EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4103321/2020 (V)

Final Hearing Held by Cloud Video Platform on 14 – 17 December 2020 and 10 and 11 May 2021, with deliberation days on 13 May, 16 June and 25 June 2021

Employment Judge A Kemp
Tribunal Member S Singh
Tribunal Member G Doherty

Mr K Ferguson	**Claimant** **Represented by** **Mr T Cordery** **Barrister** **Instructed by** **Mr T Ellis** **Solicitor**
Kintail Trustees Ltd	**First Respondent** **Represented by:** **Ms C Aldridge** **Solicitor**
Agnes Lawrie Addie Shonaig MacPherson	**Second Respondent** **Represented by:** **Ms C Aldridge** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The decision of the Tribunal, unanimous save as to the claim of direct discrimination, is that

(i) The claimant was unfairly dismissed by the first respondent

(ii) The claim of direct discrimination of the claimant by the first respondent under section 13 of the Equality Act 2010 succeeds by a majority decision

(iii) The second respondent is liable for the acts of direct discrimination under sections 109 and 110 of the Equality Act 2010

(iv) The claimant did not receive a written statement of particulars under section 1 of the Employment Rights Act 1996

(v) The claim of harassment under section 26 of the Equality Act is dismissed.

2. There shall be a hearing on remedy to take place remotely for a period of two days on dates to be afterwards fixed. .

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant. He was represented by Mr Cordery. The respondents were both represented by Ms Aldridge.

2. The hearing took place by Cloud Video Platform remotely in accordance with the orders made at the Preliminary Hearing on 9 September 2020. It had been notified externally and a number of observers were present.

3. The hearing was conducted successfully, with the parties, representatives and witnesses attending (in the case of the witnesses they did so individually when called to give their evidence) and being able to be seen and heard, as well as being able themselves to see and hear. On a number of occasions the connection of one of the participants was lost, but renewed shortly thereafter such that it did not unduly interrupt the proceedings, and the evidence was repeated where necessary. On the fourth day it was noted that the witness Ms Campbell had logged into the hearing remotely and inadvertently been admitted. She heard the evidence only very briefly and her having gained admission to the hearing for a brief period was not considered to affect her evidence in any material way.

4. The Tribunal members each had a paper copy of the Bundle of Documents.. Both parties provided supplementary documents which were available electronically.

5. The parties had agreed an outline timetable for the evidence for the first four days of hearing, but that had not included time for breaks, questions from the Tribunal, or re-examination where required. The Tribunal informed the representatives that it was not necessary to stay rigidly within the timetable that they had set out. It was also agreed that the hearing was unlikely to be concluded if it covered remedy and was restricted to the issue of liability only, with remedy to be heard separately in the event that the claimant succeeded. Towards the end of the fourth day the evidence of the final witness for the claimant Ms Campbell had not been heard, and it was agreed that that should take place on a later date. In due course, that date was arranged for 10 May 2021, an unfortunately lengthy period from the December 2020 dates. It was anticipated that that day would include her evidence and submissions by both parties. The evidence of Ms Campbell finished a little after 3pm on 10 May 2021, its start having been delayed by submissions as to whether additional productions should be received or not as referred to below, and it was agreed that the following day be utilised for submissions, the parties having produced outline submissions in writing in advance. 11 May 2021 had been arranged for a deliberation day, but having partly been taken up with submissions

further deliberation days on 13 May and 16 June, and briefly on 25 June 2021, were held.

6. The Tribunal was satisfied that the arrangements for the Final Hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence it heard.

Issues

7. The Tribunal identified the following issues for determination, and raised them with the parties at the commencement of the hearing. They confirmed their agreement. The list of issues is:

(i) What was the reason, or principal reason, for the claimant's dismissal?

(ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 ("the 1996 Act") was it fair or unfair under section 98(4) of that Act?

(iii) Did the first respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 ("the Act") in causing him any detriment or in his dismissal because of his religion or belief?

(iv) Did the first respondent harass the claimant under section 26 of the Act because of the claimant's religion or belief?

(v) Is the second respondent liable for a breach of sections 13 or 26 of the 2010 Act by the first respondent under sections 109 - 112 of the Act?

(vi) Is any alleged detriment suffered by the claimant outwith the jurisdiction of the Tribunal under section 123 of the Act and in that regard (a) was there any conduct extending over a period, and if so what conduct over what period, and (b) in the event that any claim is otherwise outwith the jurisdiction of the Tribunal is it just and equitable to consider the claim?

(vii) If any claim is successful, to what remedy is the claimant entitled? That included issues of losses sustained, the quantification of a claim for the failure to provide written statement of particulars of employment, any adjustment in respect of the ACAS Code of Practice, and of mitigation, ***Polkey*** deduction and contribution [this issue was not addressed in evidence at this hearing].

8. In his submission Mr Cordery withdrew the claim against the second respondent based on sections 111 and 112 of the Equality Act 2010.

Preliminary Issues

9. There were a number of preliminary issues that the Tribunal addressed prior to the hearing of evidence. They were as follows:

(i) Claimant's applications

10. The claimant sought further documents during the hearing. The first and second of these were minutes of board meetings on 31 January 2020 and 3 December 2019. The respondent stated that no minutes were kept. That being their position the Tribunal concluded that there was no document to produce, but the issue was one that could be explored in cross examination if disputed. The claimant thirdly sought documents in relation to a board meeting on 10 March 2020. The respondent stated that all documents were in the Bundle, and no order was made. The claimant similarly sought a draft minute referred to in an email of 11 March 2020 and the Tribunal considered, having regard to the overriding objective, that that should be produced, as it was thereafter. Fifthly the claimant sought an email from the second respondent referred to in her email of 8 November 2019, which the respondent produced voluntarily. Sixthly the claimant sought emails on 28 February 2020, which the respondent argued were not relevant to the issues, but the Tribunal considered may be, and that they should be produced, as they were. Finally there was a board minute that had been redacted. The

claimant sought the full version of it. The respondent stated that the redactions were for matters of legal privilege. The Tribunal decided that the respondent should send the unredacted version of the Minute to the Tribunal for consideration by the Judge alone. He duly did so, and considered that as it did not include specific reference to any advice given it was not subject to legal advice privilege, and should be produced in unredacted form. That was duly provided.

(ii) Respondent's applications

11. The respondent had applied earlier for an unless order, but did not argue for that at the hearing. Ms Aldridge after discussion and consideration of a skeleton argument submitted by Mr Cordery on the morning of the hearing that adequate specification of the comparator and legal basis for liability of the second respondent had been provided.

12. The respondent argued that reference in witness statements or documents in the Bundles should be excluded where that referred to without prejudice communications. She had referred in submission to the authority of ***Framlington v Barnetson [2007] IRLR 689***. The claimant in his skeleton submission referred to ***BNP Paribas v Mezoterro [2004] IRLR 508.*** After adjourning for about an hour the Judge gave an oral decision refusing the respondent's application at this stage, and reserving the question of the admissibility of the evidence until the evidence had been heard, and submissions made further. He noted that the law in Scotland is not identical to that in England and Wales. In Scotland a clear and unequivocal admission of fact made in without prejudice communications is capable of being founded on – ***Daks Simpson Group plc v Kuiper 1994 SLT 689***. The Judge did not consider that that was an exhaustive statement of the law in Scotland. He noted that the ***Framlington*** case concerned a claim for breach of contract in the High Court in England and not one of discrimination or unfair dismissal. In the ***Mezoterro*** case there was a discrimination claim, and it was held that

discussions prior to any dispute arising were not protected, and that there was also the exception of unambiguous impropriety engaged. The following comments were also made:

> ""It is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the employment tribunal to whom complaint is made. Cases involving allegations of sex and race discrimination are peculiarly fact-sensitive and can only properly be considered after full consideration of all the facts. Proving direct discrimination is not an easy task for any complainant. Even under the Sex Discrimination Act as amended following the EC Burden of Proof Directive, the primary facts from which inferences of unlawful discrimination can be drawn remain a vital part of any complaint of direct discrimination before an employment tribunal".

13. Those words appeared to the Tribunal to be apposite to the present case. The EAT had more recently addressed the potential exclusion to the without prejudice exclusion in ***Cole v Elders Voice UKEAT/251/19.*** In addition it was noted that the respondent disputed what the claimant alleged had been said. The words or conduct, and context, of the communications was not therefore clear or agreed. The Tribunal considered that it was in accordance with the overriding objective to allow the statements of witnesses and documents in so far as they are challenged on this basis to be received, and to reserve the issue of admissibility as noted above. It is addressed below.

14. The respondent further sought to exclude a large part of the supplementary bundle of documents produced by the claimant arguing that it was late, not relevant to the issues before the Tribunal, and disproportionate. The claimant argued that there had been a lengthy process of disclosure with the respondent disclosing its documents later in part and that the documents were relevant to the reason for dismissal and arose in part from the

respondent's witness statements. The Tribunal considered that the documents were of potential relevance, and no material prejudice was said to arise from their being late. On that basis it refused the application by the respondent but stated that the respondent could, as the claimant proposed, raise an individual objection to any particular document during evidence. The respondent's application was refused subject to that qualification. No individual objection was made thereafter.

15. After the respondents had led their evidence, and on 10 May 2021, they applied to introduce further evidence, which the claimant opposed. By email they intimated to the Tribunal (without including the documents themselves) that documents had been obtained after discussion with a third party which had approached them, and were relevant to the credibility of the next witness Ms Campbell. A copy of the documents had been sent to the claimant's solicitors. In brief summary Mr Cordery argued that it was not in accordance with the overriding objective to receive the documents. He argued that they were not relevant to the issues before the Tribunal, were late as they had been known to the respondents at latest by 19 April 2021 but not disclosed to the claimant until 29 April 2021, that they had been provided in what he called parallel proceedings involving the Church of which the claimant is a member and the first respondent in the Sheriff Court in respect of proceedings understood to have been commenced under the Equality Act 2010 in relation to the termination of the lease of premises to the Church by the first respondent, it was not clear whether all relevant emails had been produced and there may have been cherry picking, and finally that the production of such emails was prejudicial to the claimant. He explained that he had not been able to take instructions from the claimant on the terms of them, they were largely on his emails but of others, some were historic going to 2017, that the respondents had not searched for them when they could have done, and that allowing them would lead to delay in concluding the case when there had already been material delay to the present hearing. Mr Cordery referred to the authorities of ***Digby v East Cambridgeshire District Council [2007]***

IRLR 585, Chattopadyay v Headmaster of Holloway School [1981] IRIR 487 and ***Vernon v Bosley[1994] PIQR 357***.

16. Ms Aldridge argued, in brief summary, that the documents were relevant to credibility of the witness, on whom the claimant sought to rely. She was not able to state when the documents had first come to the attention of the respondent, but it was after an approach by a third party and had led to their discovery. She was not able to state whether all of the emails in the chains had been produced.

17. After consideration the Tribunal indicated that the Judge proposed to read himself, and alone, the disputed material, he having raised that potential step with the parties counsel in submission previously, to assess the extent of their potential relevance. The documents were then sent to him, and having read them he considered that they were potentially relevant to the credibility of the witness. The Tribunal met privately thereafter and considered the position in light of that. It decided that in was in accordance with the interests of justice in Rule 2 that the documents should be received subject to (i) the claimant having the opportunity to provide instructions to his counsel on them (ii) the claimant having an opportunity to decide whether he wished to give evidence himself on them before or after Ms Campbell and (iii) the claimant having an opportunity to apply for any order he wished to if he considered that all relevant emails related to those produced had not been provided. That was so as although there may be some delay, the evidence was potentially relevant and had been seen by the witness in separate Sheriff Court proceedings, that under civil court practice in Scotland a document may be tendered to challenge credibility even if not within the Inventory of Productions lodged for a proof, subject to the decision of the Sheriff or Judge, that although the documents could have been searched for earlier that was not determinative of the issue, and that prejudice to the claimant could be managed as above.

18. Mr Cordery then indicated that he was content that the evidence be heard from Ms Campbell, and that he would decide after that whether to call the claimant or make any other application. In the event after the evidence of Ms Campbell was heard he did not recall the claimant to give evidence nor make any other application. The evidence is addressed below.

Evidence

19. Evidence was given by the respondents first, commencing with that of the second respondent, and then Ms Judy Cromarty, Professor Lorne Crerar, Mr Andrew Walls and Mr Gary Coutts. The claimant then gave evidence and after a break of over four months as referred to above evidence was given by Ms Katie Campbell.

20. Although a witness statement was tendered for Mr Gordon Hunt he did not appear to give evidence in person. It is addressed below.

21. Evidence in chief for the witnesses who did appear was given by written witness statement, with supplementary questions permitted where appropriate, with cross examination and re-examination together with questions from the Tribunal. The witnesses' evidence is addressed further below.

22. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. There were also two supplementary bundles and further documents were added following the partial granting of the claimant's application as above, the respondent's application on 10 May 2021 and during the course of the hearing more generally.

Facts

23. The Tribunal found the following facts, material to the case before it, to have been established:

24. The claimant is Mr Kenneth Ferguson.

25. The first respondent is Kintail Trustees Limited. It operates as the corporate Trustee of the Robertson Trust ("the Trust"), which is a charity. Kintail Trustees Limited is a company limited by guarantee. It has a board of directors, with those directors being described as Trustees. The directors are not paid for their services to the Trust.

26. The Trust is a very substantial charitable organisation. It has very substantial assets with a value in the region of £350 million and income generally in excess of £20 million per annum, and makes charitable grants of various kinds which total about £20 million per annum.

27. The first respondent has access to legal and other professional advice.

28. The first respondent had about forty employees during the latter stages of the claimant's employment. One of the employees in its finance department had some limited human resources training and experience.

29. The second respondent is Ms Agnes Lawrie Addie Shonaig Macpherson, known as Shonaig Macpherson, who is the Chair of Trustees of the first respondent. She is not an employee of the first respondent.

30. The claimant was employed by the first respondent with the titles of Director and Chief Executive from 21 July 2011. He was not a statutory director of the first respondent. He was its Company Secretary. The first respondent did not provide him with written particulars of the terms of his employment with them.

31. At the time of his appointment to the role, the claimant was sent an offer letter dated 24 March 2011 setting out some of the main terms of his employment, which he accepted on 26 March 2011. It stated that his detailed contract of employment would be issued to him on the commencement of his position but no such contract was provided to him. No statement of terms of employment fulfilling all the requirements under section 1 of the Employment

Rights Act 1996 was ever issued to him. The claimant had a wide responsibility for operational and financial matters, including for Human Resources issues. He did not raise the issue of a statement of terms of employment with the first respondent at any time.

32. The Trust is a very significant charity in Scotland. Its overall aim is improve the wellbeing of people and communities affected by poverty and trauma. Its mission was to improve the quality of life and realise the potential of people and communities in Scotland by (i) funding and supporting charitable organisations of all sizes who are committed to achieving positive change for individuals and communities across Scotland (ii) building understanding of the root causes of problems and testing potential approaches and solutions and (iii) supporting talented young people who may face barriers to education and development.

33. The first respondent's Trust Deed included the provision that

> "The Trustees hold the Trust Estate in Trust for the purposes and subject to the terms and conditions and under the powers, privileges, immunities and discretions… including "for payment out of the Revenue or Capital of the Trust Estate at any time of such sum or sums for such charitable purposes as the Trustees may in their sole and uncontrolled discretion determine and for such charitable purposes."

34. The first respondent has a Conflict of Interest Policy for its staff which states:

> "….This policy provides guidelines and procedures for employees only of the Robertson Trust
>
> **What is a conflict of interest?**
>
> 1. A situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's

> self interest, the self interest of a person or organisation closely associated (defined as “spouse, partner, child, sibling or relative or organisation related to any employee”)
>
> ……
>
> **What to do if you face a conflict of interest?**
>
> If you have a conflict of interest, whether it materialises or not, you are required to take appropriate steps to prevent it from interfering with your ability to make a decision that is only in the best interest of the Trust. This means that staff with a conflict of interest, direct or indirect, should not be involved in any decisions that directly affect the organisation that they or family members are involved in. Staff members should declare their interest at the earliest opportunity and withdraw from any subsequent discussions.”

35. The first respondent published Guidelines on how it makes revenue and capital Main Awards, known as its Funding Policy. Applications require to be made to its Giving Committee. It referred to revenue funding, and capital funding which were monetary grants of various amounts. It set out that written applications for funding required to be made, and the criteria to determine the same. Its Guidelines include reference to the types of activities it does not fund which includes:

> “Projects and activities which incorporate the promotion of political or religious beliefs….”

36. The first respondent provided direct financial support under its Funding Policy to a wide variety of religious organisations, and political organisations, for activities that did not promote that organisation’s religious beliefs or political opinions, such as food banks, mother and toddler groups, and other activities. That included to the Church.

37. Prior to the granting of the Licence referred to below, the first respondent had not leased or otherwise made available premises to any third party for use as a place of religious worship or instruction.

38. The first respondent did not have any specific written policy with regard to renting or providing a licence to occupy to third parties.

39. In practice its support of charities included what it terms a “Funding plus” model, that includes support by way of subsidised rents of premises to charities. The rents charged to charities are less than those to commercial organisations, or bodies such as local authorities.

40. A list of organisations to which the first respondent rented properties, produced by the claimant, is accurate. That list does not include religious organisations as that term is normally understood. It included one organisation named Faith in Older People, but there was no evidence as to what that organisation was or did. There were some organisations which had beliefs as to marriage and rightful sexual relationships that were different to those of the Church referred to above, such as LGBT Youth Scotland, and Stonewall.

41. The board of trustees of the first respondent in practice sought to apply a general policy of neutrality on matters of religion or politics, such that it sought to avoid being seen to support or oppose any particular set of beliefs or views in its activities. Such a policy was not committed to writing.

42. There are currently twelve board members of the first respondent, one of whom was the second respondent. At the time of the claimant’s employment latterly there were ten board members. The Trustees met five to six times per year to oversee delivery of the Trust’s strategy, and also had communications by email and telephone if required.

43. The second respondent has worked with the Trust since 1 April 2004 when she was first appointed as a Trustee. She was appointed Vice Chair of Trustees in 2014. She has been Chairman of the Board since 25 November 2017. She was formerly a partner of McGrigors LLP, one of Scotland's largest law firms, and between 2000 – 2004 was its Chair. She remains on the solicitors roll in Scotland but has not practised as a solicitor since 2004. When in private practice her area of work was intellectual property and corporate finance.

44. The second respondent worked with the claimant since he joined the Trust in 2011. From the time she was appointed as Chair she was the claimant's line manager. They had monthly one to one meetings to discuss ongoing business matters affecting the Trust. The second respondent was responsible for carrying out appraisals for the claimant every 6 months. The claimant and second respondent would email each other regularly, discussed matters regularly, and liaised in relation matters such as preparation for board meetings and committee meetings. Until November 2019 their relationship was a good one.

45. The claimant is a member, an elder, and the Treasurer of the Stirling Free Church of Scotland ("the Church"). Since 2015 he declared that he was a Trustee of the Church in the first respondent's Register of Interests, and latterly that he was also its Treasurer. The first respondent operates a Register of Interests where Trustees and members of the senior management team ("SMT") register external interests. The claimant is a member of the SMT. The Board review this Register on a periodic basis.

46. The claimant describes himself as an evangelical Christian with orthodox beliefs. The claimant believes that for him marriage is between a man and woman, and that as a man rightful sexual relations are only with a woman.

47. The Church expounds the belief that marriage may solely be between a man and a woman, and that rightful sexual relationships are solely those between a man and a woman.

48. The second respondent had been aware of the claimant's religion and involvement with the Church prior to November 2019, as a result of intermittent conversations with him about it and his disclosure in the Register of Interests. She talked to him about the vote by the General Assembly of the Church of Scotland in 2013 regarding the ordination of gay clergy.

49. The second respondent did not share the views of the claimant and Church as described in paragraphs 45 and 46 but there was no dispute between them about such views overtly articulated by either of them at any stage.

50. The claimant reported to four different Chairs during his employment, and all were positive relationships until that with the second respondent. For about the first year of the second respondent's period as Chair she and the claimant worked well together.

51. The second respondent conducted twice yearly appraisals of the claimant's performance. In the appraisal dated 19 December 2017 the summary she prepared indicated "another solid performance" by him. She referred to his six direct reports and external responsibilities, and added that he would "need to consider how he supports his SMT while supporting the Board of [the first respondent] as it becomes a more strategic governance body."

52. The first respondent undertook a major development of premises known as the Barracks in Stirling, which involved the creation of a conference centre and other facilities. The intent was to lease space at the Barracks to a variety of organisations. Initially one party was identified as an anchor tenant to take a major proportion of the use of that space, but latterly in 2017 at a stage when the development had not concluded negotiations for that broke down.

53. In about October 2017 the minister of the Church Rev Iain Macaskill wished to enquire about the possibility of renting The Barracks once the site was open. When he asked the claimant about it the claimant indicated that he had a conflict of interest and that Rev Macaskill should contact the Head of Social Investment of the first respondent, Katie Campbell, who had responsibility for renting space in The Barracks, to discuss that further.

