think that explanation is highly implausible not least in light of the Claimant's informal audit, which shows manifold non-compliance and repeat 'offending'. It is much more likely that the policy was simply not well or consistently enforced and that the wearing of non-compliant jewellery was very widely tolerated.

143.2. We note the Respondent carried out regular audits that included compliance with the DCU-P. In principle then, the Respondent had a non-anecdotal, structured and data-based way of challenging the Claimant's evidence and informal audit. However, no audit documentation nor even a summary or analysis of audit findings over a period of time have been disclosed or put in evidence. The only exception is that there is a passing reference in the *Integrated Surgery, Cancer, and Clinical Support Directorate Action Plan* to an audit that was carried out, it seems in August or September 2018. That audit showed

"*Medical staff non-compliant as evidenced by infection control audits. Weekly audits undertaken as part of the Perfect Ward quality rounds".* That tends to corroborate the Claimant's case.

144. Standing back and looking at matters in the round, we come to the conclusion that even after the re-briefing of the DCU-P in the summer of 2018, breach of the DCU-P by wearing non-compliant jewellery including necklaces, was rife. The non-compliance was very widely tolerated, hence the almost complete lack of documentation showing management action to enforce the policy against any individual other than the Claimant.

145. The Claimant's informal audit, spanned the period approximately September 2018 to February 2019. In our view, however, this broadly represents the height of the level of compliance with the DCU-P in the whole period to which the claim relates. We infer this finding primarily because we would expect compliance with the DCU-P to be at its highest in the months following the re-briefing of the policy in the summer of 2018. There is no good reason to think that compliance was significantly better in the period prior to the re-briefing of the policy in the summer of 2018, nor in the period following February 2019. We were not, for example, presented with evidence that compliance had improved after February 2019.

Health and safety findings of fact

146. It is necessary for us to make some findings of fact in relation to health and safety. As the case has been argued before us there are essentially two limbs to this:
    146.1. The infection risk posed by things employees wear;
    146.2. The risk of something an employee is wearing injuring the employee e.g. being used by an angry patient or a patient that did not know what they were doing to injure the employee.

147. In terms of infection risk, the risk the Respondent was really concerned about was to patients. The basic premise is that a piece of jewellery could harbour pathogens and that these could through one mechanism or another be transferred to a patient.

148. Most of the evidence we heard focussed on the possibility of the necklace touching a patient in the course of the Claimant's work. This could be because the Claimant leaned over the patient, or because the necklace fell off onto the patient. The major concern explored in evidence was that the Cross-Necklace might touch an open wound.

149. The Claimant herself did not acknowledge that there was any such risk at all. That was unrealistic. However, on her behalf her case was put differently by Mr Phillips. The case he advanced when questioning the Respondent's witnesses was that risks of this sort were remote. The Respondent's witnesses generally agreed with this. We also agree with this broad assessment. The Cross-Necklace the Claimant routinely wore was very short and it thus barely dangled. The place where the Claimant wore the necklace - around her neck with the pendant resting around or just below the throat area - made contact very unlikely. There was no

particular reason why it would fall off, and certainly nothing to suggest it was more likely to accidentally come off than a plain ring or stud earrings.

150. There is a second dimension to infection risk which Ms Knopp described as 'chain of transmission'. This effectively deals with pathogens from the jewellery being transferred to the patient indirectly. Primarily this would be through the Claimant touching the necklace and then touching the patient or touching something else that then touches the patient.

151. It obviously is possible that the Claimant might touch her necklace and then touch something else. Just as anyone might touch their throat, neck, ear, mouth or nose to scratch an itch or for any reason at all. However, there is no evidence that touching a necklace would present a greater risk of indirect infection than touching a body part as described in the previous sentence. Of course handwashing is the way in which risks of this sort are principally mitigated. There is no reason to think that handwashing would be any more or less effective at mitigating risk if the Claimant touched her necklace than if she touched, say, her neck.

152. Applying common sense, it is clear to us that the infection risk posed by a necklace of the sorts the Claimant used to wear, when worn by a responsible clinician such as the Claimant, who complied with handwashing protocol, was very low. We are not able to make a more precise quantification than that. We are not alone in this. In the course of her investigation, Ms Muchengwa consulted a colleague in infection control who told her there was no evidence about the extent of the infection risk posed by a necklace.

153. Just as important as making a broad assessment of the infection risk is putting the risk in the context of other risks caused by other items that are permitted in the self-same workplace.

154. The DCU-P permits the wearing of plain rings (i.e., with no stones or other details). The DCU-P says *that care must be taken to ensure hands are thoroughly washed*. There was no explanation as to why, from an infection control perspective, plain rings are permitted but plain necklaces are not. It is obvious that a ring worn by a member of staff is more likely to touch a patient, because hand to patient contact is common whereas neck/throat area contact to patient is not. Mr Lord made the point that for some procedures such as dressing wounds, the member of staff would be likely to wear gloves. However, that would not apply to all instances of staff touching patients. Equally a ring could be taken off for patient care, but this is not actually required and even if it were it would be inevitable that, with the best will in the world, the requirement would not always be followed.

155. In our view, applying the same sort of common sense that the Respondent relies upon to prove that there was an infection risk presented by necklaces, the infection risk presented by wearing a plain ring is of the same order, if not a greater order (given that it is clearly more likely to touch a patient), as wearing a necklace.

156. The only explanation we have had as to why rings are permitted is that of Mr Lord. He did not have or profess to have any particular expertise in the matter, but speculated that it may be because rings have a traditional significance in marriage. This is not a criticism of Mr Lord personally, but that explanation does not begin to explain why (plain) rings are permitted but necklaces are not.

157. The DCU-P also permits neckties to be worn albeit that they are discouraged. They need to be tucked in during patient care. However, a tie that is tucked in, even if tucked in high up the shirt, is roughly as likely as the claimant's Cross-Necklace to touch a patient. Both are worn fitting closely around the neck with the knot of the tie/the pendant of the necklace around the throat. It is clear that a tie could carry pathogens, just as a necklace could. There is no explanation as to why neck-ties are permitted by the DCU-P whilst necklaces are not permitted.

158. It is also notable that the DOH Guidance permits bowties. From an infection control perspective, a bowties is rather like a necklace. It could carry pathogens. It is unlikely to come into contact with a patient because it is worn so close to the neck rather than dangling. It could be grabbed by an assailant.

159. We would assume that neckties and bowties are not worn in surgery since they do not go with scrubs but they still have a relevance to other clinical areas, such as wards.

160. The Claimant placed significant weight on the fact that a number of other religious items were permitted. These included:

160.1. headscarves (such as hijabs);
160.2. turbans,
160.3. skullcaps,
160.4. kalava bracelets;
160.5. kirpans.

161. The Claimant's broad point was that these items also carried some infection risk. This was uncontroversial, and it is obvious that any item including the above ones can carry some infection risk in much the same way as a necklace. The item is worn about the body and can get pathogens on it like anything else.

162. There some additional provisions and practice in relation to the above religious items:

162.1. There was a requirement for headscarves to be worn tightly rather than to have loose hanging material. However, much the same thing was true of the Claimant's Cross-Necklaces. They were close fitting and barely dangled.
162.2. There was a requirement to wear a surgical hat over headscarves and turbans; however the items would remain partly visible and it would be obvious that the wearer had the item on;
162.3. There was a requirement for kalava bracelets to be pushed up the arm so as to be above the elbow thus facilitating 'bare below the

elbow' good practice; a necklace would not impact on bare below the elbow/handwashing.

163. There would be a possibility of pathogens on any of these religious items (even with the mitigations described immediately above) coming into contact with a patient, whether through direct contact or through chain of transmission. The risk is a common sense risk. The same common sense tells us that the level of risk is of much the same order as the infection risk posed by a necklace of the sort the Claimant wore.

164. A few other items are also worth considering that were common in this workplace: ID badges worn on a lanyard and name badges pinned to the outside of the uniform.

165. The ID badge is an electronic security pass which needs to be tapped to enter/exit many areas of the premises and thus it can be assumed is touched regularly by the wearer in the course of the day as well touching multiple surfaces such as the entry/exit electronic locks.

166. It is a requirement of the Security Management Policy that the Trust identify badges are displayed at all times whilst the employee is on duty. The policy provides as follows:

> *Identification Badges and Access Control Cards*
>
> *All Trust staff must display authorised Trust identity badges at all times when on duty. Routine stop-checks will be undertaken by security. All staff must comply with a request from security to show the officer identify badge.*

167. Ms Knopp's evidence was that she would expect the ID badge to be put in a pocket during contact with patients. Ms Wright's evidence was that frequently practitioners would wear the Lanyard around their back when dealing with patients. However, there does not appear to be any rule requiring either of these practices and, Ms Knopp's suggestion at the least, would appear to be a breach of the *Security Management Policy.*

168. There is no evidence before us off any disinfection regime or rules as regards lanyards and ID badges themselves.

169. Common sense tells us that the infection risks posed by these items is at least as great as that posed by a Cross-Necklace of the sort the Claimant wore. They are items that are likely to be touched at least as often as a Cross-Necklace.

170. Turning now to the other aspect of health and safety, the Respondent prohibits necklaces in part because they pose a potential risk to staff in the event of being grabbed by a patient (and though no real emphasis has been put on this, we would add, becoming caught up in something like equipment).

171. In terms of a patient grabbing the necklace, the Claimant's evidence was that this is not something that had happened to her in her roughly twenty year career.

However, the Respondent's witness evidence was to the effect that incidents of this sort did happen occasionally. More generally, the Respondent's evidence was that upon coming around from anaesthesia some patients could confused, disoriented and lash out.

172. In our view it is obvious that there is a small possibility of a patient grabbing a necklace. This is also true of a whole host of other things that a patient might grab. For example, loose clothing (and the scrubs were fairly loose), hair (including pony-tails), beards, turbans, headscarves (whether pinned or not) and more. The Cross-Necklace the Claimant routinely wore would not have been easy to grab. It was a short, on a very fine chain and worn close to the skin. It was thus, if anything, probably less likely than the foregoing items to be grabbed.

173. There was a dispute between the parties as to whether or not, if grabbed, the necklace the Claimant routinely wore could have caused the Claimant any harm. At one extreme, it was suggested it may be possible to choke her with it, and at the other extreme it was suggested that there was no risk as it would come off. There was no scientific evidence as to how strong the Claimant's necklace was. She did comment in her evidence that it was strong, but added "*but even if pulled would not harm anyone*". Doing our best and using our common sense, we think the chain is so fine that it is likely it would break long before anyone could really harm the Claimant with it. It would simply break if given a good yank.

174. In any event, the Respondent was content for the Claimant to wear a necklace if it were a longer necklace that could be tucked into her scrubs. It was suggested that a longer necklace could be tucked in, in one way or another to the Claimant's bra, or bra strap or alternatively pinned on the inside. For the most part this would have meant less of the necklace was visible, though some of the chain would have been visible in the V-neck of the scrub. However, there was also always a chance that the necklace might dislodge, especially if it was just tucked in, and come out of the uniform, for instance, when bending over. If so, the longer chain would surely have been easier to grab should someone have wanted to grab it.

175. It was put to some of the Respondent's witnesses, that a possible solution was for the Claimant to wear a necklace with some sort of quick release so that it assured that the necklace would not present a choking risk. There was no specific evidence before the tribunal that such a necklace existed and Mr Jones did not concede that it did. However, using our common sense, we think it is highly likely that such a necklace could be purchased and/or that the fastening of an existing necklace could be adapted. For instance, the closing mechanism could be as simple as two magnets of a strength sufficient to ensure that the necklace did not come off accidentally, but sufficiently weak to ensure no choking risk/or risk of being entangled with equipment. These days, workplace lanyards routinely have a safety mechanism and there is no reason why a necklace could not too.

176. This possibility of wearing a 'safety necklace' was not canvassed with the Claimant either during her employment with the respondent nor during her evidence. It is something that came up during cross examination of the

Respondent's witness and in closing submissions. There is therefore no direct evidence from the Claimant as to whether or not she would have worn a safety necklace if this option had been suggested. However, we have no doubt at all that she would have if this had meant a solution to the impasse between her and management. She wanted to visibly wear the cross on a necklace and, save when scrubbed in, she was not prepared to do otherwise. She also wanted to work as a Theatre Practitioner. She did not want to work in non-clinical duties. Had anyone said to her, you can carry on working as a Theatre Practitioner as long as you get a safety closing mechanism for the necklace she would obviously have agreed.

177. Finally, on the risk of choking we note that ties though strongly discouraged are permitted under DUC-P. It provides:

> *4.4….Ties are strongly discouraged in all clinical areas. If a tie is worn, it must be removed or tucked into a shirt or behind a plastic apron before examining patients. Ties, if worn should be laundered regularly.*

178. Even if tucked into a shirt, part of the tie (the knot and at least some of the length) would be visible and potentially grabble by a patient. If anything, a tie presents more of a choking risk than a very fine short gold chain.

179. We make the following final findings in relation to the health and safety aspects of the case:

179.1. The Respondent has an *Infection Prevention and Control Policy*. However, that policy is quite general and does not further enlighten the assessment of the infection issues in this case. It does not deal directly with uniform or jewellery. In that regard it cross refers to the DCU-P. It does make clear that the Respondent has an Infection Prevention and Control Team which includes an Infection Control Doctor / Consultant Microbiologist. We did not hear from anyone with those expertise and aside from Ms Muchengwa consulting an Infection Control Nurse in the course of her investigation, there appears generally to have been little if any input into this case during its internal stages from the Infection Prevention and Control Team.

179.2. The DCU-P is devoid of any structured method for determining whether particular items of religious significance should be permitted or not. For example, there is no template for a risk assessment, and there are no defined criteria for managers to use to balance risk against other factors.

Expert evidence on the significance of wearing the Cross

180. The tribunal was presented with Dr Parsons' written report dated 17 September 2019 (on it's face it is dated 2017 but that is an error). Dr Parsons' report was unchallenged.

