Neutral Citation Number: [2023] EAT 89

Case No: EA-2020-000896-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 June 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MRS KRISTIE HIGGS **Appellant**

- and –

FARMOR'S SCHOOL **Respondent**

-and-

THE ARCHBISHOPS' COUNCIL OF THE CHURCH OF ENGLAND **Intervenor**

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Mr Richard O'Dair of counsel (instructed by Andrew Storch Solicitors) for the **Appellant**
Ms Debbie Grennan of counsel (instructed by Browne Jacobson LLP) for the **Respondent**
Ms Sarah Fraser Butlin of counsel (instructed by Herbert Smith Freehills LLP) for the **Intervenor**

Hearing date: 16 March 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 16 June 2023

Summary

Religion and belief – direct discrimination; section 13 Equality Act 2010 – harassment; section 26 Equality Act 2010

The claimant worked as a pastoral administrator and work experience manager in the respondent secondary school. After complaints were received relating to Facebook posts the claimant had made relating to relationships education in primary schools, she was suspended and, after a disciplinary investigation, subsequently dismissed from her employment. The claimant complained that these actions amounted to direct discrimination because of, or to harassment relating to, her protected beliefs. The ET concluded, however, that the measures taken by the respondent had been due to its concerns that someone reading the claimant's posts could reasonably consider she held homophobic and transphobic views (which she denied) and that the reason for its actions was, therefore, not because of, or related to, the claimant's protected beliefs. The claimant appealed.

Held: *allowing the appeal*

Although entitled to find that there had been one concern underlying each of the decisions made (suspension, disciplinary investigation, dismissal, refusal of appeal), the ET had failed to engage with the question identified in **Eweida and ors v United Kingdom** (2013) 57 EHRR 8; had it done so, it would have concluded that there was a close or direct nexus between the claimant's Facebook posts and her protected beliefs. That being so, in then determining the reason why the respondent had acted as it had, the ET had been required to assess whether those actions were prescribed by law and were necessary for the protection of the rights and freedoms of others, recognising the essential nature of the claimant's rights to freedom of belief and freedom of expression (articles 9 and 10 **European Convention of Human Rights**). The proportionality assessment that the ET was thus required to undertake (asking the questions identified in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700) was necessary in determining whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were in fact due to a justified objection to the manner of that manifestation (see **Page v NHS Trust Development Authority** [2021] EWCA Civ

255). As the ET had erred in its approach to the determination of the "*reason why*" question in this case, this matter would be remitted for re-hearing on this issue. Guidance given as to the approach to be adopted.

The Honourable Mrs Justice Eady DBE, President:

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Introduction

1. This appeal raises questions as to the approach to be taken to the determination of claims of direct discrimination because of, or harassment related to, religion or belief. More broadly, these proceedings raise issues relating to the manifestation of a belief and the exercise of free speech. The particular facts of the case may also be seen to touch on matters of current public debate relating to same sex relationships, transgender issues and the way such matters are addressed in schools. I make clear, however, that I express no view as to the merits of either side of that debate; the role of the Employment Appeal Tribunal is limited to the determination of such questions of law as arise from the judgment of the Employment Tribunal ("ET") under appeal.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is my decision on the claimant's appeal against the decision of the Bristol ET (Employment Judge Reed, sitting with members Mrs England and Ms Maidment, from 21-24 September 2020, with an additional day in chambers). By its reserved judgment, sent to the parties on 6 October 2020, the ET dismissed the claimant's claims of direct religious discrimination and of unlawful harassment. The claimant appeals against that decision, contending that the ET applied the wrong legal test, failed to take into account relevant matters and had regard to factors that were not relevant, and/or reached a perverse

conclusion. The respondent resists the appeal, although at the oral hearing it conceded that a question arose as to whether the ET had properly approached its task.

3. Both the claimant and respondent were represented before the ET, albeit that Mr O'Dair did appear for the claimant below, she was then represented by a consultant; the respondent has been represented by Ms Grennan throughout. The Archbishops' Council of the Church of England was not represented below but has been given permission to make general submissions as an intervenor on this appeal and appears by Ms Fraser Butlin; it is neutral as to the particular merits of the claims in this case.

