



# EMPLOYMENT TRIBUNALS

**Claimant:** Rev. M Burns

**Respondent:** Secretary of State for Justice

**Heard at:** Sheffield      **On:** 22, 23, 24, 25 & 26 August; 24, 28, 29 & 30 November and 1 December 2022

**Before:** Employment Judge Miller  
Mr D Fields  
Mr D Crowe

## Representation

Claimant: In person

Respondent: Mr D Bayne – Counsel

# RESERVED JUDGMENT

1. The claimant's claim that he was unfairly dismissed is not well founded and is dismissed
2. The claimant's claim that he was subject to direct discrimination because of religious belief is unsuccessful and is dismissed
3. The claimant's claim that he was subject to direct discrimination because of sexual orientation is unsuccessful and is dismissed
4. The claimant's claim that he was subject to direct discrimination because of disability is unsuccessful and is dismissed
5. The claimant's claim that he was subject to harassment relating to religious belief is unsuccessful and is dismissed.
6. The claimant's claim that he was subject to harassment relating to sexual orientation is unsuccessful and is dismissed.
7. The claimant's claim that he was subject to harassment relating to disability is unsuccessful and is dismissed.

# REASONS

## Introduction and issues

1. The claimant was employed by the respondent as an Anglican Chaplain working at Wakefield prison. His employment started on 18 December 2018

and he was dismissed with effect from 14 June 2021 following a hearing about his performance on 6 May 2021.

2. On 30 September 2021 the claimant brought a claim to the employment tribunal following a period of early conciliation from 3 September 2021 to 9 September 2021.
3. Following two case management hearings, the claimant's claims were identified as
  - a. Unfair dismissal
  - b. Direct discrimination on the grounds of sexual orientation, disability and religion or belief
  - c. Harassment related to sexual orientation, disability and religion or belief
4. The allegations relate to a number of allegations about his then line manager Mr Paul Kirwan, except for two allegations of discrimination against his Roman Catholic colleague, Ms Joanna Thompson – Vear.
5. A detailed list of issues is set out in the appendix and referred to in the conclusions. Although it is not explicit from the final list of issues, the claimant also says in his claim form that his dismissal was discriminatory in relation to all three protected characteristics (although it is not explicitly stated whether this is direct discrimination, harassment or something else). Mr Bayne asked questions about this in cross examination in respect of all protected characteristics and we have considered it accordingly in our conclusions.
6. The claimant's sexual orientation is heterosexual, his religious belief is that of Anglican Christian and his disability is said to be dyslexia. It was not agreed by the respondent that the claimant was disabled by reason of dyslexia at the relevant time. The respondent does not dispute that the claimant is an Anglican Christian or that he is heterosexual.
7. The claimant's case, broadly, was that he was subjected to what amounted to a campaign of discrimination and harassment by Mr Kirwan. This included Mr Kirwan initiating the respondent's performance management process in respect of the claimant which ultimately resulted in his dismissal.
8. The respondent denied the claimant's claims of discrimination and said that the claimant was properly taken through the respondent's performance management process because of concerns they had with the claimant's performance.

### **Hearing**

9. The case was listed for 5 days in person in Sheffield. Mr Bayne raised at the outset his concerns about the time allocation and they turned out to be warranted. In August, we heard evidence from
  - a. The claimant

- b. Ms Naomi Kaiga (for claimant, subject to witness order)
  - c. Rev Canon Paul Cartwright (for claimant)
  - d. Ms Joanna Thompson-Vear (for respondent)
  - e. Mrs Susan Burns (for claimant)
  - f. Mr Paul Kirwan (for respondent)
10. In November, we heard evidence from
- a. Ms Kiran Bali (for claimant, subject to witness order)
  - b. Ms Kate Marshall (for respondent)
  - c. Mr Tom Wheatley (for respondent)
  - d. Mr Gavin O' Malley (for respondent)
11. The witnesses all produced witness statements or, in the case of Ms Bali, a summary of evidence, her evidence in chief being taken orally. The witnesses were heard in the order set out above. For practical reasons and by agreement with the parties, Ms Thompson-Vear and Ms Kaiga were interposed during the claimant's evidence. Mr Wheatley and Mr O'Malley gave evidence by video. Ms Bali attempted to give evidence by video, but in the event joined the video hearing by telephone because of technical difficulties.
12. We were also provided with a large file of documents. During the second part of the hearing in November, the respondent said that there was a draft report in respect of a grievance raised by Ms Thompson-Vear against Mr Kirwan. It had not been disclosed to the relevant parties to the grievance at that time, and the respondent was concerned about whether it was appropriate to disclose it to the claimant. We saw the report and decided that it was relevant and needed to be disclosed. However, without looking at it the claimant decided that he did not want it to be admitted into evidence and neither did the respondent. We invited the claimant to at least take the time to read it before making a decision but he declined to do so. We have therefore not considered this report any further and we do not take it into account in our decision.
13. At the first hearing, Mr Fields attended by video for practical reasons and on the last day on which the parties attended Mr Fields attended by telephone because of transport and computer difficulties. There was no alternative to Mr Fields attending by telephone except to adjourn the case again and this was not proportionate.
14. We are grateful for the patience and co-operation of the parties in helping us address the numerous practical and technical difficulties arising in this hearing.
15. In the course of giving evidence, the claimant made an application to amend his claims of direct discrimination on the grounds of religious belief

to compare himself to non-Christian chaplains rather than non *Anglican* chaplains. The application was refused for reasons given at the time. The issues for the tribunal to determine, including the particular type of religious belief discrimination and respective comparator(s) are as set out in the list of issues in the appendix to this judgment.

## Findings of fact

### Commencement of role and probation

16. Although our findings are extensive, we have not made findings about every disputed issue of fact. We have tried to limit our findings to matters relevant to the issues to be decided. Where matters are disputed, we have made our decision on the balance of probabilities.
17. The claimant was employed by the respondent as an Anglican Prison Chaplain, working at Wakefield Prison which is a Category A prison. This is a high security prison, housing some of the most dangerous offenders. The role of an Anglican Prison Chaplain is to provide for the religious care of prisoners and staff in the Anglican faith tradition and to provide pastoral care for all irrespective of faith or tradition.
18. The claimant's contract of employment requires him to work on his normal day of weekly observance (Sunday for the claimant) and on main seasonal holy days (such as Christmas, Easter and others). The claimant's standard working week was Sunday to Thursday.
19. The claimant's role included a number of statutory obligations and was also governed by various policies and guidance referred to as Prison Service Instructions – PSIs. We have not been referred to the statutory obligations of Prison Chaplains but whenever a reference to them arose in evidence, the status of those obligations was not disputed. We therefore accept the parties' evidence of them.
20. The claimant's employment started on 3 December 2018. He was ordained as a non-stipendiary (self supporting) priest in 2017. This is a priest who is ordained but has no right to require the Church to provide them with a living. Prior to working for the respondent, the claimant had worked for 8 years as an assistant Chaplain in a Hospital and for "nearly two years" (the claimant says) as Chaplain in a High Security Hospital. We conclude that this was from the point that he was ordained in 2017.
21. A newly ordained priest is required to complete a training period in the Parish which is called a curacy. The claimant had not completed his curacy when he started working for the respondent. The claimant was initially allowed additional time off work to complete his curacy in the claimant's Parish.
22. It was usually a requirement for the claimant's post that he have at least three years' experience as an ordained priest. The claimant did not have this at the time of his appointment so Mr Kirwan appointed a mentor from the Church of England, outside the Prison service, to support the claimant. Mr Kirwan identified this need in December 2018 and a mentor was identified in January 2019. This was in consultation with the claimant's

Bishop – Bishop Tony Robinson – and Reverend Helen Dearnley the Anglican and Headquarters Chaplaincy Adviser, both of whom were in contact with Mr Kirwan about the claimant’s appointment from the outset.

23. The claimant’s post was subject to a 6 month probation period and Mr Kirwan produced an interim probation report around March 2019. Although the precise dates are not clear, it was agreed that this was the timescale. The report is dated 1 December 2018 but this is plainly incorrect.
24. The relevant matters set out in that report are as follows. The interim grading of the claimant was “Good”. The three available categories were outstanding, good and failing. There were five broad objectives in that report which included specific steps the claimant needed to take. It is a long and detailed document, but Mr Kirwan’s summary is that “This is a good start for Mark but he will need to focus on certain areas as detailed [in the report] if he is to maintain progress. As time moves forward, more will be expected of him”.
25. Mr Kirwan said in evidence that he felt the claimant had a tendency to become overwhelmed by the breadth of the work at the chaplaincy and we find that that was Mr Kirwan’s view, and that he had reasonable grounds for believing this. This is reflected in the first set of objectives set by Mr Kirwan which included matters such as more effective use of computer systems, and a later identification in the same report of the breadth of work and the procedural requirements being more than perhaps the claimant was used to.

### **Allegations in March 2019**

26. The claimant has made two allegations about incidents in March 2019. The first is that  
  
“a prisoner touched the claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. He did not take appropriate action and did not want the Claimant to do so”.
27. The claimant expanded on this allegation in his evidence. He said that he wanted the prisoner excluded from chapel under PSI 05/2016 but Mr Kirwan would not allow it. He also made allegations of further criticism by Mr Kirwan about that. Mr Kirwan’s account was that the claimant had in fact been too close to the prisoner. However, when the claimant reported that the prisoner had touched him he needed to know if the claimant had perceived it as sexual in nature as this would impact on the seriousness of the incident. The claimant said that prisoner in question was a sex offender. The claimant’s response to Mr Kirwan’s enquiry was “my legs are short and my knee is very close to my genitals” and the claimant repeated this response in oral evidence to the tribunal.
28. Mr Kirwan said that he felt, at the time, that the claimant had dealt with the prisoner appropriately and no further action was required. Particularly, the governor would not sanction banning the prisoner from the chaplaincy in those circumstances so there was no point in pursuing it.

29. We prefer Mr Kirwan's evidence of this incident and find that he acted appropriately. We find, on the balance of probabilities, that he was enquiring whether in the claimant's view the prisoner had any sexual intention behind his actions, rather than enquiring about the claimant's response to it. This is, of course, in the context of a category A prison, a reasonable and proper enquiry to make. In our view, the claimant's perception of this incident is mistaken and this, in our judgment, is a consistent theme of the claimant's case.
30. The second allegation in March is that Mr Kirwan was rude about the claimant's sermons and on 14 March 2019 described them as 'cold vegetables'. In his witness statement, the claimant said
- "On 14 March 2019, Mr Kirwan referred to my Sermons as 'Cold Vegetables', with Mr Kirwan laughing and grinning. Humiliating, degrading, and as the only ordained CoE priest, I regularly held Sunday Services, more so than any other Christian Chaplain".
31. The claimant said in oral evidence that he thought Mr Kirwan was giving him some feedback when he said this, but he said it laughing and grinning. The claimant said he might have misunderstood what was said, but his point was that it was not very constructive feedback. Mr Kirwan did not address this phrase explicitly in his witness statement, but did agree he had given the claimant feedback about his sermons. It was agreed by both parties that one of the claimant's early sermons was "nothing to write home about" and that some feedback from prisoners about the claimant had been unfair.
32. On balance, we prefer the claimant's evidence and find that Mr Kirwan did say something to the effect that the claimant's sermons were like 'cold vegetables'. However, we think that this was because Mr Kirwan genuinely believed that the claimant's sermons were, at that time, falling a bit flat and for no other reason. He said the claimant needed to work on his relationship with prisoners and that is consistent with needing to produce more engaging sermons.
33. The next allegation the claimant makes, and the next incident chronologically, is that Mr Kirwan refused to permit the claimant to renew his vows on Maundy Thursday. Maundy Thursday was on 18 April in 2019 and the allegation relates to a day or two before then. The claimant asked for time off a day or two before to attend a service to renew his vows. He said he only asked for part of the day off but Mr Kirwan refused. Mr Kirwan says that the claimant asked for the whole day but that was not possible because of work commitments, but he offered him part of the day. The claimant was not requesting leave, but to be allowed to attend as part of his job.
34. Mr Kirwan said in oral evidence that he would expect the claimant to attend in work time if business allowed.
35. We prefer Mr Kirwan's evidence. The claimant only made the request two days, at most, before the vows and it was reasonable for Mr Kirwan to refuse a whole day's absence at such short notice. In any event, however,

even if we are wrong and Mr Kirwan has misremembered the conversation we find that the reason for the refusal of time off – whether a whole day or a half day – was because the claimant had provided insufficient notice and he was required at work.

36. In May 2019, it was Ascension Day. This is a day of Obligation for Roman Catholics and Roman Catholic Prisoners are entitled to a day off. Anglican prisoners are not. The next allegation concerns a service for Anglican prisoners to mark Ascension Day.
37. The claimant's allegation is that "Mr Kirwan encouraged the Claimant to celebrate Ascension Day by asking him to put together a list of prisoners for the service, but he then took the list off the Claimant and told him he would not be doing the service. The Claimant was not permitted to celebrate Ascension Day with the Anglican prisoners"
38. The significance of the list was explained by Mr O'Malley. It is necessary to identify in advance which prisoners will be entitled to attend a service to ensure that the prison knows that all prisoners are where they are supposed to be and to avoid potential conflicts between different prisoners. The claimant did not address this in his witness statement. Mr Kirwan said that the claimant could have conducted a service in the evening, as Anglican prisoners were not allowed the day off work or Ascension Day, but that the claimant resented this.
39. In oral evidence the claimant's concern seemed to be that Mr Kirwan had "stolen" the list from him and gone behind his back in some way. The claimant said that Mr Kirwan should have just explained the requirements of the PSI to him. However, the claimant had not at that time arranged the service. Mr Kirwan said that the claimant ought to have been familiar with the PSI by then and we note that in his interim probation review it is an objective that the claimant should familiarise himself with the PSI 05/2016 and the chaplaincy handbook. The claimant was 5 months into his employment by this stage,
40. On balance, we prefer the evidence of Mr Kirwan. In his grievance meeting with Ms Marshall on 30 August 2020 the claimant said that Mr Kirwan *did* explain the PSI to him, and on other occasions the only complaint the claimant raised was that Mr Kirwan had taken the list from him. We find that Mr Kirwan acted appropriately and reasonably in telling the claimant that he could conduct the service in the evening and in taking the list of prisoners, if he in fact did. In our view, the claimant has retrospectively read much more into this incident than was really there.
41. The next allegation is that on 1 June 2019 Mr Kirwan suggested that the claimant 'have his way' with a body in the mortuary. By this, the claimant means that Mr Kirwan suggested the claimant should have sex with a dead prisoner.
42. The claimant did not raise this at any point prior to the claim – not in his grievance or any other meeting. Mr Kirwan denies saying this. We heard evidence about Mr Kirwan's conduct from other witnesses including Ms Thompson-Vear, a Roman Catholic Chaplain employed, at the relevant

time, for 18 hours per week. Mr Kirwan was described as swearing – Mr Kirwan admitted that he does – and as micromanaging and bullying. However, we have heard nothing that supports the claimant’s allegation that Mr Kirwan suggested the claimant have sex with a dead body.