181. We make the following findings based upon it:

181.1. The Cross is of central importance in Christianity;
181.2. The Cross is a symbol of Christianity;
181.3. The Roman Catholic Church attaches particular importance to the symbolism of the Cross and to a far greater degree than Protestant churches. In Roman Catholicism the Cross is an object of veneration;
181.4. The symbolism of the Cross plays a daily part in the devotional life of committed Catholics;
181.5. There is a tradition of wearing a physical cross which is of very long standing;
181.6. For the Catholic Church it is not only Scripture which is important - tradition is also understood to be an important guide to belief and practice;
181.7. The wearing of the cross is not and should not be simply as a fashion accessory;
181.8. In some parts of the world, stopping Christians from displaying the cross has been a feature of wider persecution campaigns;
181.9. The Roman Catholic Church hierarchy has urged Christians to wear the symbol of the cross on their clothing every day;
181.10. There is biblical teaching imploring Christians to be open about their faith and not to hide it.

Law

European Convention of Human Rights

182. Article 9 ECHR provides:

> *9(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.*
>
> *9(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.*

183. The most important case-law on article 9 for our purposes is the decision of the ECtHR in the joined cases reported as ***Eweida v United Kingdom*** [2013] IRLR 231. As Underhill LJ said, when summarising part of ***Eweida*** in ***Page v NHS Development Authority*** [2021] EWCA Civ 255**:**

> *At para. 80 of its judgment the Court points out that paragraph 1 provides for the protection of religious belief in two ways – that is, it protects not only the right to hold (or change) such a belief but also the right to manifest it (in public as well as in private). As it also points out, the right to manifest a religious belief is qualified to the extent specified in paragraph 2*.

184. Not every act that is in some way inspired or motivated or influenced by a religious belief is a manifestation of it for the purpose of article 9(1). However, there is no doubt that in this case the Claimant wearing a cross on a necklace was a manifestation of her religious belief protected by article 9(1). The Respondent, realistically, accepts that. Any interference with that manifestation of belief therefore had to be justified in accordance with article 9(2).

185. The starting point for article 9(2) is that the interference is prescribed by law. As Mr Phillips says, this phrase has been broadly interpreted. Law in this context includes enactments of lower rank than statutory law. It includes the common law and the lawful exercise of powers conferred by law. As Mr Phillips points out, "*the DCU-P is, in principle, capable of being part of 'law' in this sense, because the domestic law permits the employers to make policies of this nature binding on their employees."*

186. There are three substantive elements to 'prescribed by law' (per Lord Hope, ***Purdy v DPP*** 1 AC 345 at [40-41]):

> *40. The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from Sunday Times v United Kingdom (1979) 2 EHRR 245 , para 49 and also from Winterwerp v The Netherlands (1979) 2 EHRR 387 , para 39; Engel v The Netherlands (No 1) (1976) 1 EHRR 647 , paras 58–59 which were concerned with the principle of legality in the context of article 5(1) , Silver v United Kingdom (1983) 5 EHRR 347 , paras 85–90; Liberty v United Kingdom (2008) 48 EHRR 1 , para 59 and Sorvisto v Finland (Application No 19348/04) (unreported) given 13 January 2009 , para 112.*
>
> *41. The word "law" in this context is to be understood in its substantive sense, not its formal one: Kafkaris v Cyprus (2008) 25 BHRC 591 , para 139. This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute. As the Grand Chamber said in that case, in paras 139–140, it has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable: see also Gülmez v Turkey (Application No 16330/02) (unreported) given 20 May 2008 , para 49. The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be*

with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary: Goodwin v United Kingdom (1996) 22 EHRR 123 , para 31; Sorvisto v Finland , para 112. So far as it goes, section 2(1) of the 1961 Act satisfies all these requirements. It is plain from its wording that a person who aid, abets, counsels or procures the suicide of another is guilty of criminal conduct. It does not provide for any exceptions. It is not difficult to see that the actions which Mr Puente will need to take in this jurisdiction in support of Ms Purdy's desire to travel to another country assisted suicide is lawful will be likely to fall into the proscribed category.

187. In very short, justification under article 9(2) involves balancing the interference with the fundamental right in question against the legitimate interests recognised by paragraph 2 (per Underhill in ***Page***).

188. In ***Bank Mellat v Her Majesty's Treasury*** (no. 2) [2013] UKSC 39, [2014] 1 AC 700, Lord Neuberger said:

20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case law, notably R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (in particular the speech of Lord Steyn), R v Shayler [2003] 1 AC 247 , paras 57–59 (Lord Hope of Craighead), Huang v Secretary of State for the Home Department [2007] 2 AC 167 , para 19 (Lord Bingham of Cornhill) and R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 AC 621 , para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without

unacceptably compromising the objective. Lord Reed JSC, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68–76) which I would disagree with.

189. In considering whether an interference with article 9(1) rights is justified the reason for the interference is obviously of great importance. This is not only because some reasons fall within the ambit of article 9(2) while others do not; but also because the margin of appreciation to be afforded to reasons that do fall within that ambit varies. In that regard, we are acutely aware that in ***Eweida*** one of the case the ECtHR considered was that of Ms Chaplin, a nurse who wanted to wear a Cross-Necklace in the workplace. This was prohibited for health and safety reasons. This contrasted with Ms Eweida's case in which the concern of the employer airline was more in the way of corporate image/professional appearance. The ECtHR said this:

The Court considers that, as in Ms Eweida's case, the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However, the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.

190. We therefore direct ourselves that a wide margin of appreciation must be given in this case. That does not, however, mean we must accept at face value the evidence of the hospital managers we have heard from. Provided we allow a wide margin of appreciation when doing so, we are entitled to assess their evidence, scrutinise it and apply the relevant tests to it.

191. We agree with Mr Jones' submission that "*Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing"* (see ***R(Begum) v Governors of Denbigh High School*** **[2007] 1 AC 100**). The Claimant does not suggest otherwise. Through Mr Phillips she accepts, for instance, that it would be inappropriate to wear the cross visibly while working as the scrubbed in nurse and that the requirement to wear a neck to wrist covering in that instance was justified.

192. Mr Jones directed us to the following passage in ***Page***:

"Although article 9(2) does indeed use the term "necessary" that language has, as Lord Bingham says at para. 23 of his speech in R v Shayler, [2002] UKHL 11, [2003] AC 247, been "strongly interpreted". The essential task of the Tribunal in the circumstances of this case was to balance the infringement of the Appellant's right to express in public beliefs that were evidently important to him against the importance to the Trust of mitigating or avoiding the risk of damage to its work from his remaining in post…"

193. The tribunal's task in this case, so far as assessing article 9 is concerned, can be identified by replacing the reference to Mr Page's right to express his beliefs with the Claimant's right to manifest her beliefs, and replacing Mr Page's employer's aim with the Respondent's aim of protecting the health and safety of staff and patients.

Interface between Convention rights and domestic law

194. The tribunal has no jurisdiction to hear a freestanding complaint of breach of article 9 ECHR (***Mba v London Borough of Merton*** [2014] ICR 357). However, by virtue of ss. 3 & 6 Human Rights Act 1998 the Tribunal must determine claims that are within its jurisdiction compatibly, so far as possible, with Convention rights. Those provisions provide as follows**:**

> *Interpretation of legislation*
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
> *(2) This section—*
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*
>
> *6 Acts of public authorities.*
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
> *(2) Subsection (1) does not apply to an act if—*
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*
> *(3) In this section "public authority" includes—*
> *(a) a court or tribunal…*

195. In the course of our legal self-directions in respect of the causes of action that are before us we further consideration how they interact with article 9 ECHR and ss. 3 and 6 HRA.

Direct discrimination

196. Section 13 EqA is headed "Direct discrimination". So far as relevant it provides:

> *"A person (A) discriminates against another (B) if, because of a protected*

characteristic, A treats B less favourably than A treats or would treat others."

197. *Section 23 (1) provides:*

> *"On a comparison of cases for the purposes of section 13, … or 19 there must be no material difference between the circumstances relating to each case."*

198. The phrase '*because of*' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.*

199. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

> *69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:*
>
> *(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said:*
> *"It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not."*
> *I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36:*

"The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

200. There are particular challenges in applying the '*because of*' test where the protected characteristic relied upon is religion or belief. Underhill LJ's said this in ***Page v NHS***:

68. I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case

where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.

69. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytization at work – Chondol v Liverpool City Council [2009] UKEAT 0298/08, Grace v Places for Children [2013] UKEAT 0217/13 and Wasteney v East London NHS Foundation Trust [2016] UKEAT 0157/15, [2016] ICR 643. In essence, the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately. In Wasteney HH Judge Eady QC referred to the distinction as being between the manifestation of the religion or belief and the "inappropriate manner" of its manifestation: see para. 55 of her judgment. That is an acceptable shorthand, as long as it is understood that the word "manner" is not limited to things like intemperate or offensive language.

201. Plainly then, it is essential to identify whether, on the facts of any given case the objection to the manifestation of the belief "*could justifiably be taken*". In this regard it is also important to note what Underhill LJ went on to say at [74]:

So far as I am aware the distinction applied by the Tribunal has not been endorsed in this Court, but it is in my view plainly correct. It conforms to the orthodox analysis deriving from Nagarajan: in such a case the "mental processes" which cause the respondent to act do not involve the belief but only its objectionable manifestation. An analogous distinction can be found in other areas of employment law – see paras. 19-21 of my judgment in Morris v Metrolink RATP DEV Ltd [2018] EWCA Civ 1358, [2019] ICR 90. Also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it. It is obviously highly desirable that the domestic and Convention jurisprudence should correspond.

202. We understand this to mean that when applying s.13 EqA, and asking whether or not the employer's objection to the manifestation of the belief "*could justifiably be taken*", the tribunal *can* have regard to article 9. In particular, it can have regard to whether the interference with the employee's qualified right to manifest religious belief was justified in accordance with article 9(2).

203. This understanding is supported by reference to one of the authorities that Underhill LJ was considering in ***Page v NHS*** at paragraphs 68 – 69. In ***Wasteney***

v East London NHS Foundation Trust [2016] ICR 643, HHJ Eady (as she then was) said this:

> *54 In domestic law, the expression of right and limitation—as allowed by article 9 of the Convention—is most easily discernible when addressing cases of indirect discrimination under section 19 of the Equality Act 2010 (which may be the more obvious route of challenge in most cases involving the manifestation of a religious belief). Whilst there is no statutory means of "justifying" direct discrimination or harassment, however, the claimant accepts that the limitations permitted by article 9.2 are relevant to the approach to be adopted to claims brought under sections 13 (direct discrimination) and 26 (harassment). Although the claimant relies on the protection of the right to manifest religious belief in the workplace, as recognised by the European Court of Human Rights in Eweida, she (correctly) does not seek to suggest that right cannot be subject to limitation.*
>
> *55 The concession is in some senses easier to state than apply, but the task will always be made easier by having a clear understanding of the nature of the claim and how it is being put. If the case is one of direct discrimination then the focus on the reason why the less favourable treatment occurred should permit an employment tribunal to identify those cases where the treatment is not because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is "inappropriate" may be tested by reference to article 9.2 and the case law in that respect): see Chondol v Liverpool City Council and Grace v Places for Children* [emphasis added]. *Similarly, whilst the definition of harassment permits the looser test of "related to", a clear sense of what the conduct did in fact relate to should permit the employment tribunal to reach a conclusion as to whether it is the manifestation of religion or belief that is in issue or whether it is in fact the complainant's own inappropriate conduct (and that must be right, otherwise an employer's attempt to discipline an employee for the harassment of a co-worker related to, e.g., the co-worker's religion or belief could itself be characterised as harassment related to that protected characteristic).*

204. The Claimant additionally referred us to recent decisions of the ECJ on religion/belief and dress codes as an alternative route to a finding of direct discrimination.

205. In ***Bougnaoui v Micropole SA*** [2018] ICR 139, the ECJ considered whether or not an employee's dismissal which related to her wearing an Islamic headscarf was permitted as a genuine occupational requirement. The Claimant relies on the reasoning of the Advocate General in that case. The AG considered that the case before the ECJ was one in which there was necessarily direct discrimination (see paragraph 88 of her opinion). However, in our view, the court itself did not accept that part of the AG's reasoning. The court's essential reasoning was that it was a question of fact for the national court to resolve whether the dress code was directly discriminatory or alternatively indirectly discriminatory (subject to justification). It gave the following guidance as to whether a dress code related restriction on manifestations of religious belief amounted to direct or potentially indirect

discrimination:

> *30 In so far as the ECHR and, subsequently, the Charter use the term religion in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of religion in article of that Directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public.*
>
> *31 In the second place, it should be noted that it is not clear from the order for reference whether the referring court's question is based on a finding of a difference of treatment based directly on religion or belief, or on a finding of a difference of treatment based indirectly on those criteria.*
>
> *32 If, which it is for the referring court to ascertain, Ms Bougnaoui's dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if it were to transpire that that apparently neutral rule resulted, in fact, in persons aDOHring to a particular religion or belief, such as Ms Bougnaoui, being put at a particular disadvantage, it would have to be concluded that there was a difference of treatment indirectly based on religion or belief, as referred to in article 2(2)(b) of Directive 2000/78: see, to that effect, judgment of today's date in Achbita v G4S Secure Solutions NV (Case the Claimant-157/15) [2018] ICR 102, paras and 34.*

206. The ECJ had the opportunity to consider dress codes again in ***IX v WABE eV; MH Müller Handels GmbH v MJ [2021] IRLR 832*** to which Mr Phillips also refererred. The court held:

206.1. A blanket ban on wearing signs and symbols of religious, philosophical or political belief which treated all workers in the same way would not be direct discrimination. Such a policy could, however, constitute indirect discrimination.

206.2. A workplace policy banning only 'conspicuous, large-sized' signs of political, philosophical or religious beliefs was liable to constitute direct discrimination. Unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground must be regarded as being directly based on that ground. It must be noted, however, that the court was clearly not suggesting that *all* dress codes which have unequal effects on people of different religions are thereby directly discriminatory. The dress code here was specially targeted at large-sized signs of political, philosophical or religious beliefs.

206.3. A workplace policy banning only 'conspicuous, large-sized' signs of political, philosophical or religious beliefs could be indirect discrimination if not direct discrimination.