The Facts

4. The respondent is an academy trust state secondary school in Gloucestershire. It had employed the claimant since 2012 and, at the relevant time, she carried out two roles: (1) pastoral administrator, which required her to work with pupils who had been removed from class and who might be considered vulnerable; (2) work experience manager, in which capacity she would have contact with both pupils and parents. I understand it to be common ground that the claimant would at times work alongside pupils who had lesbian, gay, bisexual and/or transgender ("LGBT") characteristics, or were questioning whether they did so.

5. On 26 October 2018, the Head Teacher of the respondent, Mr Evans, received an email from a parent of pupils at the school, complaining about a Facebook post the claimant had made. The content of the post was as follows:

> "PLEASE READ THIS! THEY ARE BRAINWASHING OUR CHILDREN! ** On November 7th the Government Consultation into making Relationships Education mandatory in primary schools, and Relationships and Sex Education mandatory in secondary schools closes. Which means, for example, that children will be taught that all relationships are equally valid and 'normal', so that same sex marriage is exactly the same as traditional marriage, and that

> gender is a matter of choice, not biology, so that it's up to them what sex they are.
> At the same time it means that expressing and teaching fundamental Christian beliefs, relating to the creation of men and women and marriage will in practice become forbidden - because they conflict with the new morality and are seen as indoctrination into unacceptable religious bigotry.
> Which means that freedom of belief will be destroyed, with freedom of speech permitted only for those who toe the party line!
> We say again, this is a vicious form of totalitarianism … aimed at suppressing Christianity and removing it from the public arena.
> ***Please sign this petition, they have already started to brainwash our innocent wonderfully created children and its happening in our local primary school now***"

I understand that the exhortations to read the post, and then to sign the petition, were added by the claimant to text that had otherwise been posted by someone else. Beneath the text was a link to a petition organised by CitizenGo.Org, which was described as being concerned to:

> "Uphold the right of parents to have children educated in line with their religious beliefs. …"

6. The complainant expressed their concern:

> "… that a member of your staff who works directly with children has been posting homophobic and prejudiced views against the lgbt community on Facebook … [and] that this individual may exert influence over the vulnerable pupils that may end up in isolation for whatever reason. I find these views offensive and I am sure that when you look into it, you will understand my concern. …"

7. Mr Evans responded to the complainant on 29 October 2018, saying it would be helpful to forward screenshots of *"any similarly offensive posts"*. The complainant emailed back, attaching screenshots of other Facebook posts made by the claimant, further explaining:

> "I'm aware that not everyone has liberal views like myself but I do feel that people working directly with children should refrain from posting this type of view on social media. I know of several children at Farmors who might fit into the category of person your staff member seems to find so obnoxious, friends of my children even. …"

8. The additional screenshots provided to Mr Evans were of re-posts by the claimant of views expressed by others (seemingly concerned with materials said to be used in schools in the United States of America), as follows:

> "While normal Americans are busy at work trying to provide for their families, liberal school systems are busy indoctrinating their children. Kindergarten and first grade children are being primed for a gender fluid society. Of course, the schools are introducing the propaganda in the name of anti-bullying campaigns, but we know better.
> They are busy recruiting children for the transgender roster. Their agenda is not about bullying. They are using our children to promote their gender free society of madness.
> … They are stealing the innocence of our children with a devious scheme to supplant traditional gender roles by differentiating a child's gender assignment at birth with his perceived gender.
> …
> … The far-left zealots have hijacked the learning environment, and they insist on cramming their perverted vision of gender fluidity down the throats of unsuspecting school children who are a government mandated captive audience.
> …
> The LBGT crowd with the assistance of progressive school systems are destroying the minds of normal children by promoting mental illness. Delusional thinking is a form of psychotic thinking, and we have professionals promoting it to our young kids."