54. Neither at that point nor afterwards did the claimant inform his line manager, the second respondent, or any other Board member, of the approach by the Church to rent the premises from the first respondent,

55. On 4 October 2017 Rev Macaskill attempted to email Ms Campbell requesting a meeting with her to discuss the interest of the Church in those premises, and said "I understand that Kenneth [the claimant] has spoken to you about this." When his message bounced back Rev Macaskill emailed the claimant about that.

56. Ms Campbell then emailed Rev Macaskill on 11 October 2017 to indicate that the claimant had forwarded the email Rev Macaskill had sent her requesting a meeting, which had gone to the wrong email address and had been passed to her by the claimant. She invited Rev Macaskill to call her on her mobile telephone.

57. Ms Campbell met Rev Macaskill on 25 October 2017and after that reported the meeting to the claimant by email. At that stage she understood that the Church was interested in becoming in effect the Head Tenant for the whole site. In the email to the claimant dated 25 October 2017, to which he did not reply, she stated:

> "The only thing I think we'll have to be careful of is not being seen to be linked to a particular faith given the push back we get on that from the board. Iain seemed very mindful of not being overly "churchy" and

> focussing on community support which I think will work well. The Sunday service is the only thing that might not fly with the board (especially Shonaig as she has been quite vocal in the past on this). Am sure we can navigate round it though with a bit of thought."

58. On 30 October 2017 Ms Campbell emailed Rev Macaskill further with additional information and drawings.

59. Rev Macaskill sent an email to the claimant on 20 February 2018 stating

> "Hi Kenneth. Can you check if Katie got the email I sent her which I copied you in on (the one expressing our interest). I haven't had anything back – I did have 3 attempts to get the email right! Thanks"

60. He replied shortly thereafter that day stating

> "Hi Iain. Yes safely received. I can't be involved as I'm conflicted. Katie's just back from holiday and will get the draft licence across to you. Kind regards"

61. The claimant sent an email to Ms Campbell shortly thereafter that same day which copied on the email to him from Rev Iain Macaskill. It stated

> "Hi Katie. Could you please progress a licence discussion with Iain? Thanks and kind regards"

62. Ms Campbell later spoke to Rev Macaskill. He emailed her on 26 February 2018 with additional details of what they required which included the use of premises for a "main worship service". Ms Campbell replied on 17 May 2018 suggesting a rental of £6,500 per annum, which she understood was the rental that the Church was then paying. That sum was about 25% of the commercial rent, which less than the standard50% reduction of what was a commercial rent, but took account of the fact that it was intended to be for a

twelve month period. She indicated that if the proposal was acceptable a draft Licence would be prepared.

63. On 20 February 2018 the second respondent informed the claimant of a course entitled "The Leadership Centre – Future Visions". In his reply of that date he indicated that he realised that his role with the first respondent may well be his last job, and in her reply of 27 February 2018 the second respondent said that she had always assumed that this would be his last job.

64. In June 2018 the claimant sought the second respondent's assistance in relation to an issue with a programme run by the first respondent called Heart & Soul.

65. On 23 August 2018 the second respondent emailed the claimant and Mark Laing, a Trustee, in relation to the project to convert the Barracks. She suggested that "given the quantum of overspend and potential reputational risks a higher degree of oversight is arguably required." She suggested that a committee of the claimant, Mr Laing and the second respondent to "steer the project to completion." That was duly set up.

66. In the interim appraisal dated 6 December 2018 the second respondent included comments in relation to the claimant's performance that "Need to invest more time at outset of projects to plan resources, identify issues and potential risks…..Need for more reflection before making a decision…..By Kenneth's own recognition a difficult six months in which several issues have arisen – principally as a result of inadequate planning and communications at outset of projects." In respect of the Trust and its stakeholders she wrote "No issues of concern here. Strong contributor…." In the summary of the year's performance her comments included "I have found this to be one of the most difficult periods of working with the Trust….While I fear that the tempo will not reduce over the coming six months or so, Kenneth has learned from the formal "training" within Future Vision and by reflection on issues that have arisen in relation to the Barracks, Heart & Soul etc……"

67. On 22 February 2019 Ms Campbell emailed the claimant with a copy to Lesley Williams the first respondent's events co-ordinator expressing concern with regard to the licence to the Church if the option then being discussed of contracting with Stirling University to manage the premises at the Barracks site progressed. It in fact did not so progress. In expressing her concerns she added "It also occurred to me does Shonaig know about the church taking the space. Assume she'd be fine with it?" She concluded by stating "Leave it with me and I'll get in touch with Iain to try and nudge forward." She did not receive a reply to her message from the claimant.

68. In addition to the normal appraisal, the Trust introduced a 360 degree appraisal in April 2019, carried out by Hunter Adams, the Trust's HR consultants. In that the second respondent gave the following summary of the claimant's performance with an overall 8 out of 10, with the scale including 10 as excellent and 5 as adequate:

> "Engaging, optimistic, values driven individual who fulfils an excellent role as an ambassador for The Robertson Trust, recognised as a thought leader in the third sector in Scotland and increasingly elsewhere beyond the UK. He continuously seeks to innovate and improve performance of the Trust, coming up with lots of new ideas and schemes. Internally he encourages and supports the staff to be the best they possibly can be, providing promotion and development opportunities for all and setting the tone/culture for the organisation. He has boundless energy and enthusiasm, always going the extra mile to support and accommodate stakeholders and staff. This is coupled with a resilience to bounce back from setbacks. Kenneth is very loyal and supportive of his team, seeking out the good in everyone."

69. The board scored him as a 6.75 and their comments included

> "Caring/compassion – Kenneth is clearly and visibly a very caring individual and demonstrates a commitment to improving the lives of people in Scotland and to the staff team and others he works with.

Commitment – he is committed to the Trust. He is a superb ambassador with external agencies and grant recipients.

Competence – As a professional he has a calm confidence that gives assurance about the management of the key elements of the Trust's business.

Knowledge – his knowledge of the trust and the wider charitable sector in Scotland is immense and he uses this extensively in the business of the Trust.

Respect – it is clear from the interactions I see that he is respected by staff and other stakeholders.

Kenneth has led change at TRT over recent years, bringing greater focus and improved approaches to the delivery of the core work."

70. The Board comments also included reference to some challenging situations and that "The factors which seem common across these situations are that it has been new/project work for which there was insufficient planning and self-reflection at the outset, lack of oversight leading to no pre-emption/prevention of the difficulties and an apparent outsourcing of responsibility to external organisations when things went wrong."

71. The claimant scored himself as 8,and the Senior Management Team a 9.25.The appraisal gave the claimant an overall average score of 7.9.

72. For the standard April 2019 appraisal the second respondent's comments included:

"An optimistic and positive leadership style which engenders confidence within and outside the Trust. Determined to do the right thing and follow through on projects. Excellent ambassador for the

> Trust throughout the UK with strong relationships with stakeholders including Edrington and advisers. Leadership and influencing skills are put to good use to benefit Trust and wider third sector: examples include Local Government Pension Scheme, Charity Law Consultation and engagement at ministerial level within Scottish Government. Very good technical skills. Strong personal values set".

73. The comments also included, as areas to address "blind spots, ….review of planning processes….follow on from Future Vision and 360 appraisal, Listening and acceptance", under the heading of the Trust and its Stakeholders as areas to discuss "relationship with Board", and her summary was:

> "My perception is that this has been an extremely challenging year for Kenneth despite business as usual continuing apace, several innovations, and continued growth and investment in new people to deliver the Trust's objectives. In the current year there is one over-riding priority which is the successful implementation of the strategy renewal process. We need to discuss what that means for Kenneth's own personal planning and activities in the year."

74. On 16 April 2019 the second respondent emailed two of the Trustees who had contributed to the 360 appraisal Mark Laing the Vice Chair and Gary Coutts, discussing her appraisal meeting with the claimant. It stated the following:

> "…..We went through the form that I had completed and circulated to you. We discussed whether he could have prevented the Barracks, Heart and Soul and the Budget issue but he had no answers……What was somewhat disconcerting but not at all surprising is Kenneth's inability or unwillingness to learn from what has happened in the last financial year around management and support of people. This manifested itself around two issues:

> Firstly in relation to the Staff Survey when questioned on what action he might be thinking of taking to address a couple of the negative trends and issues he replied that he was not going to do anything as the negativity emanated entirely from one member of staff who he described as a malcontent……
> ..the second issue is the feedback from the 360 appraisal….Kenneth advised me in strong terms that the feedback which was negative was wrong and completely inaccurate….
> Finally I encouraged him to build a stronger relationship with all of the Board and he is going to reflect on how he can achieve that…"

75. That email was not sent to the claimant, who was not aware of its contents.

76. The claimant met with Gary Paterson of Hunter Adams who had carried out the 360 appraisal process and said the report was "outstanding" and that he had received high and consistent marks across all the groups. The claimant asked about some of the less positive comments from the board and some from the wider group of managers. He said that the two groups to focus on were those the claimant worked with most closely namely the Chair and SMT, as they knew him best. He said both groups had given similar and consistently high scores. He mentioned that the questions were designed for the groups to come up with areas where there could be improvement or further development and this was the main purpose of the 360 appraisals.

77. On receiving the indication from the Rev Macaskill that the rent proposed was accepted Ms Campbell instructed the first respondent's solicitors to draft a Licence. She took comfort in doing so from the email to her from the claimant that progressing the discussion with the Church was in order. She considered that it would be beneficial to rent out the lecture theatre to the Church for use at weekends, and receive income that was otherwise not to be obtained. The board had been encouraging her to obtain rental income for the Barracks once it was completed. Making that decision was within her delegated

authority. A Licence was then drafted by the first respondent's solicitors (on a date not given in evidence).

78. A 12-month Licence to Occupy was granted by the Trust to the Church, executed in June 2109, to commence on the date of entry being the first Sunday after Practical Completion of the premises, for a licence fee of £6,500.00 per annum. It had as the Permitted Use "for public worship and delivery of religious instruction" and entitled the Church to use the premises for the permitted use during Licence Hours of 10.00 to 13.00 and 17.30 to 19.30 each Sunday. The Licence fee was subject to VAT, and was payable quarterly. The Licence had been drafted and concluded by the first respondent's solicitors.

79. The claimant was not involved with the discussions as to the granting of the Licence, the level of the licence fee, or details of the terms of it. They were managed for the Trust by Ms Campbell, who is August 2019 left employment and acted as a contractor to the first respondent. The claimant absented himself from all discussions on the Licence at the Church. As he was Treasurer of the Church he was aware of the grant and terms of the Licence at that time.

80. In September 2019 the claimant sought an increase in headcount in the Finance team for a part-time role, which was funded within the existing budget.

81. The Barracks opened officially on 2November 2019.

82. The second respondent visited the site on the morning of 8November 2019, a Friday. When there her guide, Alan Campbell, explained that the ground floor kitchen of the Conference Centre was to be used by what he said was "the Church" on Sundays when the cafe was not open. She asked him "which Church" to which he replied "Kenneth's Church". By Kenneth he meant the

claimant, who was on leave that day. The date of entry for the Licence to Occupy was due to be on Sunday 10 November 2019.

83. The second respondent was astonished, and very distressed, at learning of that. She was angry. She was concerned as to a breach of the Funding Policy. The claimant had not informed the second respondent as to any conflict of interest in relation to the use of the Barracks by the Church, and she was concerned that a breach of the Conflict of Interest Policy had occurred. She felt let down by him.

84. After leaving the Barracks the second respondent telephoned Katie Campbell, Head of Social Investment, who was responsible for leasing space at the Barracks. The second respondent asked her if it was correct that the Church was using the Barracks for church services and she confirmed that it was, and that she had agreed a licence to occupy with the Church. Ms Campbell told her that the claimant was a member and elder of the Church, that the licence had "come about" through him but other than that he had not been involved. The second respondent said that it was "such a conflict" for the claimant, and asked Ms Campbell if she knew the Church's views on same sex marriage. The second respondent's voice was shaking. The second respondent said that it could be seen as detrimental to the Trust to be associated with such an organisation because of their views. She asked if the Licence had been signed, and Ms Campbell said that she did not know and would check.

85. Ms Campbell had a call that day from Mr Stephenson who said that he had been alarmed by the second respondent's reaction to being informed of the Licence.

86. The second respondent later that day spoke to other Trustees to inform them of what she had discovered in relation to the Licence and her concern about it. She spoke to Ms Judy Cromarty. When she did so the second respondent referred to the Church not supporting gay marriage or words to that effect.

Ms Cromarty said something to the effect that what had happened called into question the claimant's ability to lead on values. She also spoke to Garry Coutts to discuss matters. When she did so he expressed a view that there seemed to be a conflict of interest and it appeared to be an error of judgement by the claimant not to discuss that with anyone on the Board. The second respondent referred him to the Church's stance on same sex marriage or words to that effect. Mr Coutts said something to the effect that he was uncomfortable with those beliefs.

87. The second respondent called Lesley Macdonald, Head of Giving, to ask for a copy of the Funding Policy as she wanted to check its terms. Ms Macdonald directed her to the Trust's website. The Trust website had a section setting out the said guidelines which applied to revenue and capital Main Award applications which may be made to the Trust by organisations which were registered charities. Ms Macdonald later emailed the claimant that same day in which she said that the second respondent "really sounded angry".

88. The second respondent made a second call to Ms Campbell later that day to ask when the first Church service was to be held. When told it was the following Sunday she confirmed that it should proceed if there was a signed agreement, and Ms Campbell confirmed that there was.

89. The claimant received messages from Ms Campbell on 8 November 2019 suggesting that she had never seen the second respondent so angry, that the second respondent was "on the warpath" and that he should "watch out". Ms Campbell sent a message to a colleague that day saying in relation to the second respondent "She is appalled at the idea of the Free Church using a Trust space & Kenneth's role in facilitating it."

90. The second respondent spoke by telephone to a number of other trustees that day. Those she spoke to were, in addition to Ms Cromarty and Mr Coutts:

(i) Mr Andrew Walls, who is recorded in hand written notes the second respondent kept as including having said that what the claimant did was "just wrong", questioned whether it was a breach of policy, and the second respondent wrote the word "yes" after the words "do we need investigation?".

(ii) Mr Mark Laing, whose comments are recorded as including "sadly only one outcome – so stupid"

(iii) Ms Heather Lamont who is recorded as asking, amongst other issues, whether the Trust funds the Church. The second respondent recorded her arrangement to meet the claimant to investigate. Ms Lamont is recorded as commenting that dismissal was a "nuclear option"

(iv) Professor Lorne Crerar who is recorded as having "accepted position", and later "extraordinary, what was he thinking? Need to be sensitive, proper process,"

(v) Mr Mark Batho who said that the grant of the licence was "extremely embarrassing" and that it called into question their values especially on equality and diversity.

91. The second respondent asked for a copy of the claimant's terms and conditions of employment, although none could be produced. She sought employment law advice on the possible dismissal of the claimant.

92. The second respondent then wrote to all the Trustees that day at 13.28 stating that she had visited the Conference Centre at the Barracks that day, had been shown round, that the kitchen was to be used by the Church and that Katie Campbell had informed her that a licence had been entered into with the Church to allow them to hold Sunday services. She added that the claimant is a member and elder of the Church, and "Some of you may be familiar with the views of the Free Church in relation to homosexuality and gay marriage." She stated that the arrangement with the Church "does not fit with the Robertson Trust's values and will offend staff, grant holders and stake holders generally as well as harming our reputation." She added that the claimant had not informed her of that arrangement, and that "You will be

aware that our policy is that we do not fund projects and activities which incorporate the promotion of political or religious beliefs or requests for salaried posts where there is a requirement for the post holder to be of a particular faith or none", and she added a link to the website entry referred to above for the Funding Policy.

93. The second respondent was concerned that one of the Trust's values was not to support organisations in promoting religion or political belief. She was concerned that leasing space to the Church may have been seen as supporting the Church and the beliefs that it holds.

94. The second respondent received responses from some Trustees to her email on 8 November 2019 which included one from Edel Harris on the same day who wrote to the second respondent stating:

> "…..This is obviously a tricky one but I would suggest that we enquire if the Church arrangement is in any way being subsidised or funded by the Trust or is the Church a paying customer of the conference centre. I would suggest there is a difference between the Robertson Trust funding activity that goes against policy and us accepting business from or hiring space to organisations or individuals whom might take a different stance to us on certain things. If it is the latter I would imagine (if we don't have one) that we think about writing down by way of a policy statement how we deal with issues such as this in our public buildings. We may also need to take legal advice. We could get requests for hiring space from all sorts of organisations in the future and we need to be clear if we are going to be turning people away".

95. The other responses generally supported the second respondent's concerns.

96. The response from Mr Coutts included

"1) I think it highly irregular for a licence to be given to an organisation where one of our senior colleagues has a clear interests without this being discussed and approved by the board

2) The views of the Free Church of Scotland in relation to diversity and equality issues are uncomfortable to me and I know are to a large section of our population."

97. The response from Professor Crerar included "all my instincts are to be very, very cautious with this issue and Kenneth. It has all the hallmarks of being reputation threatening….."

98. Having considered the responses of the Trustees the second respondent decided that it was appropriate to carry out a fact-finding investigation under the first respondent's Disciplinary and Grievance Policy. She asked Garry Coutts, Trustee to carry out the investigation.. She chose Mr Coutts as he had experience of handling such investigations and time available to do so, which many of the other Trustees did not.

99. She also contacted the claimant's PA by email that same day to bring forward their one to one meeting, scheduled for the following Monday, from the afternoon to 9am. No explanation was given for this change at that time.

100. In the evening of 8 November 2019 the claimant received an email from Lesley Macdonald an employee of the first respondent which stated "Re Shonaig – be warned. Please take care on this one. Am worried for you. We know how she can be and she really sounded angry. Asked me about our policy on funding faith organisations and wanted to see where it was on our website. Will keep in touch."

101. On 9 November 2019 Ms Campbell emailed Fiona Jamieson the Venue Manager of the Barracks, stating "….Church bomb dropped & don't think its going to end well for Kenneth. Shonaig on warpath…She loved the site but overshadowed by her finding about the church which is disappointing. But in some ways think it was inevitable."

102. On 10 November 2019, Andrew Walls a Trustee, sent an email to the second respondent which read:

> "Dear Shonaig - I have reflected on your email and our conversation. I think for me - it's very serious because as our most senior director Kenneth has to be 100 percent trusted and he knows our position on religion - yet he has gone ahead with this arrangement without seeking approval from you and the Trustees.
>
> As to the consequence - if you were very satisfied with his performance to date you perhaps can forgive / but the relationship will never be back 100 percent. If there are aspects of his performance which on balance have made you wonder to date - then this is the act that breaks the camel's back.
>
> If after investigation you feel the relationship can't continue - I would support that view. Equally if you feel it's a written warning because then again I am supportive. I am clear that a relationship between chair and CE must work."

103. On 10 November 2019 Ms Campbell emailed the claimant and informed him that the second respondent wanted to speak with her on the following day, was asking why the Licence was not included in the working group discussions and added "I don't really have an explanation. I'm around first thing if you want to discuss how best to position things." The claimant responded including saying "I'm quite clear we did everything right."

104. On 10 November 2019 the second respondent and Ms Campbell exchanged emails with regard to the licence. The second respondent asked why it was not included in the reports to the Working Group. Ms Campbell replied that she did not know, and said "if I had appreciated how much of a problem it was going to be I would of course have raised it for discussion with the group. I took my lead from Kenneth which I can see now was a mistake on my part.

I conversely took comfort that Kenneth's involvement meant we could trust them with having access to the new space."

105. At the meeting between the claimant and second respondent on 11 November 2019 the second respondent asked the claimant if he was an elder, member and treasurer in Stirling Free Church of Scotland and aware they had rented space at The Barracks. He replied to the effect that he was. She said that she was concerned that there may have been a breach of the Funding Policy and Conflict of Interest Policy in respect of the licence to occupy granted at the Barracks to the Church. She said that she was disappointed and angry.

106. The claimant said that he was very surprised that she regarded the matter as worthy of investigation or concern, that it only involved £3,000, that the Trust already funded the Free Church and that he had absented himself from negotiations.The claimant stated his view that receiving rental income from hiring out The Barracks was not funding by the Trust. He denied that he had done anything wrong.

107. The second respondent did not accept that argument and informed the claimant that he would be the subject of a formal investigation which could result in dismissal. He was advised by the second respondent to keep the issue confidential and told that the board would also do so. Hewas told to meet with Garry Coutts on 14 November 2019 as part of the first respondent's investigation. He said that he would bring Gordon Hunt, a senior member of my SMT. The second respondent said "this was not a good idea", as she was concerned to retain confidentiality of the process. The second respondent was not inappropriate in the manner in which she conducted the conversation. She stated when asked about the outcome by him that she could not prejudge the investigation.

108. The second respondent wrote to the claimant on 11 November 2019 to confirm the arrangements for the investigation meeting. She attached to her email the first respondent's disciplinary policy.