43. We consider that, given the seriousness of this allegation and given the other allegations that the claimant has raised throughout his employment, it is inherently unlikely that Mr Kirwan said this and we prefer his evidence that he did not. In our view, the claimant was doing his best to give his evidence honestly. We think it likely, however, that the claimant has misremembered this conversation and we prefer the evidence of Mr Kirwan.
44. The claimant says that on 18 June 2019, Mr Kirwan referred to the claimant’s sermons as ‘Laughing Monkeys’. In his witness statement, the claimant said  

“On 18 June 2019. After preaching on the joy of the Holy Spirit, the following day Mr Kirwan came into Office 3, and whispered to Joanna, but loud enough for me to hear “Laughing Monkeys”, in a sinister tone. I felt spooked, and yet again humiliated. Some of the RC prisoners had been saying it the previous day. Undermined professionally as the only CoE priest, in my preaching ability”.
45. The claimant was unable to explain the relevance of this phrase – he said it might have come from Umberto Eco’s “The Name of the Rose” and he had heard prisoners saying it after a service.
46. In reality, the claimant’s complaint about this – as well as the comment about ‘cold vegetables’ – is that Mr Kirwan ridiculed him in respect of his sermons generally. The claimant makes another allegation that Mr Kirwan put up posters which were of a group of nuns having a cigarette and making rude remarks about a sermon they had heard. The claimant believed this was aimed at him. The claimant said that the governor made Mr Kirwan remove most of the posters but some were left up on the chaplaincy and psychology departments.
47. Mr Kirwan said that the poster of the nuns was to advertise an event, had been put up before the claimant started working at the prison and was taken down because of a fear it would be taken to mean that smoking was permitted at the event or in the prison.
48. We prefer Mr Kirwan’s evidence about the nuns poster and we prefer Mr Kirwan’s evidence about the alleged ‘laughing monkeys’ comment – that it did not happen.
49. The claimant did raise the issue of the nun’s poster and the ‘cold vegetables’ comment internally. Ms Marshall and Mr Kirwan provided an explanation for the nun’s poster and its removal and the cold vegetables appears to have come from prisoner feedback.
50. In our view, all of three of these alleged issues were innocuous and the claimant has retrospectively re-interpreted them. We accept that the claimant genuinely believed these comments were made and were made about him. Objectively, we do not think they were and, in the case of the



'cold vegetables' comment, we think this was likely to have been misjudged feedback from Mr Kirwan.

### **Probation report**

51. In June 2019, Mr Kirwan produced a final probation report for the claimant. The claimant was again marked good, but a weaker good. Mr Kirwan said in the report

“Mark’s end of probation review is marked as Good but it is a weaker good than at the interim point. In particular Mark does not appear to have understood that SPDR objectives would be followed up on and progress against them would be expected. Progress has slowed significantly since his interim review and this is a cause of some concern moving forward. While Mark got off to a good start he has not yet reached the point where he is carrying the workload or responsibility of a full time chaplain. Again, while he got off to a good start, he has not developed his role as Anglican Chaplain”.

52. Mr Kirwan discussed with his then manager, Ms Marshall, whether or not to extend the claimant’s probation but decided against it because, he said, he felt that encouragement would be better. We accept Mr Kirwan’s evidence about this and find that the final probation report was an accurate summary of the claimant’s abilities in his job at that point. Particularly, that the claimant was still a bit overwhelmed by the role even though he was not yet carrying a full workload.
53. From then, the claimant was subject to the respondent’s normal performance appraisal process called the SPDR. The claimant still had the benefit of a mentor at this point and was allowed time away from work on some Sundays to attend to his Parish and his curacy.
54. The next allegation is that “in August 2019 Mr Kirwan made the claimant watch Joanna set up the first response chaplain whiteboard, a trivial task he had done many times before. He says he was targeted because of having dyslexia. Nobody else was made to watch and it was “to do with words.” He felt that Mr Kirwan was “making a mockery” of his dyslexia”.
55. The claimant was shown how to fill in the white board. Ms Thompson-Vear says she has no recollection of demonstrating it but Mr Kirwan said that he showed the claimant how to do it. He said that it is an important task that the claimant had persistently failed to carry out. We prefer Mr Kirwan’s evidence about this. Again, we think it likely that the claimant has re-interpreted this as something sinister. We also find that Mr Kirwan did not know about the claimant’s dyslexia at this point – the claimant agreed that that was the case in his oral evidence.

### **Interim period**

56. On 6 June 2019, Mr Kirwan emailed the team to remind them about Christmas leave and to state explicitly that leave might not always be approved, to ensure adequate cover, and that there is no automatic right to public holidays off.

57. The claimant was continuing to meet with his mentor, and Mr Kirwan and the claimant were each in contact with Bishop Tony Robinson. There were issues with the claimant completing his curacy and it is clear that Bishop Tony Robinson also had some low level concerns about the way the claimant was managing.

### **Mid year appraisal**

58. Mr Kirwan conducted a mid year appraisal of the claimant on or around 1 September 2019. At this point, the claimant was marked as “must improve”. There is a long narrative in that form setting out Mr Kirwan’s concerns. He summarises in his witness statement

“By this point, I had a number of serious concerns about the Claimant’s performance, which are set out in my comments on his interim appraisal at page 939-940. The Claimant had, on some occasions, demonstrated rudeness and poor interpersonal skills with staff and prisoners, was continuing to appear overwhelmed by his role and tended to focus on only those aspects of the role that he enjoyed to the detriment of other aspects of his role. In my report of 1 September 2019, I noted that the Claimant was a “Must Improve””.

59. Some of the particular issues raised include that the claimant still had little understanding of the importance of security measures including the importance of lists for service attendance, going into cells and wings unaccompanied and that he can at times be difficult to locate.
60. There are five development needs set out along with specific tasks to accomplish them. Those tasks include booking onto training and identifying opportunities for development; preparing properly for meetings; try to understand the reasons behind security measures; take and act on feedback; read and action emails at least once in the morning and afternoon; observe basic standards of decency and respect and the requirements of procedural justice; and manage time effectively. We find that this was detailed guidance that was provided for the claimant to follow.
61. We also find, however, that the report was not wholly negative and Mr Kirwan made sure to identify positive aspects of the claimant’s work where he could.

### **End of 2019 – early 2020**

62. The next allegation is that in October 2019 Mr Kirwan would not allow the Claimant to attend a study day with Anglican colleagues. The claimant provided no evidence about this in his witness statement. In cross examination it was put to the claimant that this was the same incident as an allegation that in February 2020 he was not allowed to attend a study day with an Anglican nun. The claimant could not remember. Mr Kirwan’s evidence was that it was the same incident.
63. In his witness statement, the claimant did refer to being refused permission to meet a Bishop and other Anglican chaplains which he described as “a chance to share, listen, learn and be affirmed”.

64. It is unclear if this is the same incident. However, Mr Kirwan's evidence is that he did refuse the claimant time off to attend the Anglican Study Day event (and the event with the Nun). In oral evidence, this turned into a discussion about the training that the claimant was allowed on. His case was that Ms Thompson-Vear was allowed to go on training when he was not. Mr Bayne made the point that the claimant was still being allowed time off to attend to his Parish/curacy and that he had been on plenty of training.
65. In fact, one of the reasons that the claimant could not attend some training was because of difficulties accessing the booking process on his computer which was eventually resolved. We also note that in his Probation review the claimant was encouraged to book himself onto training.
66. We find that Mr Kirwan refused permission to attend the training events for legitimate business needs having regard to the fact that the claimant was already receiving additional time off, support and mentoring; and that the reason the claimant was not on the training that Ms Thompson-Vear had gone on was because he did not apply for it.
67. On 24 October 2019, Bishop Tony Robinson emailed Mr Kirwan about the claimant to see if things had improved since their meeting, about which we heard no evidence. Mr Kirwan responded the following day. It is clear that Mr Kirwan had concerns about the claimant's performance and said that the claimant will be getting Improvement Needed in his next SPDR. He described the claimant as having no real work ethic. Specifically, he said "Mark still doesn't read emails, familiarise himself with working protocols, observe security measures...when issues arise it's always someone else's fault: "how was I supposed to know?" Most worrying, as a Chaplain, he doesn't seem to be able to engage effectively with prisoners – in groups he continues to try to promote the King James Bible and the BCP to men who can hardly read or write and who just want to hear what the Gospel is".
68. Further on in the email chain, Mr Kirwan replied to Bishop Tony Robinson: "Don't worry I think Mark has the ability and can turn things around if he wants to – I just feel we are reaching the point of no return." We find that, from 25 October 2019, Mr Kirwan had genuine and significant concerns about the claimant's ability to perform his role.
69. On 30 October 2019, Rev Helen Dearnley attended a meeting with the claimant and Mr Kirwan. Although we do not have notes of that meeting, the claimant agreed that Rev Dearnley was there as a further source of support and that at that meeting Mr Kirwan told the claimant that he was not doing a proportionate amount of work.
70. On 11 November 2019, Mr Kirwan emailed the claimant to arrange a meeting to discuss the claimant's workload and his perception of it. They met the next day, 12 November 2019, and discussed the claimant's workload. The claimant said in that meeting that he did not feel overburdened at work. It appears that the claimant was putting himself under pressure by writing a philosophy course for prisoners in his own time. We find that this was the claimant's idea – that although he might have initially been encouraged to do it, he was not required to do this work. Mr Kirwan was concerned that the claimant was spending so much time

working outside of work and his clearly communicated view was that either the claimant needed assistance with the task or potentially the work was not needed.

71. We find that Mr Kirwan was seeking to support the claimant in managing his time and workload in this meeting.
72. It was also around this time that Mr Kirwan received some negative feedback from the prisoners about the claimant's sermons.
73. We find that Mr Kirwan continued to have genuine well founded concerns about the claimant's performance at this point, but was still hopeful that the claimant would be able to improve. Mr Kirwan was continuing to attempt to support the claimant with external support and a reduced workload.
74. The claimant was unhappy with how he perceived he was being managed by Mr Kirwan at this point. He raised his concerns with the deputy governor who passed them on to Ms Marshall. The claimant met Ms Marshall on 14 November 2019 to discuss his concerns. The meeting lasted an hour and a half and Ms Marshall discussed the claimant's concerns at length. The claimant raised issues about his performance review and particularly that Mr Kirwan had said he couldn't be bothered. Ms Marshall noted that both she and Rev Dearnley had noticed a lack of engagement by the claimant with prisoners and staff. The claimant agreed that on reflection he could be a little introverted. Ms Marshall acknowledged that Mr Kirwan could appear quite abrupt. The claimant said, then and in the hearing, that Mr Kirwan did not exchange social niceties with him.
75. There was also a discussion about the philosophy course the claimant had spent his own time preparing and Ms Marshall reiterated that while that was admirable, any materials still needed to be approved. Ms Marshall arranged a further meeting with her, the claimant and Mr Kirwan to find a way forward. However, Ms Marshall confirmed that if the claimant was not able to meet the standards required with informal support, she would expect Mr Kirwan to go down the formal performance management route.
76. The claimant also said at that meeting that his father was dying and he was caring for him which was adding stress. Ms Marshall said that they would help the claimant address his time/workload concerns but that at that point the claimant's workload was not inappropriately high.
77. We find that at this meeting Ms Marshall listened to the claimant's concerns and was broadly supportive while making it clear that the claimant was expected to meet the appropriate working standards.
78. It is unclear if Ms Marshall did subsequently meet with the claimant and Mr Kirwan, but there was a further meeting between Mr Kirwan and the claimant on 18 November 2019. At this meeting, the claimant raised concerns about his workload, but he had not completed any time sheets for the previous 3 or 4 months so Mr Kirwan could not identify whether the claimant was working excessive hours or not. There was a discussion about the philosophy project which the claimant had decided not to progress with by then. Mr Kirwan raised some particular concerns about occasions that week when the claimant had not taken appropriate responsibility.

79. Mr Kirwan explained that the claimant had been identified as “improvement needed” at the interim review. The claimant asserted that he was ‘downgraded’ at this meeting. It is obvious that this is not the case. The interim report was sent to the claimant on 29 October and it was clear that Mr Kirwan had considered that the claimant needed to improve at that point.
80. Mr Kirwan set out further clear objectives for the claimant – including a requirement that he make arrangements for New Starters training, that he schedule a further meeting with his mentor, that the claimant keep the attendance lists up to date. The claimant was to observe colleagues conducting services and classes and to lead or co-lead some services.
81. The notes record that “Paul went through the SPDR process with Mark, especially in relation to “improvement needed”. He also explained the consequences, should the necessary improvement not be achieved and how poor performance procedures work. Paul reiterated how important it is for Mark to focus on his objectives as these are in focus but not to the exclusion of wider aspects of his role”.
82. We find that at this meeting, Mr Kirwan explained clearly what the claimant needed to do to improve his performance, he set clear tasks that were capable of being assessed and warned the claimant that if he did not improve, he may face formal capability procedures. Mr Kirwan also put in support to assist the claimant.
83. At this point, the claimant still had paid time off to attend to his Parish duties, a concession that is not routinely granted. There was further correspondence between Mr Kirwan and Bishop Tony Robinson about this. In this correspondence, Mr Kirwan commented that “Mark is totally oblivious to his own development needs and very focussed on what he sees as everyone else’s failings”.
84. The claimant said this was not a fair criticism of him as he was trying to fulfil his objectives, However, we find that this is what Mr Kirwan genuinely believed at that time.
85. Over the next few months, certainly up to 10 March 2020, the claimant’s performance improved from Mr Kirwan’s perspective with the concessions and support that had been put in place. On 2 December 2019 Mr Kirwan emailed Bishop Tony Robinson to say things were looking like they had turned a corner, and on 10 March 2020, he outlined some positive feedback – although still with some concerns – to Bishop Tony Robinson and concluded that he would be looking to take “improvement needed” off the claimant’s next appraisal.
86. We find that this is an example of Mr Kirwan recognising improvement when he saw it.

### **March – July 2020**

87. From March 2020, the country was in lockdown because of the Covid-19 Pandemic and a policy decision was taken by the respondent to grade all employees who were not in formal improvement process as ‘good’ in their performance reviews by default. The way of working changed during this

period. There was no group worship, but religious materials were distributed to prisoners.

88. The claimant says that he was required to produce his own materials from scratch by Mr Kirwan. We find that he was not required to produce material from scratch. We saw many examples of Rev Dearnley sending through materials for distribution, or amendment and distribution, and examples of Mr Kirwan urging the claimant to use pre-prepared materials. We prefer Mr Kirwan's evidence about this.
89. Mr Kirwan continued to have some concerns about the claimant's performance during this period. He refers to an email he sent to the claimant and another chaplain on 17 April 2020 criticising the quality of Faith Forum notes. The email starts  

"These notes are not good enough and bring us back to the situation where I had to take over and do them myself. I am not going to do that again. It might sound harsh, but this document is simply not of the quality that chaplains should be producing".
90. On first reading, this email does seem harsh – curt even. However, in oral evidence Mr Kirwan explained that this was sent after a long period of trying to improve the claimant's work. Mr Kirwan sets out in that email very detailed guidance as to how the notes should be set out. This could be seen as micromanaging, patronising even. However, overall it conveys a sense of exasperation. During this period, Mr Kirwan also refers to occasions when the claimant left clothes lying around, creating a security/escape risk, failing to properly follow Covid guidelines and that he was not recording matters correctly on the computer system.
91. It is also clear that Mr Kirwan was critical of other members of the team and the team in general. In May 2020 there was an issue between the claimant and Rev Kaiga about Rev Kaiga passing on work to the claimant. Relevantly, in that meeting the claimant was identified as sometimes appearing a bit overwhelmed, and the claimant confirmed this was accurate; and that the three Christian Chaplains (the claimant, Rev Kaiga and Ms Thompson-Vear) were having difficulties working co-operatively together. The claimant agreed that at that time he, Ms Thompson-Vear and Rev Kaiga were finding it difficult to work together.
92. Notwithstanding these ongoing issues, Mr Kirwan wrote to Bishop Tony Robinson on 18 June 2020 in broadly positive terms. He again highlighted the difficulties the three Christian chaplains had working together and on this occasion he said that the problems were less about the claimant and more about Ms Thompson-Vear and Rev Kaiga.
93. On 10 July 2020, Mr Kirwan contacted Rev Dearnley to enquire whether she was still distributing materials for chaplains to use as the ones produced by the claimant and/or Rev Kaiga were taking up too much time and were not adequate. It is not clear if this criticism is aimed at the claimant specifically but in any event, it is clear that Mr Kirwan was not requiring the claimant to produce his own materials from scratch at this point.

### First disciplinary warning

94. On 8 July 2020 the claimant was given a six month written warning for removing a radio from the prison. It was accepted that this was a mistake by the claimant but represented a security risk. Mr Wheatley said that it was a security risk but not the most serious which was why the warning was only for 6 months.
95. We also heard that the claimant had previously left a door unsecured which presented a further security risk, but he was not given a sanction for that, although it was investigated.