9. On 31 October 2018, Mr Evans spoke to the claimant about the screenshots that had been forwarded to him and she confirmed she had made these posts on her personal Facebook account, accepting it was possible they might have been seen by parents of pupils at the respondent school, albeit she had not said anything about the school itself. Asked whether the posts might be considered "*offensive or prejudiced by other people*", the claimant was recorded as responding:

> "Yes. I am not against gay, lesbian or transgender people. It's about making sure people are aware of what's going on in the primary school. It's not about the schools, they are just following government policy, it's about the government."

By her reference to "*the primary school*", I understand that the claimant was referring to a Church of England primary school attended by her younger child.

The claimant further said:

> "I don't regret making the posts, it's about the children in the primary school. I don't have any issues with gay, lesbian or transgender people, I love all people."

10. Mr Evans suspended the claimant pending an investigation. The claimant contends that the ET failed to properly engage with the reason why she was suspended and it is thus relevant to note what Mr Evans said in his evidence below. In responding to a point raised by the ET, Mr Evans agreed that, in the complaint he had received: "*There is no reference to manner as opposed to content*" and confirmed that there would have been "*no prospect of disciplinary action*" in the case of "*a complaint … made about posts expressing opposite views, for example applauding same sex marriage*", explaining: "*… under the Sex and Relationships Education provisions, there is a duty on schools to deliver that*".

11. The investigation was carried out by a Ms Dorey (an employee of the respondent). Interviewed on 8 November 2018, the claimant again confirmed she had made the posts in question on her Facebook account, explaining she had wanted these to be seen by other parents at her son's primary school. Acknowledging:

> "Brainwashing was not the best language to use"

the claimant explained that:

> "… the post is about what the government is trying to do in my son's Christian primary schools."

pointing out:

> "I copied and pasted this – they are not my words, I should have used my own wording or put a link instead. I believe marriage is between a man and a woman, I am not having a go at gays as there are gay people who think like that too."

Asked whether she considered that her posts may be considered offensive or prejudiced by other people, the claimant responded:

> "I know that there are transgenders and gays who do have the same beliefs as me. Brainwashing was a bad word to use, I shouldn't have copied and pasted. I am not against gay people, it doesn't say that."

Further asked whether she considered her posts might compromise her position of trust in working with children, some of whom may be LGBT, the claimant answered:

> "No I don't. Students know me and I know gay students, I wouldn't treat any of them any different. … I wouldn't bring this into school."

As for the risk of reputational damage to the respondent, the claimant said:

> "People should know my belief … as people on [Facebook] … are my friends. They would know me as a person and know I wouldn't discriminate. If anything I am being discriminated against as I have shared what the government is doing, this is what I stand for …"

12. On the completion of her investigation, Ms Dorey recommended that this matter should proceed to a disciplinary hearing, explaining:

> "… by choosing to make the posts, and stating that she believes in God's Law and not Man's Law, I believe that, on the balance of probability, this means that she holds views that are discriminatory against groups of people with protected characteristics."

She concluded:

> "Whilst not making any direct discriminatory comments about students at Farmor's School, the posts use discriminatory language and are endorsed by [the claimant] which would indicate that she shares these views. On the balance of probability this would be interpreted that she holds illegal discriminatory views that are not in line with the Equality Act 2010 and therefore has breached the Conduct policy."

13. The reference to the "Conduct policy" was to the respondent's code of conduct, which included, as examples of behaviour that might constitute gross misconduct:

> "any illegal discrimination;

> …
> serious inappropriate use of social media e.g. Facebook or other online comments that could bring the school into disrepute."

14. Again, as it is an issue raised on appeal, it is relevant to note what Ms Dorey said in evidence as to why she considered this should proceed to a disciplinary hearing. In cross-examination, Ms Dorey confirmed she had concluded that "*on a balance of probability [the claimant] … could have held discriminatory views*", that "*she may have broken the Code of Conduct by holding illegal discriminatory views*", and that "*a reader [of the posts] would infer that [the claimant] holds discriminatory beliefs*" including "*that she does not believe in same sex marriage and gender fluidity*".