109. She reported matters to the board that day with an email that included that there would be a fact finding investigation, which "should not be [by] me" and once completed by Mr Coutts "he will submit a report to the Board for consideration of next steps, if any, including disciplinary action."

110. That afternoon the second respondent instructed the Trust's lawyers to serve a break clause notice on the Church ending the licence to take effect on the 6-month break date. The Church sought an explanation for the decision, which was provided on dictation by the second respondent to Ms Campbell.

111. The first respondent issued an invoice to the Church for its use of the premises, and in doing so levied VAT on the sum due. VAT is not payable on charitable donations, but is payable where renting premises.

112. Mr Coutts wrote to the claimant by email on 12 November 2019 to outline what he was to investigate, and that he had a right to he accompanied under the first respondent's disciplinary policy. He attached that policy, the Conflict of Interest Policy, a link to the website entry referred to above in relation to the Funding Policy, and a copy of the Licence Agreement.

113. At the investigation meeting with Mr Coutts on 14 November 2019 the claimant said that he did not consider that the licence was a funding matter and therefore the funding policy did not apply. He suggested that there was no such thing as a rental policy. He denied being in breach of the conflict of interest policy or otherwise having acted improperly. He provided a written response with attachments, which included his two emails in February 2018 referred to above. A minute of the meeting was taken which is a reasonably accurate record of it.

114. Mr Coutts also met Katie Campbell as part of his investigation. In her interview with him she was asked whether the claimant wanted the licence to happen and said that it was not as strong as that, but that the claimant's involvement gave her comfort. She also stated that as the claimant had been involved at the beginning, had a "clear compass" and was " a man of integrity" she thought that it would be ok. The minute of the meeting with Ms Campbell is a reasonably accurate record of it.

115. Mr Coutts prepared an Investigation Report dated as November 2019. It concluded that the claimant had a case to answer and recommended a disciplinary hearing.

116. On 3 December 2019 a board meeting of the first respondent was held, at which the claimant was present. He gave an update on the Barracks development, with a final cost of about £9 million rather than the original costs provided to the Board of £3.6 million. He also reported in relation to a potential development at Tynecastle, Edinburgh. As the claimant gave a strategy update at the meeting the second respondent shook her head and said "no, no, no" as he was speaking, so that some of those present, including staff, heard. She interrupted him when he spoke. She did not agree that the presentation he was giving was correct. The meeting included a discussion as to whether to proceed with the project with concerns raised by some trustees about it. The board agreed that the claimant should continue to make enquiries regarding the project but did not make a decision to proceed with it.

117. After the meeting the second respondent was approached by two of the Trustees who also expressed concerns. She then emailed the Trustees and received responses to the effect that they wished to cease work on that project. The second respondent prepared a written resolution in relation to not progressing discussions on the project and the board minutes for the meeting on 3 December 2019 were amended in light of that.

118. Later on 3 December 2019 the second respondent advised the claimant at a private meeting between them that a full disciplinary process would be initiated. The second respondent tried to dissuade the claimant from bringing a colleague, Mr Hunt, to the disciplinary meeting. She mentioned at that meeting the possibility of a non-prejudicial conversation, and then of a settlement agreement under which the claimant's employment would end by mutual agreement, or words to that effect. The offer was not accepted.

119. She sent him an email on that date with the Investigation Report and the first respondent's Disciplinary and Grievance Policy. That policy includes the following provisions:

> "The Robertson Trust (TRT) attaches particular importance to the maintenance of high standards of conduct, attendance, work performance and behaviours. ….These disciplinary and grievance rules are designed to provide a fair and consistent framework for dealing with disciplinary issues and grievances in a positive way. This serves to assist in raising standards to the required level, while safeguarding at every stage the rights of the individual. All employees and line managers should familiarise themselves with these rules and procedures.
>
> Guiding principles –
> ……
> A decision regarding disciplinary action will only be taken after the facts of the case have been fully investigated and the employee has the opportunity to state their case…….
> Different managers should deal with different stages of the disciplinary process…..
>
> Disciplinary procedure
>
> Any allegations of misconduct or failure to maintain appropriate standards will be investigated."

120. The claimant was to have had an interim appraisal meeting with the second respondent on 6 December 2019, which was postponed in light of the disciplinary proceedings that had commenced. The claimant was not suspended from his duties and remained in post.

121. On 6 December 2019 the second respondent wrote to the Trustees by email with regard to the potential development at Tynecastle, and to ask if they disagreed with the view that it should not proceed. She received replies indicating a lack of disagreement and the board made a decision not to proceed. That was communicated to the claimant who was disappointed at that development.

122. A Trustee of the first respondent Ms Judy Cromarty wrote to the claimant to inform him of the disciplinary hearing on 9 December 2019 to require him to attend that hearing on 13 December 2019, and that she would conduct it. The allegations set out in that letter were that the claimant:

- Failed to ensure that the Trust was aware of your conflict of interest in relation to the Church's wish to rent space at the Barracks
- Failed to consider the impact on Trust policy, namely not to support activities which incorporate the promotion of political or religious beliefs, in relation to a proposal coming to the Trust before delegating the matter to a colleague to progress; and
- Failed to consider that your actions may have significant reputational risks for the Trust."

123. The letter referred to the claimant's right to be accompanied, and stated that if the allegations were held to be gross misconduct dismissal was one possible outcome.

124. On 11 December 2019 the claimant wrote to Ms Cromarty asking for the policy on supporting churches and other matters including to change the date.

He stated that he would not be bringing a colleague. She replied on 15 December 2019 referring to the first respondent's website and the comment under the heading "Types of activity we do not fund" – "Projects and activities which incorporate the promotion of political or religious beliefs, or requests for salaried posts where there is a requirement for the post holder to be of a particular faith or none."

125. On 12 December 2019 the second respondent asked the claimant for further information before approving a continued secondment to the Barracks for Fiona Jamieson, confirmed by email to the claimant on 19 December 2019 in which she agreed to it on condition that Ms Jamieson receive further training.

126. The hearing took place on 19 December 2019 after the date of it was re-arranged at the claimant's request.. A minute of it prepared by the first respondent is a reasonably accurate record of it. When the claimant was not permitted to record the hearing he took a companion with him Mr Gordon Hunt.

127. On 23 December 2019 Ms Cromarty sent the claimant a letter outlining her decision. She held that there had been a breach of the conflict of interest policy, and that the appropriate step under the policy would have been for the claimant as Chief Executive to have "escalated this matter to the Trustees". She held that there had been a breach of the funding policy, in that "it is implicit in the Trust's investment into its charity hubs that rental income is sacrificed in terms of lower than commercial rent for high quality accommodation". She also held that there had been a failure to consider that the actions may have had significant reputational risk. Her conclusion was that the claimant had exercised a lack of judgment, that there had been deficiencies in his oversight of the conflict of interest, but that he had acknowledged that with hindsight he ought to have raised the matter with the Chair. She considered that the appropriate penalty was a final written warning to remain live on his personnel file for eighteen months.

128. On the same date she emailed the Trustees to report the outcome of the meeting, which she had given to the claimant orally, and that she had decided that the sanction was a final written warning to last for eighteen months.

129. The second respondent wrote to the other trustees on 23 December 2019 and said, "I am somewhat astonished that despite speaking to Kenneth about his involvement of Gordon Hunt at the Fact Finding Mission he has taken him along to the Disciplinary Hearing".

130. The claimant was given five days to lodge an appeal, and did so on 30 December 2019. In his appeal he argued that he did not have a fair hearing from the trustees, they had all been involved in the process which was a failure to abide by the Trust's disciplinary policy of "escalating" the appeal to someone more senior than the person conducting the original disciplinary. He argued that he had not been in breach of any policy.

131. Professor Lorne Crerar, a Trustee and solicitor, was appointed to hear the appeal. The claimant objected to his doing so by email on 6 January 2020 on the basis that he had been "briefed" by the second respondent earlier. The second respondent replied to his message, denied that she had briefed the board but had "gone to great lengths to ensure that [she had] not been involved in the conduct of the process", and confirm that he would hear the appeal.

132. On 7 January 2020 Professor Crerar emailed the claimant with regard to the arrangements for the hearing of the appeal. On 9 January 2020 the claimant emailed Professor Crerar with regard to his appeal, suggested that all Trustees were not independent, and referred to the disciplinary policy. Professor Crerar replied on 10 January 2020 to assure him that he was impartial, had not been briefed in relation to the matter, and would approach it with an open mind.

133. On 13 January 2020 a Barracks Project Review meeting was held, attended inter alia by the claimant, second respondent and Ms Campbell. The second

respondent contradicted the claimant as he spoke, and at one point turned her back to him. After the meeting some of the others who attended asked Ms Campbell about the relationship between the claimant and second respondent.

134. The appeal was heard on 15January 2020. The minute of the hearing taken by the first respondent is a reasonably accurate record of it.

135. Professor Crerar issued his decision on 21January 2020, being that the appeal was rejected but the period of the final written warning was reduced to12 months. He held that the circumstances there was a breach of the funding policy, that there was no breach of the Equality Act 2010, that there had been a breach of the conflict of interest policy by the failure to raise the matter to the Trustees, but that the sanction was to be reduced in relation to the period of the final written warning. That was the final level of appeal under the disciplinary policy.

136. On 23 January 2020 the second respondent emailed the Trustees to inform them of the outcome of the appeal, and referred to the adjourned appraisal meeting for the claimant, on which she had been working, and said that she wished to speak to them as to “next steps”.

137. In January 2020 the claimant was working with a recruitment consultant, Odgers Berndtson, on the recruitment of new trustees. Previously for the recruitment of Trustees Mr Lees of that firm and the claimant would draft the proposed documents between them and obtain approval before it went live. The second respondent then dealt directly with Mr Lees, met him alone, worked with him to draft the text and when it was completed asked the claimant to send the documentation.

138. The second respondent continued a practice she had started before November 2019 of copying the claimant in on emails where she thought it appropriate to do so, and not therefore for all, including in relation to Linda

Macdonald who was a project support to the Strategy Steering Group the second respondent chaired. She liaised directly with staff who were on steering groups. She communicated directly with Lydia Rose, Head of Administration, and Danielle Diamond, Executive Administrator, as they had been and continued to assist her with administrative matters.

139. The second respondent gave a presentation to staff herself with regard to what was called Project Stadium on 28 January 2020. It was a very significant matter for the first respondent, had been in train since 2017, and had been led by the second respondent.

140. The second respondent asked the claimant's PA to send a copy of his diary for the next two months. His PA felt uncomfortable about this and informed him later that she had given the copy to her.

141. Some of the first respondent's staff questioned why the second respondent had recently started dealing with operational matters instead of the claimant. There was an office joke that the Trust had two Chief Executives.

142. The first respondent had undertaken the sale of its shareholding in a company named Edrington, which it called Project Stadium. The project had been led by the second respondent. The claimant had been involved in it including in matters such as board minutes, and implementation. There was an announcement to staff on 28January 2020. which the second respondent conducted, with the claimant present. The claimant answered some of the questions asked.

143. The Trust was in the process of recruiting a replacement Knowledge and Learning Officer. There were two candidates and given the workload on staff due to the strategy renewal going forward the claimant contacted the second respondent on 29 January 2020 to ask if he could increase the establishment and take both candidates. An increase in headcount required the approval of the second respondent. She asked if she could see both CVs and the Job Description.

144. At an over running PSG meeting on 21January 2020 the claimant and a colleague left to go to another pre-arranged meeting with attendees who had flown up from London. The claimant had not informed the second respondent of that meeting, and had she known she would have rearranged the running order of issues at it. She was annoyed that he had left that meeting as he did. She expressed her views as to how poorly some matters had been handled by the claimant. The staff present reported that to him a short time later.

145. There was a board meeting of the first respondent on 31January 2020 at which the claimant presented a paper on a draft staff structure. The claimant had understood that it had earlier been agreed with the second respondent. At the meeting the second respondent criticised it as not radical enough. She subsequently went direct to Hunter Adams to arrange a meeting with them and a member of the SMT without informing the claimant. When he heard about it from the SMT member, and how it related to staffing, he telephoned the second respondent and asked to attend the meeting. She said that he did not need to be there and then cancelled the meeting.

146. The claimant's interim appraisal due in November 2019 had been delayed due to the disciplinary process. The claimant sent his comments in the draft appraisal form to the second respondent on 3 February 2020.

147. On 6 February 2020 the claimant emailed the second respondent at 10.06 asking if it was better to rearrange a one to one meeting scheduled for the following Monday. The second respondent replied at 10.44 asking a series of questions and saying that she would have thought that a meeting was required. The claimant replied at 13.18 to state that he was happy to meet and attaching a draft agenda for their meeting.

148. The second respondent informed him that the appraisal would take place at 2pm on 7 February 2020 by email and attached the draft appraisal form with her comments at 16.53 on 6 February 2020.

149. The second respondent's comments in the draft interim appraisal were materially critical of the claimant's performance, and included the following:

"Failure to act upon 360 degree appraisals, lack of engagement during strategy…..Business model for Barracks under review – several issues including no PRS licence, failure to check if Barracks lease fetters Conference Centre operations, failure to invest in management team.
….Does not learn from past mistakes……Tynecastle was stopped by the Board at December 2019 following a presentation by KF which wished to continue the project…..Continued inability to listen or reflect….Created tension between Board and SMT due to failure to explain new delegated regimes and impact on staff and that where board had become more involved in specific operations matters eg Heart and Soul, Barracks, this was a direct result of requests and failure to deliver…..
Major failure to comply with Trust Policies in respect of Barracks during period from February to July 2019 leading to disciplinary procedure and final warning. Performance management requirement to be discussed…….

150. In the summary section her comments included "….No mention of Stadium at all which is Trust's number one objective but given engagement levels perhaps not surprising. Lack of engagement in Strategy, moved from being covertly obstructive to tolerance and suggesting no real change. No recognition of stasis in Social Impact and in Learning. No recognition of repeated failures in Barracks Project."

151. In the section in relation to the previous objectives the second respondent wrote in relation to "Successful completion of the Barracks Project and implementation of business model for operation at the Conference Centre at the Barracks" – "……No recognition of significant cost overruns and delays. Financial Return is to date unknown. No recognition that management framework of Barracks Conference Centre is inadequate. Failure to obtain

PRS licence. Failure to check on Lease and operation of Conference Centre. Breaches of Trusts Rental Policy for Barracks. Failure to ensure T&Cs appropriate. KO already revising pricing as believes original model unsustainable. No forward strategic marketing plan."

152. The claimant attended the meeting with the second respondent on 7 February 2020 and said that he could not answer the performance issues in the time he had been given. He suggested that a more positive approach would be to see how our working relationship could be rebuilt and that mediation could be a way forward. She answered that "it was too late for that" and that "the board have lost faith in you; the only options are performance management or a protected conversation and settlement agreement". She discussed a termination date by 31 March 2020. She said she would send a detailed offer to his solicitors as he was to go on holiday from 8 February 2020.

153. On 20 February 2020 Ms Campbell wrote to the Vice Chair of the first respondent Mark Laing to express what she referred to as serious concerns around the governance of the Trust, that the second respondent was stepping into executive roles, and the investigation into the claimant, amongst other matters. In her letter she did not complain that the second respondent had raised the beliefs of the Church when speaking to her on 8 November 2018.

154. While on holiday the claimant received a draft settlement agreement. He rejected it by a letter from his solicitor dated 24 February 2020. In that letter, written without prejudice, there was an allegation that the second respondent's behaviour in relation to the claimant amounted to bullying.

155. The Trust carried out an internal investigation into Ms Campbell's allegations, which were supported by a former employee Ms Christine Walker. The claimant wrote to Mark Laing as Vice Chair and Andrew Walls as Chair of the Audit and Risk Committee expressing his concerns over the delay and lack of independence in the investigation into the grievance that the second

respondent had fostered a toxic culture and failed in board governance, and what he referred to as his grievance. No answer was sent to him.

156. Katie Campbell and Christine Walker have not received a formal response to their complaints. As a result, they contacted the charity regulator OSCR who commenced an investigation not yet concluded.

157. On 10 March 2020 the board of the first respondent met. One of the issues discussed was the position of the claimant and whether or not to proceed with discussions with him as to his future. The minute noted that " A discussion followed in relation to the performance of Kenneth Ferguson which had caused concern including the significant overspend at the Barracks, budgetary issues, the lack of engagement with the Board, participation and attitude in relation to the Strategy Renewal, and an overall lack of prioritization. Given the changes required under the new Strategy the Board had to determine if it had confidence in the ability of Kenneth Ferguson to continue to lead the Trust. If it did not this would suggest that his employment should be terminated. Shonaig Macpherson said that she would leave the meeting to allow the Board to deliberate and would ask the Board to confirm whether or not it wished her to continue discussions with Kenneth Ferguson with the support of Andrew Wall and Gary Coutts in Mark Laing's absence overseas." The board then resolved that the second respondent should continue to seek a resolution of the claimant's position as Chief Executive. The board did not at that stage consider that it had lost trust and confidence in the claimant.

158. On 10 March 2020 Mr Walls sent a text message stating "…….Agreed not to stop or interfere with Kenneth F process…."

159. On 12 March 2020 the second respondent arranged a meeting with the claimant through his PA for Monday 16 March 2020 in Edinburgh at 10am. The claimant was informed of that, and emailed the second respondent that

day at 15.32 to ask what the meeting was to discuss. The second respondent sent the claimant by email at 18.05 on 12 March 2020 a letter referring to issues with the claimant's performance, being his "ability to lead the organisation, your skills in relation to prioritization, your understanding of the requirement to keep issues confidential and your management of major projects, the overspend on the Barracks being an example of this."

160. The letter intimated that "the Trust considers that it may not have trust and confidence in your ability to fulfill your role to the standards required going forward." It arranged a meeting between the claimant, the second respondent and another Trustee on 16March 2020 at 10am. The claimant was informed that a possible outcome was the termination of his employment, that he had the right to be accompanied at the meeting by a colleague or duly accredited trade union representative. The email had no attachments to it save the letter.

161. On 13 March 2020 the claimant replied and stated that Gordon Hunt would also attend.

162. On 14 March 2020 the claimant emailed Andrew Walls and Mark Laing, two Trustees, and indicated that he was to raise a grievance against the second respondent. He stated that it was not appropriate for her to conduct the meeting. He asked for a postponement of the meeting and alleged that the short time was a breach of the disciplinary policy.

163. Mr Walls sent a text message to Mr Laing at 12.14 referring to that email stating that he was willing to continue dealing with it in his holiday absence, that Mr Laing could express his views or authority on where they were, and adding "I should say this is against the context of Kenneth being summoned to a dismissal meeting at CMS on Monday." CMS was a reference to the first respondent's lawyers.

164. His request was refused by email from Mr Walls sent on Sunday 15 March 2020 at 17.00, and stated that the second respondent was not to attend the

meeting, which was to be chaired by him. He stated that he expected the claimant to attend with his chosen companion.

165. At 7.56am on 16 March 2020 the claimant emailed the second respondent, and copied Mr Laing, alleging that he had a severe headache, and blood pressure at 186/109 which he described as being at dangerous levels. He had been monitoring his blood pressure for some time and had equipment to do so. He took his own measurement of it. He asked to rearrange the meeting.

166. Mr Coutts and Mr Laing were at the offices of the first respondent's solicitors that morning, where the meeting was to have been held, and contacted the second respondent. They discussed matters. They agreed that it was appropriate to procced with the hearing. The second respondent conducted the hearing as the decision-maker. She considered that it was in the best interests of the first respondent to terminate the claimant's employment with immediate effect, and to pay him three months' salary in lieu of notice. She considered that there was very little prospect of any other outcome if the meeting was adjourned to another date. She felt that the claimant was continuing not to engage with her and the board by his absence from the meeting that day.

167. The second respondent wrote to the claimant on 16 March 2020 to inform him of that decision. She referred to not demonstrating an ability to prioritise and not attending a meeting in relation to Project Stadium, an inability to embrace change, concerns over ability to budget effectively and control spend, referring to an overspend on the Barracks project of several million pounds, and the Giving Committee allocating its annual budget in nine months. The letter concluded that the Board had lost confidence in the claimant's ability to lead the Trust forward, and that the circumstances were so serious that the decision had been made to terminate employment. It confirmed a right of appeal.

168. At no stage was the claimant informed that his performance was regarded as a disciplinary matter, or one in respect of which his future employment was at risk.

169. No warning as to his performance was given to him formally, or informally, at any stage. No performance management process was commenced with him at any stage.

170. The claimant appealed the dismissal by email on 19 March 2020. In his appeal he also set out a grievance against the second respondent.

171. Mr Walls replied on the same date to state that he would hear the appeal on 23 March 2020. At that point Mr Laing remained in Australia. He suggested that it could be by conference call if he preferred given the circumstances with the Covid-19 virus.

172. The appeal was heard on 23 March 2020 by Mr Walls by Zoom. A minute of the appeal hearing is a reasonably accurate record of it.