### Allegations in August 2020

96. The claimant makes two allegations about Mr Kirwan's conduct towards him in August 2020.
97. They are:

“On 13 August 2020 when they were having lunch in the pub with a third colleague Mr Kirwan asked the Claimant if he enjoyed “gay films.” The Claimant says he found this disrespectful and intrusive. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity”.
98. And:

“On 25 August 2020 Mr Kirwan called him an “idiot” in front of two prison officers and a prisoner”.
99. The first allegation relates to a discussion the claimant had in a pub with Mr Kirwan and Ms Thompson-Vear. The conversation was about Brokeback Mountain, a well known film about two men who have a romantic and sexual relationship. Someone mentioned it – it may have been Mr Kirwan – in the context of good cinematography. This does not seem to be disputed. However, the claimant interpreted this as disrespecting his sexuality because prior to this, he says, Mr Kirwan said that it was good that there were now more gay bars in Wakefield.
100. Mr Kirwan denied that he had made reference to gay bars. However, even if he had, we simply do not understand the claimant's allegation. Mr Bayne asked the claimant if he believed it was being insinuated that he was gay and the claimant said “I took it as disrespectful of my own sexual orientation. Being heterosexual is my orientation and is to be respected”.
101. It is difficult to make relevant findings about this conversation because the claimant's case is so difficult to understand. However, even taking the claimant's evidence about it at face value, this appears to us to be a wholly innocuous conversation and we find that it was.
102. In respect of the second issue, the claimant said, in his witness statement, “on Tuesday 25 August 2020 in the Chaplaincy corridor I said “Keep 2 metres”, to which Mr Kirwan said, “Ignore the idiot; what is the idiot saying?””

103. This is taken from the claimant's diary of incidents or perceived incidents at work that he had started to keep by then. Mr Kirwan firmly denies this, saying that he finds the word "idiot" objectionable because of its historical connotations in respect of disabled people. Mr Kirwan speculated that it referred to a different incident in which he had said, in jest, something like he was not available but the prisoner would have to make do with the claimant.
104. In any event, Mr Kirwan did apologise to the claimant at the time on the basis that he was horrified that the claimant thought that, and took him to lunch.
105. On balance, we think that Mr Kirwan did say something and the claimant took offence to it. We think it unlikely that the word "idiot" was used for the reasons Mr Kirwan said. The claimant agreed that Mr Kirwan appeared horrified when the claimant spoke to him about it. It may be that this was because the claimant misinterpreted something that Mr Kirwan said, or that Mr Kirwan was horrified to have been caught saying something derogatory about the claimant.
106. However, this is put as an allegation of disability discrimination and the claimant agreed in oral evidence that Mr Kirwan did not know about the claimant's dyslexia until October 2020 so we do not need to make any more detailed findings about that.
107. The final complaint the claimant makes around this time is "In summer 2020 Joanna revved her car behind him when he was at his car boot".
108. Ms Thompson-Vear simply says this did not happen. The claimant says, in his witness statement, that it was in fact in February 2021. We prefer the evidence of Ms Thompson-Vear that it did not happen or, if she was revving her car, it was nothing to do with the claimant. The claimant did not appear to pursue this very vigorously as an act of discrimination in cross examination of Ms Thompson-Vear in any event suggesting to Ms Thompson-Vear that it was a potentially dangerous act, rather than that it was explicitly intended to be aggressive or threatening because of any protected characteristic of the claimant.

### **Grievance/complaints**

109. Toward the end of August, the claimant contacted Ms Marshall and asked to speak to her confidentiality. They met on 30 August 2020 and the claimant set out a number of complaints or issues about Mr Kirwan. They included the claimant stating that he was unable to access the functional inbox. This is one of the claimant's discrimination complaints. We do not set out the remaining complaints in detail. There are 17 in total and they are either addressed elsewhere where relevant to the claim or it is not necessary to address them.
110. The complaints do include concerns about the relationships in the team generally, that he has been prevented from seeing Bishop Tony Robinson and that he was being treated unequally. The claimant said his unequal treatment was because Mr Kirwan was friends with two of the other chaplains, he did not relate it to any protected characteristics.



111. Towards the end of the meeting, Ms Marshall said that she had heard that things were settling down in the chaplaincy team and also that if the meeting was to be kept completely confidential, she would not be able to investigate the issues. The claimant then agreed that Ms Marshall could discuss the points he raised further in order to investigate them.
112. The claimant says that he was asked by Ms Marshall if he wanted to go ahead with this (the complaint) as reports were good. The claimant believed that the implication was that if the claimant went ahead with his complaint things would not go well for him.
113. We prefer Ms Marshall's evidence that she did not say this. Her notes are detailed and it is possible to see where the claimant might have conflated the two statements referred to above about confidentiality and things being better in the team. In our view, having regard to the written and oral evidence, the claimant does on occasions demonstrate a misunderstanding of what is being said or what is written.
114. After the meeting, Ms Marshall spoke to Mr Kirwan on 9 and then 17 September 2020 about the issues the claimant had raised. They also discussed a number of other issues that the claimant had raised directly with Mr Kirwan. Mr Kirwan said at the end of that meeting that he was concerned that some of the claimant's improvements from earlier in the year had not been sustained.
115. The outcome of the meeting was that Ms Marshall decided to arrange a meeting with her, the claimant, Mr Kirwan, Rev Dearnley, Bishop Tony Robinson and the claimant's trade union representative to discuss the issues and find a way forward.
116. Ms Marshall met with the claimant on 21 September to discuss her findings and planned actions. In that meeting, Ms Marshall said that she had also spoken to Bishop Tony Robinson and Rev Dearnley.
117. In respect of the issues, the claimant confirmed that he now had access to the functional mailbox – he said that he had had access all along but had not been shown how to use it. In respect of the mailbox, we find that the claimant was not prevented from accessing it. We prefer the evidence of Mr Kirwan and Ms Thompson-Vear which is consistent with the contemporaneous evidence in this series of meetings, that to the extent that the claimant could not access the mail box it was either because he did not know how to or there was an ongoing technical issue with it. In any event, we prefer Mr Kirwan's evidence that it was not habitually used by Mr Kirwan and the claimant did not miss out on any important communications because of his difficulties accessing the mailbox.
118. Other relevant points arising from that meeting, we find, are:
  - a. The claimant agreed that the issue about the alleged "idiot" comment was, by that time, dealt with
  - b. Bishop Tony Robinson had confirmed that he was not prevented from seeing the claimant

- c. A number of the claimant's complaints were based on unfounded assumptions by the claimant
- d. The claimant said he had had some poor managers before, but Mr Kirwan was not one of them
- e. The claimant agreed that he had a tendency to dwell on things

119. Ms Marshall was of the view that Mr Kirwan was managing, rather than bullying, the claimant. We find that this view was genuine and based on detailed conversations with Mr Kirwan, Bishop Tony Robinson and Rev Dearnley.

120. In the meantime, on 11 September 2020, after Ms Marshall had told Mr Kirwan about the claimant's complaints, Mr Kirwan emailed Bishop Tony Robinson. Although it is lengthy, it is appropriate to set out the relevant part in full:

"Would it be possible to talk sometime next week about Mark? Kate is not in until Wednesday and I would like a further conversation with her before we talk. I will also be in touch with Helen Dearnley.

I stand by what I wrote below but recent events have made me less optimistic. Covid 19 has slowed things down in a lot of ways. Mark's limitations are now starting to become more problematic. Something he did recently has rather exasperated me and I think demonstrated how he still has no real idea of his limitations nor any appreciation of the concessions that have been made to these and the level of support that he has been receiving. I might be making excuses a bit, but I think I have taken my eye off the ball with Covid 19. I would also now re-evaluate the level of responsibility owing to Mark for difficulties between the three Christian Chaplains. I think these arise from Mark's unrealistically positive self-appraisal and an extreme sensitivity to being treated "differently". He has a firmly entrenched lifscript that is all about how hard done by he is as a white heterosexual working class man and how he has been bullied and discriminated against his whole life. He is now accusing me of bullying him, with the most bizarre list of examples. When he talks to me, it is other people bullying him with just as bizarre examples. The situation is for me to manage and I will do this. However, I will need your perspective. I now believe that the concessions made to Mark's limitations are unfair to the Church of England in its responsibilities to its members and to the establishment generally. Essentially we do not have what we would normally expect of an Anglican Chaplain and there is a real risk, because of the difficulty in recruiting, that we settle for a situation that is really not satisfactory. If I am really honest, I may not have been holding an Anglican Chaplain to the same standards as I have held RC Chaplains. I dismissed someone who was significantly more competent than Mark. While, this is a performance issue, and I will take it forward, how I proceed will be impacted upon by whether you really believe Mark can appropriately represent the Church of England within HMP Wakefield and to some extent to the wider community. In other words, it would be helpful to know what you would consider reasonable by way of concessions and what you might think is not"

121. We gave a great deal of consideration to the extent to which this email, and the subsequent capability proceedings, were a retaliatory response to the claimant making a complaint about Mr Kirwan. It is clear that the claimant's complaints about Mr Kirwan form part of the reasons for the him contacting Bishop Tony Robinson in this way.
122. On balance, we take this email at face value. In our view, throughout the period leading up to this email, Mr Kirwan has had genuine and reasonable concerns about the claimant's capability and his attitude to work, while acknowledging good work and improvements where appropriate. We find that this email is what it appears to be – Mr Kirwan expressing concerns about the claimant's self perception, his capability and whether he will be able to properly represent the Church of England in the prison. We think that Mr Kirwan's concerns about the claimant raising complaints about him reflect his concerns about the claimant's capability and self awareness rather than any negative views about a complaint being made against him.
123. On 23 September 2020, after the claimant's meeting with Ms Marshall, he met with Mr Kirwan to discuss where they were following the discussions with Ms Marshall and in advance of the meeting with Rev Dearnley et al. The claimant says that he was told by Mr Kirwan in this meeting that he was underperforming. The claimant does not accept these notes as an accurate record of the meeting (although he does not challenge the accuracy of any other meeting notes). The claimant says that in this meeting he was "down graded" and that Mr Kirwan verbally attacked him. In his witness statement the claimant says
- "Paul was very personal and malicious. He said, "You need to look at why you have been turned down by the Church in the past." largely irrelevant as I am now an ordained priest in the Church of England. Paul then said, "I bet then (sic) when you left your last employer, they did not lose any sleep." Not true. At Rampton they wanted me to stay on their books, but Paul advised heavily against it. Paul went on to say "You need to take a long hard look at yourself." Paul continued in this malicious manner, "Bet you think that you are good, that there is nothing wrong with you." I felt humiliated and harassed, there was no performance logic to this personal and vindictive attack 2 (Mr Kirwan was already plotting behind the scenes at this stage-11 September email to Helen Dearnley)".
124. In our view, we think the truth is somewhere in between these two accounts. Mr Kirwan had made it clear that he intended to be straight with the claimant from then on. He was clearly exasperated and Ms Marshall acknowledge that Mr Kirwan could come across as brusque. However, as already noted, the claimant has a tendency to misinterpret what he is hearing. We find that Mr Kirwan did not step over the line into bullying in the way the claimant alleges in his account. We do think it likely that Mr Kirwan said that the claimant was underperforming, or words to that effect. However, Mr Kirwan had been clear about this for some time and he was not "down grading" the claimant in that meeting.
125. The following day, 24 September, Mr Kirwan emailed the claimant to inform him that all windows in the chapel had been left open and two internal doors were unlocked. Mr Kirwan did not admonish the claimant in the email but

said that he would show him how to do a “sweep” of the area before leaving.

126. It is one of the claimant’s allegations that on this day the claimant had planned a quiz for the prisoners but Mr Kirwan had taken over and made them play charades. One of the clues was ‘Papa Don’t Preach’ and the claimant thought this was directed at him.
127. In his subsequent grievance, the claimant raised an issue about charades but did not mention this. He said there that Mr Kirwan had told him to shut up during the game in front of prisoners.
128. Mr Kirwan said in his witness statement:

“I have no idea why the Claimant believes that the “Papa Don’t Preach” clue in the game of Charades was directed at him. It was a topical and humorous clue that was directed at nobody. The prisoner who chose the clue pointed to the Claimant to help their team guess it. This was independent of me and seemed to me to be pretty obvious as he was sitting dressed as a priest/preacher. I could see no reason to believe that it was a comment on his preaching, nor why he believed this to be the case”.

129. The alternative case, suggested by the claimant in oral evidence, was that it was a set up by Mr Kirwan. This is just not plausible and we prefer Mr Kirwan’s evidence – that this was a wholly innocuous incident outside Mr Kirwan’s control.
130. We are mindful of Mr Bayne’s submissions – that all witnesses including the claimant – were being honest and seeking to help the tribunal come to a decision. We agree. We think it is likely that the claimant’s impression and recollections of these incidents have been coloured by his perception at the time and more recently about Mr Kirwan’s view of him.

## **28 September 2020**

131. On 28 September, the claimant went missing at work. This resulted in contact between Mr Kirwan and the claimant’s wife, Mrs Burns. We heard a significant amount of evidence about this but it is not necessary to rehearse it. It is not directly relevant to any of the issues. There was a dispute between Mr Kirwan and Mrs Burns as to the content of their conversation about the claimant and it is potentially relevant to the extent that it might be evidence of Mr Kirwan’s views about the claimant generally.
132. We cannot, however, draw any conclusions about Mr Kirwan’s view of the claimant from this incident because the evidence of this incident is inconclusive. What is clear, however, is that the claimant left his normal workplace without properly informing his colleagues where he was and this caused an issue.
133. His whereabouts only came to light when he submitted his grievance on the same day from an internal email address which indicated that he must be in the prison.

134. The claimant's grievance sets out a list of issues about Mr Kirwan. They include:
- a. The charades incident as referred to above. We note that this includes the sentence "Paul spent more time talking to one of the pretty young prisoners than he did the rest of the group". We think this is a surprising phrase. It was not referred to in oral evidence but it does resonate with the general allegations of the claimant being unkind or nasty towards Mr Kirwan. It also jars with the claimant's claims of sexual orientation discrimination.
  - b. A complaint about the email about leaving windows and doors open
  - c. That he refused to work with Mr Kirwan as he believed he was trying to hound him out of his post
  - d. A repeat of the complaint about the shared email in-box
  - e. The allegation that Mr Kirwan referred to him as an idiot
  - f. That Mr Kirwan is racist, and particularly that he had done an impression of Rev Kaiga. Mr Kirwan agreed that he did do this impression, but said it was in a different context and Rev Kaiga was not offended by it.
  - g. The issue about Rev Kaiga passing on work to him
  - h. Mr Kirwan swearing at Rev Kaiga. This was addressed in oral evidence at the hearing and we find that he did swear at Rev Kaiga at least once. The circumstances of that incident as described were quite exceptional so that, while swearing at a colleague is not acceptable, it was at least understandable.
  - i. The Maundy Thursday issue
  - j. The Brokeback mountain issue
  - k. The 'Laughing Monkeys' and "Nuns poster" issues
  - l. The white board issue
135. The grievance ran to 8 pages and included additional issues not addressed elsewhere. The claimant made it clear that he did not want to work in the same place as Mr Kirwan.
136. The claimant was then off sick until 5 October. He had a return to work meeting with Mr Kirwan but was unhappy about attending that alone. Ms Marshall emailed the claimant on 5 October to confirm that he could take a Trade Union representative with him to the return to work meeting with Mr Kirwan. She also arranged for a third party to be in attendance at the meeting with Mr Kirwan. It is abundantly clear that by this time the claimant did not trust Mr Kirwan.