15. On 19 December 2018, a disciplinary hearing took place before a panel of three governors, chaired by a Mr Conlan. After this, by letter dated 7 January 2019, the claimant was told that she was summarily dismissed because of gross misconduct. Accepting no concerns had been raised relating to the claimant's conduct in her roles within the school, the panel nevertheless concluded she had breached the code of conduct, finding it was clear that, as a result of the Facebook posts (the language of which was "*inflammatory and quite extreme*"), the complainant had taken offence, which was "*clear evidence of discrimination … in the form of harassment*", and that there was a potential risk of harm to the respondent's reputation. Although the claimant had expressed regret for using the words "*brainwashing*", "*delusional thinking*" and "*psychotic thinking*", the panel did not accept that the posts were consistent with the claimant's statement that she was tolerant of others, and noted that she had otherwise said she agreed with the content of the posts and "*upon reflection … would not have acted differently*" (save that she would not have used the word "*brainwashing*" and would have added a link to the articles).

16. The panel noted that the claimant had relied on her rights to freedom of religion and of expression and speech, but did not consider these were unfettered; having concluded that

the claimant's Facebook posts were "*not expressing moderate views*", the panel considered it was "*legitimate for the school to impose restrictions on your rights*". It further rejected the suggestion that the claimant had herself suffered discrimination on religious grounds, finding she had failed to demonstrate an appropriate understanding of the respondent's requirement to respect and tolerate the views of others. In giving evidence before the ET, Mr Conlan further agreed with the proposition (put in cross-examination) that he had considered that the claimant's posts "*may reasonably be perceived as evidencing a negative attitude towards LGBT people*".

17. The claimant appealed against the dismissal decision and a further hearing took place on 13 February 2019, before three different governors of the respondent, chaired by Ms Paton. By letter of 26 February 2019, the claimant was told that her appeal had been dismissed.

The Claim Before the ET and the ET's Decision and Reasoning

18. By her ET claim, lodged on 15 April 2019, the claimant complained that she had suffered unlawful discrimination under the **Equality Act 2010** ("the EqA"), in her suspension, the disciplinary investigation, by her dismissal, and by the rejection of her appeal against dismissal. She claimed that those actions amounted either to direct discrimination because of religion or belief, or to unlawful harassment related to religion or belief.

19. The claimant is a Christian but it was not her case that she had been directly discriminated against, or harassed, for her Christianity *per se*. Rather, she contended that she held the following beliefs (or lack of beliefs), and had suffered direct discrimination or harassment as a result: (a) lack of belief in "*gender fluidity*"; (b) lack of belief that someone could change their biological sex/gender; (c) belief in marriage as a divinely instituted life-long union between one man and one woman; (d) lack of belief in "*same sex marriage*" (recognising that same sex marriage was legal, she believed this was contrary to Biblical teaching); (e)

opposition to sex and/or relationship education for primary school children; (f) a belief that when unbiblical ideas or ideologies are promoted, she should publicly witness to Biblical truth; (g) a belief in the literal truth of the Bible, and in particular Genesis 1v 27: "*God created man in His own image, in the image of God He created him; male and female He created them*" (see as recorded by the ET, paragraph 30).

20. Before the ET, the respondent contended that the beliefs at (a) and (b) did not meet the test for protection under section 10 **EqA** as laid down in **Grainger plc v Nicholson** [2010] ICR 360 EAT. The ET rejected that argument and there is no appeal (or cross-appeal) against this part of the decision.

21. The ET then turned to the question whether the claimant had suffered direct discrimination or harassment as a result of the respondent's actions. Relevant to these questions, the ET had received evidence for the respondent from Mr Evans, Ms Dorey, Mr Conlan and Ms Paton.

22. In reaching its decision, the ET found the claimant had had no real expectation of privacy in relation to her Facebook posts, and the respondent had been entitled to take action in relation to these; reasoning:

> "52. … anyone posting on such a platform as Facebook effectively loses control of their posts, at least when a large number of people can access them."

There is no appeal against this part of the decision.

23. As for direct discrimination because of religion or belief, the ET rejected this claim, reasoning as follows:

(1) The origin of the disciplinary proceedings was the email complaint of 26 October 2018, which described the views re-posted by the claimant as homophobic and prejudiced against the LBGT community; the complainant reasonably inferring that

the views expressed in the posts exhibited animus against the LGBT community (particularly trans people) and reflected the claimant's own views.