207. In ***LB Islington v Ladele*** [2009] IRLR 154 [32 – 41], Elias J gave (and summarised existing) guidance on the approach to complaints of direct discrimination. The passage is very well known. Suffice it to say that in many cases

focusing primarily upon the *reason why* rather than the comparative exercise is a preferrable and acceptable approach to adjudicating upon a direct discrimination complaint.

208. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 EqA. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

Indirect discrimination

209. Section 19 EqA provides as follows:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

210. As Mr Jones submits, the proper pool for comparison when considering particular disadvantage is set out in para 4.18 of the EHRC Code, as endorsed by the Supreme Court in ***Essop v Home Office*** [2017] ICR 640 namely: *In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively.* However, that is easier to state than it is to apply.

211. In ***Eweida v British Airways PLC*** [2010] IRLR 322, the Court of Appeal considered among other things the need to identify group disadvantage. It acknowledged the difficulty in identifying the relevant group, though it did not resolve it. Sedley LJ said as follow

> *14. This familiar model, originating in the US Supreme Court's landmark decision in* Griggs v Duke Power Co *(1971) US 424, brought in its train considerable problems of implementation. In particular, the schematisation of it in the Sex Discrimination Act 1975 and the Race Relations Act 1976 required the isolation of 'pools' within which the proportion of disadvantage could be gauged, a task which defeated three decades' judicial attempts to find a workable formula. The Framework Directive*

2000/78/EC avoided this snare by defining indirect discrimination as occurring 'where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons'. The 2003 Regulations, designed to implement the Directive, adopted the formula set out in paragraph 6 above (a formula now replicated by amendment in the Sex Discrimination Act). Ms Monaghan does not suggest that this was an imperfect transposition: rather she submits that reg. 3 is to be read so as to conform with the Directive.

15. I accept the correctness of this approach. But there is in my judgment no indication that the Directive intended either that solitary disadvantage should be sufficient – the use of the plural ('persons') makes such a reading highly problematical – or that any requirement of plural disadvantage must be dropped. I see no reason, therefore to depart from the natural meaning of reg. 3. That meaning, as Ms Simler submits, is that some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares. This approach, unlike Ms Monaghan's, gives value both to sub-paragraph (i) and to sub-paragraph (ii). If you look at s.4A of the Disability Discrimination Act 1995 as amended, you see how Parliament provides for indirect discrimination against a single individual: it defines it as arising when a provision, criterion or practice, or any physical feature of the premises, 'places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled'. That is palpably not the case here.

16. The use of the conditional ('would put persons ... at a particular disadvantage'), whether in the alternative, as in the domestic legislation, or on its own, as in the Directive, does not in my view have either the purpose or the effect with which Ms Monaghan seeks to invest it. Her contention is that 'would put' requires the tribunal to aggregate the claimant with what may be – and in the present case would be – an entirely hypothetical peer-group to whom the same disadvantage is to be attributed. The effect of the argument is, as before, to permit a finding of indirect discrimination against a solitary employee.

17. The argument loads far too much on to the word 'would'. Its purpose, in my judgment, is the simple one indicated at the end of paragraph 12 above: to include in the disadvantaged group not only employees to whom the condition has actually been applied but those to whom it potentially applies. Thus, if you take facts like those in the seminal case of Griggs*, the group of manual workers adversely affected by the unnecessary academic requirement will have included not only those to whom it had been applied but those to whom it stood to be applied.*

18. On the narrowest view, its practical application in a case like this would require evidence that other uniformed BA staff would, like the claimant, have wished to wear a cross in a visible place but were deterred by the code from doing so: the fact that, unlike the claimant, they had not chosen to provoke a confrontation would not count against them. On the widest view it would operate wherever evidence showed that there were in society others who shared the material religion or belief and so would suffer a disadvantage were they to be BA employees. On an intermediate view, it would operate by assuming, even if it is not the case, that the workforce includes such others

and asking whether they too, or some of them, would be adversely affected by the relevant requirement. All three have difficulties. The narrow view excludes the solitary individual from the protection of the law against indirect discrimination – a result which the Disability Discrimination Act 1995 explicitly avoids but which the 2003 Regulations do not. The wide view places an impossible burden on employers to anticipate and provide for what may be parochial or even factitious beliefs in society at large. The intermediate view, despite its attractions, in practice risks becoming merged with the wide view by inviting proof that in the world outside the workforce are co-religionists or fellow believers, however few, who are to be assumed to have entered the same employment as the claimant and have become subject to the requirement to which the claimant objects.
19. We do not have to resolve this issue because Ms Eweida's evidence failed all three tests. It is also possible that the meaning and effect of the formula differ depending on the form of discrimination alleged: it may be relatively simple, and within the legislative purpose, to aggregate a single female employee with a hypothetical group of other female staff in order to gauge adverse impact, but forensically difficult, even impossible, to do the same for a solitary believer whose fellow-believers elsewhere in society may accord different degrees of importance to the same manifestation of faith.

212. Ms Eweida's claim subsequently succeeded in the ECtHR under article 9 of the convention. Article 9 contains no requirement for group disadvantage. Thus the question arises whether in cases in which article 9 is engaged, s.19 EqA should be read down so as to remove that requirement. The short answer is 'no'.

213. The matter was first considered in ***Mba v Merton London Borough Council*** *[2014] ICR 357.* That case was about justification, rather than group disadvantage, but in the course of their respective speeches their Lordships commented upon the interaction between article 9 and group disadvantage. Those speeches were considered by Slade J in ***Trayhorn v Secretary of State for Justice*** [2018] IRLR 502, a case in which group disadvantage was squarely in issue. She said as follows at [77]:

Lord Justice Elias held at para 34 that where art 9 is in play as it is in a claim against a public body as it is in this case in considering the concept of justification now in s 19(2)(d) it does not matter whether others are disadvantaged with the claimant. However a claim would not reach the justification stage if it had not surmounted the precondition of s 19(2)(b) that others in addition to the claimant who share the claimant's religious belief are put at a disadvantage by the PCP. Having regard to the interpretation of s 19(2)(d), in my judgment a claim may surmount the s 19(2)(b) hurdle if, adopting the language of Lord Justice Maurice Kay, some individuals of the claimant's religion are disadvantaged by the relevant PCP. To this extent it may be said that the threshold of s 19(2)(b) is not a high one. However as Lord Justice Elias held in Mba *it is there and cannot be ignored. Whether it has been surmounted is a question of fact in each case*

214. Choudry P reached the same view on the need to show group disadvantage in ***Page v NHS Trust Development Authority*** *UKEAT/0183/18*. He did not comment

on the standard of evidence required to prove it.

215. As noted above, in a case of this kind, the test for justification in s.19 EqA is the same as the test for justification in article 9(2). That test has already been set out above.

216. We would add that in ***IX v WABE eV; MH Müller Handels GmbH v MJ [2021] IRLR 832*** the ECJ said this:

> *It should also be emphasised that, as noted in para 60 above, if an internal rule such as that at issue in the main proceedings is not to be regarded as indirect discrimination, it must be appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is genuinely pursued in a consistent and systematic manner, and that the prohibition on wearing any visible sign of political, philosophical or religious beliefs imposed by that rule is limited to what is strictly necessary (see, to that effect, judgment of 14 March 2017,* Achbita and another v G4S Secure Solutions NV *(Case the Claimant-157/15) EU:the Claimant:2017:203, [2017] IRLR 466, [2018] ICR 102, paras 40 and 42).*

Harassment

217. Section 26 EQA 2010 provides:

> *(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].*
> *…*
> *(4) In deciding whether conduct has the purpose or 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."

218. As Mr Jones submits, the meaning of 'related to' is distinct from and broader than the 'because of' formulation under s.13. It is not, however, to be reduced to a but-for test and it is not enough to point to the relevant characteristic as the mere background to the events. As Underhill LJ said in ***UNITE the Union v Nailard*** [2019] ICR 28:

> *'… The necessary relationship between the conduct complained of and the claimant's gender was not created simply by the fact that the complaints with which they failed to deal were complaints about sexual harassment — or, in the case of Mr Kavanagh, that part of the situation*

that led him to decide to transfer the claimant was caused by such harassment.'

219. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristic is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

220. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

221. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged,

no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

222. We set out above a passage from ***Wasteney*** (para 55)***.*** There is no need to repeat what it says here but we remind ourselves of it and it's application to harassment.

223. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

224. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 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…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be 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."*
>
> *22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

225. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

226. There is little case-law on the meaning of 'dignity' in the context of s.26. Mr Phillips submits that *"… the concept of 'violating [the Claimant's] dignity' for the purposes of harassment is an EU law concept closely linked with that of fundamental rights, and must be applied accordingly."* Certainly we agree that some conduct which breaches human rights will violate dignity. It is unnecessary for us to decide whether all breaches of human rights are violations of dignity but we think it rather depends on the nature of the breach.

Victimisation

227. Section 27 EqA provides as follows:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) …".*
> *(2) Each of the following is a protected act—*
> *(a)-(c) …*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
> *(3)-(5) …"*

228. We have already considered the concept of 'detriment' above.

229. We considered the meaning of 'because of' above. The guidance of Underhill LJ in ***Page v Lord Chancellor*** at [69] is obviously relevant here too.

230. Where the protected act is an allegation of discrimination made in the context of a broader complaint, the allegation of discrimination must be a material factor in the reason for the treatment in order for victimisation to be made out (***JJ Food Service Ltd v Mohamud*** (EAT 0310/15)).

Time limits in discrimination law

231. S.123(1)(a) EqA provides that a claim must be brought within three months, starting with the date of the act to which the complaint relates.

232. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

233. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a

continuing state of affairs, in which an employee was treated in a discriminatory manner.

234. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194).

The burden of proof

235. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (*1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

236. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> 'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[2] He explained the two stages of the process required by the statute as follows:
> (1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):
>
> > "56. … The bare facts of a difference in status and a difference in treatment 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.
> > 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"
>
> (2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

[2] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."
> He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

237. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

238. In an indirect discrimination claim the Claimant has the burden of proving that the PCP put the group with the relevant protected characteristic at a particular disadvantage compared to others: see ***Nelson v Carillon*** *[2003] IRLR 428.*

239. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

240. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Constructive dismissal

241. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

242. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

243. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

244. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify*
> *and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61): "…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

245. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

246. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

247. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will*

be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

248. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

Unfair dismissal

249. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

250. There is a limited range of fair reasons for dismissal (s.98 ERA). In a constructive dismissal case, the reason for dismissal is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

251. In *Buckland*, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

252. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. Conduct is a potentially fair reason. The test of fairness is at s.98(4), in relation to which the burden of proof is neutral.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative

resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

253. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

254. The ***Burchell*** guidance is not comprehensive, however, and there are wider considerations to have regard to in many cases. For instance, the severity of the sanction in light of the offence and mitigation are important considerations.

255. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

256. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

257. In ***X v Y*** [2004] ICR 1634, Mummery LJ gave well known guidance in respect of the interaction between conventions rights and s.98 Employment Rights Act 1996. We referred ourselves to that guidance generally and in particular to paragraph 59.

Discussion and conclusions

Article 9 ECHR

258. In our view, Article 9(1) ECHR is the optimal place to start our analysis.

259. There is no doubt or dispute in this case that the Claimant wearing a Cross-Necklace at work was a manifestation of religious belief that engaged article 9(1).

260. The controversy is limited to whether the requirement to remove the necklace or accept one of the compromises offered when in clinical areas was justified applying article 9(2).

261. The Respondent relies upon the aim of protecting the health and safety of staff and patients. Certainly this is an aim which falls within the scope of article

9(2). And, importantly, we re-remind ourselves that the nature of the aim is such that we must give the Respondent a particularly wide margin of appreciation.

262. The first issue is whether the interference with the article 9(1) rights was prescribed by law. Our analysis is as follows:

262.1. *Was there a legal basis in domestic law for the restriction?* In principle, yes there was: the DCU-P;

262.2. *Was it sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable her to understand its scope and foresee the consequences of her actions so that he can regulate his conduct without breaking the law?* It was. The policy is drafted in reasonably clear terms, but in any event the Respondent repeatedly made clear to the Claimant that it considered her wearing of the necklace in clinical areas to be a breach of the policy that was a disciplinary issue. The range of possible disciplinary sanctions, which extended to dismissal, was clear. The policy itself was readily accessible (e.g. on the intranet). Once an issue of breach of policy arose (and indeed before) we have no doubt that the Claimant could at virtually any time have accessed the policy.

262.3. *Was the law being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate?* The policy was applied in an arbitrary way and in a way that was not proportionate – this is discussed in detail in our analysis of proportionality.

263. We turn then to proportionality. When considering proportionality, the first issue is whether the objective was sufficiently important to justify the limitation of a fundamental right. In principle it was: the health and safety of patients and staff was a very important and weighty objective.

264. The second issue is whether the interference with the Claimant's right to manifest her religion was rationally connected to the objective. The interference had a rational connection to the objective. As we have identified in our findings of fact, there is some infection risk involved in wearing a necklace and there might be some risk involved in the event of an assault or entanglement with equipment, albeit it on our findings low in both cases.

265. The next issue is whether a less intrusive measure could have been used. The concern about choking/getting entangled could have been allayed altogether by a safety necklace. The simplest thing would have been a necklace that fastened with magnets that were strong enough to keep the necklace from accidentally falling off but weak enough to come off if yanked. If not magnets then some other safe closing mechanism. If this option had been presented to the Claimant she would have needed to agree to it and sourced such a necklace. We have no doubt that she would have gladly done that. Her concern was about hiding the cross or wearing it in a way that meant it was not clearly visible. This solution did not trespass on that concern.

266. A safety necklace would not, however, have allayed the concern about infection risk. This means that it is necessary still to go on to consider whether, a fair balance was struck between the rights of the individual and the interests of the community.

267. We remind ourselves that the Claimant's right to manifest her religious beliefs by wearing a cross on a chain weighs heavily in the balance.

268. It is also important to consider the compromises offered to the Claimant. We do not think that these significantly shift the balance in the Respondent's favour:

268.1. *Wearing cross-shaped stud earrings*. These would have had to be tiny, no more than 5mm in size, in order to comply with the policy. They would thus have been so small that they would not, or at best would barely have, served the function of being a visible manifestation of belief. They would only have been identifiable as a symbol of religious devotion at very close range. They were also not the manner in which the Claimant was accustomed to, nor the manner in which she wanted to, manifest her belief.