137. Ms Marshall also told the claimant in that email that he had not yet raised a formal grievance and that the meeting with Rev Dearnley , Mr Kirwan, Ms Marshall and the Bishop to address any of the claimant's concerns would go ahead on 13 October 2020.
138. The next day the claimant did raise a formal grievance in the format required by the respondent. It is not exactly the same as the informal grievance raised a few days before, but the requested outcome is to "either work under a different line manager or transfer to a different prison".
139. The claimant was then off work until 13 October 2020 when he attended the meeting with Ms Marshall, Bishop Tony Robinson, Rev Dearnley, Mr Paul Hargreaves (a faith adviser for the respondent), Mr Kirwan and the claimant's union representative Mr Andy Nolan.
140. Ms Marshall introduced the meeting, the purpose of it was to address the issues raised by the claimant, to ensure a full understanding of expectations of and from the claimant and the prison and to cover issues to enable a response to the claimant's grievance,
141. Although this was an unusual way to address the claimant's grievances, the claimant agreed to this process in the meeting. He was supported by his representative and the Bishop was also in attendance. We find, therefore, that the claimant was able to make an informed decision about this process.
142. In our view, and in the particular circumstances of the claimant at the time including that he was continuing to raise the same matters that had been dealt with previously as well as adding to them, this was an appropriate way to address and respond to the claimant's concerns.
143. The meeting started at 1.30 pm and went on for a number of hours. The claimant said 3 – 4½ hours. The claimant said in his witness statement that it was a high powered meeting in which he was brow beaten into submission and that his "racist claims against Mr Kirwan were ignored".
144. It was a long meeting. It is very clear that the claimant found it difficult.
145. It is not correct that the allegations of Mr Kirwan's racism were ignored. The claimant confirmed that he had not raised it at the right time or in the correct way and Ms Marshall confirmed that she would further investigate it.
146. The claimant is recorded as being rude and dismissive in the meeting on occasion and Rev Dearnley comments that there is a different perception between what is being articulated and the claimant's perception of it.
147. This was undoubtedly a difficult meeting for the claimant but he agreed, in oral evidence, that he was made aware by Rev Dearnley and Bishop Tony Robinson at that meeting that he would continue to be performance managed and that he recognised that he was not performing to a good standard.
148. At the end of the meeting, Rev Dearnley summarised the position:
  - a. The claimant had been given support and chances for the last year

- b. He needed to change, himself
  - c. Performance management by Mr Kirwan would be ongoing
  - d. They had seen at the meeting a disconnect between how he experiences the prison and how it experienced the claimant (which we interpret as the claimant misinterpreting what is being said to him)
  - e. He can be a good pastor, but a prison chaplain role is more diverse than that
  - f. The claimant should consider having personal support (which he had accessed) as well as a mentor from the church
149. The claimant agreed that all the matters he raised in his email and grievance had been raised and explored and that he was “at peace” with them.
150. It was also agreed by the claimant that that was the first time that Mr Kirwan became aware of the claimant’s dyslexia.
151. We find that the respondent and Mr Kirwan were entitled to believe that the claimant’s grievances were resolved at the end of this meeting, that he understood that his performance needed to improve and that he understood that he would continue to be performance managed.
152. Unfortunately, on 14 October 2020 there was an incident between Mr Kirwan and the claimant – the claimant was refusing to engage with Mr Kirwan and there was a disagreement. We think it likely that the claimant was refusing to engage constructively with Mr Kirwan and this was escalated to Ms Marshall. Ms Marshall reported this to Bishop Tony Robinson who also reminded the claimant that his attitude needed to change and that his job was on the line.
153. It is clear that by this time concerns about the claimant’s performance and his presentation generally were widespread. These concerns were based partly on Mr Kirwan’s reports but also on what the various people had witnessed first hand in the meeting on 13 October 2020. Despite agreeing that matters were resolved on 13 October, the claimant was continuing to feel, and express, that there was a problem between him and Mr Kirwan.
154. There is an occupational health report dated 15 October 2020 which indicated mild levels of anxiety and depression and increased stress at work and on 20 October 2020 the claimant met with Mr Kirwan to complete a stress risk assessment and discuss the claimant’s performance objectives following the meeting on 13 October. Mr Kirwan asked the claimant if he needed any adjustments in relation to his dyslexia, but the claimant did not engage with that discussion.

### **Formal performance management process**

155. From 3 November 2020, Mr Kirwan effectively started the precursors to the formal performance procedure. The purpose of this meeting was to make sure that the claimant was in a good position to start the performance

process – so that there were no immediate pressing concerns so that they could focus on the performance management side of things. We note that again in that meeting Mr Kirwan was trying to encourage the claimant to use off the peg materials rather than producing everything himself from scratch, and trying to encourage him to manage and respond to emails.

156. The claimant and Mr Kirwan were due to have the next meeting to start the formal capability process the next day but it was delayed until 8 November 2020. In the meantime, Mr Kirwan wrote to Bishop Tony Robinson about the claimant's performance and it is clear that Mr Kirwan was trying to be positive while still having some concerns about the claimant.
157. On 8 November 2020 the claimant met Mr Kirwan for the first formal performance management meeting. It is agreed that there were some faults with this meeting. There was no formal invitation and the claimant was not given the chance to have a trade union representative or colleague with him. We also find that, in breach of the respondent's policy, the outcome was predetermined. Mr Kirwan attended the meeting with the warning letter about the claimant's performance all ready to hand to him, rather than giving the claimant the chance to make representations before then deciding whether a warning was appropriate or not.
158. That warning letter set out the perceived problems with the claimant's work as follows:
  - a. Your work lacks organisation, you miss deadlines, fail to meet required standards and you do not take a proportionate share of the team's work. You will need to bring greater organisation to your work, meet relevant deadlines and standards and take greater responsibility within the team.
  - b. Your communication and engagement with colleagues and prisoners is often ineffective and sometimes significantly below the standards required of your role. You will need to improve communication and build more effective relationships within the establishment.
  - c. You are not effectively delivering opportunities for prayer and study for prisoners. You will need to show that you are aware of the needs of prisoners and the requirements of the Faith and Pastoral Care specification, adapting appropriately to the demands of current circumstances.
159. Having considered the lengthy process up to this date, we find that Mr Kirwan genuinely and reasonably held the belief that the claimant was performing inadequately in the way set out in that letter. Despite the problems with it – that it was predetermined and the procedural faults – we find that the claimant did know from the meeting on 13 October 2020 and subsequent meetings, that he was underperforming and could reasonably expect to be performance managed.
160. Mr Kirwan also provided the claimant with a detailed performance plan with clear tasks and goals and offered specific support. The claimant was offered the right of appeal against both the substance and process of the formal warning but the claimant did not exercise that right. We note that the



claimant was represented by at least one trade union and appeared to have access to advice about the process if he wanted it. A review was set for 7 December 2020 with weekly performance review meetings planned in the interim.

161. On 14 November the claimant was contacted by a mentor arranged by Rev Dearnley and on 15 November the claimant attended the first weekly performance review with Mr Kirwan. This was not a productive meeting. The meeting was arranged for 9.30 am and the claimant firstly objected to it being on a Sunday (albeit that that was a normal working day for the claimant) and then that he wanted to bring a colleague with him. Mr Kirwan confirmed that the claimant was entitled to bring a Trade Union representative to the next formal review meeting, but not to that one.
162. The meeting reconvened at 2pm. The claimant was not well prepared and we find that Mr Kirwan reasonably had concerns that the claimant was not taking adequate steps at that stage to improve his performance.
163. The next allegation by the claimant is that “On 17 November 2020 Mr Kirwan instructed the Claimant to go on the COVID wing. The Muslim and Pagan chaplains were not required to do so”.
164. All the respondent witnesses’ evidence was that there was no “COVID Wing” in the prison. In fact the claimant was referring to the reception wing where new prisoners, who might be Covid positive, were accommodated. Prison chaplains have a statutory obligation to visit new prisoners. However, the process was that chaplains would visit the reception unit at the end of their shift and leave immediately thereafter to avoid bringing Covid into the prison.
165. Mr Kirwan refers to a note he made of this incident on 18 November 2020, the day after it happened. We prefer Mr Kirwan’s account of the incident. The claimant was turned away from the reception unit by a guard and returned to the chaplaincy. There was an argument then between the claimant and Mr Kirwan in the course of which the claimant became angry and gave the appearance of being aggressive. He shouted at Mr Kirwan and pointed his fingers. The claimant said that Mr Kirwan told the claimant he was rubbish. Ms Thompson-Vear also gave evidence that Mr Kirwan had, on other occasions, shouted in front of prisoners that her work was rubbish.
166. The underlying issue was in fact a minor communication issue between the claimant and the officer at the reception unit that was easily resolved. The claimant appears to have reacted in a fairly extreme way and we find that Mr Kirwan was justified in having concerns about the claimant’s behaviour. We also think it likely, however, that Mr Kirwan’s discussion with the claimant was not as temperate as he describes in his own notes of the discussion. We suspect that Mr Kirwan expressed some frustration with the claimant failing to complete one of his statutory tasks in circumstances where the miscommunication could easily have been resolved.

167. Mr Kirwan's more contemporaneous note records that he said "Can you arrange for the two men to be visited tomorrow as a handover to tomorrow's Echo 1 [the duty chaplain] as they will assume they were seen today"
168. This is consistent with the respondent's case (with which the claimant agreed in oral evidence) that reception visits were shared between all the chaplains. We find, therefore, that the claimant was not exclusively asked to go onto the "COVID Wing" (or the reception unit) but that it was shared between all the chaplains and undertaken at the end of the respective chaplain's shift.
169. In our view, Mr Kirwan was probably not *wholly* blameless for the escalation of the argument. We heard evidence from other chaplains that Mr Kirwan could behave in a micro-managing or belittling way towards all the chaplains, and we think he was likely critical of the claimant in this conversation, although we think it unlikely that he actually called the claimant rubbish. Even on the claimant's own account to Rev Dearnley, the use of the word "rubbish" originated from the claimant. It is clear, however, and we find that the claimant was behaving at this time in an erratic and aggressive way towards Mr Kirwan.
170. Mr Kirwan and the claimant each wrote separately to Rev Dearnley around this time, Mr Kirwan setting out a brief account of his version of the events of 17 November and the claimant stating that he was stressed and unwell.
171. Mr Kirwan was due to meet with the claimant on 18 November 2020 to discuss the events of 7 November but it appears this did not happen. The claimant was then off sick from 19 November 2020 until 8 December 2020.
172. The next weekly review was on 15 December 2020. The claimant attended late and unprepared. Mr Kirwan's note of the meeting records that the claimant was failing to complete many of the actions he had been given at the previous meeting. The claimant did not give any evidence about this meeting and did not dispute the notes and we find that the claimant was failing to address all the tasks he had been assigned by Mr Kirwan.
173. The next weekly meeting was on 22 December 2020. Although Mr Kirwan agrees that the claimant was better prepared for this meeting, he highlighted a number of areas of concern including security risks from becoming too friendly with some of the prisoners, poor time management and failing to deal with his emails timeously. In that meeting, the claimant is recorded as shrugging his shoulders and saying "yeah whatever, move on" when told that he had to work at Christmas as he had not requested leave in advance.
174. It was part of the claimant's claim that he had been made to work all the bank holidays, whereas other chaplains had not. It was the respondent's evidence, and this interaction supports that, that the claimant's bank holidays were rolled up as part of his leave and he would need to request leave in advance if he wanted a day off – particularly at such an important time for a Christian as Christmas. It is clear, and we find, that the reason the claimant was not given time off on this, and other, bank holidays was because he did not request it early enough.

175. In his witness statement Mr Kirwan said that there remained at that time substantial areas where the claimant needed to improve his performance and we find that Mr Kirwan set out in that meeting clear areas where the claimant was continuing to underperform. We also find that the claimant was not engaging with Mr Kirwan as productively as he could have done at that meeting.
176. On 24 December 2020, the claimant took a radio with him, for a second time, when he left the prison.
177. It is part of the claimant's case that he was given too much work to do and this played a material part in the reason that he was not performing as well as he could and suffered with stress. He says, for example, that on 27 December 2020 "I had 200 letters, 40 additional names, plus F Wing and HCC. Jo came at 09:00, no additional duties".
178. We are unable to comment on what is and is not a reasonable work load for a prison chaplain in a high security prison to this level of specificity. However, we prefer the evidence of Mr Kirwan, generally, that the claimant had a *reduced* workload and his problems stemmed from difficulties with time management and organisation. This is reflected in the difficulties the claimant had in responding to a small number emails a day (up to about 10, the majority of which were from Mr Kirwan), the various miscommunications and misunderstandings by the claimant apparent throughout the documentary evidence and at the hearing and the various security breaches which betrayed the claimant's difficulty in fully appreciating the nature of the environment in which he worked.
179. The next allegation of discrimination that the claimant makes is that on 7 January 2021 "when the Claimant went to the toilet, Mr Kirwan positioned himself so that he could see the Claimant entering and leaving the room, so as to monitor him". This is mistakenly recored as 2020 in the case summary of EJ Davies.
180. The claimant's evidence about this was that he was monitored and timed by Mr Kirwan when he went to the toilet. In oral evidence, the claimant said that he caught Mr Kirwan's eye in his office as the claimant was coming out of the toilet and Mr Kirwan looked up at the clock. The claimant said he felt that Mr Kirwan was clocking the time he came out of the toilet.
181. Mr Kirwan denied that he was monitoring the claimant. On balance, we prefer the evidence of Mr Kirwan. We accept that the claimant might have felt like he was being monitored, but objectively, there is nothing to support the claimant's belief. Even if Mr Kirwan was noting how long the claimant was in the toilet, this is put as an allegation of religious belief discrimination and there is nothing at all – not even suggested by the claimant – to link any such monitoring in any way with the claimant's Anglican or Christian beliefs.
182. The next formal performance review was arranged for 14 January 2021 and was also to be an attendance review because of the claimant's absence in November/December 2020. On this occasion the claimant was formally invited to the meeting and was informed of his right to be accompanied by a

trade union representative. He was also offered some protected time to prepare for the meeting and provided with an agenda.

183. On 7 January 2021, the claimant was informed that the meeting on 14 January 2021 would also address his absence in November/December in an attendance meeting.
184. The claimant agreed that the record of the meeting was accurate. In the meeting, Mr Kirwan identified a significant number of ways in which the claimant was failing to perform adequately and the claimant agreed that he was failing in some aspects. The claimant was disengaged from the meeting and from the process, on occasion rolling his eyes and demonstrating a lack of interest to Mr Kirwan.
185. On 17 January 2021, the claimant was given a final written warning about his performance and informed that the next formal review would be on 14 February 2021.
186. On 19 January 2021, the claimant was interviewed about the second occasion on 24 December 2020 when he had removed a radio from the prison. The claimant agreed, in oral evidence, that a likely outcome of that disciplinary process was his dismissal and Mr Wheatley said that dismissal for a second offence within a warning period was a high possibility.
187. The claimant was then absent from work from 26 January 2021. He contracted Covid and, sadly, his father died. The claimant attended a combined performance review and return to work meeting on 23 February 2021. This was a relatively brief meeting and it was agreed that the claimant's final performance meeting would be put back to 22 March 2021 because of his absences. Mr Kirwan also raised, in that meeting, that the claimant had left an internal security door open before going off sick and had again left chapel doors open that day.
188. At that meeting, Mr Kirwan also completed a stress risk assessment with the claimant. In that assessment, the claimant said that the demands on him were realistic, that he felt better after the opportunity to "clear the air" (which we conclude means the grievance process) and that he felt well supported by Mr Kirwan.
189. In oral evidence the claimant said that he was not being honest about that – he was just trying to get through it. However, we find that he did say these things to Mr Kirwan and Mr Kirwan had no reason to disbelieve the claimant.
190. The claimant makes an allegation that on 24 February 2021, "Joanna threatened to throw the Claimant through a wall when his personal alarm went off". In his witness statement, the claimant said "Joana has threatened me with physical violence, when a personal alarm went off accidentally, Joana said, "I will ram your head through the cupboard doors if this happens again( 24.2.21,at 14:30 Office 1)".
191. Ms Thompson-Vear said, in her witness statement, that she did not recall the specific incident but that the claimant's "use and misuse of his personal alarm was a fraught area and was a long-standing and persistent problem".

The claimant would test it in an area where other people were, rather than somewhere alone, and it was loud and intrusive.