173. On 26 March 2020 Mr Walls issued a letter of decision rejecting the appeal. He said that the decision to proceed with the meeting on 16 March 2020 “was taken due to the significant concerns about your performance which had been of concern for some time.” He stated that the claimant would have been aware of the concerns from discussions with the second respondent. He did not consider that a grievance had been raised prior to the dismissal, but did take account of it in his decision. He commented on the one to one meetings between the claimant and second respondent and the appraisal process, and referred to the 2019 performance appraisal which he said “clearly sets out several areas that the Chairhad identified for your improvement.” He

concluded that although there had been “arguably less than best practice” the fundamental facts that underpinned the decision to dismissed remained.

174. The first respondent’s employees were informed by email on 27 March 2020 from the second respondent that the claimant “has left the employment of the Trust”. The message stated that the Board wished to acknowledge his contribution to the Trust and wished him well in his future endeavours.

175. Ms Campbell’s contracting with the first respondent ended in April 2020. At no stage was she subject to any reprimand or other penalty in relation to the conclusion of the Licence to the Church.

176. The claimant commenced early conciliation in relation to the first respondent on 29 May 2020 and the Certificate was dated 1 June 2020

177. The claimant commenced early conciliation in relation to the second respondent on 11 June 2020 and the Certificate was dated 11 June 2020

178. The Claim Form was presented to the Tribunal on 11 June 2020.

Submissions for respondent

179. The respondent’s written submission was supplemented orally by Ms Aldridge. The following is a very basic summary. The submission included reference to a large number of authorities a small number of the less frequently cited of which are set out in the summary below but all of which the Tribunal considered in its deliberations.

180. The case was not one about a clash of rights or two parties pursing conflicting agendas, but was brought as the claimant could not accept criticism. He did

not raise the alleged aversion of the second respondent to his beliefs or those of the Church until after his dismissal.

181. The majority of the claims were time-barred. Acts prior to 9 February 2020 were not within the jurisdiction of the Tribunal. They did not form part of a continuing act and it was not just and equitable to extend jurisdiction. The matters alleged could be divided into four groups being firstly the matters in November 2018 and thereafter in relation to the Licence, secondly a number of incidents in December 2019 and January 2020, thirdly the appraisal process which concluded on 7 February 2020 and fourthly the capability process leading to dismissal on 16 March 2020, and only that last of these was within the jurisdiction.

182. The respondents challenged the claimants version of the facts. She set out detailed arguments as to why individual matters of fact alleged by the claimant should not be found to have occurred, or did not have the discriminatory quality to them that was contended.

183. They argued that there was uncertainty over his beliefs. The second respondent had not made alleged comments about beliefs of the claimant or Church to Ms Campbell. The claimant's evidence that the second respondent found out for the first time of the issue of beliefs on 8 November 2018 should be rejected. The second respondent's views on same sex marriage were not any part of the reasons for her actions. The second respondent's evidence had been that she would have been in exactly the same position had she been told that the person's mosque, synagogue or Gurdwara were using the Barracks. The claimant had not established a prima facie case to meet the first stage of the test in ***Igen v Wong [2005] IRLR 258***. All there was was a lack of sympathy for and agreement with those views. Reference was made to a Tribunal authority and to ***Chondol v Liverpool City Council UKEAT/0298/08,*** where an employee was dismissed for inappropriately promoting Christianity, which was not less favourable treatment because of religion, but for "improperly foisting" his religion on service users. The claimant was not treated less favourably than a comparator. The respondents

sought a level playing field between all religions irrespective of particular beliefs. Even if he had established a prima facie case, the respondent had provided a sufficient non-discriminatory explanation for each matter such that they had discharged any onus on them. The level playing field was central as a concept for the first respondent, the claimant would have been expected to understand that, no such arrangement had been put in place before and the parties had previously worked well together. In relation to evidence of other organisations insufficient had been placed before the Tribunal. The claimant disagreed with the respondents over the issue of the Funding Policy but that does not mean that their explanation is false.

184. It was argued that the evidence did not meet the statutory test as to harassment. Reference was made in particular to ***Weeks v Newham College of Further Education [2012] 5 WLUK 195***in relation to the timing of an objection being of evidential importance. It was argued that the 11 November 2018 meeting was properly held, and that any without prejudice discussions are not admissible. It was argued that they were not held on 11 November 2018 but 3 December 2018. If admitted, it was not detrimental conduct. The various steps leading to the dismissal meeting being convened were addressed, and in each case it was argued that there was no discrimination and no harassment. There had been no marginalising of the claimant. Ms Campbell could not be an appropriate comparator as she was not an employee, not the CEO, and due to leave the organisation. The February 2020 appraisal was a fair summary of performance, and not evidence of discrimination. Performance concerns had been raised with the claimant in advance of November 2018. There was repeated and serious refusal by the claimant to engage in concerns over his performance. Performance management or a settlement agreement were mentioned as options but not the only ones.

185. The second respondent dismissed the claimant as she had an honest belief that he was not meeting the requirements of his role and not competent to continue in it. The reasons were set out in the letter of 16 March 2018. They

were trailed in documentary evidence. The process before the second respondent was entirely separate to that held earlier after the November 2018 incident. On the issue of the personal liability of the second respondent reference was made to ***Unite the Union v Nailard [2018] IRLR 730*** and that section 109 applies only where the agents discriminates in the course of carrying out the functions authorised.

186. With regard to the claim of unfair dismissal capability was the reason or principal reason, and potentially fair. A fair process had been followed. There had been identification of the problem, warning of consequences, reasonable chance to improve, support, and an opportunity to answer allegations. The Tribunal should take account of the claimant's seniority under reference to ***James v Waltham Holy Cross Urban District Council [1973] ICR 398*****.** There was no requirement to put the process on hold as the claimant indicated he would raise a grievance. Dismissal was within the band of reasonable responses. Reference was also made to ***Gallagher v Abelio Scotrail UKEATS/0027/19*** in relation to the argument over some other substantial reason as an alternative to capability.

Submissions for claimant

187. The claimant's written submission was also supplemented orally, and the following again is a basic summary of the submission given by Mr Cordery. The submission also included reference to a number of authorities some of which are referred to on the same basis as above, and all of which the Tribunal considered in its deliberations.

188. The questions for the Tribunal were did the claimant's protected belief play a more than trivial part in the decision to dismiss, and the burden of proof having shifted to the respondent as was argued as the case did the respondent prove that the dismissal was in no sense whatsoever because of the protected belief. That protected belief was his actual belief, or association with a Church

which believes, that marriage is exclusively between a man and woman, and that rightful sexual relationships are between men and women. It was trite that it is lawful to hold such beliefs and to express them. Matters started with the events on 8 November 2018 when the second respondent became aware of the Licence to the Church. Her response was extreme, and a significant part of the reason for that was her dislike of the beliefs. The Funding Policy did not make explicit reference to rentals, and there were strong mitigating factors for the possible breach of the conflict of interest policy. That unreasonable reaction had not been explained as non-discriminatory. There were negative references to the beliefs of the Church in calls and a message to Trustees. The respondents had denied in pleading that she was angry but that was clear and admitted in cross examination. There was a "continuum" from then to the dismissal. The board had stood by while the second respondent pursued what was said to be a personal crusade against the claimant. The purported performance reasons for dismissal were a sham. The reasons given were flimsy. None had been put to him before an email on 6 February 2020. Had there been a genuine performance process the disciplinary hearing would have been paused for a short time. The decision to dismiss was unreasonable and unjustified. Reference to trust and confidence was a proxy for the discriminatory animus. There had been a number of individual instances of the second respondent discriminating against the claimant in the period to the dismissal, which were humiliating for the claimant and marginalised him. The decisions on the disciplinary hearing and appeal which led to a final written warning were also discriminatory. The claimant was treated in a different manner to others on the issue of conflict of interest.

189. The dismissal was unfair. It was discriminatory and pre-determined. There was no proper investigation, there were no performance targets set and no opportunity to remedy concerns. The meeting was not postponed despite ill health. The dismissal and appeal processes were a sham. Reference was made to the ACAS Code of Conduct.

190. It was argued that weight should be placed on the evidence in the written witness statement of Mr Hunt. Reference was made to a quotation from ***Harvey on Industrial Relations and Employment Law,*** albeit under English civil court procedure. It was also argued that evidence of the without prejudice conversations should be admitted, and reference was made to ***Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd [2020] SC;R 707.*** There had been no genuine settlement negotiations. It would prejudice the claimant to exclude such evidence.

191. The submission concluded by arguing that the case was of personal importance to the claimant, and also one of principle. The human right to hold a religious belief was engaged. It is one of the hallmarks of a civilised society – ***Williamson v Secretary of State for Education [2005] 2 AC 246***., The European Court had held that it is one of the foundations of a democratic society - ***Kokkinakis v Greece(1994) 17 EHRR 397.*** The principle was a weighty one and the claimant trusted the Tribunal to uphold the rule of law and find in his favour.

Law

(i) Unfair dismissal

(i) The reason

192. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

193. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

194. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include capability and some other substantial reason, as well as conduct.

(ii) Fairness

195. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> ""(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 [that reason] as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

196. There is a dispute between the parties as to the reason. The respondents claim that it is capability or some other substantial reason. The claimant alleges that it was his religion or belief.

197. Capability is defined in section 98(3) of the 1996 Act as "capability assessed by reference to skill, aptitude, health, or any other physical or mental quality'

198. The basic principle was set out by Lord Denning in ***Taylor v Alidair Ltd [1978] IRLR 82*** as follows:

> "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.'

199. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, made the following comments:

> "an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job"

200. Three factors are generally considered, as referred to in ***N C Watling & Co Ltd v Richardson [1978] IRLR 255***, being:

1. the evidence necessary to establish that the employer has reasonably concluded that the employee is incompetent;
2. the procedures adopted; and
3. to what extent the employer should seek alternative employment for the employee.

201. The Tribunal must not substitute its own views for those of the employer. The test is the band of reasonable responses both for the decision as to capability and the penalty of dismissal – ***British Leyland (UK) Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones 1982 IRLR 439*** for example. The Court of Appeal in ***McLaren v National Coal Board [1988] IRLR***

215 referred to the importance of ensuring that employees are given a proper hearing before dismissal.

202. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a document that the Tribunal requires to take account of. It states at paragraph 1 that:

> 'Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted'.

203. That Code is applicable to issues of poor performance, as was made clear in ***Holmes v Qinetiq Ltd UKEAT/0206/15.*** The principles referred to in the Code include that an employer should carry out any necessary investigations to establish the facts of the case, and give the employee an opportunity to put their case in response before any decisions are made. The Code adds "In misconduct cases, where practicable different people should carry out the investigation and disciplinary hearing…..If it is decided that there is a disciplinary case to answer, the employee should be notified in writing…..It would normally be appropriate to provide copies of any written evidence, which may include witness statements, with the notification."

204. A non-statutory Guide issued by ACAS on Discipline and Grievances at Work includes the following guidance, which is Tribunal may but is not required to take into account:

> "**What if an employee repeatedly fails to attend a meeting?**
>
> There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed" It then lists a number of considerations.

Some other substantial reason (SOSR)

205. There are certain cases where a loss of trust and confidence, particularly in a senior employee, may be held to be sufficient for a fair dismissal, such as ***Ezsias v North Glamorgan NHS Trust [2011] IRLR 550****,* and ***Perkins v St George's Healthcare NHS Trust [2005] IRLR 934****.* In the former the following was stated:

> "We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of “some other substantial reason” as a pretext to conceal the real reason for the employee's dismissal."

206. In ***Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11*** the EAT accepted that such a principle exists but disapproved the version of it put forward by the employer. The EAT held that in a loss of trust case a tribunal is not bound to take the employer’s position at face value, provided that it is genuine, and can look at the facts behind that loss and consider whether on all the facts the dismissal was unfair under s 98(4).The following remarks were made:

> "The right [not to be unfairly dismissed] depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."

207. In similar vein in ***A v B [2010] ICR 849****, the EAT* (upheld on appeal, reported as ***Leach v OFCOM [2012] IRLR 839)*****,** referred to the reversal of the implied term on to the employee as a form of 'mission creep which should be avoided' and in ***McFarlane v Relate Avon Ltd [2010] ICR 507***commented that employers seemed to see it as a 'solvent of obligations', adding the view - 'It is not'.

208. There is something of a tension between these two lines of authority, one holding that SOSR can apply to loss of trust as a matter of generality, the other seeking to place limitations on it. All of the circumstances must be considered, and cases may normally be fact specific. The extent of the loss of trust, and the context (in ***Ezias*** an issue of patient safety arose) can influence the decision on fairness. That decision is also one where it is not permissible to substitute the Tribunal's view of matters, but the range of reasonable responses test applies, as it does in conduct and capability cases. Recently the EAT reviewed the law in ***Gallagher v Abellio Scotrail Ltd UKEATS/0027/19.*** A decision not to consult an employee before dismissal is rarely fair, but can be dependent on the circumstances. It was a SOSR case in which it was said that any argument that it was futile to have gone through procedures must be examined carefully by a Tribunal, and that an employer could act within the range of reasonable responses, and be fair if dismissing on this basis.

209. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness whatever the potentially fair reason.

Appeal

210. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness

was referred to in ***Taylor v OCS Group [2006] ICR 1602***being a conduct dismissal case, in which it was held that a fairly heard and conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

(ii) Discrimination

211. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

212. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that religion and belief are each a protected characteristic.

213. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

214. Section 23 of the Act provides

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

215. Section 26 of the Act provides:

> "26 **Harassment**

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

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

(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or

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

(2) A also harasses B if—

(*a*) A engages in unwanted conduct of a sexual nature, and

(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*).

…….

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

(*a*) the perception of B;

(*b*) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

……..

Religion or belief”

216. Section 39 of the Act provides:

“**39 Employees and applicants**

An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B

(d) by subjecting B to any other detriment."

217. Section 109 of the Act provides:

"**109** Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

218. Section 110 of the Act provides:

"**110 Liability of employees and agents**

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so.

(4) A person (B) commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (3)(a) which is false or misleading in a material respect.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5A) A does not contravene this section if A—

(a) does not conduct a relevant marriage,

(b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage, or

(c) does not consent to a relevant marriage being conducted,

for the reason that the marriage is the marriage of a same sex couple.

(5B) Subsection (5A) applies to A only if A is within the meaning of "person" for the purposes of section 2 of the Marriage (Same Sex Couples) Act 2013; and other expressions used in subsection (5A) and section 2 of that Act have the same meanings in that subsection as in that section.]

(5BA) If A is a protected person, A does not contravene this section if A—

(a) does not allow religious premises to be used as the place at which two people register as civil partners of each other under Part 2 of the Civil Partnership Act 2004 ("the 2004 Act"), or

(b) does not provide, arrange, facilitate or participate in, or is not present at—

(i) an occasion during which two people register as civil partners of each other on religious premises under Part 2 of the 2004 Act, or

(ii) a ceremony or event in England or Wales to mark the formation of a civil partnership,

for the reason that the person does not wish to do things of that sort in relation to civil partnerships generally, or those between two people of the same sex, or those between two people of the opposite sex.

(5BB) In subsection (5BA)—

"protected person" has the meaning given by section 30ZA(2) of the 2004 Act;

"religious premises" has the meaning given by section 6A(3C) of the 2004 Act.

(5C) A does not contravene this section by refusing to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.

(5D) A does not contravene this section by refusing to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(5E) Subsections (5C) and (5D) apply only if A is an approved celebrant.

(5F) Expressions used in subsections (5C) to (5E) have the same meaning as in paragraph 25B of Schedule 3.

(5G) A chaplain does not contravene this section by refusing to solemnise a relevant Scottish forces marriage for the reason that the marriage is the marriage of two persons of the same sex.

(5H) Expressions used in subsection (5G) have the same meaning as in paragraph 25C of Schedule 3.]

(6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).

(7) The reference in subsection (1)(c) to a contravention of this Act does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools).”

219. Section 123 of the Act provides

> ""**123 Time limits**
>
> (1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable…….
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

220. Section 136 of the Act provides:

> "**136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

221. Section 212 of the Act defines "substantial" as "more than minor or trivial."

222. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive97/80/EC.*** The dismissal was prior to the United Kingdom

withdrawing from the European Union, and those provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

(ii) Case law

(a) Direct discrimination

223. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

224. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. ……
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate

> inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

225. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

226. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

227. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate

comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

228. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

229. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

230. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258***the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial

reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

231. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

232. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following(in a case which concerned the protected characteristic of disability):

> "5
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed

characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.

6

In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

Harassment

233. The terms of the statute are reasonably clear but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

234. Paragraph 7.9 of the Equality Code of Practice states that it should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. In ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** it was held that whether or not there is harassment must be considered in the light of all the circumstances. But it is not enough only to point to the relevant characteristic as the background of the events or to pray in aid commonly held views***: UNITE the Union v Nailard [2018] IRLR 730*** and ***Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495***

235. The Equality and Human Rights Commission's Code of Practice states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended. Elias LJ in ***Land Registry v Grant[201]1 IRLR 748*** focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

236. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson [2017] IRLR 340***) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (***Bakkali v Greater Manchester2018 IRLR 906***). Relates to is not the same test as "because of".

Burden of proof

237. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or harassment, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

238. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

239. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage.

240. The rationale for the two stage approach was identified by Advocate General Mengozzi in ***Meister v Speech Design Carrier Systems GmbH*, *[2014] All ER (EC) 231***, as follows:

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the

> burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim … A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions.'

241. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn was confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352***.As the Court of Appeal also confirmed in that case, unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***. Elias LJ summarised the position with regard to the two stages of the analysis as follows:

> "First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

242. That case has been appealed to the Supreme Court. Argument has been heard but the Judgment of the court is not yet issued.

243. In ***Igen*** the Court said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established:

> " To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

244. The reason for a decision may be separable from circumstances related to it which arise from a person's religious beliefs – ***Page v Lord Chancellor [2021] EWCA Civ 254.***

245. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

Personal liability.

246. The Equality and Human Rights Commission Code on Employment gives guidance on the issues that arise under section 109 and 110 of the 2010 Act at paragraph 10.55.

Jurisdiction

247. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387*****.** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*****, *[2003] IRLR 96*)**

248. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

249. Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Ratharkrishnan***.

250. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

251. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although that is not exhaustive and all the facts are to be considered.

Religion or belief

252. There was no dispute but that the claimant held a religious belief, and was associated with a Church which held a religious belief, for the purposes of the Equality Act 2010 but for the avoidance of doubt the word religion is defined as any religion, and the word belief is defined as 'any religious or philosophical belief" by section 10, which re-enacted the Employment Equality (Religion and Belief) Regulations SI 2003/1660.

Observations on the evidence

253. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows:

Ms Shonaig MacPherson

254. The Tribunal held different views on the evidence of the second respondent. The majority of the Tribunal concluded that her evidence was not reliable in material respects. The minority of the Tribunal concluded that her evidence was reliable.

255. The second respondent is clearly a highly competent and experienced person, who had been the Chair of a substantial law firm previously, and had been involved with the first respondent in its charitable work for many years. It was clear to the Tribunal that she had a different style from her predecessors as Chairman, in that she was more engaged in operational matters and did not allow the claimant as free a rein as he had been used to. She was not an employee, and acted in a voluntary capacity.

256. There were some aspects of the second respondent's evidence that gave the majority of the Tribunal cause for concern, such that they could not conclude that her evidence was reliable. There were a not inconsiderable number of occasions when she did not directly answer the question asked. Whilst a

degree of care in answering questions, particularly from such a highly experienced professional person, is to be expected, the answers were on occasion evasive, notably in relation to her own beliefs not being those held by the claimant or Church. There were other occasions when the delay between the question and answer was very pronounced.

257. It was suggested to her that she had not been truthful when giving evidence as to the purpose of the meeting arranged with the claimant on 16 March 2020. She said that it was to discuss performance of the claimant, with dismissal only one potential outcome. Other evidence, as referred to below, indicated that the intention was that that be a dismissal meeting, including written evidence, which was not consistent with her position.

258. She was the claimant's line manager, but indicated that she did not have a good understanding of the first respondent's disciplinary and grievance policy, despite that very policy saying that line managers should familiarise themselves with it, and her sending that policy to the claimant in an email on 3 December 2019 when the first disciplinary hearing was being arranged. She had the operational role as Chairman described above, and decided to dismiss the claimant. She did not appreciate that the policy referred to performance as well as conduct although that is clear from the terms of that policy. She was also, she said in evidence, not aware of the terms of the ACAS Code of Practice at all. It is at the very least most surprising that someone so competent and experienced was unaware of such matters yet decided to conduct the dismissal meeting.

259. Her evidence with regard to the events on 8 November 2019 was not reconcilable with that of the claimant and Ms Campbell. It was not easy to reconcile it with contemporaneous messages sent to the claimant and others by Ms Campbell. It appeared to the majority of the Tribunal that the second respondent was seeking to underplay the extent of her anger at discovering that the conference centre at the Barracks had been made available to a church with which the claimant had a connection, and that that had not been

disclosed to her as a potential conflict of interest, and in a sense to deny it initially, but latterly accepting in cross examination that she had been angry. It is a matter addressed more fully below.