268.2. *Wearing the cross on a longer chain and pinning the cross inside her uniform/wearing a high-necked top with the cross underneath.* This would have defeated the object of wearing a visible manifestation of faith. We do not think it would be any answer to say that the Claimant was sometimes prepared to cover the cross with uniform i.e., when she was the scrubbed in nurse. That shows that there were times when she struck the balance between her religious belief and health and safety, differently. If anything that is to her credit.

268.3. *Having a cross embroidered on the uniform*. Although this was briefly canvassed in evidence before us, it is not something that was ever actually offered to the Claimant so is irrelevant. This was also not the manner in which the Claimant was accustomed to, nor the manner that she wanted to, manifest her belief.

269. In order to properly analyse the balance it is necessary to set the risks posed by the Cross-Necklace in context. That context includes a consideration of how other items, that posed comparable risks, were treated, and, where there was a difference of treatment, the quality of the explanation for it.

270. From an infection control perspective there were a range of relevant items other than necklaces in clinical areas that were permitted and which posed an infection risk. There is no evidence to show that the infection risk they posed was lower than the Cross-Necklace. Indeed, common sense would suggest the risk was at the very least of the same order:

270.1. Plain rings. These are worn on the fingers and are clearly more likely to touch patients. Of course hands can be washed, but that is as true of a hand that is wearing a ring as one that has touched a necklace. A ring can be washed, but so can a metal necklace. Gloves can be worn and they cover rings but not necklaces. However, there is no suggestion that gloves are always worn when dealing with patients. The fact is that

common sense tells us a ring worn by a clinician is more likely to touch a patient than a short necklace.

270.2. Kalava bracelets. These are permitted if pushed above the elbow so as to maintain the bare below the elbow hygiene imperative. Likewise wearing a necklace has no impact on the bare below the elbow hygiene imperative. Either a bracelet or a necklace could touch a patient. A bracelet is if anything more likely to even if worn above the elbow; at the least the chances are comparable.

270.3. Religious head-coverings such as hijabs and turbans are allowed. Hijabs should be worn so as to fit closely. In theatre at least a surgical hat should be worn over the top. Nonetheless, these are items that can (like all items of clothing) carry pathogens. They are also, like necklaces, items which belong to the individual employees and are not subject to the laundering process that hospital scrubs are. Not all of, say, a hijab would be covered by a surgical hat. It could touch a patient. The analysis is materially the same for turbans.

270.4. Neckties are “strongly discouraged” in clinical areas but the fact is they can be worn without breach of the DCU-P. This is despite neckties (other than bowties) being identified as ‘poor practice’ in the DOH Guidance. Neckties need to be tucked and worn behind an apron when dealing with a patient. If tucked in at least part of the tie (the knot and some length) is left visible and accessible. Ties can be laundered (though some are dry-clean only); metal necklaces can be washed. Ties, like necklaces, are items which belong to the individual employees and are not subject to the laundering process that hospital scrubs are.

271. There is no cogent explanation as to why these items are permitted but a fine necklace with a small pendant of religious devotional significance is not. There has been no evidence, for instance, that these items carry a lower infection risk than a necklace. When we say there is no cogent evidence of this we mean not only that there is no scientific evidence but also that there is no cogent evidence of a more anecdotal sort either, such as evidence based upon clinical experience or even just logical reasoning.

272. A further difficulty, and a further point of vital context, is that despite the terms of the DCU-P and the CQC report, the Respondent tolerated other employees openly wearing necklaces and other jewellery. If this were simply the odd isolated incident of non-compliance with the DCU-P it would not be a powerful or significant point – it would simply be as expected in a large organisation. However, it is not. Our finding of fact is that the wearing of jewellery in clinical areas, including necklaces, was rife; and it was tolerated. This happened during, among other periods, the period that the Claimant was the subject of disciplinary proceedings and a final written warning.

273. It appears that wearing jewellery that was non-compliant with the DCU-P was most rife among doctors and anaesthetists (though the problem was not limited to such medical staff). All that the Respondent’s witnesses were really able to say by way of explanation for this was that doctors and anaesthetists had a different

line management structure to nurses. However, in our view that is a very weak explanation. Ultimately reporting lines carry little weight here:

273.1. The DCU-P applied to *all* employees including doctors and anaesthetists;
273.2. Doctors and anaesthetists also worked in close contact with patients and could infect them and/or be assaulted by them;
273.3. Doctors, anaesthetists and nurses work (often cheek and jowl), for the same employer, on the same patients, in the same wards, in the same theatres.

274. Mr Jones made the point in submissions that in order to discipline a doctor a particular procedure (MHPS) would need to be followed. That is a different procedure than the one that applies to nurses. That no doubt is true. However, firstly, there is no evidence that this is the reason why the policy has not been enforced against doctors and anaesthetists. Secondly, as Mr Jones accepted a failure to comply with the DCU-P is something that could be dealt with under MHPS. Thirdly, there is no evidence before us of any particular difficultly of dealing with failures to comply with the DCU-P under MHPS.

275. Beyond the above items of dress there are also name badges (which can be worn as badges pinned to the uniform) and lanyards holding security passes. Cleary, these items can harbour pathogens. However, we regard them as less significant (and not to alter the analysis of the case) because they have important work-focussed functions that the other items considered above do not. It is obviously important from a security and customer service perspective that the Respondent's staff have identification. And important that they have electronic touch passes (which the lanyard ID pass doubles as)/keys for moving around secure and semi-secure areas of the premises and accessing secure cupboards etc.

276. The other limb of concern about wearing a necklace is that it might be grabbed by a patient or might get entangled with something and in either case cause injury. However:

276.1. Firstly, the Cross-Necklace the Claimant routinely wore had a chain so fine that common sense tells us it would just break if yanked;
276.2. Secondly, ties were strongly discouraged but permitted. Obviously a tie presents a choking hazard. If anything that is a clearer choking hazard than the Claimant's necklace, even if the tie is tucked in. A normal tie is pretty strong and really could be used to grab or garrot somebody;
276.3. Thirdly, there can be no doubt that other religious items such as headscarves and turbans could be grabbed by an assailant and used to assist the assailant in an assault. While headscarves ought to be worn so that they are not loose, even if well fastened, they are still grabbable. A kirpan might also be grabbed by an assailant and used to assist in an assault (though the kirpan would normally if not always be covered so would be less accessible). The mechanism by which these items might be used by an assailant to assist an assault may be different to the mechanism of using a necklace or tie. However, there is

no evidence that the risk to safety is lower. Nor, so far as the evidence shows, has any attempt been made to assess the comparative risk.

276.4. Fourthly, the Respondent was prepared to permit the Claimant to wear a long necklace that would therefore have been worn under her uniform (though some of the necklace would likely still have been exposed given the V-neck top of the scrubs). Even if the Claimant got in the habit of tucking the necklace into her bra, it would still be liable to fall out of the uniform and dangle from time to time, particularly in the event of the Claimant being assaulted. If so, it would present a greater risk than a short chain because it would be a lot easier to grab. At times the Respondent suggested the Claimant pin the cross to the inside of her uniform and this might have made it more secure and less likely to fall out. However, at other times, the offer to her was simply to wear a longer chain so that the necklace hung inside the uniform.

277. It is also relevant to consider that the DCU-P was in part based on national guidance in the form of the DOH Guidance. However, DOH Guidance left the uniform policy to be determined at a local level. It was not prescriptive and envisaged exceptions/accommodations being made on religious grounds. We add, though this is incidental, the Respondent clearly understood itself to be able to depart from it since its DCU-P permitted neckties which the DOH Guidance put in the same bracket as necklaces (poor practice).

278. It is also relevant to take into account the fact that the Respondent was criticised by the CQC for a lack of compliance with its DCU-P including the wearing of jewellery. This factor is heavily undermined, however, by the fact that the Respondent allowed non-compliance with the DCU-P to remain rife as regards jewellery even after the summer of 2018. Further, it is one thing for the CQC to generally criticise the wearing of jewellery. But it cannot be assumed that the CQC would be critical of an exception being made to the DCU-P where a necklace is worn as a manifestation of religious belief. That is so particularly where the necklace has the benign characteristics (small, strong enough to stay on, weak enough to come off if yanked, worn close to the neck, barely dangles etc) the Cross-Necklace the Claimant typically wore did.

279. Stepping back, looking at matters in the round and weighing the competing considerations, we find that:

279.1. the difference of treatment between the Cross-Necklaces and the other items we have considered above (hijabs, turbans, kalava bracelets and neckties) was arbitrary; and/or

279.2. the difference of treatment between the treatment of the Claimant wearing a Cross-Necklace and others whose jewellery wearing in breach of the DCU-P was tolerated was arbitrary; and/or

279.3. the Respondent did not come close to striking a fair balance as required to justify the interference under article 9(2).

280. We find, then, that the infringement of the Claimant's article 9(1) rights was not justified.

Direct discrimination and harassment: high level reasoning

281. A central issue in the case is whether the requirement that the Claimant remove the cross or accept one of the compromises was discriminatory within the meaning of either (or neither) s.13 or s.18 EqA and/or was harassment within the meaning of s.26. We think it is appropriate to deal with it at a high level before then turning to each of the allegations in the list of issues.

282. In our view, applying the approach to s.13 in manifestation of belief cases that the parties have asked us to, the one described in ***Page v NHS**,* the requirement was directly discriminatory:

282.1. In wearing a Cross-Necklace in the workplace, including in clinical areas, the Claimant was manifesting her religious belief;

282.2. The Respondent objected to the wearing of the Cross-Necklace in clinical areas. The Respondent in effect says that the treatment was not because of the manifestation of belief itself. Rather, it was because there was a feature of the manifestation that it could justifiably object to. That feature was the wearing of the cross on a necklace while in clinical areas given the risks to health and safety. The question, then, is whether that was a manifestation of belief to which objection could justifiably be taken.

282.3. In our view, on the facts of this case, the wearing of the Cross-Necklace in clinical areas was not something to which objection could justifiably be taken. The factors that led us to the conclusion that the interference with the Claimant's article 9 rights was not justified also lead us to this conclusion. By way of short summary only (and without prejudice to the more detailed analysis above), the Respondent was not justified in refusing to let the Claimant manifest her religious belief by wearing a Cross-Necklace while in practice it simultaneously permitted many others to wear religious attire that posed comparable health and safety risks and/or permitted many others to wear jewellery including necklaces (whether religious attire or not) that posed comparable health and safety risks.

282.4. Thus, as and where the Claimant was subjected to detrimental treatment (such as disciplinary action), because of her manifestation of belief / refusal to cease that manifestation, that should be conceptualised as treatment because of religion rather than some properly separable feature. Such detrimental treatment was therefore direct discrimination.

282.5. We add that for the same reasons such treatment/conduct should be conceptualised as conduct related to religion for the purposes of s.26 EqA.

283. In this case we do think not that an analysis of comparators for the purposes of the direct discrimination claims is helpful or that it adds anything. Indeed it leads to exactly the sort of arid, difficult and unnecessary disputes that have caused the appellate courts to encourage tribunals to focus upon the 'reason why'. However, In case it is necessary or helpful to perform a comparative exercise we do so.

284. We think a relevant comparison can be made with an employee working in a clinical area wearing a headscarf, alternatively a turban, alternatively kalava bracelets, alternatively a tie. These are appropriate comparators because they involve people wearing items that pose comparable health and safety risks to a necklace (certainly there is no evidence that those items posed a lower risk). Unlike the Claimant these comparators would not have been required to (1) remove the items or (2) remove them from sight or (3) swap them for stud earrings in the shape of a religious symbol or face disciplinary action if not. Certain modifications would have been required in respect of these items as canvassed above e.g. wearing a hijab in a close fitting way, wearing a surgical hat over the top when in surgery and wearing kalava bracelets above the elbow in patient-care. However, those modifications would not have removed the items from sight. Further those modifications created no known/evidenced problem for the wearer from a religious devotional perspective. Yet further, even after modification the items in question would have continued to pose a (low) level of risk. The level and nature of the risk was materially the same as that posed by wearing a Cross-Necklace.

285. In our view, it would be no answer to this comparison for the Respondent to say that these items are, unlike necklaces, permitted by the DCU-P. That would simply beg the question. One of the very things we are testing is whether the policy is discriminatory. Further and in any event, the DCU-P is not a necklace policy; it is a dress code policy of much more general application. The limitations imposed on the Claimant's manifestation of religious belief had a risk to health and safety rationale. The policy can fairly be tested, among other things, by considering the treatment of items that have risk profiles that are similar, or not materially different, to a Cross-Necklace. The items compared do not need to be identical.

286. Before leaving the high-level reasoning we record that the tribunal did consider whether or not this was a case in which some form of conscious or sub-conscious prejudice towards the Christian faith was, or was part, of the reason why the Claimant was consistently required to remove the Cross-Necklace. On this matter the tribunal split.

287. Miss Foster-Norman considered that those managing the Claimant indeed had a particular problem with the Cross. After all, the Claimant was required to remove the Cross-Necklace, cover it by wearing it inside her top or wear tiny Cross-earrings instead of it that would have been barely identifiable as Crosses. Miss Foster-Norman noted that the DCU-P contains a list of religious items at paragraph 4.14. That list did not include the Cross.

288. Employment Judge Dyal and Ms Forecast took the opposite view. The Claimant's managers were *not* prejudiced towards the Christian faith or manifestations of it. Rather, they understood themselves to be following the DCU-P in requiring the Claimant to remove the Cross-Necklace or accept a compromise when in clinical areas:

288.1.1. The provisions of the DCU-P do in terms prohibit necklaces in clinical areas and the Claimant's managers endeavoured to apply these provisions.

288.1.2. The DCU-P does make provision for reasonable accommodations of religious items and the Cross Necklace was a religious item. The Claimant's managers thought that they had done all that was needed in order to make reasonable accommodation. Although we disagree substantively with their analysis, we accept that it is what was in their minds.

288.1.3. We note that the DCU-P does include clerical-collars in the list at paragraph 4.14 and this is an item of dress associated with the Christian faith. The list is non-exhaustive in any event.