192. In our view, Ms Thompson-Vear was irritated or even angry at the claimant for setting off the alarm in a confined space. She might even have threatened to ram his head through a cupboard door. We think, however that this was an expression of frustration and there is certainly no evidence at all to suggest that this was in any way connected with the claimant's Anglican beliefs. We also conclude that this was hyperbole rather than an actual threat, if it was said.
193. It is perfectly obvious that the prison chaplaincy was an unhealthy working environment at times. On the balance of probabilities, this outburst from Ms Thompson-Vear was another example of the poor relationships between the various chaplains rather than anything related to the claimant's religious beliefs.
194. On 26 February 2021, Mr Kirwan invited the claimant to a final performance review meeting on 22 March 2021. That letter sets out clearly the purpose of the review meeting and that the claimant's work remained below an acceptable standard. The claimant was given the right to be accompanied by a colleague or Trade Union Representative.
195. On 1 March 2021 and 14 March 2021 Mr Kirwan held two further interim reviews. The claimant was late to the first meeting and it is apparent that by this time the claimant was disengaging further from the process. Mr Kirwan describes the claimant as dismissive and rude at that meeting and that is consistent with what is recorded in the notes of the meeting.
196. In this meeting, Mr Kirwan again refers to the possibility of the claimant using off the peg materials. The claimant said in oral evidence that he had obtained extensive resources at his own expense for Lent. In our view, this is indicative of the claimant's propensity to get the wrong end of the stick.
197. Similarly at the second meeting, Mr Kirwan continued to have concerns and the claimant was disengaged and uninterested, rolling his eyes and demonstrating boredom with the process.
198. It is right to observe that the tone of these meetings is fairly critical from Mr Kirwan and could be perceived as Mr Kirwan finding reasons to attack the claimant, despite any responses he gave to Mr Kirwan's questions. However, having considered the history of meetings and the chronology, we find that by this time Mr Kirwan had no real expectation that the claimant's performance would adequately improve and that Mr Kirwan had been trying for a very considerable time to support the claimant.
199. While the claimant perceived Mr Kirwan as out to get him, it is equally clear that Mr Kirwan perceived the claimant as rude and dismissive towards him. It is unsurprising that Mr Kirwan's criticism's of the claimant's work became more blunt as time went on.

### Final performance review meeting

200. Mr Kirwan held the final performance review meeting on 22 March 2021. The claimant was failing to meet a number of his objectives and he accepted that both at that meeting and in oral evidence. The claimant was failing to visit all the people he was required to visit, there was a serious issue with wrongly recording information about a prisoner on the computer system and the claimant was still not distributing materials adequately.
201. Mr Kirwan said “I still have concerns that you do not fully understand the role of a chaplain and do not hold yourself to the appropriate level of professional standards and integrity. I feel you still see the role as a list of complicated tasks”.
202. Even that meeting, however, was not wholly negative – Mr Kirwan accepted that some of the claimant’s behaviours had improved – but we find that Mr Kirwan was genuinely, and on the basis of his assessment justifiably, of the view that the claimant was not capable of performing all the tasks required of a prison chaplain. Consequently, Mr Kirwan referred the claimant to a governor for a decision meeting (to determine whether the claimant’s employment would continue or not) and, in light of the ongoing security risks the claimant was put on special leave.
203. The claimant also makes an allegation that in this meeting, “Mr Kirwan frequently ridiculed the written materials the Claimant produced, including: (1) on 22 March 2021 in a meeting in the multi-faith room attended by a manager, the Claimant’s trade union representative and a note-taker Mr Kirwan twice called his materials “embarrassing”; in chaplaincy meetings in front of the other chaplains Mr Kirwan regularly referred to the Claimant’s materials as “embarrassing”.”
204. We find that Mr Kirwan did, on 22 March 2021, refer to the claimant’s notes of a particular meeting as “potentially embarrassing for the department, due to inaccuracies or wording that was misleading. We need to ensure the team is represented positively.”
205. In the same meeting he said that he was both embarrassed for the claimant and by the claimant by the way he presented at a training event the claimant was helping to deliver. This was because the claimant was making it obvious, through his body language, that he did not want to be there.
206. We also find that Mr Kirwan had been critical of the claimant’s material generally but, in our judgment, this has always been in the context of trying to get the claimant to improve or use alternative sources of resources. We find that Mr Kirwan had a ‘robust’ management style and he spoke to all his employees in a similar way. Mr Kirwan had previously made it clear that he intended to be more direct with the claimant in seeking to manage his performance and we find that the use of “embarrassing” in these contexts was an attempt by Mr Kirwan to impress upon the claimant the impact of his performance on the Chaplaincy team generally.
207. We have heard no evidence about Mr Kirwan referring to the claimant’s materials as embarrassing in front of other chaplains. In his witness statement, the claimant recites a list of works he has produced that he said

Mr Kirwan rejected as embarrassing. This list almost exactly reflects a list of materials set out in the claimant's submission to the final decision meeting which he said were all rejected by Mr Kirwan. In the same document immediately after the list of documents he has produced, the claimant says

"Also Paul frequently uses the term "embarrassing" to describe my work. This is often delivered in a humiliating and cruel manner with Paul laughing and smirking (as on 17/01/21). Paul used the term twice in the Performance Review and Attendance Review 22 March 2021. (MFR 10:30), but was not recorded in the notes. I find this to be inaccurate, emotionally loaded, designed to inculcate shame. It is also focusing on his disposition rather than the content of the work produced, and is therefore not helpful".

208. The claimant's evidence is inconsistent. This detail is not mentioned in his witness statement and in the more contemporaneous document, the claimant clearly draws a distinction between this materials being rejected and the use of the word embarrassing. There is no evidence from any witness about an interaction between the claimant and Mr Kirwan on 17 January 2021 other than Mr Kirwan giving the claimant a written warning. It seems likely to us that, had Mr Kirwan called the claimant's materials embarrassing on the same day the claimant would have remembered and mentioned it in his witness statement.
209. We think it more likely that the claimant has misremembered incidents and got different allegations and meetings mixed up. In our view, it is most likely that the only time "embarrassing" was used by Mr Kirwan was in the meeting on 21 March 2021.
210. Mr Kirwan referred to the claimant's dyslexia in a meeting on 20 October 2020 in the context that he was asking the claimant to think about any adjustments he needed in relation to it. There is no evidence that the claimant has ever explained what assistance he would need. Mr Kirwan's evidence, which we prefer, is that he asked the claimant on other occasions, in addition to 20 October 2020 what assistance, if any, he needed to help the claimant with his dyslexia but the claimant was not prepared to engage with the issue. We find, therefore, that Mr Kirwan was aware of the claimant's reported dyslexia by the time of the meeting on 22 March 2021 but that he had concluded, on the basis of the claimant's responses to his enquiries about adjustments, that it did not impact on the claimant's ability to do his job.
211. Following this meeting, Ms Rachael Atkins (HR) prepared a case summary for the governor chairing the capability hearing and on 12 April 2021 the claimant was invited to a Final Decision meeting by Mr Wheatley. The meeting was initially planned for 29 April 2021 but was adjourned to 6 May to allow for the attendance of the claimant's trade union representative. The claimant produced detailed written submissions for Mr Wheatley.
212. This included revisiting some of his previous complaints about Mr Kirwan, the claimant asserted that the first meeting on 8 November 2020 was not a meeting because he received no formal invitation and was not given the opportunity to have a colleague or Trade Union representative with him.

The claimant also said that earlier meetings were not conducted properly and he wanted these to be looked into.

213. Other issues raised included: The claimant said that his workload increased from 8 November 2020 rather than reducing – he said that Mr Kirwan monitored him going to the toilet (as discussed above) and that he was singled out for extra work by Mr Kirwan; that he was required to produce works from scratch rather than acquiring them (we have found, above, that this is not correct); that Mr Kirwan frequently used the term embarrassing to describe his work (we have made findings about that above); that Mr Kirwan referred to his sermons as “cold vegetables” (we have found that he probably did); he complains about Ms Thompson-Vear revving her car at him and trying to persuade him not to go into work; he refers to the incident on 28 September 2020; the claimant says that Mr Kirwan has interfered in his relationship with his mentor; that the claimant was denied access to the staff mailbox; he complains that he has not been able to access training; that other people also leave doors open and present security risks; that Mr Kirwan called the claimant an idiot (we have found that it is unlikely that he did); that he has not been supported and developed.
214. This is not an exhaustive list of the matters the claimant raised. Mr Wheatley considered the matters raised by the claimant. The claimant agreed, in oral evidence, that Mr Wheatley followed the procedure, and on the basis of the information Mr Kirwan gave to Mr Wheatley that Mr Wheatley’s decision to dismiss him was probably a fair one.
215. Mr Wheatley said, and we accept, that he gave proper consideration to the points that claimant raised. In respect of the procedural failings with the November meeting, he agreed that this was done incorrectly but that the claimant had not appealed that warning and overall this did not have any impact on the process. In respect of the complaints about Mr Kirwan bullying the claimant, he said that this had been investigated previously and not upheld. We, again, agree. The claimant remained focussed on historic allegations. He had not appealed against the grievance outcome and it was not appropriate or reasonable for Mr Wheatley to revisit these matters in a capability hearing.
216. Mr Wheatley decided to dismiss the claimant on the basis that the claimant was not achieving the standards required of him and that he had been given extensive support. In oral evidence, the claimant suggested that Mr Wheatley should have taken into account the recent death of his father as mitigation. Mr Wheatley did not know about this at the time and, in fact, in the meeting on 14 March 2021 the claimant had confirmed to Mr Kirwan that his father’s death was not impacting on him at work. Despite this, even then Mr Kirwan encouraged the claimant to recognise if there actually was an impact on him of the bereavement even if he preferred to be at work.
217. Mr Wheatley also asked the claimant, in the capability meeting, about the outstanding disciplinary allegations for taking the radio out of the prison. We find that this was not part of the reason for dismissing the claimant except to the extent that, as Mr Wheatley said, to commit the same offence in a short period of time while under a warning was indicative of an inability to change behaviours as a result of guidance and warnings given to him. This is, in our



view, relevant to the question of whether there was any reasonable prospect of the claimant's performance improving to the appropriate standard.

218. We also find that the claimant did not at any point in the capability hearing make any allegations or assertions that any of Mr Kirwan's conduct (including the reference to being embarrassed by the claimant) was in any way related to the claimant's religious belief, sexual orientation or dyslexia.
219. The claimant was dismissed by Mr Wheatley on 5 weeks' notice to 14 June 2021 in a letter dated 10 May 2021. This afforded the claimant a right to appeal and he did so on 19 May 2021. On the same date, 19 May 2021, the claimant also received an invitation to a disciplinary hearing about the second radio incident. On 13 May 2021 the claimant replied to that invitation to accept that the allegations were true – he had taken a radio off site – and to state that he would not be attending the disciplinary hearing.
220. The claimant submitted detailed grounds of appeal running to 17 pages. He also provided a one page statement. Effectively, the claimant's appeal was to the effect that he was not performing poorly – giving examples of work he had done – and that he was bullied by Mr Kirwan.
221. In the statement, the claimant makes specific reference to the meeting on 13 October 2020. Having seen the notes of that meeting and the surrounding correspondence, we feel compelled to observe that the claimant's summary of it does not appear to reflect the nature of the meeting. It is apparent from the notes of that meeting that while it was lengthy, and at times challenging for the claimant, it was not oppressive in its tone.
222. The appeal meeting with Mr O'Malley was held on 21 June 2021. The purpose of the appeal was to review the decision to dismiss the claimant rather than retake the decision. However, we find that Mr O'Malley did go back and review the history of the claimant's employment including the grievance and the capability process. It is clear that Mr O'Malley took the appeal seriously and, in our view, approached it with an open mind. In oral evidence he identified very easily and clearly the areas in which the claimant had been demonstrably shown to be failing to meet the appropriate standards. In our view, this demonstrates that Mr O'Malley had given proper, detailed consideration to the appeal. It was also clear that Mr O'Malley took an inquisitorial approach to the appeal hearing. The claimant was able to raise any issues that he wanted to and Mr O'Malley considered them appropriately. The claimant was accompanied by a trade union representative at that hearing.
223. Mr O'Malley, specifically, addressed the procedural failing in respect of 8 November 2020 and concluded that although there was a breach of procedure, it had no material impact on the outcome and the claimant was unable to say how it did or would have done. He also confirmed with the claimant that he did not appeal against any of the performance warnings or the grievance outcome.

224. Mr O'Malley also invited clarification from the claimant on the notes of the final decision meeting, and particularly the reference to three managers having concerns about the claimant when in fact it was only Mr Kirwan and, the claimant agreed, Ms Marshall.
225. We also find that the claimant did refer to his perception of differential treatment between him and Ms Thompson-Vear, the Roman Catholic chaplain. However, we have also considered the evidence that Ms Thompson-Vear gave about Mr Kirwan and in our view, that was solely a matter of the claimant's perception. (We will say more about Mr Kirwan and the team generally below).
226. The appeal was dismissed and the claimant was notified of that on 23 June 2021. We found Mr O'Malley to be a plausible and reliable witness and we find that he acted genuinely and reasonably in dismissing the claimant's appeal.

## **Other issues**

### **Disability**

227. For reasons that will become clear, it is not necessary for us to express a view on whether the claimant's dyslexia amounts to a disability within the meaning of s6 Equality Act 2010 so we make no findings about that.

### **Mr Kirwan and the chaplaincy team**

228. We have found that Mr Kirwan was undertaking a genuine capability process. We have also identified areas in which the claimant was failing to perform. This is not to say, however, that the claimant was failing at everything or that Mr Kirwan's conduct was beyond reproach.
229. It is perfectly clear from the evidence we have seen and heard that the claimant was a competent priest (we refer to the evidence of Rev Cannon Paul Cartwright and the occasions when Mr Kirwan has recognised improvement and qualities in the claimant). Mr Kirwan's view, which was not significantly contradicted by the external Anglican representatives, was that the claimant was a little out of his depth and, possibly, did not fully appreciate the very different role of being a prison chaplain from his other experiences.
230. Conversely, we heard a significant amount of evidence from the witnesses, including the respondent's witness, that Mr Kirwan had what might be referred to as an abrasive management style which included shouting and swearing on occasions. In fact, Ms Thompson-Vear went further and said that Mr Kirwan was a bully. Ms Bali – who only gave evidence under a witness order – said that she left at least in part because of Mr Kirwan's conduct towards her. She described him as shouting at her, and that was also reflected in the evidence of Ms Thompson-Vear and Rev Kaiga said that she also left at least in part because of Mr Kirwan's conduct.
231. Ms Thompson-Vear, however, was clear that Mr Kirwan did not discriminate – in her view he treated all chaplains equally poorly and that view is also reflected in the evidence of Rev Kaiga and Ms Bali.

232. We find, therefore, that the prison chaplaincy was an unhappy place to work. There was a degree of dysfunctionality that was likely not helped by Mr Kirwan's management style. We think, however, that Mr Kirwan was probably dogmatic and strict and potentially this is not *necessarily* a bad thing in a high security prison. We were left with the distinct impression that this kind of management was very different to the pastoral approach taken by the chaplains' respective religious organisations and this created conflict. This tension is probably best illustrated by the claimant's unfortunate inconsistent approach to the very strict security procedures in place.

## Law

233. A person has the right not to be unfairly dismissed. Section 98 Employment Rights Act 1996 provides (as far as is relevant) that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do

...

(3) In subsection (2)(a)-

(a) "capability" in relations to an employee means his capability assessed by reference to skill, aptitude, health or other physical or mental quality, and

(b) ....

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

234. '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'.<sup>1</sup> *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323. This is a low hurdle.

235. We were also referred to the cases of *Royal Mail v Jhuti* [2019] UKSC 55 and *Kong v Gulf International Bank Ltd* EA-2020-000357 in respect of the role Mr Kirwan played in causing Mr Wheatley to make the decision to dismiss the claimant. We note that *Kong v Gulf International Bank Ltd* EA-2020-000357 was appealed to the Court of Appeal, but not in respect of what is referred to as the “*Jhuti* ground.” We refer, therefore, to the EAT judgment in *Kong*.

236. In *Jhuti*, Lord Wilson said at paragraph 60:

*“In searching for the reason for a dismissal for the purposes of s 103A of the Act, and indeed of other sections in Pt X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker’s inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer’s stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti’s line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court’s duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person’s state of mind rather than that of the deceived decision-maker”.*

237. In that case, the decision had been made almost wholly without the input of Ms Jhuti, who was unable to present her case to the decision maker. The Supreme Court held that in some circumstances like that of the claimant in that case, the knowledge or motivation of a person senior to the employee being dismissed could be imputed to the respondent employer even in circumstances where that knowledge or motivation was not known to the dismissing manager.

238. In *Kong*, HHJ Auerbach said, at para 77:

*“I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ [that the facts known to or beliefs of the decision maker have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation ... at least where he was a manager with some responsibility for the investigation – see *The Co-Operative Group Limited v Baddeley* [2014] EWCA Civ 658],*

*which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in Jhuti. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer*

239. This confirms that the exception described in *Jhuti* (to considerations only of the motivation of the dismissing manager being relevant to the reason for dismissal) must be applied in narrow circumstances and, particularly, where the decision maker was particularly dependant on the other person as the source of their information.