260. Her evidence was that it was not the beliefs of the church that caused her concern, but the use of Trust premises for religious purposes which was contrary to its policies. That evidence is not easy to reconcile with the many occasions on which she referred to the beliefs of the Church in messages to other Trustees. If the details of those beliefs were not relevant, and the concern was only that it was a religious body using Trust premises regardless of who it was or what beliefs it held, reference to their beliefs, was not necessary. That must be set in context. Firstly she had discovered the issue entirely out of the blue, and she was very surprised indeed at it. Secondly she was concerned at reputational risk from her own understanding of the policy of the first respondent to be neutral on matters of religion and politics. Whilst the Funding Policy did not set matters out as clearly as it might, most of the Trustees did appear to take that issue seriously in practice(Ms Harris having a different view according to her email). Thirdly, she did not herself take part in the investigation, disciplinary hearing or appeal which followed, although she did in relation to the eventual dismissal as is referred to below. Fourthly in her handwritten notes of the conversations she had with other Trustees, which were obtained during her evidence on application from the claimant, there is reference to that issue needing to be investigated. Fifthly in an email Ms Campbell referred to the second respondent having views against use of premises by any religious organisation. That all supported the evidence the second respondent had earlier given that she did not know the full context of matters, and that it was possible that the claimant had reported the conflict to another Trustee and that had not been known to her. But that is not how she referred to matters in discussion on the day, when she referred (as her notes recorded but which had not been set out in her witness statement) to the claimant having committed gross misconduct, and taking legal advice on dismissal. That was jumping very quickly to a conclusion that was not based on adequate evidence. The terms of her email that day to the Trustees in

which she referred to others being offended is indicative of a mindset against the beliefs of the Church. It is also addressed more fully below.

261. Her witness statement did not say that she had told anyone of the views held by the Church in the calls she made to Ms Campbell and Trustees that day, but the majority found that she did at least to Ms Campbell, Ms Cromarty and Mr Coutts. It is surprising that the witness statement omits such a point, especially when her email to Trustees later that day refers specifically to the views of the Church, staff being offended, and reputational damage amongst other matters. It is also surprising that the handwritten notes had not been provided in the exchange of documents.

262. The second respondent was the person who decided dismissal. Doing so was very surprising given that she was a witness to the allegations, the investigator of them in so far as there was any, and also the decision maker on 16 March 2020, despite having stepped back from doing so initially when there was intimation of a forthcoming grievance against her. Taking a decision herself when the person concerned said that he was too unwell to attend, even where there may have been doubts about how genuine that was, and in effect stepping back into the role of the decision-maker was also surprising. These matters are addressed further below.

263. The minority view was that the evidence of the second respondent was credible and reliable. He considered that the reference the second respondent made to the views of the Church was because the Licence to Occupy was to that Church. It was only a matter of context. There had been no prior issue between the claimant and the second respondent as to matters of belief. He considered that the reasons for her actions were solely her concerns over how he had himself acted. The member considered that the conflict of interest for a Chief Executive was obvious and serious, such that the second respondent would be expected to consider it potentially an issue of gross misconduct and dismissal. She had had concerns over his performance from prior to November 2019, in particular in April 2019 as she set out in an email to colleagues. The claimant had not performed adequately,

he had not engaged with the Board or with the performance management, and had not attended the meeting at which dismissal was to be discussed, and the minority member concluded that the second respondent's evidence on the reason why she had dismissed should be accepted in light of these factors.

264. The next issue is that of the allegations as to harassment of the claimant after 8 November 2019, much of which is directed against the second respondent. The Tribunal consideration on that issue was unanimous. In that context there was a dispute between the evidence of the claimant and the second respondent on which the Tribunal preferred the evidence of the second respondent. Whilst there is some evidence of the second respondent intimating disagreements with the claimant, her evidence was that she did so because she did not agree with his strategic decisions, particularly on Project Stadium, or what he was saying at the material time. She did have support on that from other Board members. There were performance concerns relating to the claimant predating the incidents in November 2019. Those incidents did cause strain on their relationship, but that was partly at least because the claimant did not think that he had done anything wrong, when he had. There may have been an occasion when the second respondent said No three times to what the claimant had said, but that is because what he said she thought to be wrong materially.

265. In conclusion parts of the evidence of the second respondent were accepted, and parts were not.

Ms Judy Cromarty

266. The majority of the Tribunal considered Ms Cromarty to be a generally credible and reliable witness. One member of the Tribunal (not the member in the minority in relation to the issue of direct discrimination) considered that her evidence was not reliable as she said that she followed directly the views of the second respondent. The majority thought that Ms Cromarty's evidence

was given clearly and candidly. She had decided the disciplinary hearing with an outcome that was not dismissal, and whilst the claimant did not consider it fair, the Tribunal concluded that at the least it was in the band of reasonable responses. The views of the claimant and Church were matters of background, as were the views expressed by the second respondent in relation to the Church's views which Ms Cromarty was made aware of in the email to her for example. Those beliefs were no part of the decision she made to issue a final written warning. Whilst there is certainly scope for debate as to whether the terms of the Funding Policy cover renting to the Church as occurred, and the Tribunal considered that it did not, Ms Cromarty considered that a policy of some sort existed, and was known throughout the organisation, which was against providing direct support to an organisation for the purpose of promoting its religious or political views, described as the principle as to neutrality. If that was such a founding value of the Trust it is surprising that it was nowhere committed to writing, but that was her understanding at the least. She believed that the claimant's involvement in what led to the Licence to Occupy was a breach of that unwritten policy or principle. That was her genuine belief. It was not a matter considered by her in isolation. She considered, correctly in our view, that the claimant was in breach of the conflict of interest policy. Although that policy did not state in terms to whom the conflict should be reported she was justified in her belief that it was or ought to have been clear to the claimant as Chief Executive that he should do so to his line manager, not his subordinate. She was also justified in her belief that he should have played no role at all in the process in which he had the conflict but that he did play a role. He passed on emails to Rev Macaskill to assist in contact, but more significantly he emailed Ms Campbell in a manner that indicated to her his support for the Lease, and from which she told Mr Coutts that she derived comfort. The claimant's conflict was clear, direct and material and her finding on that was justified. The argument he made that his actions in the conflict of interest was very minor was rejected by Ms Cromarty and she was fully entitled to do so. The claimant's actions were a material breach of the terms of a policy (one that he had written). Given all these circumstances the majority of the Tribunal

accepted the evidence of Ms Cromarty that her decision was based on the matters before her, and that it was not affected to any extent at all by the beliefs of the claimant or those of the Church with which he was associated.

Professor Lorne Crerar

267. The Tribunal considered Professor Crerar to be an obviously credible and reliable witness. His evidence was given clearly and candidly. He had expressed very early on the need to consider matters very carefully, and was an independent mind brought to the appeal. His decision was at the least one a reasonable employer could come to and the views of the claimant and Church were matters of background rather than factors in his decision on that appeal. There was no specific attack on the decision of Professor Crerar in the claimant's submission.

Mr Andrew Walls

268. The Tribunal considered Mr Walls to be a generally credible and reliable witness. It was concerned however firstly at his initial comments when matters arose in November 2018 and secondly at the procedure whereby he had been involved to a material extent in the decision to dismiss, having discussions with Ms MacPherson that day and indicating his support for the decision to do so, such that he was not an impartial person who could properly hear the appeal. Mr Laing was in Australia at the time, and it was believed that Mr Walls as acting Vice Chair was the next most senior person. But his lack of impartiality was or ought to have been clear, and others could have conducted the appeal. The appeal he did conduct did not address matters thoroughly. It did note some failings but upheld the decision. There was lack of evidence of an independent mind being brought to that process, and it had the impression of little more than a formality.

Mr Gary Coutts

269. The Tribunal considered Mr Coutts to be a generally credible and reliable witness. He had conducted the investigation into the events on 8 November 2019. Whilst he had expressed views in November 2018 his role was investigator not decision-maker. He had been entitled to conclude that the matter should proceed to a disciplinary hearing, given firstly the issues on conflict of interest and secondly his views, rightly or wrongly, but genuinely, as to the Funding Policy being engaged. He had experience of boards which did not adequately plan the disciplinary processes including appeal, and in light of that it is perhaps surprising that when the issue of meetings where dismissal was being considered was raised in March 2020 he did not seek to influence that from his experience. He was involved in the process that led to the decision to dismiss, but was not the decision-maker himself.

Mr Kenneth Ferguson

270. The Tribunal did not consider that the claimant's evidence was always reliable. One of the members considered that his evidence was generally reliable and that he had been affected by stress which giving evidence, but the Judge and other member were concerned that his evidence was exaggerated, and that he rejected any criticisms of him in a manner which was unreasonable. The claimant did not always answer the question asked directly. There were occasions when he made claims that did not stand scrutiny. For example he claimed in his witness statement that Ms Campbell had told him that at the visit on 8 November 2019 the second respondent had said "definitely not the Free Church, anyone but the Free Church, they don't believe in same sex marriage". Ms Campbell did not however use those words in her own witness statement. There Ms Campbell said that she had been asked whether she knew the Church's views on same sex marriage, that the second respondent had said that it was inappropriate and that she would have to raise it with the board, On another occasion he made a claim that he said had been evidenced by email. He was asked to find the email he

referred to over the break in his evidence that evening, and on the following morning referred to emails which did not support his claim. He argued that Ms Campbell had not taken comfort from his own involvement in the proposed licence for use to the Church, rather that she was comforted by the Church being likely to use the premises without causing any difficulty or harm. But the terms of Mr Coutts' interview with Ms Campbell and supporting documentation such as her emails at the time, as well as Ms Campbell's oral evidence, show that she did indeed draw comfort from the involvement of the claimant.

271. The claimant argued that he was not in breach of any policy, but the Tribunal did not accept that. He was in breach of the conflict of interest policy, as he did more than simply stand aside when the issue of a lease or licence to occupy first arose. He did not report the issue to his line manager as he ought to have done. He was the Treasurer of the Church, and the Tribunal considered that he would have been aware of the granting of the Licence on the terms that were negotiated from that role even if he did not himself carry out any of the discussions. He emailed Ms Campbell when the issue arose to say "We have done nothing wrong", not that she, or the first respondent, or the Church, had done nothing wrong, and the Tribunal inferred from that that the claimant had at the least continuing knowledge of the discussions that had taken place. Ms Campbell had emailed him about them from time to time, although the emails were not put to the claimant as they were only produced by the respondents at the stage of Ms Campbell's evidence.

272. The neutrality principle behind funding was not committed to writing, but its effect was set out in the Funding Policy. What was more complex was whether that principle was fundamental to the operation of the Trust, and that that was or ought to have been known to the claimant. There was no clear evidence of that, nothing in writing, and the renting of premises to organisations such as Stonewall at the charitable rate indicated that support was given to such organisations to an extent and on occasion. There was therefore at least doubt as to whether the claimant did or ought reasonably to

have known of the neutrality principle, in the view of the majority. The view of the minority was that that issue was clear, and that the claimant did know of that principle. Whilst the VAT treatment of the sums due by the Church (whereby the payments the Church made under the Licence to Occupy were subject to VAT in a manner that funding under the Funding Policy would not be) indicated that it was not purely charitable that is not determinative of whether or not the matter fell under the Funding Policy. Providing access to premises at less than a commercial level can be considered to be support at least to the extent of the level of that "discount". The Funding Policy is not the only aspect of the evidence that is material, there is also the evidence that the Trust considered its neutrality on such matters to be fundamental to its operations. The Funding Policy in any event is not a document that requires to be construed like a conveyance of heritable property. It is, as it states, a guideline. The first respondent was entitled to conclude that providing a licence for use of its premises to a church for the activity of its Sunday worship was to lead to an activity that promoted its religious views. But that does not mean that it follows that the claimant knew or ought reasonably have known of that, and that must further be seen in the context of the acts he did participate in.

273. The conflict of interest policy referred to taking reasonable steps. It was not a reasonable step for the claimant as Chief Executive and indeed author of that policy not to have alerted the second respondent or Trustees generally to the approach to rent premises by the Church of which he was the Treasurer, having decided to send emails to Rev Macaskill and to Ms Campbell in the terms he did. He did act in a manner that facilitated the licence to occupy by doing so, both to put Rev Macaskill in touch with Ms Campbell his subordinate and to give her comfort that he knew of and approved the proposed transaction, albeit not directly negotiating the terms including the licence fee or otherwise.

274. His refusal to accept any degree of fault stands in contrast with his comments at the disciplinary hearing and appeal to the effect that he should have alerted

the second respondent. He said in evidence that that was because of what later occurred, rather than indicating fault on his part, but the Tribunal did not accept that as being reliable evidence. Not only ought he to have alerted a Trustee at the least, and the second respondent in particular, he ought also not have sent emails to Ms Campbell in the terms he did, or to Rev Macaskill, but simply stepped entirely to one side and not participated to any extent. That there was a conflict of interest, in a matter which was liable to be delicate at the very least, was blindingly obvious.

275. He did not accept that there were justified criticisms in the 360 degree appraisal process, or that the April 2019 appraisal raised concerns. Whilst the format and process did not set out matters as clearly as they might, and should, have, it is not true to say that there were no concerns raised. There were, and they were set out in the meeting that he should have been aware of them. Whilst the second respondent was not wise not to commit them to writing and send that to the claimant, only emailing two Trustees with a summary, the Tribunal accepted that the issues had been discussed at that meeting with the claimant.

276. He denied that the second respondent had spoken to him earlier about issues of gay marriage as she had claimed, but the Tribunal considered it far more likely that she had done so, as it was very unlikely to have been something that she would simply make up. She spoke convincingly about that in her evidence.

277. That was supported by the Tribunal's assessment of the claimant's oral evidence that the second respondent had not known of his views on marriage and homosexuality before 8 November 2019. As was raised with him in cross examination, he had said in his own witness statement that the second respondent had already known of his views by that date. He therefore contradicted his own evidence on that aspect. That caused the majority of the Tribunal to have material doubts as to the reliability at least of his evidence.

278. Overall the Tribunal considered that the claimant had a tendency to exaggerate some aspects of his evidence, to be wrong about matters of detail including important detail, and that in several respects his evidence considered in isolation was not reliable, but that on other occasions his evidence was supported from another source or sources and was accepted. Not unlike the evidence of the second respondent therefore, part of the evidence of the claimant was accepted, and part was not.

Ms Katie Campbell

279. The Tribunal was satisfied that Ms Campbell sought to give honest evidence, but there were concerns over some aspects of the reliability of what she said. The most significant of these were firstly that her witness statement was not the same as those of the claimant with regard to the second respondent's comments to her on 8 November 2018, referred to above. Secondly she accepted that there were two calls but did not mention that in her witness statement. Thirdly she did not complain when sending a formal complaint in February 2020 that the second respondent had mentioned beliefs on 8 November 2018. Fourthly and perhaps most concerningly her witness statement gave the impression that events regarding the Church renting space at the Barracks commenced in June 2018, which was wrong. In fact they started in October 2017 and involved emails with Rev Macaskill, the claimant, a meeting with Rev Macaskill, further emails in February 2019 proposing rent, emails attaching plans, and emailing the claimant expressing some concerns. That is a relatively substantial series of acts over a material period, and to forget them, as she accepted she had, meant that her evidence was of doubtful reliability more widely taken alone.

280. An important consideration is whether or not the second respondent referred to the claimants and Church's beliefs in the first call to Ms Campbell on 8 November 2018. The second respondent did not dispute that in terms, but said that she could not recall doing so. Ms Campbell was 100% sure, in her words, that she had. In light of the other concerns over reliability had that

been the only evidence the Tribunal would not have considered it sufficient. The Tribunal had a difference of view in relation to this evidence. The majority view was that there was other evidence which supported the oral and witness statement evidence of Ms Campbell, including her email to a colleague Kenneth Osborne on 8 November 2019 referring to the second respondent being "appalled" at the idea of the Church using space of the first respondent, which the majority regarded as material evidence as it was contemporaneous and went beyond the second respondent simply asking questions about the detail, such that it tended to support the evidence of Ms Campbell that the second respondent had asked her if she knew the views of the Church as to gay marriage or words to that effect, the evidence of the second respondent speaking to other Trustees on 8 November 2018 referring to the Church's beliefs with regard to marriage, and that the second respondent also emailed all of the Trustees later that same day, in doing so referred specifically to the views of the Church on same sex marriage and referring to staff, grant holders and other stake holders being "offended". That is all consistent with Ms Campbell's oral evidence on this point, and the majority concluded that in light of that it was more likely that the second respondent had referred to being appalled at the Church using the premises of the Trust for religious worship, but not in the terms that the claimant had argued had been used (he not having been present during that conversation and therefore having been informed of it by Ms Campbell).

281. Whilst the respondents argued that there were differences between the evidence of the claimant and Ms Campbell on what had been said those differences do not detract from such a conclusion in the view of the majority. The claimant exaggerated the comments used, the Tribunal considered, but his doing so did not detract from Ms Campbell's evidence. The differences were not unduly substantial in context, where the issue is whether the matter of same sex marriage had or had not been mentioned by the second respondent. Had precisely the same language been used, the argument may well have been of collusion. Overall, the majority of the Tribunal concluded that Ms Campbell's evidence on this point, being supported by other sources

to the extent referred to, and not being directly contradicted by the second respondent herself, was to be accepted.

282. The minority of the Tribunal did not regard the evidence of Ms Campbell as reliable. His view was that the omissions from the witness statement were so serious as to cast substantial doubts on reliability, and that that was exacerbated by the fact that the issue was not raised at all in the grievance letter that Ms Campbell sent to the Trust. He concluded from all the evidence that Ms Campbell had not been told by the second respondent anything about the views of the Church or that she was appalled at the idea of that Church using Trust premises. He also noted that the second respondent had simply said that she could not recall that issue, in effect, but that that did not mean that it had happened, rather it was indicative of the second respondent being honest as to what she could or could not remember. His view was that the second respondent may have been appalled, but the reason for that was the conflict of interest and not the beliefs of the Church or the claimant.

283. All of the Tribunal had concerns over some of the emails sent by Ms Campbell which were put to her in cross examination but had not been put to the claimant in the circumstances already referred to. The messages indicated concern on the part of Ms Campbell about how the proposed Licence would be viewed by the second respondent, asked about whether she had approved it, and there was no reply provided. One would have thought that, aware that the claimant had a conflict, she would not email him about such details, but address them with the second respondent herself. The reference in an email to the “Church bomb” was indicative of an understanding of the sensitivity around such an issue, and the earlier message from Ms Campbell about the second respondent’s concerns was about use by any religious organisation of premises for religious purposes not of the Church specifically. These emails could have been obtained by a thorough search of records in preparation for the hearing, they were provided very late during the hearing, and the claimant was entitled not to give evidence in relation to them although he had an opportunity to do so. He not having had those matters put to him

directly however the majority of the Tribunal considered that it was not in a position to make findings as to his reaction to, or involvement with, them.

Mr Gordon Hunt

284. The clamant tendered a statement from Mr Hunt, but did not call him as a witness. His counsel submitted that the evidence should be accepted, as he argued that it was supported by a quotation in ***Harvey***, under reference there to the Civil Procedure Rules. Those Rules are however not applicable in Scotland. The Tribunal did not consider that it was in accordance with the interests of justice to have regard to the witness statement tendered by the claimant given the complex facts being assessed, issues of credibility and reliability of evidence which arise, the inability of the respondents to cross examine the witness in circumstances where their cross examination of the claimant and Ms Campbell had cast, at least, material doubt on the reliability of the evidence, and where the Tribunal had not had its own opportunity to assess the witness. It concluded that no weight should be placed on that witness statement.

Discussion

285. The present case is a highly complex one. The Tribunal required to make factual determinations on disputed matters against a background of evidence from witnesses where there were challenges to credibility and reliability, then apply the law to the facts as found. That was no easy task, and although the Tribunal reached a unanimous decision on most of the matters, it did not do so in regard to the claim of direct discrimination, on which there was a majority decision, or the assessment of the evidence of all of the witnesses where the views were different in some respects as stated above. It was also evident that cross examination of each of the second respondent and the claimant had been highly effective.

286. Before addressing the issues fully certain preliminary matters are addressed.

Without prejudice discussions

287. An issue it reserved for determination after hearing evidence was whether to accept evidence of without prejudice communications. The Tribunal considered, for the reasons set out above which it considered remained the appropriate analysis, that such evidence was not inadmissible. That was so as this is a discrimination case, in part, and it was argued that the discussion was evidence of discrimination. The Tribunal considered that the authority of ***Mezoterro*** was of particular significance in this context. The more recent authority of ***Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd 2020 SCLR 707*** is very different on its facts, involving an adjudication but does endorse the comments of the House of Lords in ***Rush and Tomkins v Greater London Council 1989 AC 1280.***

288. Its view was fortified by the lack of any evidence of agreement to holding what was specifically a without prejudice discussion. The evidence was that the second respondent stated that it would be a “non-prejudicial discussion”. What that was intended to mean was not explored in evidence. It was not at the least made clear that the intention was that a discussion would be without prejudice to the legal position of both parties, such that nothing said would be capable of being founded on later in any proceedings, or words having such an import.