288.1.4. The Claimant, and everyone, was allowed to wear a Cross Necklace in non-clinical areas.

288.1.5. VR was required to remove her necklace which had no relation to the Christian faith.

288.1.6. Enforcement of the DCU-P was extremely uneven across the Respondent trust. This reflected some managers, such as the Claimant's, giving it high priority with a preponderance of other mangers doing the opposite.

Direct discrimination and harassment: dealing with the list of issues

List of Issues 15(a): In late 2016, Ms Wright demanded that the Claimant removes her cross, and threatened to "escalate it" if the Claimant did not comply

289. Ms Wright's conduct was obviously unwanted. In our view it related to religion. We rely upon the high-level reasoning above. We add, the Claimant was not just wearing a necklace. It was a Cross-Necklace that was a manifestation of religious belief and not a mere fashion accessory. This was not only in fact the case, but was also apparent contemporaneously from the conversation on this occasion. In asking the Claimant to remove the Cross-Necklace Ms Wright was simultaneously asking the Claimant to cease manifesting her religious belief in her preferred manner.

290. Subjectively, from the Claimant's point of view, that created an offensive and threatening environment. Having regard to the Claimant's view, all the circumstances and whether it is reasonable for the conduct to have the effect the Claimant perceived we find that the conduct did have the effect (not the purpose) of creating an offensive and threatening environment. Ms Wright approached what was a very sensitive issue in a very blunt way. This occurred in circumstances in which the Claimant had been wearing the Cross-Necklace for a very long time, had been doing so openly and saw others around her manifesting their religious beliefs in their form of dress and appearance. Further, others were wearing necklaces unchallenged. Finally, this was an interference with the Claimant's article 9(1) rights that was not justified within the meaning of article 9(2).

291. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15(b): On 7 August 2018, Ms Wright demanded that the Claimant remove or conceals her cross, and threatened to "escalate it" and initiate disciplinary proceedings

292. This conduct was related to religion for the same reasons as the preceding allegation.

293. Our analysis of whether it meant the remaining tests of harassment is the same as the preceding allegation, with a few additional features:

293.1. It is of course relevant to take into account that by this stage there had been the CQC inspection and that there was a wider push going on to reinforce the uniform policy.
293.2. However, as described extensively above, the enforcement of the DCU-P was extremely inconsistent even after the CQC inspection. And, again what was a very sensitive matter was dealt with in a very blunt way. Further, this time the threat to the Claimant was even clearer – namely that she would be subject to disciplinary proceedings.
293.3. Our conclusion is that the conduct did create a threatening and offensive environment for the Claimant.

294. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of issues 15 (c): Ms Wright's email to the Claimant on 9 August 2018

295. The email was obviously unwanted.

296. In our view the email related to religion. We repeat the same reasoning.

297. Subjectively, from the Claimant's point of view, the email created an offensive and threatening environment. Having regard to the claimant's view, all the circumstances and whether it is reasonable for the conduct to have the effect the Claimant perceived we find that the conduct did have the effect (not the purpose) of creating an offensive and threatening environment:

297.1. The email was overtly threatening (the threat being of disciplinary action). It said in terms that if the Claimant did not comply "*I will have no option but to discipline you for not following the Dress Code and Uniform Policy".* This was rather high-handed given that no investigation even had yet taken place.
297.2. Again, this occurred in circumstances in which the Claimant had been wearing the Cross-Necklace for a very long time, had been doing so

openly and saw others around her manifesting their religious beliefs in their form of dress and appearance.

297.3. Further, others were wearing necklaces unchallenged.

297.4. Finally, this was an interference with the Claimant's article 9(1) rights that was not justified within the meaning of article 9(2).

298. In the alternative, the conduct complained of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of issues 15 (d – e): Ms Wright chasing the Claimant at work for an acknowledgement of that email on 9, 13 and 20 August 2018 respectively; Ms Wright saying she would ensure the Claimant would be disciplined on 20 August 2018.

299. The conduct was all unwanted by the Claimant.

300. Some but not all of the conduct related to the protected characteristic:

300.1. In so far as Ms Wright was chasing the Claimant for an acknowledgment of her email, we do not think this related to the protected characteristic. The protected characteristic was just the background to this conduct. Ms Wright's conduct was an effort to get confirmation that her email had come to the Claimant's attention, get an acknowledgment of her email and the Claimant's response to it in order to take matters forward.

300.2. However, Ms Wright saying to the Claimant on 20 August 2018 that she would ensure the Claimant would be disciplined was related to the protected characteristic. We repeat the same reasoning as above.

301. We think chasing for a response to the email was essentially innocuous and it would not be reasonable to regard it as creating a proscribed environment or violating the Claimant's dignity. In the circumstances, a response was needed and prompting to get one was ordinary managerial action.

302. However, the encounter in the coffee room went beyond that. It did become very unpleasant and confrontational and culminated with words to the effect that Ms Wright would '*ensure that the Claimant would be disciplined'*. The Claimant found this to be hostile and threatening. Having regard to the Claimant's view, all the circumstances and whether it is reasonable for the conduct to have the effect the Claimant perceived we find that the conduct did have the effect (not the purpose) of creating a hostile and threatening environment. The conduct was high-handed particularly given that no investigation even had yet taken place. Again, this occurred in circumstances in which the Claimant had been wearing the Cross-Necklace for a very long time, had been doing so openly and saw others around her manifesting their religious beliefs in their form of dress and appearance. Further, others were wearing necklaces unchallenged. Finally, the requirement to remove the Cross-Necklace or accept a compromise was an interference with the Claimant's article 9(1) rights that was not justified within the meaning of article 9(2).

303. The chasers were not direct discrimination. The reason for the treatment is described immediately above.

304. The threat of disciplinary action was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15 (f): Ms Edmondson walking into the operating theatre where the Claimant was in charge, while a patient was on the surgery table, on 21 August 2018

305. The conduct was obviously unwanted on the Claimant's part.

306. The conduct was related to religion for the same reasons that the preceding efforts to require the Claimant to remove the Cross-Necklace were.

307. The Claimant found the conduct offensive, hostile, intimidating and a violation of her dignity. Having regard to the Claimant's view, all the circumstances and whether it is reasonable for the conduct to have the effect the Claimant perceived we find that the conduct did have the effect (not the purpose) of creating an offensive, hostile and intimidating environment:

307.1. Ms Edmondson's conduct was high-handed. She literally interrupted surgery in order to address the issue. This was to treat the matter as if it was an emergency, but on any view it was not.
307.2. The Claimant had been wearing the Cross-Necklace at work for over a decade and a half by this point without it causing any known problems.
307.3. An anaesthetist in the very same theatre was wearing a pendant necklace and went unchallenged.
307.4. Ms Edmondson did not require the Claimant to remove the Cross-Necklace immediately or alternatively leave surgery immediately. She gave the Claimant until 13:30 to remove the cross. In the meantime the Claimant remained in surgery.
307.5. There were further aggravating features. The matter was dealt with very publicly – it was in front of a number of co-workers. Again this was done with another member of staff – the anaesthetist - who was subject to the DCU-P wearing a necklace with a pendant at the very same time left unchallenged.
307.6. Finally, the requirement to remove the Cross-Necklace or accept a compromise was an interference with the Claimant's article 9(1) rights that was not justified within the meaning of article 9(2).

308. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15(g): Commencing the disciplinary investigation in early October 2018

309. The conduct was clearly unwanted. The Claimant simply wanted to get on with her job whilst wearing her Cross-Necklace.

310. The conduct was related to the protected characteristic. It was an investigation into whether the way the Claimant chose to manifest her religious belief amounted to a disciplinary offence.

311. The Claimant did perceive the conduct to be intimidating and threatening. However, though we take that into account in all the circumstances we do not think it would be objectively reasonable to regard this conduct as creating a proscribed environment or violating the Claimant's dignity. The matters that were under investigation did indeed need to be investigated. The investigation was among other things an opportunity for the Claimant to be heard.

312. We do not, in the alternative, consider that this conduct was direct discrimination either. The reason for the treatment was to commence an investigation into whether or not the Claimant's refusal to remove her necklace or accept one of the compromises offered was a disciplinary offence. Obviously this was closely related to the manifestation of belief, however we think in this instance the reason was one that can properly be regard as separable from the manifestation of belief itself. Whether the Claimant was, or was not entitled to wear the Cross-Necklace was a really complicated issue. It truly merited investigation. And, if the Claimant was not entitled to wear the Cross-Necklace, her refusal to cease doing so could properly be characterised as a disciplinary issue so it was reasonable for this to be a disciplinary investigation though that was perhaps not the only kind of investigation it might have been.

List of Issues 15 (h): Sending the Claimant a letter stating she was required to submit a statement by 8 October and to attend the investigation meeting on 12 October while the letter, misleadingly dated 2 October, was only posted on 8 October and received on 10 October 2018

313. The conduct was unwanted on the Claimant's part.

314. The conduct was not related to the protected characteristic. Certainly, the protected characteristic was part of the background, but that is all it was. The letter was dated 2 October because that is when it was written. It was posted on 8 October because the Claimant had not responded to the email when the letter had first been sent. It was received on 10 October because that is how long the post took.

315. The Claimant found the letter offensive and hostile in that she thought it was deliberately making it more difficult for her to respond to the disciplinary allegations. However, we do not think, in all the circumstances that it would be reasonable to regard this conduct as creating a proscribed environment or violating the Claimant's dignity. The conclusion the Claimant drew, that the investigation letter had been falsely back-dated to give her less time to respond, was not a reasonable one even looking at the matter from her perspective. It was always a highly implausible explanation for the gap between the date on the letter and the date of delivery. This was, in reality, a minor and wholly innocuous matter.

316. This matter was not, in the alternative, direct discrimination. The reason for the treatment is stated above and, crucially, it was not because of religion or manifestation thereof.

List of Issues 15(i): Ms Edmondson's comment "We are still waiting for the hearing regarding the one on your neck"

317. The impugned conduct is the comment *"We are still waiting for the hearing regarding the one on your neck".* This was clearly unwanted on the Claimant's part.

318. The comment was related to the protected characteristic. We rely on the high-level reasoning. It was a direct reference to an investigation or disciplinary meeting about the Claimant wearing the Cross-Necklace which was a manifestation of her religious belief. It also implied that the Claimant had committed some wrongdoing by wearing the necklace.

319. The Claimant found the comment offensive. In our view, taking into account all the circumstances of the case and what is objectively reasonable, the comment did create an offensive environment. It was gratuitous, insensitive and offensive to reference the highly sensitive issue of the disciplinary investigation into the Claimant wearing the Cross-Necklace in this unrelated forum. Particularly given that a co-worker was present who was not privy to or aware of the ongoing disciplinary process.

320. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15(j): Stephen Lord's letter to the Claimant dated 20 November 2018, including accusation of "continued failure to comply with the Dress Code and Uniform Policy"

321. The letter was obviously unwanted on the Claimant's part.

322. The conduct did relate to religion. It was a letter squarely about the investigation into the Claimant's manifestation of belief and the consequences of that manifestation. We rely on the high level reasoning.

323. The Claimant found the conduct offensive and hostile. In all the circumstances and having regard to what is objectively reasonable the conduct did create an offensive and hostile environment. The letter was worded very strongly in parts. It stated *"… in the face of your continued failure to comply with the Dress Code and Uniform Policy".* It explained the decision to redeploy the Claimant in similar terms *"based on your continued failure to comply with the policy; the potential harm to patients through your own behaviour or those of others who follow your lead; the reputational risk to the organisation of your continued failure to follow policy… and in order to allow a fair investigation without hindrance of your decision to refuse to follow policy and reasonable management requests".* This essentially stated an outcome to the very things that were, or if not should have been, under investigation. Whether the Claimant was in breach of the DCU-P and whether the

management instructions she had refused to follow were reasonable. The language used was unequivocal and overall it did not suggest a provisional view but a conclusion that the Claimant was in breach of policy and that the instructions to her were reasonable ones. There was simply no need for Mr Lord to express himself in this way nor to reach the conclusions he evidentially had, at that early stage. That is enough to meet the threshold. However, we would add, that again, this all occurred in circumstances in which the Claimant had been wearing the Cross-Necklace for a very long time, had been doing so openly and saw others around her manifesting their religious beliefs in their form of dress and appearance. Further, it occurred at a time when others were wearing necklaces in clinical areas unchallenged.

324. We do note that the impugned letter also said "*Please note that this is not a sanction and does not imply right or wrong in advance of the investigation outcome".* That does not save the position because what is said there is essentially untrue in that the letter absolutely did imply wrongdoing (continued failure to comply with policy) in advance of the investigation outcome.

325. In the alternative, we consider that this was directly discriminatory. The reason for the treatment was the Claimant's manifestation of belief rather than some properly separable feature of it. Whilst we accept that investigating whether the manifestation of belief was or was not a disciplinary offence is a properly separable factor, this is different. The conclusions in the letter that the Claimant had refused to follow a reasonable management instruction and had breached the DCU-P. Relying on the high-level reasoning, the manifestation of belief itself was the reason for the treatment.

List of Issues 15(k), (v): re-deployment of the Claimant to various non-clinical roles since 28 November 2018; continued redeployment from August 2019

326. The conduct was obviously unwanted. The Claimant wanted to work in her usual substantive role.

327. The conduct did relate to religion. The Claimant was redeployed because she had, and moreover refused to cease, manifesting her religious belief in clinical areas by wearing a Cross-Necklace. We rely on the high-level reasoning.

328. The Claimant found being limited to clerical duties humiliating. In all the circumstances and having regard to what is objectively reasonable, we think that this did create a humiliating environment. The Claimant was a highly experienced and skilled Theatre Practitioner. The duties she was redeployed to were of a totally different order than her substantive duties. It would have been plain to colleagues that she had been redeployed and was not working as a Theatre Practitioner. This was done without any form of structured risk assessment as to whether it was really necessary to redeploy her away from Theatre. Moreover it happened after many years of work in Theatre, wearing a Cross-Necklace without apparent problem. And at a time when others were allowed to manifest their religious beliefs wearing items that had broadly similar risk profiles as a Cross-Necklace. And at a time when many others working in clinical environments were wearing jewellery including necklaces in clinical areas without challenge.

329. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15(l): Being approached by Mr Duymun on 31 January 2019 to demand that the Claimant removes or conceals her cross

330. The conduct was obviously unwanted.

331. The conduct clearly related to the protected characteristic. The Claimant was being asked to remove the Cross-Necklace which she wore as a manifestation of her religious belief. We also rely on the high level reasoning.

332. The Claimant found this request humiliating and offensive. We find that, having regard to all the circumstances and what is objectively reasonable this request was humiliating and offensive. The very reason that the Claimant had been redeployed to this clerical job was so that she could wear the Cross-Necklace in an environment in which the Respondent was prepared to permit her to do so. Yet, having been so redeployed she was now told to remove the cross. Further, this was at a time in which there were many others in the hospital wearing religious apparel in clinical areas that had a broadly comparable risk profile and others who were wearing jewellery including necklaces unchallenged.

333. In the alternative, the conduct complained of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15 (m): The contents of the Investigation Report and the Grievance Report provided to the Claimant on 14 February 2019

334. The contents of both reports was unwanted as were the notes of the investigation meeting which the Claimant considered inaccurate.

335. The content of both reports related to the protected characteristic. The focus of both was upon the Claimant's manifestation of her religious belief by wearing a Cross-Necklace.

336. The Claimant found both reports offensive and intimidating: cumulatively they rejected her complaints that she believed were well founded and made clear that a disciplinary sanction was very much on the cards.

337. The rejection of the Claimant's grievance and the decision that the Claimant was in breach of the DCU-P in a way that meant she should progress to the disciplinary stage we think were, in all the circumstances and considering what is objectively reasonable, offensive and intimidating. The analysis was very thin. It failed to properly grapple with the detail or the complexity of the issues. For instance, an important part of the Claimant's case was that others were wearing jewellery in clinical areas unchallenged and that this included people more senior than her. The investigation report records this point "*Senior people, consultants*

and Doctors all wear jewellery, no one has asked them to remove it. We are all suppled to follow the same policy". However, in the conclusion the only analysis of the relevance of this was to note that the matter had been raised by Ms Edmondson with the clinical lead for anaesthetics and the clinical director. That was very slender treatment of the issue. We know that the wearing of jewellery continued to be rife and to be tolerated. No real thought seems to have been given to whether it was really appropriate to discipline the Claimant for doing something that in fact many others in the workforce (including more senior colleagues who worked just as closely with patients) were doing unchallenged. Equally, no real thought was given to the Claimant's point that others were wearing religious apparel in clinical areas and that she should be treated equally to them. The Claimant's complaint of discrimination was rejected essentially because the DCU-P prohibited necklaces in clinical areas and applied to everybody. But that failed to grapple with the obvious issue: on what basis does the DCU-P treat necklaces worn as a sign of religious devotion differently to say, kalava bracelets and other items, and does that reason really withstand scrutiny?

338. In the alternative, the content of the grievance investigation report and the disciplinary investigation reports were because of the protected characteristic. Both reports had detrimental outcomes because the report writers believed that the Claimant had manifested, and wanted to continue to manifest, her religious belief in a particular way. That was a discriminatory ground of treatment on the facts of this case: we refer to our high-level reasoning.

339. As to the notes of the investigation hearing, in our view these were, objectively, innocuous. They were not verbatim but they were broadly accurate. Objectively, they did not create a proscribed environment nor violate the Claimant's dignity. The Claimant has got this issue out of all proportion. The notes were not harassment. Nor was the inaccurate/imperfect note taking such as it was directly discriminatory. The reason for such inaccuracy/imperfection as there was, was simply that the notes were not intended to be verbatim and note-taking of investigation/grievance meetings is difficult leading to imperfect and inaccuracy. People at times speak more quickly than can be perfectly noted; people sometimes speak over each other and so on.

340. We do not think that the requirement to attend a disciplinary hearing and/or a grievance hearing adds anything unlawful. Those hearings were an opportunity to further discuss the matters and give the Claimant a further right to be heard. Given the conclusions in the two reports it was right and proper for there to be hearings to respectively discuss the grievance outcome and to discuss the disciplinary allegations. (It would have been better for there to be a single meeting to discuss both but that did not happen because the Claimant's representative considered it would be too much for the Claimant to deal with both at once).

341. Asking the Claimant to attend such meetings was not harassment. It did not, objectively speaking, create a proscribed environment or violate the Claimant's dignity. Nor was it direct discrimination. The reason for requiring the Claimant to attend those meetings was respectively to discuss the grievance investigation report and to give her an opportunity to further answer disciplinary charges. We

think those reasons are properly regarded as separate from the manifestation of religious belief itself.

List of Issues 15(n): The disciplinary hearing on 13 March 2019;

342. Our analysis of this conduct – the fact of the hearing itself - is materially the same as the analysis of the requirement to attend this hearing that we considered above.

343. For the same reasons it was neither harassment nor direct discrimination.

List of Issues 15 (o – p): Refusal to postpone the disciplinary hearing until the Claimant's witness comes back from stress leave; Refusing the Claimant's request for permission to tape-record the disciplinary hearing

344. The conduct did not relate to nor was it because of the protected characteristic or any manifestation of it; those things were mere background. The postponement was refused because there was a good reason for refusing it and in order that the disciplinary process could be progressed. Permission to record was refused because it was not in keeping with Trust policy to record such meetings.

345. The Claimant may have regarded the conduct as creating a proscribed environment or violating her dignity. However, in all the circumstances of the case and having regard to what is reasonable it did not do so. The refusal to postpone was well founded since the colleague the Claimant wanted to give evidence was on long-term sick leave. Refusing the postponement decision was a benign managerial action. So too was the refusal of permission to tape-record the disciplinary hearing. Recording the meeting was not in keeping with the Respondent's internal practices. The Claimant was allowed to be represented at the meeting. A member of HR took notes.

List of Issues 15 (q – t): The contents of the outcome letter of 28 March 2019, finding the Claimant guilty of the disciplinary allegations against her; Imposing the sanction of final written warning on 28 March 2019; Dismissing the Claimant's grievance in April-May 2019; Dismissing the Claimant's disciplinary appeal, by letter dated 16 August 2019

346. All of these matters were very obviously unwanted conduct on the Claimant's part.

347. They all related to religion and belief. Each of them was in terms about the Claimant's manifestation of religious belief, her refusal to cease manifesting her religion in the way that she wanted to and the immediate consequences and analysis of the same.

348. The Claimant certainly considered that these matters were offensive and created a hostile environment for her. In all the circumstances and having regard to what is objectively reasonable, we think that these matters did create a hostile environment for the Claimant. Each played an important role in putting the Claimant's employment at risk. This is obvious in the case of the letter of 28

March 2019 and the letter of 16 August 2019 which respectively imposed and maintained a final written warning. Rejecting the Claimant's grievance also put the Claimant's employment at risk because it dismissed her central argument that the DCU-P was being applied in a discriminatory way. This all created a hostile environment for the Claimant because, in the event of her returning to her substantive role or any clinical role whilst continuing to manifest her religious beliefs in the way that she wanted to, she risked dismissal (given she was on a final written warning). This must have been extremely stressful and worrying.

349. The context is as ever very important, of course. This is the position the Claimant found herself in whilst others continued to manifest their religious beliefs by wearing items that had a broadly comparable risk profiles to her Cross-Necklace. And many others continued to wear jewellery including necklaces in clinical areas, unchallenged and tolerated. Further the requirement for her to cease manifesting her religious belief in the way she wanted to was in fact a breach of her article 9 rights.

350. We do acknowledge that, some attention was given to the Claimant's points as to the way others were treated. For instance, in Ms Knopp's letter dismissing the appeal against the Final Written Warning, she stated:

> *My recommendation to Stephen [Lord] is that an audit is carried out within the theatres and DSU area which is applied to all staffs, including Medical and Dental staff with immediate effect and any infringement on the policies is managed through the relevant line management routes to ensure consistency with the application of this policy.*

351. This was, essentially, lip-service. Firstly, the evidence before us is that the Respondent had *all the while* been auditing compliance with the DCU-P in the form of perfect ward audits. Surely the starting point would have been to pull those audits and analyse them to see whether they showed the widespread non-compliance that the Claimant alleged and if so reflect on whether it was really appropriate to maintain a final written warning for one employee who had done something that hitherto many others had been doing openly without significant challenge. This did not happen. Secondly, the Respondent did not properly followed through with this recommendation in any event. As noted, and despite requests for the same in correspondence between the parties respective solicitors, there is no documentary evidence of any action being taken against any particular doctor or dentist for failing to follow the DCU-P, not even after this letter from Ms Knopp. In our view it is wholly implausible that, if following this letter the DCU-P had been properly enforced, there nonetheless would not be a single document evidencing action or threats of against any individual. It is far more likely in our view that toleration of non-compliance with the DCU-P persisted. We also note that no audit along the lines of what Ms Knopp recommended has been disclosed.

352. In the alternative, the five matters complained of here were because of the protected characteristic. The reason for all of them was that the Claimant had manifested, and wanted to continue to manifest, her religious belief in a particular

way. That was a discriminatory ground of treatment on the facts of this case: we refer to our high-level reasoning.

List of Issues 26 (u): Mr Lord's demand at the meeting in late August 2019 that the Claimant removes her Cross-Necklace before going back to work in the Theatre, and the threat to call the security to remove Claimant from the Theatre;

353. The conduct was obviously unwanted.

354. The conduct plainly related to the protected characteristic. The Cross-Necklace was a manifestation of religious belief and the Claimant was being required to cease that manifestation. We refer to our high-level reasoning.

355. The Claimant found the conduct offensive and intimidating. In all the circumstances of the case and having regard to what is reasonable, it did create an offensive and intimidating environment. The reference to having to call security was gratuitous. The Claimant had consistently refused to remove her Cross-Necklace but she had also consistently complied with the instructions given to her as to where she should, as a result, work. She had thus spent months in non-clinical areas. There had never been a time when she had forced her way into a clinical area or refused to leave it if told to do so.

356. We do take into account the fact that the disciplinary process had completed and that the grievance had been rejected. However, we also take into account the fact that other employees continued to wear jewellery, including necklaces, without significant challenge in clinical areas. And other employees were permitted to continue to wear religious apparel with a similar risk profile to a Cross-Necklace.

357. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 26 (w): Failing to confirm the contents of the meeting in late August 2019 by a letter to the Claimant, despite the Claimant's repeated requests

358. This conduct was unwanted.

359. The conduct was not related to the protected characteristic, which was merely the background for the conduct. This was just an administrative malfunction.

360. In all the circumstances and having regard to what is reasonable the treatment did not create a proscribed environment or violate the Claimant's dignity. This was simply a case of administrative error.

361. The treatment was not direct discrimination either. The reason for the treatment was that Mr Lord delegated the task of sending the letter to the Claimant and incorrectly assumed it had been done.

List of Issues 26 (x): Commencing the Second Investigation by letter dated 10 January 2020

362. The conduct was plainly unwanted.

363. The conduct clearly related to the protected characteristic. The investigation was commenced because it was clear the Claimant was not prepared to cease manifesting her religious belief by wearing a Cross-Necklace or accepting one of the compromises.

364. The Claimant found the letter intimidating. In our view the letter did create an intimidating environment. The commencement of a second disciplinary investigation increased the threat of dismissal. It put the Claimant's employment in further jeopardy particularly as, given that she was not prepared to cease wearing the Cross-Necklace nor to accept a compromise, it was pretty clear which way the investigation would head. Again the circumstances were such that other employees continued to wear jewellery, including necklaces, without significant challenge in clinical areas. And other employees were permitted to continue to wear religious apparel with a similar risk profile to a Cross-Necklace. Further the requirement to remove the Cross-Necklace was a breach of article 9.

365. In the alternative, the conduct complaint of was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic.

List of Issues 15 (y, z, aa): The investigatory interview on 10 February 2020; Refusal to permit audio-recording of the investigatory interview on 10 February 2020; Inaccurate and incomplete notes of the investigatory interview on 10 February 2020

366. The conduct was unwanted on the Claimant's part.

367. The investigatory interview itself was related to the protected characteristic. It was all about the Claimant's chosen manifestation of religious belief. However, the refusal to permit audio-recording and the quality of the notetaking of the meeting were not related to the protected characteristic – which was mere background. The analysis in relation to recording and note taking is the same as the analysis above earlier in the chronology.

368. The Claimant found the conduct offensive and hostile. However, having regard to what is reasonable and all the circumstances of the case it was not. It was necessary and appropriate to have an investigation meeting given that allegations. Refusal of audio-recording was benign. The Claimant was represented at the meeting and there was an HR note-taker. The notes taken were not verbatim, nor were they perfect; but they were in the normal range and were a good faith effort at capturing the essentials of what was said.

369. These matters were not direct discrimination either.

369.1. The reason for the meeting was to give the Claimant the opportunity to answer potential disciplinary charges. This was an appropriate

course given that a disciplinary investigation had been commenced. It was properly separable from the belief/manifestation of belief itself;

369.2. The reason for refusal of audio-recording was that the same was contrary to trust practice;

369.3. The reason for imperfect notes is the ordinary difficult in capturing perfectly everything that is said in a meeting at which multiple people speak about difficult and important topics.

List of Issues 15 (bb): the contents of the letter of 17 August 2020, requiring the Claimant to attend the disciplinary hearing on 26 September (despite her being on stress leave) and threatening to proceed in her absence

370. The conduct was unwanted.

371. The meeting itself was related to religion. It was all about the manifestation of religious belief and the consequences of the same. However, threatening to proceed with the meeting in the Claimant's absence was not related to religion – though the manifestation of religious belief was part of the background. Potentially proceeding in the Claimant's absence was simply the function of wanting to make progress with the issues and avoid further delay.

372. The Claimant found the conduct offensive and intimidating. However, having regard to all the circumstances and what is reasonable, the conduct did not create a proscribed environment or violate the Claimant's dignity. Given the disciplinary charges it was plainly a good idea to have a meeting to discuss them and to give the Claimant a chance to make representations. In all the circumstances, the threat to proceed in the Claimant's absence was understandable and reasonable. The Claimant was not engaging at that time with the Respondent's efforts to manage her sick leave and to understand her health problems. The Respondent cannot be blamed for wanting to progress the issues.