240. If the employer shows a potentially fair reason for dismissing the employee, the Tribunal must then decide if the dismissal was fair in all the circumstances as set out in s 98(4) above.

241. We were referred to *Taylor v Alidair Ltd* [1978] IRLR 82 which sets out the test which should be applied by the tribunal in deciding whether or not a dismissal on grounds of capability is fair or not:

*"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".*

242. The tribunal must not substitute its own decision, but decide whether the decision of the employer, that the claimant was not capable of performing the role that he was employed to do, was within the band of reasonable decisions of a reasonable employer.

243. The steps an employer should normally take to dismiss an employee fairly for incapability are summarised in *Harvey on Industrial Relations and Employment law* [at Division D1, para 1130]:

- a. The employer should carry out a careful appraisal of the employee's performance and discuss his criticisms with the employee.
- b. He should warn the employee of the consequences of there being no improvement.
- c. He should give him a reasonable opportunity to improve.

244. The provisions of the ACAS Code of Practice on Disciplinary and Grievance procedures also applies to dismissal for incapability. The relevant part of the Code says:

- a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

- b. Employers and employees should act consistently.
- c. Employers should carry out any necessary investigations, to establish the facts of the case.
- d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- e. Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- f. Employers should allow an employee to appeal against any formal decision made.

245. We also heard submissions from the respondent on reductions to any compensatory award on the basis of the claimant's contributory conduct to his dismissal and to take account of the possibility of a fair dismissal if we found the dismissal to be procedurally flawed. It is not necessary to address those submissions in this judgment.

### Direct discrimination

246. S 13 of the Equality Act 2010 provides

(1) 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.

247. Section 136 provides

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

248. The initial burden of proving facts from which we could conclude that the claimant has been discriminated against rests with the claimant, although we are entitled to take into account all the evidence we have heard but must initially disregard the respondent's explanation.

249. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, either disability, sexual orientation or religious belief) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

250. This means that there must be something more than just unfavourable treatment and a difference in status.
251. The burden is also on the claimant to show that the alleged discriminatory treatment is detrimental (where that is not obvious). An unjustified sense of grievance is not enough – the test is whether a reasonable worker would agree that the alleged treatment is detrimental.
252. Where the acts relied on are not inherently discriminatory, or if they are not unreasonable, the burden is again on the claimant to show facts from which the tribunal could conclude that there is a discriminatory motivation.

### Harassment

253. S 26 Equality Act 2010 says, as far as is relevant,

- (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.
- (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.

254. In *Pemberton v Inwood* [2018] ICR 1291 Underhill LJ said:

*“In order to decide whether any conduct falling within sub-paragraph (1)(a) 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, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so”.*

255. Whether conduct is related to the relevant protected characteristic is a matter for the Tribunal to decide on the facts, but while it is a broader test than that for direct discrimination, the conduct itself must be *related to* the protected characteristic. It is not sufficient, of itself, for the alleged conduct to be related to some other alleged discriminatory conduct.

### **Protected characteristics**

256. The claimant relies on the protected characteristics of sexual orientation (that he is a heterosexual man), philosophical or religious belief (that he is an Anglican) and disability.

257. Sexual orientation is defined in section 12 Equality Act 2010 as a person's sexual orientation towards a person of the same sex, the opposite sex or either sex. In our judgment, this does not include socially or criminally unacceptable sexual attraction.

258. The disability that the claimant relies on is dyslexia. The definition of disability is set out in section 6 Equality Act 2010. It was not agreed by the respondent that the claimant had dyslexia (rather than "mild specific learning difficulty revolving around the area of short-term auditory memory") or that this amounted to a disability.

259. For reasons that will be apparent, it has not been necessary, and it is therefore not proportionate, for us to determine whether the claimant was disabled at the relevant time so we do not address the law relating to disability here.

260. All of the protected characteristics on which the claimant seeks to rely apply to both harassment and direct discrimination.

### **Comparators**

261. Section 23 (1) provides

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

262. In considering the appropriateness of a comparator, it is likely to be necessary to consider the reason for the alleged treatment before considering what aspects of the claimant and comparator must be the same.

### **Conclusions**

263. We set out our conclusions in respect of each of the issues in the list of issues

### **Unfair dismissal**

264. Addressing first the reason for dismissal, in our judgment the person whose reasoning we need to consider is Mr Wheatley. It is the claimant's case that



he was, effectively, set up by Mr Kirwan and that Mr Wheatley was always going to dismiss the claimant. This is an argument based on *Jhuti* (above).

265. We do not agree that one of the exceptions in *Kong* or *Jhuti* apply to this case. It is correct that Mr Kirwan was the claimant's line manager, that he conducted the informal and formal capability processes (before and after November 2020 respectively) and that he produced the respondent's evidence on which Mr Wheatley's decision was made. However, there are a number of factors that take this case outside *Jhuti*. Firstly the claimant played a key part in the decision making process. He attended a thorough final decision meeting with Mr Wheatley at which he was represented, produced detailed written submissions and had an opportunity to make his case. He was then afforded a right of appeal at which he was again represented, produced written submissions and set out his case.
266. This is very different to *Jhuti* in which the claimant took no part in the process and the dismissing manager was entirely at the mercy of the investigating manager.
267. Secondly, other people had also expressed concerns about the claimant's performance. Within the respondent this was Ms Marshall and externally, Rev Dearnley. We accept that, to an extent, they were relying on Mr Kirwan's word about the claimant, but there is also evidence of both Rev Dearnley and Ms Marshall directly experiencing the claimant's presentation that was consistent with what they had heard from Mr Kirwan.
268. For these reasons, it is not appropriate to look behind the reasons for the decision of Mr Wheatley as the dismissing manager and we have found that he genuinely believed that the claimant was not performing his job adequately and that is why he dismissed the claimant.
269. The reason for the claimant's dismissal was, therefore, that he was not capable of performing the role for which he was employed.
270. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
271. Firstly, we remind ourselves that it is not our role to decide whether the claimant was underperforming or not. The claimant's job was a specialist one which we are not, in any event, qualified to assess. The question is whether the respondent reasonably believed that the claimant was not performing adequately. The claimant's case is that he was set up to fail by Mr Kirwan. We do not agree. We think that Mr Kirwan's motivation was to get the claimant to an acceptable standard.
272. There is no doubt at all that there were problems in the chaplaincy team, and we think that Mr Kirwan had a harsh management style. In our view, however, Mr Kirwan was genuinely trying to assist the claimant to improve but there was a significant clash of personality and expectations. While another manager might have had more success with the claimant, Mr Kirwan's actions were not unreasonable and his expectations were not unrealistic.

273. Mr Kirwan was best placed to assess the claimant's performance and he additionally took advice and guidance from internal and external faith advisors (including Rev Dearnley and Bishop Tony Robinson).
274. Having seen the steps that Mr Kirwan took, having considered his assessment and having heard detailed representations from the claimant, Mr Wheatley did act reasonably in deciding that the claimant was not capable of adequately performing his role and was not likely to become capable in a reasonable period.
275. In respect of reasonableness we also consider the following questions:
276. Did the employer carry out a careful appraisal of the employee's performance and discuss his criticisms with the employee.
277. In our view it did. It was clear from the outset, more or less, of the claimant's employment that he would need to develop his performance. There was an initial recognition that the claimant should be given time to develop on the basis of his limited previous experience. He was given this chance including a number of concessions. Mr Kirwan regularly appraised and discussed the claimant's performance with him, setting him targets and goals and providing help and support to meet them.
278. He should warn the employee of the consequences of there being no improvement.
279. The claimant was warned both formally and informally on a number of occasions of the consequences of him failing to get to the appropriate standards. In respect of the first warning, the respondent acknowledged that they made a mistake in failing to notify the claimant of his right to bring a representative and that the decision was predetermined to issue a warning. However, in all the circumstances, including the right to appeal, the delay in the overall process (the respondent's policy is to complete the process within 3 months) and the fact that the claimant did not appeal the warning at the time means that that mistake did not impact at all on the overall fairness of the dismissal or the process leading up to it.
280. He should give him a reasonable opportunity to improve.
281. The claimant was given an opportunity to improve. The process lasted a very long time – he was given detailed support and guidance, he was provided with a mentor. It is clear that the claimant struggled with managing his time and the demands of the job. He did not book himself onto training and he was slow to adopt simple steps like using a notebook to manage his workload. In our view, the claimant was given a reasonable opportunity to improve.
282. Returning to the list of issues, it was the claimant's case that: "his dismissal was unfair because the performance issues raised by Mr Kirwan were not genuine; his colleague Joanna (a Roman Catholic chaplain) was treated differently; he made a complaint about bullying and was treated differently; and the performance process was unfair".

283. Addressing those allegations specifically, the performance issues were genuine, his colleague was not treated significantly differently. In fact, her evidence was that she had also been subjected to unacceptable behaviour of Mr Kirwan. We have found that the claimant's grievance and complaints did not impact on the way he was treated and we have also found that the process was not unfair.
284. The decision to dismiss the claimant on the grounds of his capability was reasonable and within the band of reasonable responses of a reasonable employer and for that reason, the claimant's claim that he was unfairly dismissed is not well founded and is dismissed.

**Direct discrimination – sexual orientation (Equality Act 2010 section 13)**

285. We address each of the incidents as set out in the consolidated list of issues:
286. *5.3 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. The Claimant is heterosexual. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*
287. We have found that this did not happen as the claimant alleged. Mr Kirwan was not asking about the claimant's sexuality, he was making perfectly proper enquiries about the claimant's perception of the prisoner's intentions. This was for the reason of assessing the seriousness of the misconduct of the prisoner.
288. The act was not detrimental and was not related in any way at all to the claimant's sexual orientation. This allegation of direct discrimination is dismissed.
289. *5.4 On 1 June 2019 Mr Kirwan suggested that the Claimant visit a prisoner in the mortuary and "have his way with the body." He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*
290. We have found that, on the balance of probabilities, the claimant has misremembered this conversation and that it did not happen as described. For that reason, this allegation is dismissed. In any event, however, even if Mr Kirwan had said such a thing, we have heard no evidence or convincing argument that could lead us to conclude that this could in any way be related to the claimant being a heterosexual male.
291. *5.5 On 13 August 2020 when they were having lunch in the pub with a third colleague Mr Kirwan asked the Claimant if he enjoyed "gay films." The Claimant says he found this disrespectful and intrusive. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

292. This conversation, even as described by the claimant, was wholly innocuous. It was what it appeared to be – a discussion about a film. Again, in any event, we cannot conceive how this conversation could be a detriment related to, in any way at all, the claimant being a heterosexual man. This claim also fails and is dismissed.

293. The claimant's claims of direct discrimination because of sexual orientation are therefore unsuccessful and are dismissed.

**Direct discrimination - disability (Equality Act 2010 section 13)**

294. We address each of the incidents as set out in the consolidated list of issues:

295. *5.7 In about August 2019 Mr Kirwan made him watch Joanna set up the first response chaplain whiteboard, a trivial task he had done many times before. He says he was targeted because of having dyslexia. Nobody else was made to watch and it was "to do with words." He felt that Mr Kirwan was "making a mockery" of his dyslexia.*

296. We have found that Mr Kirwan did not know about the claimant's dyslexia or mild specific learning disability at that time. Even if it was, therefore, a disability there is no possible basis on which we could conclude that Mr Kirwan decided to show the claimant how to set up the white board *because* of his disability.

297. In any event, we have found that Mr Kirwan's motivation for undertaking this task was because it was an important task that needed to be done properly.

298. This claim of direct disability discrimination is therefore unsuccessful and is dismissed.

299. *5.8 From about March 2020 to about March 2021 Mr Kirwan made him write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan). The Claimant believes Mr Kirwan was targeting him because of his dyslexia. He is not saying that there was a failure to make reasonable adjustments, this is about picking on him.*

300. As should be clear from our findings of fact, this simply did not happen. We have found on the basis of a great deal of written evidence that Mr Kirwan was continually encouraging the claimant to stop unnecessarily producing his own materials.

301. For this reason, this claim of direct disability discrimination is unsuccessful and is dismissed.

302. *5.9 On 25 August 2020 Mr Kirwan called him an "idiot" in front of two prison officers and a prisoner.*

303. We have found, on the balance of probabilities, that Mr Kirwan did not call the claimant an idiot. It is apparent that *something* was said but we do not know what. We have preferred Mr Kirwan's evidence and think that it was

something intended to be jocular but which the claimant has misinterpreted in retrospect.

304. In any event, however, as the claimant agreed, Mr Kirwan was unaware of the claimant's dyslexia or specific mild learning disability at that time so that anything he did say can not possibly have been *because* the claimant was disabled by reason of the relevant condition.
305. For this reason this claim of direct disability discrimination is unsuccessful and is dismissed.
306. *5.10 Mr Kirwan frequently ridiculed the written materials the Claimant produced, including: (1) on 22 March 2021 in a meeting in the multi-faith room attended by a manager, the Claimant's trade union representative and a note-taker Mr Kirwan twice called his materials "embarrassing"; in chaplaincy meetings in front of the other chaplains Mr Kirwan regularly referred to the Claimant's materials as "embarrassing".*
307. We have made detailed findings about this above to the effect that the only comments made were likely to have been in the meeting on 22 March 2021.
308. However, we have also found that the reason for this was because Mr Kirwan was concerned about the quality of the claimant's written materials and his presentation at a training event. Mr Kirwan had also made comments about the quality of other people's work including Ms Thompson-Vear.
309. In our view, this comment was not because of or related to the claimant's dyslexia or specific mild learning disability at all. As far as Mr Kirwan was concerned, and on the basis of the claimant's refusal to engage with the possibility of reasonable adjustments, the claimant was unaffected by dyslexia or specific mild learning disability and the comments were made because of Mr Kirwan's genuine belief that the claimant's work did have the potential to cause embarrassment to the chaplaincy department.
310. This was not because of the claimant's condition (whether it was a disability or not) and, for those reasons, this claim of direct disability discrimination also fails.
311. Generally, in respect of the direct disability discrimination claims, we have not needed to consider a comparator. However, we do observe that the evidence we heard and as set out above demonstrates that Mr Kirwan treated all the chaplains the same so that even if any of the treatment alleged amounted to a detriment, the claimant was not treated worse than any potential comparators or than any hypothetical comparator would have been treated.

**Direct discrimination – religion or belief (Equality Act 2010 section 13) .**

312. We address each of the incidents as set out in the consolidated list of issues:
313. *5.11 The Claimant is a Church of England priest. Mr Kirwan the lead chaplain is a member of the Roman Catholic church. The Claimant says*

*that Mr Kirwan treated him less favourably or harassed him because of his Protestant or Church of England faith. His colleague Joanna was also a member of the Roman Catholic church and the Claimant says that eventually she joined in with Mr Kirwan's treatment. His complaints are as follows.*

314. *5.12 From the start of his employment until 21 September 2020 the Claimant was excluded from the chaplaincy database. Everybody else had access. He asked about it regularly and was fobbed off.*
315. We have found that this allegation is not correct. The claimant was not excluded from the team inbox (rather than database) he just did not know how to access it. In any event, he was not disadvantaged by not knowing how to access the inbox as it was rarely used.
316. This allegation of direct religious belief discrimination is therefore unsuccessful and is dismissed.
317. *5.13 The Claimant accepts that as the lead Anglican chaplain and the only ordained priest, he would expect to have to work Christmas Day and Easter Sunday. However, he says that he was required to work all the other bank holidays as well. Joanna was not.*
318. We have found that the claimant was contracted to work from Sunday to Thursday. It was part of his contract that his bank holiday entitlement was "rolled up" into his annual leave so that his annual leave increased but he had to work bank holidays unless he requested them off. The reason the claimant was required to work bank holidays was because he was contracted to do so and he did not request leave.
319. Ms Thompson-Vear had a part time contract which did not include Mondays. Consequently, she was more likely to be off on a bank holiday, which is usually on a Monday. This is unrelated to the claimant's religious belief and, to the extent that he was treated differently to the Roman Catholic chaplain, there is no evidence at all to suggest that this is because he is Anglican.
320. This allegation of direct religious belief discrimination is therefore unsuccessful and is dismissed.
321. *5.14 Mr Kirwan was rude about the Claimant's sermons. For example, on 14 March 2019 and on other occasions he described them as "cold vegetables"; and on 18 June 2019 he referred to "laughing monkeys" when talking about the Claimant's sermon. Mr Kirwan also stuck posters up which were of a group of nuns having a cigarette and making rude remarks about the sermon they had heard. The Claimant was the only person who preached and he believed the posters were directed at him. The governor made Mr Kirwan remove most of the posters, but Mr Kirwan insisted on keeping them up in Psychology and the Chaplaincy.*
322. In respect to the specific examples, we have found that Mr Kirwan probably did refer to the claimant's sermons as 'cold vegetables' but that the other allegations did not occur as alleged. However, we have also found that all of these incidents were innocuous.