289. The Tribunal considered however that that evidence was not shown to be relevant to the claims under the 2010 Act. The second respondent made proposals to resolve what she considered to be concerns over the claimant and did so in a manner that did not infer that discrimination had taken place. There was nothing in the timing or content of the material to which the Tribunal was referred that supported the claimant’s arguments as to discrimination in relation to such an offer. Details of what was offered, either

at a meeting when the offer was oral, or later when put in writing through solicitors, were not provided, entirely understandably and properly.

290. The Tribunal preferred the evidence of the second respondent that the first occasion when she mentioned the possibility of a non-prejudicial conversation, using her words, was on 3 December 2019 to the claimant's evidence that it was at the meeting on 11 November 2019. There is nothing in the written notes that she kept for the 11 November 2019 meeting that refers to such a proposal, rather they include comments as to an investigation, and an investigation was then commenced, and to taking legal advice. It would have been moving very quickly indeed from 8 November 2019, a Friday, when matters were discovered and much time was spent thereafter in messaging a number of Trustees, to making such a comment on the next standard working day 11 November 2019, at a meeting with the claimant commencing at 9am. The Tribunal considered that it was far more likely that the offer was made on the latter date as she stated, and it did not accept the claimant's evidence on that point.

291. That an offer was made then, and on a later occasion, by letter to his solicitors which was, again understandably, not in the Bundle, was a neutral act the Tribunal concluded. The offer was rejected. Parties are entitled to make proposals for settlement of issues between them, and to reject them. The second respondent was of the view that the claimant's actions were gross misconduct. She had increasing concerns over performance matters. He was the Chief Executive. Making an offer to him in such a situation is not a matter from which discrimination can be inferred, in the Tribunal's judgment. There was nothing improper in the offers being put to him. The claimant had a choice on the offers. He was entitled to, and did, reject the offers. He had legal advice when doing so at least on the second occasion. In all the circumstances the Tribunal regarded the evidence related to without prejudice offers or protected conversations as not material to the decisions it required to make on direct discrimination. It was not part of the background on which a prima facie case could properly be held to be constructed on the very limited detail

before the Tribunal. It is addressed separately below in relation to the claim as to harassment.

Principle

292. A point that arose from the claimant's submission is in relation to principle. The submission was that the case was a matter of personal importance to the claimant, as well as a point of principle. The issue of personal importance was obvious and applied to all of the parties. The matter of principle was put forward in submission on the footing that the issue of principle was for the Tribunal itself, and appeared to the Tribunal to be made in the sense that the Tribunal should uphold the human right to hold one's own religious beliefs.

293. However eloquently that aspect of the submission was made, the Tribunal did not accept it. It is not for the Tribunal to decide matters of principle in that context. That is for lawmakers. The role of the Tribunal as a creature of statute is to determine the facts from the evidence led before it, identify the law that applies, and then apply that law to the facts as found. That involves assessing whether the burden shifts under section136, and then if so whether it is discharged. The Tribunal has sought to do so, having regard to all the evidence it heard and all of the submissions made, and not the principle of the right to hold one's own religious beliefs. The extent to which a purposive construction is required to conform to the Directive is addressed in some of the authorities referred to in the section on the law. The 2010 Act provides for specific measures of what may be termed protection for protected characteristics, and not for protection in all circumstances. There may be a fine division between circumstances which are protected in law, and those not. They are demonstrated by high profile cases such **as *Bull v Hall [2013] UKSC 73*** in which there was a refusal of a double bedded room to a homosexual couple in a civil partnership because of the hoteliers' religious beliefs, in which the Supreme Court decided 3–2 in favour of that amounting to direct discrimination. In ***Lee v Ashers Baking Co Ltd [2018] IRLR 1116*** it was held that a refusal by bakers who held Christian beliefs to bake a cake

with a message supporting gay rights was held by the Supreme Court not to be direct discrimination because it was insufficiently connected with the claimant's own orientation. The protected characteristic must be that of the claimant, not of the respondent, and that was applied in ***Gan Menachem Hendon Ltd v Groen [2019] IRLR 410***. That there is an important principle at issue does not determine the outcome. The law does.

294. The law has not consistently dealt with issues of same sex sexual relationships, and same sex marriage. Homosexual acts between males was a crime in Scotland until 1980. Section 7 of the Sexual Offences (Scotland) Act 1978 and section 80 of the Criminal Justice (Scotland) Act 1980 changed that as between consenting males over 21. That law was then changed further by the Crime and Punishment (Scotland) Act 1997. Originally a lawful marriage was solely between a man and a woman. Civil partnerships were introduced for same sex couples by the Civil Partnerships Act 2004. Same sex marriage was then introduced into the law by the Marriage and Civil Partnerships (Scotland) Act 2014.

295. Against that background of profound changes in law, differences of belief between those at work are not straightforward to regulate. Both the claimant and the second respondent are each entitled to hold the beliefs that they do. As the EAT very recently (and after submissions had been made to us) stated in the case of ***Forstater v CGD Europe and others UKEAT/0105/20,***(in which the point at issue was very different to the ones before us), a decision in a case before the Employment Appeal Tribunal, as with this Tribunal, should not be read as providing support for or diminishing the views of either side. They added the following:

> "Just as the legal recognition of Civil Partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples, becoming the acquired gender "for all purposes" within the meaning of GRA does not negate a person's right to believe, like the Claimant, that as a matter of biology a trans person

is still their natal sex. Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society."

296. A case such as the present is therefore not a competition between the beliefs of the claimant and those of the second respondent. It is very largely a competition of evidence, with that evidence assessed against the law that is applicable. The two stage assessment for direct discrimination is a form of tool to seek to determine, as best as an adversarial process can, the reason why something happened, in this case that being in particular the dismissal of the claimant. Where parties are not able to resolve the dispute between them, the Tribunal must do so from the evidence placed before it.

297. The questions that are to be addressed in that two stage assessment are:

(i) Has the claimant proved facts from which the tribunal can properly conclude from all the evidence before it that the claimant has established a prima facie case that the first respondent directly discriminated against him because of the beliefs he holds or his association with the beliefs of the Church, and if so

(ii) Has the first respondent proved that it did not do so, to any extent whatsoever, because of such beliefs.

Beliefs

298. The respondents submitted that the claimant's beliefs were not clear, but that they were that he believed in marriage only between a man and woman for himself, such that his views were not the same as those of the Church. Such views of the claimant are sufficient however, and in any event he was associated with a Church holding views that marriage was only between a man and a woman. Indeed the primary focus of the comments of the second respondent herself on 8 November 2019 were not the claimant's personal views, but those of the Church, and that he was a member and elder of that

Church. He was associated with the Church and its beliefs in light of that clear evidence, part of which came from the second respondent's email to Trustees that day referring explicitly to the beliefs of the Church. The Tribunal did not consider that there was any merit in the argument that the claim should be dismissed because of the claimant's evidence on his beliefs being limited to how he lived his own life.

When was discrimination first raised

299. The respondents argued that the claimant had only raised discrimination claims after the dismissal, and that his failure to do so at the time was material to the assessment of the evidence. That is correct. The claimant in his letter of appeal referred to the Equality Act 2010 in relation to the giving of services, but not in relation to how the decision had been reached to dismiss him. That was a factor, but the majority did not consider that it was determinative. The minority considered that to be a highly persuasive factor leading to the conclusion that no prima facie case was established.

Deliberations

300. The submissions of both representatives were of conspicuously high quality, and the Tribunal was grateful to both of them for that, as well as the manner in which the Hearing was conducted.

301. The Tribunal found some of the issues particularly complex, and the deliberations were lengthy. On the issue of direct discrimination the Tribunal was not able to reach an unanimous decision.

302. The parties submissions had adopted directly opposing positions. The claimant argued that he had done nothing wrong, and that there were no genuine issues as to his performance. The respondents argued that the claimant could not accept criticism, that the criticism was justified, and that

his performance had been so poor that dismissal was appropriate. They took what are in effect polar opposite positions.

303. Neither position was considered by the Tribunal to be entirely correct. The analysis of the reason why the first (and second) respondent dismissed the clamant is not a matter that necessarily only flows from whether the claimant can or cannot accept criticism. The respondents may be right about that, but that may not be a sufficient answer to the direct discrimination claim which focusses on what the reason was for their acts. Not accepting the claimant's evidence on many material points does not mean that the claim must fail. For the direct discrimination claim the focus is on the decision made by the second respondent, and it is her evidence that requires particular consideration in that context.

304. The Tribunal reached the following conclusions in relation to each of the issues identified.

Unfair dismissal

(i) Reason for dismissal

305. The principal reason for dismissal was the belief of the second respondent that the claimant was not performing his role of Chief Executive as she would wish. The Tribunal accepted the evidence given by the second respondent in this regard that she had a genuine belief in his poor performance generally. She had some support in that from the evidence of the Trustees who gave evidence to the Tribunal. The principal reason was therefore capability, although for reasons we shall come to the majority did not consider it to be the only reason.

306. Capability is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

(ii) Fairness

307. The Tribunal considered that in all the circumstances the dismissal was unfair under section 98(4) of that Act. In reaching that conclusion it noted (i) that there was no clear and certainly no written indication given to the claimant that the concerns over his performance were those that had reached the level of risking his future employment (ii) there had been no formal or informal warning as to his performance given to him at any stage (iii) the first respondent failed to carry out any process under its disciplinary policy although that stated that it was to apply to cases of performance, and sought to rely on appraisals which are not performance management or disciplinary matters (iv) the letter calling him to a disciplinary hearing dated 12 March 2020 did not have specific details of the allegations, had not been based on any form of independent investigation, and had no attachments as documentary evidence to support it (v) the claimant intimated on the morning of the hearing that he was unwell but a decision was taken in his absence despite that (vi) the decision was taken by the second respondent who was involved as a witness to allegations made, and undertook any investigation that was made (vii) the claimant's appeal was heard by Mr Walls who had been involved in detailed discussions in relation to the decision, such that he was not an impartial person to hear it, and in turn the appeal did not "cure" the earlier unfairness and generally (viii) the decision and process did not comply with the ACAS Code of Practice in light of the foregoing in respect in particular that reasonable investigations were not conducted, it was practicable to have different persons carry out the investigation and disciplinary hearing (as was done in respect of the allegations in November 2019), no documentary evidence in support was provided to the claimant, the hearing was not adjourned for one occasion when he was unwell but a decision reached in his absences and the appeal was not heard by someone impartial who had not previously been involved in the case. That Code applies primarily to issues of conduct and discipline, but also to performance matters as paragraph 1 makes clear.

308. The Code is not statute, but guidance the Tribunal is required to take into account. It was breached to a material extent given the matters set out above. The ACAS Guide does not have the same statutory base, but has guidance which can also assist in assessing what happened. It accords with common sense that repeated failure to attend a hearing permits a decision in absence, but the obvious implication is that more than one failure to do so is required.

309. The decision was said to have been taken in the best interests of the first respondent, but if that was all that were needed the law of unfair dismissal for capability would cease to have any effect at all. Fairness generally requires a balance between the interests of employer and employee. There were several other Trustees who had not otherwise been involved, and there was no direct evidence that they were unavailable for other reasons. Mr Laing could have heard the appeal on Zoom for example, which is how it was conducted, wherever he was albeit that at that time he was on holiday. It could, if necessary, have awaited his return from that holiday, or someone else asked to do it such as Professor Crerar.

310. Whilst it is clear now that the first respondent, and second respondent as an individual, had concerns over the performance of the claimant they were not clearly articulated to him in any sense that would have given him notice that unless his performance improved he would be dismissed. Appraisals are very different to performance management meetings. It is entirely correct that the level of concern about the claimant's performance generally rose, from about April 2019, but it did so from a low base, and those concerns that the second respondent articulated in an email to colleagues she did not share with the claimant in a clear manner. He had long service of nine years, the vast majority of which was regarded as being at least good, if not excellent. Although the claimant was the most senior employee, and had broad operational and financial powers, the respondent did have access to professional advice and had very substantial financial resources of its own. Whilst the respondent referred to authority from 1973 that takes no account

of the ACAS Code of Practice, which was first introduced in 1977 and amended several times since then.

311. This case has material distinctions to that of ***Gallagher***. The claimant did attempt to engage with the issues the second respondent raised at least to an extent in that he suggested mediation to the second respondent for example. The appraisal in February 2020 was somewhat sprung on him, with a lengthy document provided one evening for discussion the next day. It was not at all surprising that the claimant sought additional time to reply to what was set out in the document the second respondent sent him.

312. That having been said, some of the criticisms of him were justified, and he was the Chief Executive therefore a senior employee. A Chief Executive has nevertheless the same entitlement to a fair process as other employees, and the Code of Practice is not disengaged simply because of his role. Cases such as ***Gallagher*** are rare, as it states. The Tribunal did not think that this was one of them. In any event that case was one of some other substantial reason, and the principal reason in this case was not that, but capability as the first respondent argued as its principal position, such that the case was not relevant to the principal reason for the dismissal.

313. The reasons given for the decision in the letter of 16 March 2020 did not include the prior issues that led to the final written warning at all, and were independent of them. Little evidence was given in the second respondent's witness statement about them. She was however involved in matters to an extent. It is for example very surprising that the second respondent formed a working group of three, including the claimant, to address the Barracks issue if she thought that he was substantially underperforming in his role, but that is what she did and there is no evidence that it was changed. It is also surprising that she raised issues of budgeting of the Barracks in what was a very major and lengthy project, where budget overruns might occur for a wide variety of reasons unconnected to the acts or omissions of the claimant, and where raising budget issues with him during that process was not properly evidenced. It was not mentioned in her email to two Trustees in April 2019 at

all. Budget overruns of the extent referred to in the dismissal letter are not likely to have arisen in the last few months of such a major project, but through much of its course, and if they did arise in the latter months that was not set out in evidence. It is also most surprising that she said in evidence that she did not know the terms of the first respondent's own disciplinary policy, and its comment on performance issues, despite having sent it to the claimant, or the terms of the ACAS Code of Practice, when she took the decision to dismiss.

314. The Tribunal took into account that the first respondent is a charity, not a commercial organisation, and has very limited internal resources on HR matters. But it does have a number of external advisers including its solicitors, and an HR firm Hunter Adams which it commissioned to carry out the 360 appraisal. In financial terms it has a very substantial capital base, and annual income.

315. The Tribunal concluded that no reasonable employer would have dismissed the claimant in the manner referred to above at that time, and that in all the circumstances the dismissal was unfair under section 98(4) of the Employment Rights Act 1996.

Section 13 -direct discrimination

316. The Tribunal considered that this matter was an especially complex one, with a number of possible reasons operating on the mind of the decision maker, such that it was preferable to follow the structure of the two stage process rather than to seek to decide immediately the reason why question. Whilst not using a comparator is also permitted by ***Shamoon,*** and was the claimant's primary position, it is a route which is permissible "sometimes" and is not what may be described as the standard methodology.

317. As stated in this respect the Tribunal came to its decision by majority. The following sets out the majority decision, and the facts found above reflect the majority decision where that was necessary.

Majority view

318. The claimant argued that the Tribunal could consider the reason why question directly, but that if a comparator were needed, under reference to the Equality Act 2010 section 23, the authorities (for example ***Watt (formerly Carter) v Ahsan [2008] IRLR 243***) made it clear that the statutory comparator must be someone in materially the same circumstances as the claimant but who does not share his protected characteristic.

319. The protected characteristic he argued for is his belief in, and association with a church which believes in, marriage only between a man and a woman and that rightful sexual relationships are only between men and women. The argument made by the claimant was that the hypothetical comparator is a pro-same-sex marriage, pro-homosexuality Chief Executive found to have been involved in renting the Barracks to a pro-same-sex marriage, pro-homosexuality church at which he was an elder.

320. The Tribunal did not agree that that was strictly the correct analysis. The hypothetical comparator must be someone in materially the same circumstances as the claimant who does not share his protected characteristic. It is not necessary to construct a hypothetical comparator who has what may be termed opposite beliefs to those founded on, rather that those beliefs are not present. The hypothetical comparator is, the Tribunal considers, a Chief Executive in the same circumstances as the claimant who does not believe in or have an association with a church which believes in, marriage being only between a man and a woman and that rightful sexual relationships are only between men and women, and a Licence to Occupy being granted to that church in the same circumstances as occurred in this case. The Tribunal also however considered a hypothetical comparator as

proposed by the claimant. It also considered matters more generally as shall be addressed below.

Had the claimant established a prima facie case?

321. The first issue for the Tribunal was whether the claimant had established a prima facie case, such that the burden of proof moved to the first respondent under section 136, as that matter is explained above. Has the claimant proved facts from which the tribunal can properly conclude from all the evidence before it that the claimant has established a prima facie case that the first respondent directly discriminated against him because of the beliefs he holds or his association with the beliefs of the Church? In that regard, would the first respondent have treated either of the hypothetical comparators the same or differently?

322. The claimant made a number of allegations, and the Tribunal did not find for him on several of them. We set these out before addressing the other matters.

323. Whilst the process that led to the decision was not fair for the reasons set out above, there were adminicles of evidence showing increasing levels of concern over the claimant's performance independently of the issues in relation to the Licence for use given to the Church. They included an increasing difference between the views of the Trustees and those of the claimant, and a perception that the claimant did not engage adequately with a new strategy being developed by the Trustees. His reply in cross examination on engagement with the board was that he attended meetings and had regular communication, but that is not a full answer to the point. It was the quality of engagement that was being challenged as much as its quantity. There was some evidence of the claimant not appreciating the need for a change of strategy, or of how he should conduct his role as Chief Executive.

324. The claimant's argument that he had done nothing wrong in relation to conflict of interest was rejected. He had. Firstly the Policy states that what should be taken are "reasonable steps". It was obvious that the reasonable step was to inform the line manager, not the person subordinate to and under the line management of the claimant. Secondly he did not step back and have nothing to do with the issue. He acted as a conduit between Rev Macaskill and Ms Campbell. He emailed Ms Campbell asking her to progress the Licence. Doing so was impliedly giving it his approval. She took comfort from that, as she said in her evidence but which he disputed in his own. Whilst he did not have a role in the terms of the Licence including the fee and duration, or the matter of the Permitted Use, he did have a role in the arrangements that led to it when he had a clear and material conflict of interest between his role as Chief Executive and as elder, treasurer and member of the Church.

325. It is clear that the claimant's relationship with the second respondent was also deteriorating substantially over a period of about a year prior to his dismissal. The second respondent's email to fellow Trustees after his appraisal meeting with her in April 2019 was sent six months before the issue with the Licence to the Church arose, but is critical of his position in relation to the 360 appraisal to a material extent. It was not sent to the claimant, either directly or by summary, which is surprising, but it is independent evidence of her concerns over his performance separate to the issue of his beliefs as to performance concerns.

326. We rejected arguments that certain of the individual matters that the claimant seeks to found on as evidence of discriminatory acts, and of harassment. The decision by Ms Cromarty was not, we considered, one that was affected to any extent by the claimant's beliefs or those with which he was associated. There was no evidence of any reaction by her to the discovery of the Licence to Occupy which may indicate discriminatory intent by her as an individual, and her circumstances were different to those of the second respondent. Her decision was taken firstly on the basis that there had been a breach of the conflict of interest policy. We consider that she was entitled to come to that

decision, for the reasons given above. Secondly her view was that there was a breach of the Funding Policy. To reach that view requires the re-writing of that Policy or at least its construction in a very broad manner. But that was her genuine opinion, and it was an opinion we considered was not one affected to any extent at all by the issue of the claimant's beliefs actual or by association. Thirdly it was particularly significant that the decision was not to dismiss. Breach of issues of conflict of interest are serious. The claimant had had an involvement in the process leading to the Licence. It may have been at a fairly low level, but it was not insignificant. He acknowledged himself that he ought to have informed the second respondent about it. That was clearly apparent as set out above. He must have known when discussions started that they would involve issues where the Church's interests may not be the same as the first respondent, even if on issues only of the amount of the licence fee or terms such as permitted use and duration. The outcome was not dismissal but a final written warning. That is strong evidence of an independence of thought, separate from the second respondent, who had been discussing the issue of gross misconduct initially, which carries the obvious indication of a view towards dismissal. It is also we consider good evidence that the issue of the claimant's beliefs did not play any part in the decision- making by her. If the onus shifted in that regard we considered that it had been discharged.

327. That was then followed by the appeal heard by Professor Crerar, and the appeal outcome was to reduce the period of the final written warning by six months. For essentially the same reasons we concluded that there was no evidence of discrimination applying to that decision.

328. We also rejected arguments of a form of campaign against the claimant by excluding him from messages or events and that that was because of the issue of belief. The second respondent had a far more proactive approach to the role of the Chair than her predecessors. She had an increasing concern over the nature of his performance. It was understandable in that connection that she become involved further in day to day management. The claimant

may not have liked that but it was within her role to do so, she was his line manager, and as Ms Campbell accepted in her evidence she also did not send a copy of certain messages to the claimant. We did not consider that that allegation was one which raised a prima facie case of discrimination.