373. These matters were not direct discrimination either:

373.1. the reason for the hearing was to give the Claimant a chance to answer disciplinary allegations;

373.2. the reason for threatening to proceed in her absence was to progress the process.

List of Issues 15 (cc): The contents of the Second Investigation Report provided in August 2020, in particular (i) the alleged 'false' denial that any permission had been previously given to the Claimant to wear her crucifix and (ii) the recommendation to proceed to a disciplinary hearing.

374. The treatment was unwanted on the Claimant's part.

375. The report, including the two impugned aspects of it, related to religion. The report was all about the manifestation of religious belief and the consequences of it. This included considering the extent to which the Claimant had been given permission historically to wear a Cross-Necklace which was the way she chose to manifest her religion.

376. The Claimant found the impugned parts of the report offensive, hostile and intimidating.

377. We do not accept that it 'falsely' denied that the Claimant had historically been given permission. On the contrary it was a good faith effort to evaluate that issue based on the evidence gathered.

378. However, the ultimate conclusion was that the Claimant should face a disciplinary hearing (i.e. that there was a case to answer) for manifesting her religious belief by wearing a Cross-Necklace and refusing to accept one of the compromises offered. In all the circumstances we think it is reasonable to consider that hostile and intimidating.

    378.1. The Claimant was on a final written warning so there was a clear likelihood that any further disciplinary action, which was the (or at least a) realistic outcome of a disciplinary hearing, would be dismissal;
    378.2. As a matter of fact even at this time there were many other people wearing jewellery including necklaces in clinical areas who were unchallenged;
    378.3. As a matter of fact even at this time others were manifesting their religious beliefs by wearing apparel with a similar risk profile and were permitted to do so;
    378.4. As a matter of fact the interference with the Claimant's article 9 rights was not justified.

379. In the alternative, the recommendation that the Claimant face a further disciplinary hearing was directly discriminatory. The same factors that led to the conclusion that the conduct was related to the protected characteristic lead to the conclusion it was because of the protected characteristic. We refer also to our high-level reasoning.

Further allegations of direct discrimination

List of issues 22(a): The Claimant was singled out for an aggressive application of the Policy

380. We have already identified which of these allegations succeed and which fail. Standing back, overall, we consider that it is very fair to say that the policy was applied to the Claimant more severely (one could say aggressively without error, though we prefer the word severely) than to others.

381. The reason the policy was applied to the Claimant in the way that it was, was because those who were managing her believed that her conduct in wearing a Cross-Necklace was a breach of the DCU-P because necklaces generally were prohibited and because allowing the Cross-Necklace to be worn as the Claimant wanted to wear it went beyond a reasonable accommodation that should be permitted. However, for the reasons given in the high-level reasoning this still comes down to treatment because of the manifestation of belief rather than some

feature of it that could justifiably be objected to and treated as a properly separate ground for the treatment.

List of issues 22(b): The Respondent failed to accommodate a reasonable manifestation of her religion by an agreement envisaged in section 4.14 of the Policy;

382. For the reasons set out extensively elsewhere the Respondent's refusal to allow the Claimant to wear a Cross-Necklace was unjustified and it did fail to accommodate a reasonable manifestation of religion by agreement or at all. For the reasons given in our high-level reasoning this treatment was because of the protected characteristic.

List of issues 22(c): Alternatively, the Respondent failed to honour an earlier express or tacit agreement to allow the Claimant to wear her cross at work.

383. The reason that the Respondent did not 'honour' the earlier express or tacit agreements was because it did not think they existed and/or if they did that it continued to be bound by them. The conversations the Claimant historically had with her managers were very informal. They are just the sort of things that could be overtaken by the passage of time and events. If the requirement to remove the Cross-Necklace in clinical areas or accept one of the compromises was otherwise in compliance with article 9(2) ECHR and otherwise non-discriminatory, we do not think these historical agreements would have prevented the Respondent from drawing a line in the sand and taking a different view going forwards.

384. We do not think this allegation adds anything to the Claimant's claim but in any event it fails.

List of issues 22(d): Constructive discriminatory dismissal

385. In our view the Claimant was constructively dismissed.

385.1. In our view the conduct which we have identified above as amounting to harassment and/or direct discrimination individually or cumulatively was sufficiently serious so as to be likely to destroy or seriously undermine the relationship of trust and confidence. We rely on the analysis of the conduct / treatment above in coming to that conclusion. We remind ourselves that not every discriminatory/harassing act will be serious enough to have this effect on the employment relationship.

385.2. We do not accept that the Respondent had reasonable and proper cause for its conduct. There was a broad health and safety objective underlying much of the conduct. However, as discussed above repeatedly, in the particular circumstances of this case, given the inconsistency of treatment between employees wearing other items of religious and non-religious apparel that had no work-based function but had a comparable risk profile, that simply did not justify the treatment of the Claimant.

386. We are satisfied that the matters we have found to be unlawful were all part of the reason why the Claimant resigned.

387. There can be no question of affirmation or waiver in this case. The Claimant always steadfastly and openly refused to accept that the Respondent was lawfully entitled to manage her in the way that it did.

388. In any event there was a final straw that was very proximate to the Claimant's resignation – namely the decision that the Claimant should face further disciplinary proceedings. That was an apt final straw, heightening as it did, the likelihood of further disciplinary action.

389. The Claimant was dismissed and, given the nature of the breach, the dismissal was discriminatory.

Victimisation

390. The Claimant did a protected act, namely her grievance raised on 16 October 2018.

391. The Claimant did suffer the detriments alleged: she was redeployed to non-clinical duties from around 28 November 2018. She was in fact redeployed quite a number of times.

392. In one, but only one, case, a material part of the reason for the re-deployment was the Claimant's protected act.

393. The Claimant was initially redeployed to the main theatre. She was further redeployed away from the main theatre in significant part because of her protected act. As set out in our findings of fact, Ms Wright was very angry that the Claimant had been redeployed to her department (main theatre) having raised a grievance about her. She complained about this to Mr Lord. Mr Lord then further redeployed the Claimant.

394. We find that a significant part of Mr Lord's reason for doing so was that the Claimant had raised a very serious complaint, in particular a complaint of discrimination, against Ms Wright. Ms Wright had reminded him of this, complained about it, and his response was to move the Claimant again. At some point she probably would have been moved anyway, but nonetheless part of Mr Lord's mental process in deciding to move the Claimant was that she had raised a serious complaint of discrimination against Ms Wright. We think the fact that the complaint was of discrimination was a material and relevant factor in this. If the complaint had been a minor or trivial one Mr Lord would have been unlikely to have responded in the way that he did. It was the particular nature of the complaint that made him think it appropriate to respond to Ms Wright's complaint by moving the Claimant.

395. In our view this was a detriment, the Claimant was being passed from one department to another in part because she had done a protected act.

396. The Claimant's redeployments were not otherwise because of the protected act. The reason for them was so that the Claimant could continue to work while wearing the Cross-Necklace in circumstances that Mr Lord considered would not breach the DCU-P.

Indirect discrimination

397. Direct and indirect discrimination are mutually exclusive. To the extent that the application of the DCU-P in this case was not directly discriminatory we find in the alternative that it was indirectly discriminatory.

398. The Claimant relies on the following PCPs:

> *(a) the provisions of the Policy which ban wearing of necklaces in clinical areas of the Hospital; and*
> *(b) the interpretation of those provisions as applying to a small cross worn on a fine chain around the neck.*

399. It is plain on the evidence that the matters that are said to be PCPs existed, were applied and amounted to PCPs.

400. The only real controversy is that, as Mr Jones points out, the DCU-P left scope for some exceptions that meant a necklace might be allowed i.e., if worn on a longer chain inside the clothing. In our view the proper place to consider that, analytically, is at the justification stage. Not least, that is because the DCU-P itself does not make provision for this, it is something that was offered to the Claimant in an attempt to mitigate the impact of the DCU-P upon her. (This is also consistent with the analysis of how PCPs should be defined in ***General Dynamics v Carranza*** [2015] IRLR 43: *"It is, I think, unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage",* per HHJ Richardson. We recognise that HHJ Richardson was considering PCP in a different context: the duty to make reasonable adjustments. However, the reasoning makes sense here too.)

401. The next question is whether the PCPs put Christians at a particular disadvantage "in that they are unable to manifest their religion at their workplace by visibly wearing their religious symbol" (List of Issues, para 30).

402. To begin with it is important to note that there was no general ban on wearing the cross or any other religious symbol. It could be worn even as a necklace in non-clinical areas. It could be worn, for instance as stud earrings (0.5 cm or smaller), in clinical areas. However, that is not close to a complete answer to the complaint of indirect discrimination. The Claimant does not need to prove that the PCPs made it impossible for her or Christians to wear a Cross-Necklace. She only needs to prove a particular disadvantage which is a lower threshold than 'impossibility'.

403. It is clear that the PCPs prevented the wearing of the cross as a visible symbol in a number of forms in clinical areas and that this significantly reduced the scope for wearing it. For instance, it could not be worn as a pendant on a necklace, nor as a broach on the outside of uniform, nor as a detail on a ring. And, though stud earrings could have been worn, they would have had to be so small that they would be visible/identifiable as crosses only at very close range. We must take those matters into account when answering the question of whether the PCPs put Christians at a particular disadvantage compared to others who are not Christian.

404. In this case, in our view the most logical pool is staff of the Respondent to whom the DCU-P applied, that is, all its staff. The DCU-P is the source of the PCPs in this case and it is the DCU-P that the hospital managers were endeavouring to apply. This is the group of people that the PCPs affect.

405. The Respondent submits that the pool is "*employees who wish to wear a necklace*". In our view that pool is artificially narrow. The rules in respect wearing of wearing necklaces apply to all employees not just those who actually want to wear necklaces. Certainly some employees will be indifferent to the rules because they are not interested in necklaces, but the rules still apply to them nonetheless and they are still subject to them. Further, the rules in relation to necklaces are part of the DCU-P and that applies to all staff. In any event, even if the Respondent were right in relation to the pool we do not think it would materially change the analysis.

406. In our view, group disadvantage is made out.

407. Firstly, we find that there were other Christians in the pool who wanted to, but were deterred from, wearing the cross by the PCPs. We infer that finding from the following evidence:

    407.1. The Respondent is a large employer (around 3000 people). We do not know the exact number, but we heard evidence (specifically Ms Wright accepting the proposition in cross-examination), that among the staff there are a large number of Christians. We also heard evidence (specifically Ms Haldane accepting the proposition in cross-examination) that Christians are probably the largest religious group among the Respondent's employees. We accept all that evidence.

    407.2. We have received expert evidence on the tradition of and significance of visibly wearing the Cross. This is summarised above and we accept the evidence, unchallenged as it is. We infer from it that it is likely that wearing a Cross was a matter of some importance for at least some of the Respondent's Christian workforce.

    407.3. The Claimant's evidence is that after the push on enforcement of the dress code (such as it was) fewer colleagues now wore a Cross-Necklace. That evidence was not challenged and we accept it. On the other hand there is no evidence of such employees pivoting to wearing the cross in permitted ways (e.g. replacing their necklaces with stud earrings).

408. Secondly, we infer that the PCPs put Christians at the stated particular

disadvantage compared to others who are not Christian. With the exception of employee VR, there is no evidence before us that anyone of any other group wanted to manifest a religious or other belief by wearing a necklace. There is certainly no cogent evidence before us that this was something of importance to any other group nor to non-Christians generally. There is evidence that VR's desire to wear a necklace was a Hindu practice and thus there is a possibility that other Hindus may also have followed the same practice. However, there is no evidence about the extent or popularity of that practice in Hinduism. In any event, the Claimant does not need to show that Christian's were put a particular disadvantage compared to each and every other religious and non-religious group. Thus even if it were the case that the PCPs similarly disadvantaged Hindus and Christians, group disadvantage would still be proven. The analysis would be that the PCPs put Christians at a particular disadvantage compared to others who are not Christian - save for Hindus.

409. The Claimant plainly suffered the particular disadvantage identified. She wanted to display the cross as a pendant on a necklace. The alternatives offered to her either involved placing the cross under clothing (making it invisible) or wearing it as tiny earrings (making it barely visible save at very close range).

410. We accept that the Respondent had a legitimate aim. However, the means of achieving the aim were not proportionate. In that regard we repeat our analysis of proportionality above.

Limitation and discrimination/harassment/victimisation claims

411. In our view this is a case in which there was conduct extending over the whole period to which the claims relate:

411.1. Underlying all the issues in the claim is the Respondent's DCU-P which has been materially in the same terms throughout. It has been a consistent underlying basis for the treatment of the Claimant;

411.2. Each of the managers whose conduct has been impugned sought to enforce this policy against the Claimant or otherwise measure her behaviour against it;

411.3. The discrimination/harassment/victimisatoin claims are essentially at their heart about the very same central issue arising again and again with slightly different permutations: whether and the Claimant should or should not be permitted to wear a Cross-Necklace in clinical areas; whether the Respondent may or may not permissible prevent her from doing so.

411.4. The Respondent, through its managers, took much the same position throughout.

411.5. In our view the case can properly be viewed as continuum in respect of the same central issues as they played out to a conclusion over time.

412. In our view it can, to use the language of ***Hendricks,*** properly be said that there was a continuing discriminatory state of affairs. There was an ongoing situation for which the Respondent was responsible.

413. All complaints are therefore in time.

Unfair dismissal

414. For the reasons considered above, the Claimant was constructively dismissed.

415. The principal reason for the Claimant's dismissal was 'conduct'. Essentially, the Respondent considered that the Claimant was in breach of the DCU-P by refusing to remove the Cross-Necklace or accept one of the compromises.

416. The dismissal was obviously unfair, in the sense of being outside the range of reasonable responses.

417. Firstly, the Claimant repeatedly alleged that other employees to whom the DCU-P applied were wearing jewellery including necklaces in clinical areas essentially with impunity. These were employees who like her provided direct patient care. The Respondent failed to properly grapple with this.

    417.1. It failed to investigate whether or not the Claimant was right about this though it would have been fairly easy to do so. This would have been by reviewing and analysis existing audits of compliance with the DCU-P. Alternatively, by conducting an audit especially in light of the Claimant's allegations and analysing the results. This does not appear to have happened (though at one point Ms Knopp recommended it).