323. More generally, we have found that Mr Kirwan's feedback became more explicit and to the point as time went on. This is because Mr Kirwan had concerns about the claimant's performance. We have heard evidence that Mr Kirwan's conduct sometimes fell short of ideal
324. However, on balance we think that Mr Kirwan's reasons for this were his genuine concerns about the claimant's conduct and his management style. There is nothing, in our view, to link Mr Kirwan's conduct in relation to these allegations to the claimant's religious beliefs and for these reasons this allegation of direct discrimination because of religious belief is unsuccessful and is dismissed.
325. *5.15 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. He did not take appropriate action and did not want the Claimant to do so.*
326. We have addressed this above under sexual orientation discrimination. For the same reasons this allegation is unsuccessful and is dismissed. In any event, however, we have heard nothing to connect the alleged conduct of Mr Kirwan with the claimant's religious beliefs at all.
327. *5.16 Mr Kirwan refused to allow the Claimant to renew his vows on Maundy Thursday 2019.*
328. We have found that Mr Kirwan most likely did not refuse to allow the claimant time of to renew his vows but if he did (i.e. if he refused half a day off rather than offering half a day) it was for a legitimate reason. This reason was unrelated to the claimant's religious belief and for these reasons this allegation is unsuccessful and is dismissed.
329. *5.17 In May 2019 Mr Kirwan encouraged the Claimant to celebrate Ascension Day by asking him to put together a list of prisoners for the service, but he then took the list off the Claimant and told him he would not be doing the service. The Claimant was not permitted to celebrate Ascension Day with the Anglican prisoners.*
330. We have found that the claimant was permitted to celebrate Ascension Day but not during working time. In respect of the list, we find that Mr Kirwan had a perfectly legitimate reason for taking the prisoner list. The actions of Mr Kirwan were wholly reasonable and unconnected with the claimant's religious belief and for this reasons this allegation is unsuccessful and is dismissed.
331. *5.18 In October 2019 Mr Kirwan would not allow the Claimant to attend a study day with Anglican colleagues.*
332. We have found that Mr Kirwan had a legitimate reason for refusing the claimant's attendance at the particular event, namely the business needs of the respondent. The claimant was permitted – in fact encouraged – to attend and undertake other training.

333. Mr Kirwan's decision was unrelated to the claimant's religious belief and this allegation is therefore unsuccessful and is dismissed.
334. *5.19 On 7 January 2020 when the Claimant went to the toilet, Mr Kirwan positioned himself so that he could see the Claimant entering and leaving the room, so as to monitor him.*
335. We have found that this did not happen and that, in any event, the claimant has produced no evidence at all to link the alleged monitoring to his religious beliefs. For these reasons this allegation is unsuccessful and is dismissed.
336. *5.20 In February 2020 Mr Kirwan would not allow the Claimant to attend a study day with an Anglican nun.*
337. This is the same allegation as set out in the preceding section (allegation 5.18) and for the same reasons is dismissed.
338. *5.21 From about March 2020 to about March 2021 Mr Kirwan made the Claimant write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan).*
339. As should be clear from our findings of fact, we have found that Mr Kirwan did not make the claimant write work-related materials from scratch. This allegation is therefore unsuccessful and is dismissed.
340. *5.22 In summer 2020 Joanna revved her car behind him when he was at his car boot.*
341. We have found that Ms Thompson-Vear did not rev her car at the claimant. If she did rev her car in the proximity of the claimant this was entirely unrelated to the claimant at all, let alone any protected characteristic of the claimant. For these reasons this allegation is unsuccessful and is dismissed.
342. *5.23 On 24 September 2020 the Claimant had planned a quiz for the prisoners. Mr Kirwan took over and made them play charades. One of the clues was "papa don't preach." The Claimant thought this was directed at him.*
343. We have found that this was a wholly innocuous incident outside Mr Kirwan's control. The acts of the prisoner were not acts of Mr Kirwan and for these reasons this allegation is unsuccessful and is dismissed.
344. *5.24 On 17 November 2020 Mr Kirwan instructed the Claimant to go on the COVID wing. The Muslim and Pagan chaplains were not required to do so.*
345. We have found that the claimant was not exclusively asked to go into the reception unit (rather than Covid wing). This was a job shared between all chaplains. Consequently, the claimant was not treated less favourably than anyone else and this allegation is unsuccessful and is dismissed.



346. *5.25 On 24 February 2021 Joanna threatened to throw the Claimant through a wall when his personal alarm went off.*
347. We have found that if this did happen, firstly it was hyperbole rather than a threat and, in any event, was because the claimant persisted in setting off his personal alarm in an enclosed space and not in any way related to his religious belief. For these reasons this allegation is unsuccessful and is dismissed.
348. *5.26 Mr Kirwan put the Claimant on a performance management process, pursued that process, increased the Claimant's workload and made him attend regular meetings.*
349. We have made detailed findings of fact about the performance management process and we have set out our conclusions about the claimant's claim of unfair dismissal. Mr Kirwan had a legitimate and genuine reason for implementing and seeing through the performance management process. This was wholly because of his genuine concerns about the claimant's performance.
350. Similarly, in respect of his dismissal, this was a reasonable decision of Mr Wheatley based on the evidence of Mr Kirwan and of the claimant.
351. The performance management process and the decision to dismiss the claimant were wholly unconnected with his religious belief and were solely because of the respondent's genuine and reasonable concerns about his performance. For these reasons this allegation, and the allegation that the claimant's dismissal was direct discrimination because of his religious belief, are both unsuccessful and are dismissed.
352. For these reasons, the claimant's claims of direct discrimination because of his religious belief are all unsuccessful and are dismissed.

**Harassment related to sexual orientation (Equality Act 2010 section 26)**

353. 7.1 Did the respondent do the following things:
354. 7.1.1 See paragraphs 5.3, 5.4 and 5.5 of the CMO's
355. 7.2 If so, was that unwanted conduct?
356. 7.3 Did it relate to sexual orientation?
357. 7.4 Alternatively was it of a sexual nature?
358. 7.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
359. 7.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

360. *5.3 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. The Claimant is heterosexual. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*
361. As set out above, we have found that this did not happen as the claimant alleged. Mr Kirwan was not asking about the claimant's sexuality, he was making perfectly proper enquiries about the claimant's perception of the prisoner's intentions. This was for the reason of assessing the seriousness of the misconduct of the prisoner.
362. The act was not related in any way at all to the claimant's sexual orientation.
363. As the claimant recall is, it was related to sexual orientation. It is just about arguable that the conversation was related in a tenuous way to the sexual orientation of the prisoner, although that was not what the conversation was, strictly speaking, about.
364. We have difficulty in believing that that conversation could have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We have found that it did not have the purpose as the conversation was, in our view, wholly innocuous. However, even if the claimant's understanding of the conversation did have that effect, it was not reasonable for it to do so. It was, as we have said, a perfectly proper conversation to have in the context of a high security prison.
365. This allegation of harassment related to sexual orientation is therefore unsuccessful and is dismissed.
366. *5.4 On 1 June 2019 Mr Kirwan suggested that the Claimant visit a prisoner in the mortuary and "have his way with the body." He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*
367. As set out above, we have found that, on the balance of probabilities, the claimant has misremembered this conversation and that it did not happen as described. For that reason, this allegation is dismissed.
368. We note that if it had happened, it would have been unwanted and could quite easily have had the effect (regardless of the purpose) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and it would have been reasonable for it to do so.
369. We cannot find any basis on which such a comment could be said to be related to the claimant's sexual orientation - namely being heterosexual. We refer to the definition of sexual orientation set out above. Merely saying something offensive, without more context, about an abhorrent or criminal sexual act is not sufficient to relate the comment to sexual orientation and

the claimant was unable to explain how such a comment, even if it had been said, was related to his sexual orientation of being a heterosexual man.

370. This allegation is also, therefore, dismissed.

371. *5.5 On 13 August 2020 when they were having lunch in the pub with a third colleague Mr Kirwan asked the Claimant if he enjoyed “gay films.” The Claimant says he found this disrespectful and intrusive. He says Mr Kirwan’s behaviour was unwanted conduct related to sexual orientation*

372. This conversation, even as described by the claimant, was wholly innocuous. It was what it appeared to be – a discussion about a film. It may have been unwanted conduct, but in our view and as we have found the incident occurred, it was extremely unlikely that it had the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and, even if it did, it was not objectively reasonable for it to do so.

373. For these reasons, the claimant’s claims of harassment related to sexual orientation are unsuccessful.

#### **Harassment related to disability (Equality Act 2010 section 26)**

374. 8.1 Did the respondent do the following things:

375. *5.7 In about August 2019 Mr Kirwan made him watch Joanna set up the first response chaplain whiteboard, a trivial task he had done many times before. He says he was targeted because of having dyslexia. Nobody else was made to watch and it was “to do with words.” He felt that Mr Kirwan was “making a mockery” of his dyslexia.*

376. This may have been unwanted conduct, but for the reasons set out above in relation to direct discrimination this was wholly unrelated to disability. Mr Kirwan did not know of the claimant’s condition and he had a genuine reason for undertaking this act.

377. This allegation is unsuccessful and is dismissed.

378. *5.8 From about March 2020 to about March 2021 Mr Kirwan made him write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan). The Claimant believes Mr Kirwan was targeting him because of his dyslexia. He is not saying that there was a failure to make reasonable adjustments, this is about picking on him.*

379. As set out above, we have found that Mr Kirwan did not act in this way. For this reason, this allegation is unsuccessful and is dismissed.

380. *5.9 On 25 August 2020 Mr Kirwan called him an “idiot” in front of two prison officers and a prisoner.*

381. We have found that this did not happen as alleged. Anything else that Mr Kirwan did say may have been unwanted but the only thing that could connect this allegation to the claimant's asserted disability is the use of the word idiot. Had that happened and had Mr Kirwan known about the claimant's condition it is entirely possible that this could fall into the definition of harassment. However, on the basis of the facts we have found this allegation of harassment is unsuccessful and is dismissed.
382. *5.10 Mr Kirwan frequently ridiculed the written materials the Claimant produced, including: (1) on 22 March 2021 in a meeting in the multi-faith room attended by a manager, the Claimant's trade union representative and a note-taker Mr Kirwan twice called his materials "embarrassing"; in chaplaincy meetings in front of the other chaplains Mr Kirwan regularly referred to the Claimant's materials as "embarrassing".*
383. In our view, referring to the claimant's materials as being potentially embarrassing for the department and saying that Mr Kirwan was embarrassed by and for the claimant by the way he presented at the training event were unwanted conduct.
384. We have found that by the date of this incident, Mr Kirwan was aware of the claimant's asserted disability.
385. In our view, however, the comments are not related to disability. The comments are specific and about notes required for wider use and the claimant's presentation. The latter cannot in any way be related, as far as we can see, to the claimant's asserted disability. It was obviously about the claimant's presentation and apparent lack of enthusiasm for the training.
386. The reference to written materials being embarrassing *could* be related to dyslexia. To that extent (assuming for these purposes that the claimant was disabled by reason of dyslexia) the burden of proof is reversed – the claimant has shown facts from which we could conclude that the conduct was related to disability.
387. However, in our view, the respondent has show that in fact the conduct was in no way related to the claimant's asserted disability. It is clear from the whole context, and as found, that this was solely about the claimant's performance – it was about trying to get the claimant to understand the importance of improving his performance – and in our view the claimant recognised that at the time. He refers in more contemporaneous documentation to that being "inaccurate, emotionally loaded, designed to inculcate shame. It is also focussing on his disposition rather than the content of the work produced and therefore not helpful".
388. The question of whether the conduct was *related to* is an objective one for us and the claimant's perception of this aspect is not determinative but in our view if the claimant has not related it to his asserted disability, that tends to support our conclusion that his was just generally unwanted and unhelpful conduct rather than conduct related to any disability.
389. For these reasons, this allegation of harassment is unsuccessful and is dismissed.

390. Consequently, the claimant's claims of harassment related to disability are unsuccessful and are dismissed.

**Harassment related to religion or belief (Equality Act 2010 section 26)**

391. 9.1 Did the respondent do the following things:

392. *5.11 The Claimant is a Church of England priest. Mr Kirwan the lead chaplain is a member of the Roman Catholic church. The Claimant says that Mr Kirwan treated him less favourably or harassed him because of his Protestant or Church of England faith. His colleague Joanna was also a member of the Roman Catholic church and the Claimant says that eventually she joined in with Mr Kirwan's treatment. His complaints are as follows.*

393. *5.12 From the start of his employment until 21 September 2020 the Claimant was excluded from the chaplaincy database. Everybody else had access. He asked about it regularly and was fobbed off.*

394. As set out above the claimant was not excluded from the chaplaincy inbox. To the extent he did not have access this was wholly unrelated to his religious belief.

395. For these reasons this allegation is unsuccessful and is dismissed.

396. *5.14 Mr Kirwan was rude about the Claimant's sermons. For example, on 14 March 2019 and on other occasions he described them as "cold vegetables"; and on 18 June 2019 he referred to "laughing monkeys" when talking about the Claimant's sermon. Mr Kirwan also stuck posters up which were of a group of nuns having a cigarette and making rude remarks about the sermon they had heard. The Claimant was the only person who preached and he believed the posters were directed at him. The governor made Mr Kirwan remove most of the posters, but Mr Kirwan insisted on keeping them up in Psychology and the Chaplaincy.*

397. We have found that the conduct complained of did not happen in the way alleged except for the comments about the claimant's sermons being 'cold vegetables'.

398. In our view, this comment was unrelated to the claimant's religious belief. The fact that the subject matter was inherently linked to the claimant's religious belief is not, in the context of that being the claimant's job, enough of itself to make the unwanted conduct itself related to the claimant's religious belief.

399. The reason for, and the only reason for, the comment was to comment on the quality of the claimant's work. Had the claimant's work in the prison been something else that required engagement with prisoners – facilitating a drama workshop for example – it would be inconceivable that the comment as alleged could reasonably be perceived by itself as relating to the claimant's religious belief.

400. The comment was undoubtedly unwanted conduct but was unrelated to the claimant's religious belief.

401. For these reasons this allegation of harassment is unsuccessful and is dismissed.
402. *5.15 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. He did not take appropriate action and did not want the Claimant to do so.*
403. As set out above, this did not happen as alleged. The actions of Mr Kirwan were wholly reasonable. They were unconnected with the claimant's religious belief and they were not objectively capable of causing the proscribed effects under s26 Equality Act 2010.
404. For these reasons this allegation is unsuccessful and is dismissed.
405. *5.16 Mr Kirwan refused to allow the Claimant to renew his vows on Maundy Thursday 2019.*
406. We have found that this did not happen as alleged but, in any event, to the extent that Mr Kirwan did prevent the claimant having any time off this was for a legitimate reason and was unrelated to the claimant's religious belief. The fact that the renewal of vows was an inherently religious act is not of itself sufficient to make Mr Kirwan's refusal of time off "related to" the claimant's religious belief.
407. For these reasons this allegation is unsuccessful and is dismissed.
408. *5.17 In May 2019 Mr Kirwan encouraged the Claimant to celebrate Ascension Day by asking him to put together a list of prisoners for the service, but he then took the list off the Claimant and told him he would not be doing the service. The Claimant was not permitted to celebrate Ascension Day with the Anglican prisoners.*
409. We have found that the actions of Mr Kirwan in relation to this were perfectly reasonable. Consequently, objectively, they were not capable of causing the proscribed effect under s 26 Equality Act 2010.
410. In any event, and in common with the previous allegation, the fact that the celebration of ascension day is inherently connected with the claimant's religious beliefs is not of itself sufficient to make Mr Kirwan's acts – which were wholly in accordance with the Prison Service instructions – related to the claimant's religious belief.
411. For these reason, this allegation of harassment is unsuccessful and is dismissed.
412. *5.18 In October 2019 Mr Kirwan would not allow the Claimant to attend a study day with Anglican colleagues.*
413. We have found that Mr Kirwan had legitimate reasons for refusing the claimant permission to attend this event. This was a reasonable management decision. It was unrelated to the claimant's religious belief and

was not capable of causing the proscribed effects under s 26 Equality Act 2010.