(2) There was really only one misconduct allegation, which was that the consequence of the claimant's Facebook posts, expressed in "*florid and provocative language*", was that readers might reasonably conclude she was homophobic and transphobic. The respondent felt that behaviour had the potential for a negative impact in relation to various groups (pupils, parents, staff and the wider community); it was this concern that had brought about the entire process.

(3) The claimant had made clear she had no intention of desisting from making further such posts. It was contended, on the claimant's behalf, that the suggestion that she might do so amounted to an invitation to renounce her beliefs; the ET disagreed, accepting the respondent's evidence that, if those beliefs had been stated on her Facebook page in the form in which they were characterised in the ET proceedings, no further action would have been taken against her.

(4) The disciplinary proceedings, the dismissal decision, and the refusal of the appeal, had all been motivated by the respondent's concern that, by reason of her posts, the claimant would be perceived as holding unacceptable views in relation to gay and trans people, views which she vehemently denied holding. That action was not because of the claimant's beliefs, but was for a completely different reason, namely that as a result of her posts she might reasonably be perceived as holding beliefs (which she denied) that would not qualify for protection under the **EqA**.

24. The ET noted that this was not a claim of unfair dismissal and that it was not concerned with the reasonableness of the respondent's actions; it observed:

> "65. … It might be contended that there was a different course of action the [respondent] could have taken, in the light of the position made clear by [the claimant] in the disciplinary process. Since she denied being homophobic or transphobic, a reasonable employer might have taken the view that justice would be served by her (or [the respondent]) making it clear that if anyone thought she held those views they had got "the wrong end of the stick" – that pupils and parents should not be concerned that she would demonstrate any sort of hostility to gay or trans pupils (or indeed gay or trans parents)."

As the ET recorded, however, this was not a matter canvassed before it:

> "66. … for the simple reason that it was irrelevant to our considerations. Our only task was to decide if there was a causal connection between the [claimant's] beliefs [as recorded] in paragraph 30 and the treatment meted out to [her]."

25. As for the claim of harassment, the ET accepted that the treatment of the claimant was undoubtedly unwanted; the question was whether it was related to the relevant protected characteristic. The ET found that it was:

> "70. … possible to see some sort of connection between her beliefs and that treatment. The posts in question clearly expressed those beliefs, both in relation to same sex marriage and gender fluidity."

It nevertheless concluded that the treatment:

> "… was not a consequence of her expressing those beliefs in a temperate and rational way. Rather it was because [the respondent] felt that the language used in those posts might reasonably lead someone who read them to conclude that she held views (homophobic and transphobic) that she expressly rejected."

26. The ET found that it was not the claimant's protected views that had resulted in disciplinary action but the respondent's:

> "71. … conclusion that her action in posting the items in question might reasonably (and in fact did) lead others to conclude that she held wholly unacceptable views."

27. The ET concluded that the "*causal nexus between the protected characteristic and the actions of the [respondent]*" was not made out: the treatment had not "*related to*" the relevant beliefs.

The Legal Framework

28. By section 13 of the **Equality Act 2010** ("the EqA") 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.

29. Under Section 26 of the **EqA**, 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.

30. Section 4 **EqA** provides that religion or belief are protected characteristics. Pursuant to section10 of the **EqA**, religion means any religion; belief means any religious or philosophical belief.

31. The right to protection in respect of religion or belief was introduced to ensure compliance with EU law; specifically, **Council Directive 2000/78/EC** ("the Framework Directive"). The recitals to the **Framework Directive** emphasise the fundamental values of liberty, democracy, and of economic and social cohesion. Thus, by recital (1), it is provided:

> "…, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

And, by recital (11), it is further acknowledged:

> "Discrimination based on religion or belief … may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons."

32. As the case-law of the Court of Justice makes clear, the protection afforded by the **Framework Directive** in respect of religion and belief applies not only to the holding of a particular faith or belief, but also to its manifestation; thus, in C-188/15 **Bougnaoui v Micropole SA** [2018] ICR 139, it was held:

> "30 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public."