329. We did not accept the argument that the Board stood by to allow the second respondent to do as she did. Ms Cromarty and Professor Crerar came to independent views on the disciplinary process before them. Trustees on occasions expressed different views from the second respondent, for example on the terms and applicability of the Funding Policy. That there was some agreement on concerns over performance, and that dismissal should be considered which appeared to be the view of the board as a whole, albeit that some trustees then appeared to have made up their minds, was not evidence of the board simply doing the second respondent's bidding.

330. The claimant argued that there had been no action taken against Ms Campbell. That was indeed surprising given that she had conducted the detailed discussions over the terms of the Licence, and instructed the first respondent's solicitors. She had been aware of the conflict of interest that the claimant had but continued to contact him with regard to matters. But she was not at that stage an employee, and she was not the Chief Executive. Her role was one that was to be ending in any event. It did not appear to the Tribunal that the manner in which she was treated, without any termination of contract or otherwise, was comparable to the circumstances of the claimant in any material way.

331. We also rejected a number of the arguments for the claimant, for example that the 16 March 2020 meeting should have been adjourned because he had intimated that he would be raising a grievance. He had not raised the grievance at that date however. Even if he had, there is no requirement to adjourn a meeting but to consider whether to do so, under the ACAS Code.

332. We shall also comment on one further aspect. The Tribunal noted that, as was raised in cross examination, the claimant had not stated allegations of

discrimination on grounds of religious beliefs during the disciplinary investigation, the disciplinary hearing before Ms Cromarty, the appeal before Professor Crerar (although it was mentioned as referred to above), his appeal against dismissal, or the grievance he raised. That was explained as being difficult for someone in employment, and who was seeking to retain it. It is a factor that was considered, but not one we considered should cause us to depart from the views expressed below. We accepted that the claimant was seeking to preserve a job he had held for a lengthy period and enjoyed.

(i) *Majority view*

333. The majority of the Tribunal being the Employment Judge and one of the members considered that the claimant had established a prima facie case that each of the hypothetical comparators would have been treated differently by the first respondent. Both of those hypothetical comparators would not have been subject to the same meeting on 7 February 2020, which the majority concluded was a detriment, and would not have been dismissed when not attending the meeting on 16 March 2020. The majority considered that the material factors in this analysis were:

(i) The immediate reaction of the second respondent on 8 November 2019 to being told of the Licence to Occupy granted to the Church was more extreme than would ordinarily be expected if the only issue was the use of premises for a religious service and the identity of those doing so was not important. If the true concern for her was only breach of policy as to neutrality, and a conflict of interest, the Tribunal would not have expected her voice to be audibly shaking, as the Tribunal accepted was the case, that she would be as angry as she was, and that the employees she spoke to would email in the terms that they did referring to matters in a manner of clear concern. The descriptions of her demeanour range from her own that she was distressed, flabbergasted and felt let down, to being very angry. In cross examination she latterly accepted that she was angry. She told the claimant that she was disappointed and angry when they met on 11 November 2019. Yet it was argued that she was not angry on 8

November 2019. That there was a reaction that was one of anger later denied, which was disproportionate to the issue the second respondent says that was in her mind (breaching the principle of neutrality) is, the majority considered, established on the evidence.

(ii) The second respondent referred to the views of the Church on same sex marriage and sexual relationships on 8 November 2019 both in emails and orally. That has been addressed above. Whilst the claimant's description of her doing so as "scornfully and critically" are not the terms that the Tribunal adopts, she did so in a manner that indicated a disagreement with those beliefs, and inferred that she took offence at them, as her email to Trustees claimed would all other staff, grant holders and stake holders. The inference is that the second respondent was one of those offended. There was no good reason to make those comments specifically as to the beliefs of the Church if the issue was truly one of neutrality on issues of belief, and if the concern was that an organisation was using premises to promote its beliefs regardless of what those beliefs were. Whilst shock that an arrangement had been made of which she had been unaware was entirely to be expected, particularly where the purpose of the Licence was religious worship which the first respondent had not agreed to before, the shock was clearly exacerbated by the identity of the Church and the views it held. The second respondent not agreeing with the beliefs held by the Church or claimant, and not easily accepting that that was the case, was also a factor. She latterly accepted in cross examination that she held views supporting marriage between same sex couples. She did not answer such questions candidly or easily. She repeated more than once an answer in relation to her own beliefs that she held them no higher than she holds any other human rights view. That appeared to the Tribunal to be avoiding the question asked. Although she said that she believes that all citizens are entitled to their human rights including to faith and belief and that she would support that, that answer stands in contrast to her email to Trustees which did not contain any such expression of view, but rather was at least in part contrary to it. It was argued that these and other expressions of view by Trustees were fleeting

thoughts on the matter in that moment, but the Tribunal did not accept that. They were repeated to a number of different people in oral discussion and then set out in an email. In her discussions with Ms Campbell, and some of the Trustees, together with her email to them on 8 November 2019, the second respondent referred to the Church's beliefs in a manner that was not neutral, but impliedly critical of them, and how they would be received. The reaction went beyond a lack of sympathy for and agreement with the beliefs, which is how the respondents argued they should be assessed.

(iii) Even if the second respondent had already been aware of the claimant those beliefs, the circumstance of the granting of the Licence put her disagreement on belief with the claimant in a new perspective and context. The beliefs of the Church were an important factor in the extent of her reaction, in the view of the majority, and if those beliefs were not present, each of the hypothetical comparators would not have had the same reaction. That was so whether that comparator had the absence of belief, or those beliefs for that hypothetical comparator argued for by the claimant. The majority concluded that in the circumstances of either hypothetical comparator the second respondent would not have written an email to Trustees in equivalent terms regarding the absence of belief or the other beliefs held by the hypothetical comparator. By way of illustration, had the circumstance of the Licence involved Stonewall holding meetings to promote same sex marriage specifically, or to a different organisation promoting marriage to couples regardless of their genders, including both homosexual and heterosexual couples, or was simply a rent of the premises to be used as a place of worship for a religion expressing no views on marriage or sexual relationships, the majority believe that the reaction of the second respondent would have been far less antipathetical to the claimant. For the avoidance of doubt, the views that she holds being supportive of same sex marriage and relationships is not only one she is entitled to hold, but it is also in keeping with the terms of legislation permitting such marriages referred to above, and an overall policy of being inclusive and supportive to all which is entirely consistent

with discrimination legislation at the very least, if not positively to be commended. There are fundamental differences in the beliefs held by the claimant and Church on the one hand and the second respondent on the other hand, on an area of particular controversy, on which strong emotions may be felt on each side of that divide, but each is entitled to hold the beliefs that they do. Nevertheless the context of that difference in belief and how the second respondent expressed herself in relation to the Church and its beliefs was relevant, the majority of the Tribunal considered. This case was also very different from the authorities of ***Chondol v Liverpool City Council UKEAT/0298/08*** at the EAT and the Tribunal case of ***Monaghan v Leicester YMCA ET/1901830/04.*** Those cases involved the active promotion of beliefs with others, a distinction not present in this case. That is not what the claimant did, or was alleged to have done.

(iv) The relevant policy in writing was the Funding Policy, and strictly on its own terms it did not apply to rental income received from a third party but to grant income given to that third party. There was no clear evidence of a policy as to neutrality, or against allowing use of the first respondent's space for religious worship or instruction, having been communicated either to her or the claimant. The email from Ms Harris does not support the view that it was a policy universally known and applied. The extent to which the operation of the neutrality principle was consistently known and applied was at the least put in doubt by that. To make the Funding Policy apply to the Licence to the Church requires it to be revised very substantially, after the event, or to construe it in a way that tortures the words originally used. A Licence to Occupy where a licence fee of £6,500 per annum is paid for using premises for a few hours on Sundays, albeit far less than a commercial level, is income from the Church to the first respondent. It is not grant funding given to the Church by the first respondent. Whilst its VAT treatment did not appear to the Tribunal to be material, what was material was that it was accounted for as income to the Trust, and as a matter of reality and common sense was not funding by the Trust. It can properly be seen as supporting an organisation by a

form of subsidy, but that is not the same as funding it, which connotes giving money. That is clear from the context of the terms of the Funding Policy which refer only to revenue or capital grants. Nowhere else in another document before the Tribunal is the value or ethos as to neutrality expressed in writing. If what was done was so obviously contrary to a fundamental value of the first respondent, described above as the neutrality principle, such that the claimant should have known of that, it is at least surprising that Ms Harris emailed in the terms she did, that its solicitors concluded the Licence with the term as to permitted use as it did, and for Ms Campbell its Finance Director not to be aware of and apply it such as to end very quickly the suggestion of a lease or Licence to the Church when first raised, and thereafter. It is also not easy to reconcile the more general, and unwritten, policy as to neutrality with support for organisations by renting (at charity levels therefore below commercial rents) to two organisations which promote the interests of those who are not heterosexual. If funding includes subsidised rents, renting to such organisations (entirely appropriate to do) is not consistent with the suggestion that the first respondent does not (ever) support organisations promoting religious or political views and maintains strict neutrality. The majority took account of the evidence of Ms Cromarty and Professor Crerar, who shared the views of the second respondent with regard to the Funding Policy and its application and accepted that they were genuinely held, and that the second respondent genuinely believed that the Funding Policy applied, but her view was that the issues raised were ones of gross misconduct, she leapt to a conclusion as to the nature of his involvement, and she disregarded the contrary email from Ms Harris. No action of any kind was taken against Ms Campbell. Although she was a contractor not an employee, and not the Chief Executive that is surprising if the neutrality policy was as widely known as contended. The explanation given for the lack of any action against her was that she was shortly to leave the first respondent, but that occurred in April 2020, about five months after the discovery by the second respondent of the Licence having been granted.

(v) The interim appraisal form sent to the claimant in February 2020 including reference to the licence to the Church, and what was referred to as a breach of "The Rental Policy" when there was no such policy on renting in writing at all. As the conflict of interest and funding policies issues had been dealt with by others under the disciplinary policy, with a decision after appeal being final, it is not clear why that issue was addressed in the appraisal as a matter of performance as well. It indicated that that issue remained a live one in the mind of the second respondent at that time.

(vi) The meeting for the appraisal on 7 February 2020 was called at very short notice indeed, of less than 24 hours. The appraisal form was reasonably lengthy and detailed. The impression from the evidence is that the second respondent believed that because she had concerns they were justified. That impression is fortified by her rejection of the claimant's proposal of mediation, which the majority considers indicates a view at that stage against the claimant's continued employment, with part of the reasoning for that being the issue of belief. The Tribunal did not consider that the second respondent's evidence of a proposal of an adjourned meeting which was rejected by the claimant was likely to be correct. He had proposed mediation, and complained at a lack of notice. She had rejected mediation, which is surprising if she was prepared to allow more time. The Tribunal considered that the claimant's evidence on that meeting was more likely to be correct.

(vii) The second respondent did not commence a formal performance management process then or later, which is not consistent with normal practice if there are substantial concerns over performance. She claims that she tried to do so but was preventing from doing so as the claimant did not wish to discuss his performance. She was his line manager and in a position either to commence a formal performance process, or a formal disciplinary process including an investigation, in effect to impose it. There was no evidence of her doing so.

(viii) The first respondent's own disciplinary process was not engaged formally then or later despite being relevant to performance concerns, and being engaged for the conflict of interest and Funding Policy complaints.

(ix) The second respondent wrote to the claimant on 12 March 2020 calling him to a disciplinary hearing on 16 March 2020 without there having been any form of prior formal warning as to his performance being considered so inadequate that his employment was at risk. Appraisals are not the same as performance management or disciplinary processes.

(x) The terms of the letter of that date are indicative of a measure of prejudgment, and written by someone who was witness, investigator and later decision-maker when there were alternatives within the first respondent to the second and third of those. The absence of any supporting material is particularly surprising, indicating again a measure of prejudgment. The contrast with how the November 2019 issues were dealt with is stark. Any of the comparators mentioned above would not, the majority concluded, have been treated in that same manner.

(xi) The respondent's evidence about the meeting on 16 March 2020 was not consistent. The second respondent said both that she had spoken to board members and it was agreed that the claimant's performance was so unsatisfactory that his employment was to end, and that also that had he appeared one outcome might have been performance management. Her evidence on that aspect was not consistent. It was characterised as a performance meeting by the second respondent, and a "dismissal meeting" by Mr Coutts, who was always intended to be present at it, in his email on 14 March 2020.

(xii) That the second respondent proceeded to dismiss the claimant on 16 March 2020 despite his informing her that morning that he was unwell and could not attend, and the letter of dismissal (and her witness statement) not referencing that reason given for his not attending. That was far from what would normally be expected, and not how a comparator would have been treated.

(xiii) She herself did so notwithstanding that Mr Coutts and Mr Walls were to have undertaken the meeting in light of the email from the claimant on 14 March 2020 saying by email to other Trustees that he would intimate a grievance. As Mr Coutts put it in his witness statement "Shonaig stepped

back" at that stage because of that email. She then stepped forward again, however, after the claimant did not attend, and made the decision herself.

(xiv) Whilst there is some limited evidence as to performance matters in the Bundle of Documents, and evidence given by Trustees critical of the claimant, precisely why performance was so poor as required dismissal is not clear and the evidence in relation to it is somewhat nebulous. It was not so serious as warranted summary dismissal, as notice is given in lieu. The reasons given in the letter of 16 March 2020 commented "These matters cumulatively have demonstrated that you have not been able to lead the Trust in the direction that is needed" That is a very vague phrase. The individual examples given before that were not clear. The first was ability to prioritise concerning not attending a meeting some time earlier. It was a meeting which overran, and the claimant left to meet others who had travelled from London. The second respondent was annoyed at his doing so, but that was not a matter of gross misconduct on any sensible view. The second was said to be inability to embrace change, but not further explained. Budgetary issues were raised including the Barracks, but no explanation was given as to why the clamant had been at fault personally for the overspend. He was part of a group managing it, latterly including the second respondent herself. Reference was finally made to the budget of the Giving Committee but again why that was the fault personally of the claimant was not explained. There is then reference to "the circumstances being so serious". What those circumstances were is not explained. In submission the respondents referred to the February 2020 appraisal and earlier documents, but the February 2020 appraisal had what amounted to allegations against the claimant that had not fully been addressed with him, had not been properly investigated, and had limited support in the documentary evidence before the Tribunal. They were allegations rather than evidence as that is normally understood, being source materials justifying the allegations. The second respondent setting out her concerns in an appraisal document is not the same as clear evidence including written evidence that those concerns were soundly based. That would ordinarily have been found in an investigation report of

some kind, with statements and attachments, and normally including a statement from the claimant responding to the allegations but all of that did not take place. Whilst there was some material provided to support the argument as to performance the majority were concerned at its limitations, and led it to conclude that there may have been other factors involved in the decision, in particular that of the beliefs of the claimant and Church.

(xv) That Mr Walls who had been involved in discussions with the second respondent as to whether or not to proceed with the hearing and then to dismiss, supporting her doing so, then heard the appeal against dismissal, and that he had expressed views in relation to the religious views of the Church on 8 November 2019.

334. The majority concluded that the claimant had established a prima facie case that none of the said comparators would have been treated in the same manner and dismissed in the circumstances referred to.

(iii) Minority view

335. The minority view held by one of the Tribunal members was that the claimant had not established a prima facie case. For that member the key considerations in that assessment were the following:

336. The claimant was the Chief Executive and a Chartered Accountant. He did know what a Conflict of Interest was, or should have known, prior to embarking on the discussions with the Church.

337. He did have a clear and unambiguous Conflict of Interest and the organisation with which that conflict arose, and of which he was Treasurer, benefitted financially by achieving lower than normal discounted charity rental terms.

338. The claimant did not, at first, inform Ms Campbell of his conflict of interest, she was initially informed by the Church's Minister. The claimant was prompted a number of times by his subordinate to address the conflict and he did not do so which may lead to a view that he acted wilfully in his failure to declare.

339. The Claimant did not accept that there was a Conflict of Interest at all and trivialised any suggestion of one by reference to the small value of the transaction. He was the Chief Executive with extensive financial and operational powers within the Trust and this reaction from him to a serious allegation is alarming.

340. The claimant did know that the promotion of any religious beliefs was not supported by the Trust and the substantially discounted rental rates achieved only by this one organisation of which he was Treasurer also involved promotion of religious beliefs even if that knowledge came from his role in the organisation rather than from commercial knowledge in his employment role with the Trust.

341. The absence of any evidence of difference or dispute between the claimant and second respondent on matters of belief of any kind until the allegation made against the second respondent in November 2019 although the allegation was not made known to either of the respondents until after the employment of the claimant had ended. It was also not raised in his appeal.

342. The second respondent did not, at any time, make comments to the claimant about his beliefs or those of the Church of which he was a member. The claimant relied on what was relayed to him by his subordinate, Ms Campbell. She was not a credible witness. Neither Ms Campbell nor the claimant made known to any Trustee the alleged comments the second respondent had made.

343. Ms Campbell with-held reference to the comments despite believing it was an over reaction to a minor matter but knowing it was having serious consequences for the claimant. She with-held reference during her interview for the formal investigation. She even with-held reference in her grievance where her complaint was a direct one in relation to the second respondent and where she raises the issue of The Equality Act 2010 related to the church in the provision of services.

344. In the case of the claimant, who allegedly knew of the alleged comments by the time he met the second respondent to learn of the investigation meeting,

he did not raise them with the second respondent. He did not raise them at the Investigation Meeting or the Disciplinary Meeting. The claimant said that this is because he was in fear of losing his job. Yet, after learning the outcome of the Disciplinary Meeting and that he would not be dismissed, he did not raise it in his appeal letter or at the Appeal Meeting. He did, however, raise the issue of the Equality Act in the provision of services with reference to the church. But no mention of the alleged comments about his or the church's beliefs by the second respondent was made. Even when matters progress and there is a real risk of his job he did not raise the issue.

345. The comments made by the second respondent on 8 November 2019 in relation to the beliefs held by the Church were nothing more than examples as to why neutrality on matters of religion were important, and not evidence that might indicate a mindset against such beliefs. Events following 8 November 2019 confirm that the claimant's or the church's beliefs were not treated as relevant by the second respondent. Throughout events from 8 November 2019 until the claimant's dismissal the respondents acted in addressing the Conflict of Interest and performance issues only.

346. The claimant took no responsibility for the Conflict of Interest. He tried to link his breach to the Funding Policy, questioned why Ms Campbell had not been disciplined for her role and questioned why the lawyers for the Trust allowed the contract to proceed. He blamed anyone or thing but himself, eventually concluding that as it couldn't be anything he had done then it had to be because of something else and he settled on his or his church's beliefs.

347. After the appeal decisions by Ms Cromarty and Professor Crerar there is no evidence of the second respondent or anyone else referencing the beliefs of the Church or the claimant. What was mentioned was the Conflict of Interest and the claimant did commit a breach of that and the organisation with which that was done was the Church. The claimant was closely involved with that Church which was a beneficiary of the arrangement put in place.

348. The claim of discrimination is out of time if, as he alleges, he was aware of the comments on 8 November 2019 but did nothing about them despite having many opportunities to do so.

349. The conclusion reached by the member in the minority was that a prima facie case had not been established that there had been direct discrimination.

Has the onus been discharged?

350. The Tribunal then considered whether the first respondent had discharged the onus of proof. Has the first respondent proved that on the balance of probabilities that the decision to dismiss was not taken to any extent whatsoever because of the beliefs of the claimant or those of the Church with which he was associated? This was the most difficult of all the issues to determine. There are arguments both ways, and the issue was a finely balanced one.

351. There were a number of matters that the majority of the Tribunal considered influenced the second respondent in her decision to dismiss. The minority view being that no prima facie case was established the Tribunal member holding that view did not address that issue.

352. The reasons for the decisions of the second respondent to commence a disciplinary procedure and later to dismiss include, in the judgment of the Tribunal:

(i) The second respondent's belief that the claimant had breached the conflict of interest policy in not informing her about the proposed Licence to the Church, and that he had let her down in that, even although that was not referred to in the letter of dismissal

(ii) Her belief that there had been a breach either of the Funding Policy or an unwritten value of the first respondent in relation to not supporting the beliefs of any one religious organisation,

even although that had also not been referred to in the letter of dismissal

(iii) Her concern on learning of the Licence that it may harm the reputation of the first respondent and be viewed negatively by staff and others in light of the beliefs of the Church which did not conform to the first respondent's general policy as to equality and diversity

(iv) The concerns that she had over his performance, which pre-dated her finding out about the Licence and continued, indeed accelerated, in the period thereafter

(v) The concerns that she had over what she perceived to be his non-engagement with issues in relation to his performance, culminating in his not attending the meeting on 16 March 2020 which she considered to be further evidence of the same, although again not referred to in the letter of dismissal.