414. For these reasons this allegation is unsuccessful and is dismissed.
415. *5.19 On 7 January 2020 when the Claimant went to the toilet, Mr Kirwan positioned himself so that he could see the Claimant entering and leaving the room, so as to monitor him.*
416. We have found that this allegation did not happen. For these reasons this allegation of harassment is unsuccessful and is dismissed.
417. *5.20 In February 2020 Mr Kirwan would not allow the Claimant to attend a study day with an Anglican nun.*
418. This allegation is the same as the allegation relating to October 2019 (5.18) above and for the same reasons this allegation of harassment is unsuccessful and is dismissed.
419. *5.21 From about March 2020 to about March 2021 Mr Kirwan made the Claimant write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan).*
420. We have found that this did not happen and for these reasons this allegation of harassment is unsuccessful and is dismissed.
421. *5.23 On 24 September 2020 the Claimant had planned a quiz for the prisoners. Mr Kirwan took over and made them play charades. One of the clues was "papa don't preach." The Claimant thought this was directed at him.*
422. As set out above, this was not the act of Mr Kirwan (or the respondent) and was a wholly innocuous incident that the claimant has misinterpreted.
423. For these reasons this allegation of harassment is unsuccessful and is dismissed.
424. *5.24 On 17 November 2020 Mr Kirwan instructed the Claimant to go on the COVID wing. The Muslim and Pagan chaplains were not required to do so.*
425. We have found that this did not happen as alleged as set out above. For these reasons this allegation of harassment is unsuccessful and is dismissed.
426. *5.25 On 24 February 2021 Joanna threatened to throw the Claimant through a wall when his personal alarm went off.*
427. This was undoubtedly unwanted conduct. However, it was unrelated to the claimant's religious belief. It was solely related to the claimant's acts in setting off his personal alarm in a closed space. We have heard nothing to link any of the acts (whether as alleged or otherwise) of Ms Thompson-Vear to the claimant's religious belief.

428. The fact that Ms Thompson-Vear is Roman Catholic and the claimant is Anglican does not, of itself, come anywhere close to establishing such a link.
429. For this reason, this allegation of harassment is unsuccessful and is dismissed.
430. Consequently, the claimant's allegations of harassment relating to religious belief are unsuccessful and are dismissed.

**Discriminatory dismissal generally**

431. We have addressed the allegation that the claimant's dismissal was discrimination because of his religious belief. For the avoidance of doubt, we find that the claimant's dismissal was not discrimination because of the claimant's sexual orientation or his asserted disability. It was because of the reasons as explored at length above and unrelated to any protected characteristic of the claimant.
432. For similar reasons, and for the avoidance of doubt, we find that the claimant's dismissal did not amount to harassment related to any protected characteristic.

**Time limits as necessary**

433. Many of the allegations are out of time. However, as the claimant's claims are unsuccessful it is not necessary for us to address that point.

Employment Judge **Miller**

16 February 2023

**Appendix - Consolidated list of issues**

**1. Time limits**



1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 March 2021 may not have been brought in time.

1.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

## **2. Unfair dismissal**

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (performance) or some other substantial reason.

2.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 The respondent adequately warned the claimant and gave the claimant a chance to improve;

2.2.2 Dismissal was within the range of reasonable responses.

*5.1 In very general terms, he says his dismissal was unfair because the performance issues raised by Mr Kirwan were not genuine; his colleague Joanna (a Roman Catholic chaplain) was treated differently; he made a complaint about bullying and was treated differently; and the performance process was unfair.*

*5.2 He says that many of the things that led to his dismissal were discriminatory and that his dismissal was also discriminatory.*

## **3. Remedy for unfair dismissal**

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

- 3.1.3 If not, for what period of loss should the claimant be compensated?
- 3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 3.1.5 If so, should the claimant's compensation be reduced? By how much?
- 3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 3.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
- 3.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 3.1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 3.2 What basic award is payable to the claimant, if any?
- 3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

#### **4. Direct discrimination – sexual orientation (Equality Act 2010 section 13)**

4.1 Did the respondent do the following things:

4.1.1 See paragraphs 5.3, 5.4 and 5.5 of the CMO's.

*5.3 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. The Claimant is heterosexual. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

*5.4 On 1 June 2019 Mr Kirwan suggested that the Claimant visit a prisoner in the mortuary and "have his way with the body." He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

*5.5 On 13 August 2020 when they were having lunch in the pub with a third colleague Mr Kirwan asked the Claimant if he enjoyed "gay films." The Claimant says he found this disrespectful and intrusive. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says has not named anyone in particular who he said was treated better than he was.

4.3 If so, was it because of sexual orientation?

## **5. Direct discrimination - disability (Equality Act 2010 section 13)**

5.1 Did the respondent do the following things:

5.1.1 See paragraphs 5.6 (5.7) to 5.10 of the CMO's.

*5.7 In about August 2019 Mr Kirwan made him watch Joanna set up the first response chaplain whiteboard, a trivial task he had done many times before. He says he was targeted because of having dyslexia. Nobody else was made to watch and it was "to do with words." He felt that Mr Kirwan was "making a mockery" of his dyslexia.*

*5.8 From about March 2020 to about March 2021 Mr Kirwan made him write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan). The Claimant believes Mr Kirwan was targeting him because of his dyslexia. He is not saying that there was a failure to make reasonable adjustments, this is about picking on him.*

*5.9 On 25 August 2020 Mr Kirwan called him an "idiot" in front of two prison officers and a prisoner. ?????*

*5.10 Mr Kirwan frequently ridiculed the written materials the Claimant produced, including: (1) on 22 March 2021 in a meeting in the multi-faith room attended by a manager, the Claimant's trade union representative and a note-taker Mr Kirwan twice called his materials "embarrassing"; in chaplaincy meetings in front of the other chaplains Mr Kirwan regularly referred to the Claimant's materials as "embarrassing".*

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he has not named anyone in particular who he said was treated better than he was.

5.3 If so, was it because of disability?

## 6. Direct discrimination – religion or belief (Equality Act 2010 section 13)

6.1 Did the respondent do the following things:

6.1.1 See paragraphs 5.11 to 5.26 of the CMO's.

*5.11 The Claimant is a Church of England priest. Mr Kirwan the lead chaplain is a member of the Roman Catholic church. The Claimant says that Mr Kirwan treated him less favourably or harassed him because of his Protestant or Church of England faith. His colleague Joanna was also a member of the Roman Catholic church and the Claimant says that eventually she joined in with Mr Kirwan's treatment. His complaints are as follows.*

*5.12 From the start of his employment until 21 September 2020 the Claimant was excluded from the chaplaincy database. Everybody else had access. He asked about it regularly and was fobbed off.*

*5.13 The Claimant accepts that as the lead Anglican chaplain and the only ordained priest, he would expect to have to work Christmas Day and Easter Sunday. However, he says that he was required to work all the other bank holidays as well. Joanna was not.*

*5.14 Mr Kirwan was rude about the Claimant's sermons. For example, on 14 March 2019 and on other occasions he described them as "cold vegetables"; and on 18 June 2019 he referred to "laughing monkeys" when talking about the Claimant's sermon. Mr Kirwan also stuck posters up which were of a group of nuns having a cigarette and making rude remarks about the sermon they had heard. The Claimant was the only person who preached and he believed the posters were directed at him. The governor made Mr Kirwan remove most of the posters, but Mr Kirwan insisted on keeping them up in Psychology and the Chaplaincy.*

*5.15 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. He did not take appropriate action and did not want the Claimant to do so.*

*5.16 Mr Kirwan refused to allow the Claimant to renew his vows on Maundy Thursday 2019.*

*5.17 In May 2019 Mr Kirwan encouraged the Claimant to celebrate Ascension Day by asking him to put together a list of prisoners for the service, but he then took the list off the Claimant and told him he would not be doing the service. The Claimant was not permitted to celebrate Ascension Day with the Anglican prisoners.*

*5.18 In October 2019 Mr Kirwan would not allow the Claimant to attend a study day with Anglican colleagues.*

*5.19 On 7 January 2020 when the Claimant went to the toilet, Mr Kirwan positioned himself so that he could see the Claimant entering and leaving the room, so as to monitor him.*

5.20 In February 2020 Mr Kirwan would not allow the Claimant to attend a study day with an Anglican nun. **See 5.18 – same event**

5.21 From about March 2020 to about March 2021 Mr Kirwan made the Claimant write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan).

5.22 In summer 2020 Joanna revved her car behind him when he was at his car boot.

5.23 On 24 September 2020 the Claimant had planned a quiz for the prisoners. Mr Kirwan took over and made them play charades. One of the clues was “papa don’t preach.” The Claimant thought this was directed at him.

5.24 On 17 November 2020 Mr Kirwan instructed the Claimant to go on the COVID wing. The Muslim and Pagan chaplains were not required to do so.

5.25 On 24 February 2021 Joanna threatened to throw the Claimant through a wall when his personal alarm went off.

5.26 Mr Kirwan put the Claimant on a performance management process, pursued that process, increased the Claimant’s workload and made him attend regular meetings.

6.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says in relation to 5.11 of the CMO’s he was treated worse than Joanna Thompson. The claimant says in relation to paragraph 5.12 of the CMO’s he was treated worse than fellow chaplains. The claimant says in relation to paragraph 5.13 of the CMO’s he was treated worse than Joanna Thompson. The claimant says that in relation to paragraph

5.21 of the CMO’s he was treated worse than Joanna Thompson. The claimant says in relation to paragraph 5.2.4 of the CMO’s that he was treated worse than Muslim and Pagan chaplains. The claimant has not named anyone in particular in relation to paragraphs 5.1.4, 5.1.5, 5.1.6, 5.1.7, 5.18, 5.19, 5.20, 5.22, 5.23, 5.25 and 5.26 who he says was treated better than he was.

6.3 If so, was it because of religion or belief?

## **7. Harassment related to sexual orientation (Equality Act 2010 section 26)**

7.1 Did the respondent do the following things:

7.1.1 See paragraphs 5.3, 5.4 and 5.5 of the CMO's

*5.3 On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He asked the Claimant how it made him feel and seemed to dwell on it. The Claimant is heterosexual. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

*5.4 On 1 June 2019 Mr Kirwan suggested that the Claimant visit a prisoner in the mortuary and "have his way with the body." He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation because it undermined his heterosexual identity.*

*5.5 On 13 August 2020 when they were having lunch in the pub with a third colleague Mr Kirwan asked the Claimant if he enjoyed "gay films." The Claimant says he found this disrespectful and intrusive. He says Mr Kirwan's behaviour was unwanted conduct related to sexual orientation*

7.2 If so, was that unwanted conduct?

7.3 Did it relate to sexual orientation?

7.4 Alternatively was it of a sexual nature?

7.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **8. Harassment related to disability (Equality Act 2010 section 26)**

8.1 Did the respondent do the following things:

8.1.1 See paragraphs 5.7, 5.8, 5.9 and 5.10 of the CMO's.

*5.7 In about August 2019 Mr Kirwan made him watch Joanna set up the first response chaplain whiteboard, a trivial task he had done many times before. He says he was targeted because of having dyslexia. Nobody else was made to watch and it was "to do with words." He felt that Mr Kirwan was "making a mockery" of his dyslexia.*

*5.8 From about March 2020 to about March 2021 Mr Kirwan made him write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan). The Claimant believes Mr Kirwan was targeting him because of his dyslexia. He is not saying that there was a failure to make reasonable adjustments, this is about picking on him.*

5.9 On 25 August 2020 Mr Kirwan called him an “idiot” in front of two prison officers and a prisoner.

5.10 Mr Kirwan frequently ridiculed the written materials the Claimant produced, including: (1) on 22 March 2021 in a meeting in the multi-faith room attended by a manager, the Claimant’s trade union representative and a note-taker Mr Kirwan twice called his materials “embarrassing”; in chaplaincy meetings in front of the other chaplains Mr Kirwan regularly referred to the Claimant’s materials as “embarrassing”.

8.2 If so, was that unwanted conduct?

8.3 Did it relate to disability?

8.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **9. Harassment related to religion or belief (Equality Act 2010 section 26)**

9.1 Did the respondent do the following things:

9.1.1 See paragraphs 5.11, 5.12, 5.14, 5.15, 5.16, 5.17, 5.18, 5.19, 5.20, 5.21, 5.23, 5.24 and 5.25 of the CMO’s

5.11 *The Claimant is a Church of England priest. Mr Kirwan the lead chaplain is a member of the Roman Catholic church. The Claimant says that Mr Kirwan treated him less favourably or harassed him because of his Protestant or Church of England faith. His colleague Joanna was also a member of the Roman Catholic church and the Claimant says that eventually she joined in with Mr Kirwan’s treatment. His complaints are as follows.*

5.12 *From the start of his employment until 21 September 2020 the Claimant was excluded from the chaplaincy database. Everybody else had access. He asked about it regularly and was fobbed off.*

5.14 *Mr Kirwan was rude about the Claimant’s sermons. For example, on 14 March 2019 and on other occasions he described them as “cold vegetables”; and on 18 June 2019 he referred to “laughing monkeys” when talking about the Claimant’s sermon. Mr Kirwan also stuck posters up which were of a group of nuns having a cigarette and making rude remarks about the sermon they had heard. The Claimant was the only person who preached and he believed the posters were directed at him. The governor made Mr Kirwan remove most of the posters, but Mr Kirwan insisted on keeping them up in Psychology and the Chaplaincy.*

5.15 *On 11 March 2019 a prisoner touched the Claimant inappropriately on his leg. Mr Kirwan seemed more interested in exploring any sexual response the Claimant may have had than taking appropriate action against the prisoner. He*

*asked the Claimant how it made him feel and seemed to dwell on it. He did not take appropriate action and did not want the Claimant to do so.*

*5.16 Mr Kirwan refused to allow the Claimant to renew his vows on Maundy Thursday 2019.*

*5.17 In May 2019 Mr Kirwan encouraged the Claimant to celebrate Ascension Day by asking him to put together a list of prisoners for the service, but he then took the list off the Claimant and told him he would not be doing the service. The Claimant was not permitted to celebrate Ascension Day with the Anglican prisoners.*

*5.18 In October 2019 Mr Kirwan would not allow the Claimant to attend a study day with Anglican colleagues.*

*5.19 On 7 January 2020 when the Claimant went to the toilet, Mr Kirwan positioned himself so that he could see the Claimant entering and leaving the room, so as to monitor him.*

*5.20 In February 2020 Mr Kirwan would not allow the Claimant to attend a study day with an Anglican nun.*

*5.21 From about March 2020 to about March 2021 Mr Kirwan made the Claimant write work-related materials from scratch. There were written materials available through Head Office or the Anglican adviser but Mr Kirwan would not let him use them. Joanna was able to use materials that had already been prepared (including by Mr Kirwan).*

*5.23 On 24 September 2020 the Claimant had planned a quiz for the prisoners. Mr Kirwan took over and made them play charades. One of the clues was "papa don't preach." The Claimant thought this was directed at him.*

*5.24 On 17 November 2020 Mr Kirwan instructed the Claimant to go on the COVID wing. The Muslim and Pagan chaplains were not required to do so.*

*5.25 On 24 February 2021 Joanna threatened to throw the Claimant through a wall when his personal alarm went off.*

9.2 If so, was that unwanted conduct?

9.3 Did it relate to religion or belief?

9.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **10. Remedy for discrimination**

10.1 What financial losses has the discrimination caused the claimant?



10.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.3 If not, for what period of loss should the claimant be compensated?

10.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

10.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

10.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

10.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10.8 Did the respondent or the claimant unreasonably fail to comply with it?

10.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

10.10 By what proportion, up to 25%?

10.11 Should interest be awarded? How much?