    417.2. It dismissed the Claimant in circumstances in which as matter of fact, and they are facts it ought reasonably to have known, many other clinicians were wearing jewellery in clinical areas and doing so without significant challenge. It was not fair to dismiss the Claimant for doing this whilst others to whom the DCU-P applied equally, also did it.

418. The above was sufficient to make the dismissal unfair.

419. Secondly, the Respondent failed to grapple with the Claimant's arguments that other people were manifesting their religious beliefs by wearing religious apparel in clinical areas. No reasonable attempt was made to analyse whether the difference of treatment between e.g. a small necklace and a bracelet or headwear was really justified. This was sufficient to make the dismissal unfair.

420. Thirdly, much the same points could be made in relation to plain rings which were permitted by the DCU-P. There was a failure to grapple with whether it was rational to permit those things but not a small necklace.

421. Fourthly, putting the points more generally, the matter which the Respondent considered to be misconduct, the refusal to accede to the instruction remove the

Cross-Necklace or accept a compromise, was in fact an unjustified interference with the Claimant's article 9 rights. Those reasons also the dismissal was unfair.

Employment Judge Dyal

Date 21.12.2021

SENT TO THE PARTIES ON: 04.01.2022

Appendix: Final List of Issues

Pleaded factual disputes

1. Whether the Claimant visibly wore the crucifix throughout the period of her employment by the Respondent since November 2001 (PoC, paras 2-4; GoR, paras 8-10)
2. The size of the crucifix worn by the Claimant: "tiny metal cross on a fine chain" (PoC, para 3), or "choker with a large crucifix measuring around 4 inches" and/or "a gold chain and cross" (GoR paras 19, 26).
3. Whether the Theatre Manager Jackie Walker confirmed to the Claimant at a general meeting of theatre staff in Coulsdon in or around 2014-2015 that she was allowed to wear her cross in the workplace (PoC, para 6; GoR, para 12).
4. Whether Matron Aleyamma Eappen tacitly permitted the Claimant to wear her cross at the workplace in or around 2015 (PoC, para 7; GoR, para 13).
5. Whether Ms Wright demanded that the Claimant remove her cross in or around late 2016, and threatened to "escalate it" if the Claimant did not comply (PoC, para 8; GoR, para 14).
6. Whether the Theatre Manager Helen Dighton expressly or tacitly agreed in or around late 2016 that the Claimant could wear her cross at the workplace (PoC, para 9; GoR, para 15)
7. Details of the encounter between the Claimant and Ms Edmondson on 21 August 2018 (PoC, paras 16-17; GoR, paras 26-28)
8. Details of the encounter between the Claimant and Ms Edmondson on 25 October 2018 (PoC, para 23; GoR, para 39)
9. Details of the encounter between the Claimant and Mr Duymun on 31 January 2019 (PoC, para 26; GoR, para 50)
10. Whether the re-deployment of the Claimant to non-clinical duties was consistent with the terms of her employment contract (PoC, paras 25, 26A; GoR, paras 42, 60, 64, 66)

Analysis of the Respondent's DCU Policy

11. Whether there was a valid agreement between the Claimant and the Respondent under section 4.14 to the effect that the Claimant was allowed to wear her cross in the clinical area.
12. If no, whether section 4.14 of the Policy required the Respondent to enter such an agreement.
13. Whether the 'compromise' solutions proposed by the Respondent (wearing a longer chain or wearing an additional scrub top, to conceal the cross) were reasonable, and sufficient to comply with the Respondent's obligations under section 4.14 of the Policy.
14. Whether in the circumstances, the Respondent was entitled to treat wearing of the cross by the Claimant as a breach of the Policy.

Harassment (PoC, paras 28-30; GoR, paras 95-98)

15. Whether the Respondent subjected the Claimant to the 'unwanted conduct' pleaded in paras 8, 11-16, 18-20 and 23-27F of the PoC, namely:
    (a) In late 2016, Ms Wright demanded that the Claimant removes her cross, and threatened to "escalate it" if the Claimant did not comply (para 8).

(b) On 7 August 2018, Ms Wright demanded that the Claimant removes or conceals her cross, and threatened to "escalate it" and initiate disciplinary proceedings (para 11)
(c) Ms Wright's email to the Claimant on 9 August 2018 (para 12)
(d) Ms Wright chasing the Claimant at work for an acknowledgement of that email on 9, 13 and 20 August 2018 respectively (paras 13-15)
(e) Ms Wright saying she would ensure the Claimant would be disciplined on 20 August 2018 (para 15)
(f) Ms Edmondson walking into the operating theatre where the Claimant was in charge, while a patient was on the surgery table, on 21 August 2018 (para 16)
(g) Commencing the disciplinary investigation in early October 2018 (para 18);
(h) Sending the Claimant a letter stating she was required to submit a statement by 8 October and to attend the investigation meeting on 12 October while the letter, misleadingly dated 2 October, was only posted on 8 October and received on 10 October 2018 (paras 18-19)
(i) On 25 October 2018, during a meeting to resolve a workplace dispute (unrelated to wearing of jewellery or religious symbols), Ms Edmondson demanded that the Claimant remove the small stud earrings she was wearing at the time. As the Claimant did so, Ms Edmondson commented: "We are still waiting for the hearing regarding the one on your neck". The comment was made in the presence of a colleague, Amanda Belgrove, who was not privy to, or aware of, the ongoing disciplinary process. (para 23)
(j) The contents of Stephen Lord's letter to the Claimant dated 20 November 2018, including accusation of "continued failure to comply with the Dress Code and Uniform Policy" (para 24)
(k) Re-deployment of the Claimant to various non-clinical roles since 28 November 2018 (paras 25, 26A)
(l) Being approached by Mr Duymun on 31 January 2019 to demand that the Claimant removes or conceals her cross (para 26)
(m) The contents of the Investigation Report and the Grievance Report provided to the Claimant on 14 February 2019 (para 26B)
(n) The disciplinary hearing on 13 March 2019 (para 26C)
(o) Refusal to postpone the disciplinary hearing until the Claimant's witness comes back from stress leave (para 26C)
(p) Refusing the Claimant's request for permission to tape-record the disciplinary hearing (para 26C)
(q) The contents of the outcome letter of 28 March 2019, finding the Claimant guilty of the disciplinary allegations against her (para 26D)
(r) Imposing the sanction of final written warning on 28 March 2019 (para 26E)
(s) Dismissing the Claimant's grievance in April-May 2019 (para 26F)
(t) Dismissing the Claimant's disciplinary appeal, by letter dated 16 August 2019 (para 26G)
(u) Mr Lord's demand at the meeting in late August 2019 that the Claimant removes her cross necklace before going back to work in the Theatre, and the threat to call the security to remove Claimant from the Theatre (para 26H)

(v) Continued re-deployment to non-clinical duties since August 2019 (para 26H)
(w) Failing to confirm the contents of the meeting in late August 2019 by a letter to the Claimant, despite the Claimant's repeated requests (para 26I)
(x) Commencing the Second Investigation by letter dated 10 January 2020 (para 27)
(y) The investigatory interview on 10 February 2020 (para 27A)
(z) Refusal to permit audio-recording of the investigatory interview on 10 February 2020 (para 27A)
(aa) Inaccurate and incomplete notes of the investigatory interview on 10 February 2020 (para 27C)
(bb) The contents of the letter of 17 August 2020, requiring the Claimant to attend the disciplinary hearing on 26 September (despite her being on stress leave) and threatening to proceed in her absence (para 27E).
(cc) The contents of the Second Investigation Report provided in August 2020, in particular (i) the alleged 'false' denial that any permission had been previously given to the Claimant to wear her crucifix and (ii) the recommendation to proceed to a disciplinary hearing (para 27F).

16. If yes, whether that unwanted conduct was related to the Claimant's religion and/or beliefs.
17. Whether that conduct had the purpose and/or effect of:
    (a) violating the Claimant's dignity; and/or
    (b) creating an intimidating, hostile, degrading, humiliating and/or offensive environment for her, within the meaning of s. 26 of the Equality Act 2010 ("EqA").

Victimisation (PoC, paras 31-32; GoR, paras 99-100)

18. Whether the Claimant did a protected act or whether the Respondent believed the Claimant had done or may do a protected act.
19. The Claimant relies on the following protected act:
    (a) Her Grievance raised on 16 October 2018 (PoC, para 22)
20. Whether the Claimant suffered the following alleged detriment?
    (a) re-deploying the Claimant to non-clinical duties on and after 28 November 2018 as pleaded in paras 24(d), 25, 26A and 26I of the amended Particulars of Claim.

21. Whether the Respondent subjected the Claimant to the alleged detriment because she did a protected act?

Direct discrimination (PoC, paras 33-36; GoR, paras 86-90)

22. Whether the Respondent treated the Claimant less favourably.

The Claimant relies on the following matters to demonstrate less favourable treatment:

(a) She was singled out for an aggressive application of the Policy (PoC, paras 6-27F), as set out above in para 15(a)-(cc)
(b) The Respondent failed to accommodate a reasonable manifestation of her religion by an agreement envisaged in section 4.14 of the Policy;

(c) Alternatively, the Respondent failed to honour an earlier express or tacit agreement to allow the Claimant to wear her cross at work;

(d) *Her constructive dismissal (PoC, para 27G).*

23. Whether those matters are capable of amounting to detriments within s. 13 of EA 2010?
24. If yes to 23, whether the detriments were:
    (a) because of the Claimant's Christian religion,
    (b) because the Claimant wears a cross.
25. Whether there is a sufficiently close and direct nexus between the Christian religion and a manifestation of it by wearing a cross to bring the latter within the ambit of "because of a protected characteristic" requirement interpreted in a Convention-compatible manner: *Eweida v UK*.
26. Whether the Respondent can show that there was a proper lawful reason for the conduct above.
27. Whether the actual comparators relied upon by the Claimant are in materially different circumstances from her.

The Claimant relies on the following actual comparators:

(a) Employees of the Respondent who wear non-Christian religious symbols (Turbans, Hijabs, and Kalava bracelets) while working in the theatres and other clinical areas of the Hospital.

(b) Employees of the Respondent who wear necklaces and other jewellery, not related to religious faith, while working in the theatres and other clinical areas of the Hospital.

28. If the proposed actual comparators are inappropriate, what is the appropriate hypothetical comparator?

Indirect discrimination (PoC, paras 37-39; GoR, paras 91-94)

29. Whether the Respondent imposed a policy, criterion or practice ("PCP").

The Claimant relies on the following PCPs:

(a) the provisions of the Policy which ban wearing of necklaces in clinical areas of the Hospital; and

(b) the interpretation of those provisions as applying to a small cross worn on a fine chain around the neck.

30. Whether the PCPs put Christians at a particular disadvantage in that they are unable to manifest their religion at their workplace by visibly wearing their religious symbol.
31. Whether the PCPs put the Claimant at that disadvantage.
32. Whether the PCPs are justified as proportionate means of achieving the legitimate aim.

(a) The legitimate aim relied upon by the Respondent is the protection of the health and safety of staff and patients.

Constructive Unfair Dismissal (PoC, paras 27G-H; GoR, paras 80-85)

33. Whether the Respondent committed an act or series of acts which cumulatively amounted to a breach of the implied term of trust and confidence.

(a) The Claimant relies on the conduct pleaded in PoC, paras 8, 11-16, 18-20 and 23-27F, and set out above in para 15 (a)-(cc)

34. If there was a series of cumulative acts, what was the last straw?

(a) The Claimant relies on the conduct pleaded in PoC, paras 27E-27F as the 'last straw'., namely:

i. The contents of the letter of 17 August 2020, requiring the Claimant to attend the disciplinary hearing on 26 August 2020 (despite her being on stress leave) and threatening to proceed in her absence (27E).

ii. The contents of the Second Investigation Report provided in August 2020, in particular:

1. the alleged 'false' denial that any permission had been previously given to the Claimant to wear her crucifix (27F); and

2. the recommendation to proceed to a disciplinary hearing (27F).

35. Whether the Claimant resigned in response to that breach.
36. Whether the Claimant delayed too long before resigning.
37. If the Claimant was constructively dismissed, what was the reason or principal reason for her dismissal?
38. If the Claimant was constructively dismissed, was the reason for the dismissal a permissible reason under s. 98(1) or (2) of the Employment Rights Act 1996 ("ERA")?
39. If yes, whether the dismissal was fair or unfair under s. 98(4) ERA 1996.

Article 9 ECHR (PoC, paras 40-41; GoR, para 101)

40. Whether the interference with the Claimant's Article 9 rights was justified as prescribed by law and necessary in a democratic society for the protection of health and safety of staff and patients.

Damage to Mental Health (PoC, para 42; GoR para 102)

41. The Claimant no longer seeks compensation for damage to her mental health.

Time limits

42. The Claimant brought her claim on 11 February 2019 having contacted ACAS for early conciliation on 12 December 2018, and having obtained an early conciliation certificate on the same day. It is common ground that any events that occurred before 12 November 2018, and did not continue beyond that date, are *prima facie* out of time.
43. Whether the alleged acts of harassment and/or discrimination pleaded by the Claimant constitute 'continuing acts' and/or 'an ongoing state of affairs' which continued beyond 12 November 2018 (see *Aziz v FDA* [2010] EWCA Civ 304, paras 35-36; *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530 at paras 48-52)
44. If any of the pleaded matters are out of time, whether it is just and equitable to extend time.

Remedies

45. What (if any) compensation should be awarded under s. 124(2)(a) of the EqA?
46. What (if any) declaration should be made under s. 124(2)(b) EqA?
47. What (if any) recommendation should be made under s. 124(2)(c) EqA?

48. What (if any) compensation should be awarded under s. 119 (basic award) and/or s. 123 (compensatory award) of the Employment Rights Act 1996?

In particular:

(a) has the Claimant reasonably mitigated her losses;

(b) should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed in any event; and

(c) should any basic and/or compensatory awards be reduced by reason of the Claimant's own culpable or blameworthy conduct pursuant to ss. 122(2) and/or 123(6)| ERA?

49. Costs

5 October 2021