353. These are the Tribunal considered all matters that are not issues that arose in her mind because of his beliefs, or those with which he was associated. If they are proved to be the only matters that are the reasons why the decision was taken, that decision is not direct discrimination as the respondents will have proved that there were non-discriminatory reasons for the decisions taken, particularly that to dismiss. The question we require to address is whether, in addition to those five matters, the first respondent has proved that there was not a sixth, being those beliefs, either consciously or unconsciously.

354. The majority of the Tribunal concluded that the respondents had not discharged the onus on them. It reached that conclusion for the following reasons, which to an extent repeat the observations with regard to the evidence of the second respondent made above:

a. The evidence of the second respondent herself, which in certain material respects the Tribunal considered not reliable. She disputed

matters that the majority of the Tribunal found did occur, such as in relation to her comments to Ms Campbell on 8 November 2019 as to the beliefs of the Church, whether or not she was angry at that time (commented on further below), and repeating the word "No" at a meeting where the claimant spoke. She showed an unwillingness to accept quickly some propositions she eventually agreed with, such as her own views on same sex marriage, and she was at times less than fully candid in a reply to questions in cross examination. That lack of full candour was also a factor in her witness statement and the documents in the Bundle. Both parties had agreed that the events on 8 November 2019 were of substantial importance. That much was fairly obvious. It is therefore most surprising that the second respondent did not address in her witness statement precisely how the events that day unfolded, the detail of the content of the calls to Trustees, her view that it was gross misconduct, and the important fact that she took handwritten notes of her conversations with the trustees and others including Ms Campbell. Those notes were not provided as part of the exchange of documents for the Bundle of Documents, and were only provided after the start of cross examination when it was accepted that they existed. There was much discussion in evidence of the level of reaction of the second respondent on 8 November 2019, and whether she was simply upset and shocked, or angry. It is true that Ms Campbell, being the person who met her, said in cross examination that it might not have been anger but in the second respondent's own cross examination she accepted that she had been angry. In her witness statement she had claimed that she was calm, and had used the word "flabbergasted" when she spoke to Ms Campbell for the first time that day, not anything indicating anger. In the Response Form the respondents pled that she was not angry. The strong preponderance of evidence including contemporaneous emails from some of the first respondent's employees referring to her anger is that she was, supported by her own admission in cross examination. The various attempts, as the Tribunal considered them to be, to

downplay her demeanour that day, and the other issues raised above, all tended to support the impression of a not insignificant degree of a lack of candour such that her evidence was not considered to be reliable.

b. Holding a church service in the first respondent's premises was an activity that could be said to promote the views of the Church, and was the first occasion when that had occurred, but the reaction of the second respondent on learning that that was the position was considered disproportionate. She leapt to the conclusion that there had been breaches of policy as to funding and conflict of interest by the claimant before she knew any details of the true extent of his involvement. All she had from Ms Campbell was that the arrangement had "come about through" the claimant, and in the second respondent's own statement she says nothing about what Ms Campbell told her as to the claimant's role. For all she knew at that time he may have had nothing material to do with it, or could have told another Trustee about it who had not mentioned it to her.

c. She referred on a number of occasions in messages that day to the beliefs of the Church when, as stated above, on her argument as to neutrality, the content of those beliefs was not relevant to neutrality. If the position was as she claimed, one would have expected her only to have mentioned that the premises were to be used for religious worship or instruction, not the beliefs themselves. The majority did not accept her explanation on that, or that put forward in submission. The email to Trustees in particular was sent later in the day, at a time when one would consider that any immediate sense of shock had passed, and when there was an opportunity to frame what she said with care.

d. The email to Trustees on 8 November 2019 used terms such as people being "offended", referring in that regard in a sweeping generalisation to the views of others such as staff and stakeholders, when at least some of the staff (Ms Campbell and Ms Macdonald) emailed the claimant to warn him as to the reaction of the second respondent. In a pluralistic society differences of views are expected. Not all staff and

stakeholders were likely to share either the views of the claimant or the second respondent, or to hold them to the same extent, and no evidence was submitted to establish such a proposition by the respondents. Many might well have been offended at the Church using the Trust premises for religious worship, but it was possible that some might not be offended by that whilst not agreeing with the beliefs referred to. The email was considered significant as it was written in a manner that indicated her disagreement with the beliefs of the Church at a fundamental level.

e. Her almost immediate reaction was also to discuss gross misconduct and dismissal, seeking legal advice on that obviously in order to do so, and bringing forward the meeting with the claimant to first thing the next working day.

f. It did not consider the second respondent's evidence on the Funding Policy issue was reliable, and remained concerned at what was said to be a breach of the Funding Policy initially by the second respondent before the detail of what the claimant had or had not done was known, the lack of clarity over its applicability at the least which was in effect ignored by the second respondent, the apparent lack of full consistency as to the application of the neutrality principle by the renting to certain organisations as referred to, and the second respondent's reference in the interim appraisal form in February 2020 to a "Rental Policy", when such a policy did not exist in writing at all.

g. The claimant was not dismissed directly (at least initially) for the issue of the licence to the Church and related matters. The second respondent could have engineered that there be a disciplinary hearing before her, and a dismissal by her, but did not. Instead she arranged an investigation. It was suggested that she chose Mr Coutts as he was of the same view as her such that he would do her bidding but we rejected that. She referred to having an investigation in her notes of the conversations on 8 November 2019. She accepted in her evidence that she might not have been aware of a material fact, such as the possibility of the claimant having told another Trustee of the matter,

such that there had been no breaches of those policies. She did not participate in the disciplinary process at all. That is to her credit. But that same process of separation of functions as to investigation and disciplinary hearing did not happen at the stage of dismissal. The performance management issues she raised with the claimant were so raised not long after the decision on the appeal against the final written warning. It is true that they had been held back in light of the disciplinary process, but the time between the appeal decision and her email to Trustees about next steps and meeting with each to discuss that was two days, from 21 January 2020. She sent the appraisal form to him at 16.53 on 6 February 2020 for a meeting scheduled for 14.00 the next day, which was extremely short notice. In it there was continuing reference to the issues around the Licence, even although they had been dealt with not as performance matters but as a disciplinary issue, and concluded. It was not adequately explained why they remained as matters there referred to, and the inference was that they were continuing to play a more than trivial part in the decisions she took.

h. The second respondent was a witness about issues of performance, indeed the principal witness, she had carried out such investigation as there was, and she was the decision-maker. That is not what a fair procedure normally is, and there was no proper explanation for not having the same kind of process for the performance issues as was followed for the first disciplinary process with those who were independent of the second respondent. The impression gained from the evidence in this regard is that the second respondent took matters into her own hands to secure a dismissal when the original disciplinary process which did not do so had concluded, and her own evidence did not dispel that impression.

i. It is also at the least not normal practice not to adjourn when the employee says for the first occasion that he is unwell and not able to attend. The majority accepted the claimant's evidence that he was unwell as he claimed, but that again is not directly the point in this

context. The second respondent did nothing to check whether the claimant had been unwell or not, such as to ask for a medical certificate or refer him to an occupational health adviser. The decision was taken at a speed the need for which was also not properly explained.

j. The letter of dismissal did not set out clear examples of what the claimant had been thought to have done that amounted to inadequate performance, or refer to any supporting documentary evidence, of such poor performance as merited dismissal. That has been addressed above in the context of unfair dismissal, and for a prima facie case, and the majority concluded that there was an absence of adequate explanation or evidence given as to them. The evidential basis for the decision to dismiss was not covered in sufficient detail in the second respondent's witness statement.

k. In addition the second respondent refers in her witness statement to being seriously concerned about the claimant's failure to properly engage in the capability process, but that was not part of the letter with the reasons for dismissal, and indicates that there were other factors influencing her decision than she set out in that letter. The majority concluded that those additional factors extended beyond those that she admitted to in her witness statement.

l. The second respondent referred in her witness statement to his not attending the capability meeting but did not refer to his stated reason for that, being ill health. That omission was very surprising, and not explained in evidence. She then stated that to only alternative to dismissal was to reschedule the meeting but "given the claimant's approach to the process to date it seemed unlikely that this would have changed anything." That indicated to a form of pre-judgment, and again made no mention of the issue of his health which he gave as the reason for not attending the disciplinary hearing.

m. The impression was of the second respondent seeking to find reasons to justify dismissal, that that decision in her mind had been taken well before 16 March 20120 and explains why she did not take the trouble

to read the disciplinary procedure she had send the claimant in November 2019, to have a formal investigation, or attach any supporting material to the letter of 12 March 2020. The inference that the majority draws is that the issue of beliefs remained one that was one of the reasons for that decision to dismiss.

n. That conclusion was further fortified by the first respondent having the appeal against dismissal heard by Mr Walls, the choice of the second respondent, who had been involved in the discussions on the decision to dismiss and expressed a view supportive of doing so, which was also not properly explained. The majority concluded that the second respondent had decided that he should do so. There were other alternatives to Mr Walls as set out above.

355. Taking account of all of the evidence the majority of the Tribunal concluded that the evidence of the second respondent was not sufficiently reliable to hold that the first respondent had discharged the onus on it. The conclusion was formed in part by the manner in which she gave her evidence, the lack of detail in her witness statement and candid inclusion of material facts, and the lack of supporting written evidence provided. The second respondent sought to deny some of the facts, and to downplay her reaction to discovering the fact of the Licence, and was not as candid as the Tribunal would expect of a witness before it. The issue of the beliefs of the claimant and Church with which he was associated had been in the mind of the second respondent on 8 November 2019 and the majority of the Tribunal considered that they remained to the point of dismissal. The evidence to establish performance being of such a level as justifies dismissal was not sufficiently established. To that is added the very unusual process, contrary to the first respondent's own procedure, that led to dismissal. Individually there were in many respects steps taken which were not the normal steps to take and although by itself that is not determinative by any means collectively the picture painted is a suspicious one, where there is the ability to secure dismissal when that was not achieved by the first disciplinary process. That was all in circumstances of the second respondent's comments on the issue of beliefs referred to. It

was never properly explained why the dismissal process was undertaken in that manner, and with such apparent urgency, by the second respondent in such stark contrast to the first disciplinary process.

356. The first respondent not having discharged the onus on it, the Tribunal must draw the inference that there had been direct discrimination accordingly. For the avoidance of doubt, the majority did not consider that the issue of jurisdiction in relation to time-bar could arise with regard to the dismissal itself, as the Claim was commenced timeously in relation to the dismissal.

Section 26 – harassment

357. The Tribunal did not accept that there had been harassment of the claimant contrary to section 26 of the Act, which requires the act having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, and that it was reasonable to consider that the conduct had that effect, as explained more fully in the case law referred to above. The claimant was, the Tribunal considered, over sensitive to criticisms of him after the events on 8 November 2019. He saw issues of religious belief in every step taken with which he did not agree. He was the Chief Executive, an experienced person in that role.

358. The assessment of what occurred must also be made in the context of there being at least in some measure legitimate grounds to criticise the claimant's conduct and performance. He appeared somewhat blind to his failings in relation to conflict of interest. He at best went down the line of management to Ms Campbell about the conflict of interest, although whether he specifically told her directly initially was not clearly established, rather she appears to have learned it from Rev Macaskill, but in any event it was obvious that it was an issue that was only reasonable to intimate up the line of management to the second respondent, or at least another Trustee. He did have some level of involvement in the process leading to the Licence, which Ms Campbell derived comfort from. Putting matters simply he was by no means innocent

of wrong doing in regard to the arrangements leading to the Licence to Occupy, and any reaction he had to the commencement of an investigation into it was not reasonable.

359. He was not present on 8 November 2019, and had some matters reported to him by others. Emails sent by colleagues in such circumstances did not, the Tribunal concluded, meet the statutory test, particularly for a Chief Executive.

360. It was appropriate for an investigation to be commenced in relation to that issue, and for the claimant to be told of that at a meeting on 11 November 2019. The Tribunal did not regard as reliable the evidence of the claimant that the meeting on 11 November 2019 had been conducted in a form of intimidatory manner, as he alleged. He did not complain of that at the time. His reaction was to deny the allegations. The impression from the evidence is that he did that as robustly as the allegations were put to him. Those allegations were as to conflict of interest, and breaching the Funding Policy. He denied both, but there was at least some potential basis for each of the allegations to be made, and an investigation undertaken. The claimant was not suspended. The meeting was a relatively short one, and not likely to be easy for either party in the circumstances. The second respondent asked questions, and indicated that an investigation would be held. Given the circumstances, that was entirely reasonable, and there is nothing in the evidence that the Tribunal considers justifies a conclusion that it is reasonable to regard the environment or circumstances at that meeting as within the statutory test. The second respondent's style may have been direct but it did not involve humiliation or offense for example. The Tribunal has not accepted that at that meeting there was discussion of a non-prejudicial conversation, and when that did take place the Tribunal again did not regard that as any evidence of discrimination or other impropriety, as explained above.

361. The process of investigation flowed from that, as did the disciplinary hearing and appeal hearing. They were not conducted other than in appropriate manners in each case. They do not meet the statutory test as it was not

reasonable for the claimant to have felt that there was any humiliation or offensive or similar environment. Any such process can be stressful and difficult, particularly one involving a senior employee such as the claimant, but it did not relate to the beliefs of the claimant in this context.

362. There were other matters of which he claimed that the Tribunal did not accept amounted to harassment. One example was the decision taken not to proceed with Project Tynecastle. The claimant had been promoting that, and was aggrieved when the board decided on 6 December 2019 to proceed no further. He accepted that they had the right to do so, but considered that he should have been involved more directly in that process. The Tribunal did not consider that the manner in which that decision was taken had anything to do with the claimant's religious beliefs or their perception and all to do with the details of that transaction. All of the Trustees did not consider it appropriate to proceed, they were entitled to have such a view, and the claimant was not entitled to be a part of the decision making. He is not in the same position as an individual with sole decision-making powers. He is subject to the direction of the Trustees. This was a matter of sufficient importance that it would be normal for it to be decided at the Trustee level. The claimant feeling that he had not been treated properly in this respect was not reasonable.

363. There were differences of opinion between the claimant and second respondent on a number of what may be termed operational matters. It was not particularly professional for the second respondent to have made clear in meetings that disagreement, but the statutory test we consider was not met. The Tribunal in any event concluded from the evidence it heard that the behaviours of the second respondent in these meetings did not relate to his beliefs in any way, but was solely because she thought that what he was saying on such operational matters was wrong. Similarly the claimant argued that he had requested additional resource and that was refused. That was not however a basis to consider that to have been harassment. What the second respondent did was enquire about Ms Jamieson, for example, before agreeing to extend her role. That was not anything other than a normal, and appropriate, operational matter In general terms, as a matter of generality as

Chief Executive, the claimant must expect a measure of disagreement with colleagues, and what may be robust engagement with others, including those on the board. The evidence was that the second respondent was more pro-active in operational matters than her predecessors, but that happened and that is not we considered evidence of harassment. To the extent that he felt that an environment in such matters occurred that met the statutory test had been created existed, the Tribunal concluded that doing so was not in all the circumstances reasonable.

364. The Tribunal considered that the claimant's evidence of a change of attitude on the part of the second respondent towards him after 8 November 2019 was exaggerated to a material extent. Some of that change is likely to have occurred, but to have occurred in a more minor way and because the second respondent was both angry at not having been involved in the discussions that led to the Licence to Occupy being granted to the Church in the circumstances set out, and increasingly concerned at what she thought was his poor performance. That included a presentation he had given at a board meeting which she did not think was correct. She indicated her disagreement vocally repeating under her breath the word no, and by shaking her head and turning away from him, but the reason for that was her disagreement with what he was then saying, not his religious beliefs or the perception of them, such that her behaviour was not because of his beliefs, and her style was understood by the claimant generally to be a robust one. Similarly the claimant's concerns in relation to telling staff about Project Stadium were unfounded. It was a very significant matter for the first respondent and not at all surprising that the Chair of Trustees should give that presentation.

365. The appraisal form sent on 6 February and the meeting of 7 February 2020 were founded on by the claimant. Whilst the arrangements for the meeting may not have been fair as set out above, we did not consider that there was evidence that the meeting was arranged or conducted in a manner that met the statutory test. The second respondent prepared an appraisal form with a number of matters critical of the claimant's performance, but (save as for the

issues covered by the disciplinary proceedings) there were grounds for her to do so, and whilst the claimant may have disagreed with them there was evidence of him not appreciating that there could be grounds to criticise him. That had been mentioned in April 2019. He appeared not to accept the possibility that criticism of his performance could be justified, and did not appear to understand that some of the earlier appraisals, including the 360 degree appraisal, might be partly critical.. The February 2020 meeting was an appraisal meeting to address his performance on an interim basis. It was not reasonable for the claimant to have regarded the meeting as having been arranged or conducted in the kind of environment or otherwise as meets the statutory test. He may not have liked it being arranged at all, or the content of the appraisal document, but that is not the point.

366. Calling a disciplinary hearing on 12 March 2020 in the circumstances that have been referred to, in the absence of any formal investigation, with no attachments to the letter, was the closest to meeting the statutory test. It has been held to be part of the analysis leading to a finding of direct discrimination but that does not mean that it follows that it is also harassment. The Tribunal concluded on balance that it did not do so. The second respondent did have concerns as to his performance, as well as his lack of engagement as she saw it, and although the manner in which she addressed that was unfair, and direct discrimination, providing a letter to commence a disciplinary hearing of a Chief Executive was not, the Tribunal concluded, harassment within the statutory definition.

367. Taking account of all of the evidence, therefore, the Tribunal concluded that the claim as to harassment had not been established.

Sections 109 – 110 liability of the second respondent

368. The claim against the first respondent under sections 13 having succeeded, the question is whether the second respondent has liability under these

provisions. She was the person who was the principal actor in what occurred in the period 8 – 11 November 2018, she framed the appraisal document and conducted the meeting on 7 February 2020, she wrote the letter of 12 March 2020 and she herself decided the dismissal on 16 March 2019. The Tribunal concluded that she was an agent of the first respondent in those circumstances, and the respondents did not seriously argue to the contrary. The Tribunal considers that her acts fall within the terms of these sections in light of the findings above. The only submission made on this aspect by the respondents was that if the second respondent had been acting outside her authority the provisions would not be engaged, but there was nothing in such a point. Her position is that she had the specific approval of the Trustees, or at least many of them.

Jurisdiction – conduct extending over a period

369. The Tribunal considered that there was conduct extending over a period in the actings of the second respondent in the period from sending the appraisal form on 6 February 2020, containing reference to the issues from 8 November 2019 and amounting to a detriment, to the letter of 12 March 2020 which was also a detriment, and up to dismissal decided by her on 16 March 2020. It considers that she had a view during that period that the claimant should be dismissed, which view was effected to a more than trivial extent by his beliefs and those of the Church with which he was associated.

Jurisdiction – just and equitable

370. This matter does not now fall for determination, but if it had the Tribunal would have concluded that it was just and equitable to extend the primary time limit. The hardship the respondents relied upon was the loss of a time bar defence. On the other hand, the claimant has succeeded in the merits of the direct discrimination claim, and that includes one detriment for the appraisal form being sent on 6 February 2020 including reference to the issue of the Funding Policy for the Licence to the Church. The evidence as to events in the period

prior to three months before early conciliation commenced was relevant to the lawfulness of the dismissal at the very least. There was no indication in the evidence that the passage of time had had an evidential effect in the sense of making it more difficult for the respondents to lead evidence.

Contribution and other issues

371. The Tribunal was asked by the claimant to address issues which may affect the level of remedy, although a hearing on remedy has still to take place. The respondent did not support doing so, and did not make submissions. There are issues to address as to whether there was a contribution to dismissal, what the outcome would have been if there had been a fair process or a process and decision that was not discriminatory, together with whether the terms of the ACAS Code were breached, as well as the extent of loss and the related matter of mitigation of loss, but the Tribunal considers that all such matters are appropriately addressed after any further evidence, and submissions. It therefore does not at this stage comment further.

Statement of Particulars

As there has been a finding of unfair dismissal, and it was accepted that no written particulars of employment were provided to the claimant, the claim for failure to provide the statement of particulars required by section 1 of the Employment Rights Act 1996 succeeds. The remedy shall be addressed at the remedy hearing.

Conclusion

372. In light of the findings made above, the Tribunal dismisses the Claim so far as made for harassment under section 26 of the Equality Act 2010 against both respondents. It finds in favour of the claimant on the claim of unfair dismissal under the Employment Rights Act 1996 and by majority for direct

discrimination under section 13 of the 2010 Act, that being in relation to the dismissal itself. It also finds that the claims that arise against the second respondent under sections 109 and 110, and the claim in relation to the statement of particulars, as having succeeded.

373. A remedy hearing shall proceed on dates to be afterwards fixed. Notice of the same shall be intimated to parties separately. It was agreed that it would be appropriate to arrange two days, and for the hearing to be held remotely. Both parties wish to tender evidence at that hearing, and agreed that written witness statements, and any supporting documents including an updated Schedule of Loss, be provided no less than fourteen days before the first day of such hearing. Three paper copies of the same should also be provided to the Tribunal at least seven days before the first day of the hearing.

Employment Judge: **A Kemp**
Date of Judgment: **28 June 2021**
Entered in register: **28 July 2021**
and copied to parties