33. Article 2 defines what is meant by "discrimination", which specifically includes direct discrimination and harassment, albeit providing that:

> "(5) This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."

34. The case-law further makes clear that the right to freedom of conscience and religion (laid down at article 10 of the **EU Charter of Fundamental Rights**) forms an integral part of the relevant context in interpreting the **Framework Directive**, corresponding to the right guaranteed under article 9 **ECHR**; see C-344-20 **LF v SCRL** [2023] ICR 133.

35. In domestic law, by virtue of sections 3 and 6 **Human Rights Act 1998**, courts and tribunals are required to read and give effect to statutory provisions in a way which is, so far as possible, compatible with the rights conferred by the **ECHR**. Although the ET has no jurisdiction to entertain a claim for a breach of a claimant's rights under the **ECHR** as such (**Mba v Merton London Borough Council** [2014] ICR 357), it is thus obliged to determine a claim before it compatibly, so far as possible, with those rights; see **Page v NHS Trust Development Authority** [2021] EWCA Civ 255, per Underhill LJ at paragraph 37.

36. In the present case, it is common ground that the relevant rights are those afforded by articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression).

37. By article 9 **ECHR** it is provided:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

38. The European Court of Human Rights has provided clear guidance on the foundational nature of the rights in article 9, as well as the basis for limitations that may be placed on those rights; see (for example) **Sahin v Turkey** (2007) 44 EHRR 5:

> "104. … as enshrined in Art.9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.
> 105. Article 9 does not protect every act motivated or inspired by a religion or belief.
> 106. In democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. This follows both from para.2 of Art.9 and the State's positive obligation under Art.1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.
> 107. … Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.
> 108. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit

> of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead states to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"."

39. Before restrictions to the right to freedom of religion or belief are weighed, the essential nature of the right has to be recognised. The first question is, therefore, whether the conduct complained of involves any limitation on the claimant's article 9 rights. That, in turn, requires an assessment as to whether the actions of the claimant (that is, the actions that caused the response complained of) amount to a manifestation of religion or belief. As the European Court of Human Rights made clear in **Eweida and ors v United Kingdom** (2013) 57 EHRR 8:

> "82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of art.9(1). In order to count as a "manifestation" within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question."

40. Whether or not there is the requisite link between the act in issue and the relevant belief will be a matter for the ET to assess, although its task may not always be straightforward. In particular, there can be a danger of oversimplification in the use of labels (see the observations at paragraph 250 **R (oao Miller) v College of Policing and anor** [2020] EWHC 225 (Admin), cited below), and care needs to be taken to recognise the potential subtleties that might exist in relation to the specific beliefs held (see the observations (relating to the

particular facts of that case) of Underhill LJ at paragraph 18 **Page v NHS Trust Development Authority** [2021] EWCA Civ 255). The assessment must be undertaken in respect of the beliefs held by the claimant, not as to how those beliefs might have been interpreted or understood by the respondent (see **Page** at paragraph 49).

41. If the claimant's actions have a sufficiently close and direct nexus to an underlying religion or belief, such that they are properly to be understood as a manifestation of that religion or belief, any limitation would need to be such as is prescribed by law and necessary, in one of the ways identified under article 9(2). I return to this question below.

42. As for article 10 **ECHR**, this provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

43. A similar set of fundamental values to those described in relation to article 9 can also be identified as underlying article 10. As observed in **Handyside v UK** (1979-80) 1 EHRR 737:

> "49. … The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or

> 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

44. The importance of the right to freedom of expression as an essential foundation of a democracy has long been recognised by the domestic courts, as helpfully summarised by Knowles J in **Miller** (*supra*):

> "2. In *R v Central Independent Television plc* [1994] Fam 192, 202-203, Hoffmann LJ said that:
> "… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."
> 3. Also much quoted are the words of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, [20]:
> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ..."
> 4. In *R v Shayler* [2003] 1 AC 247, [21], Lord Bingham emphasised the connection between freedom of expression and democracy. He observed that 'the fundamental right of free expression has been recognised at common law for very many years' and explained:
> "The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated …"."

45. In particular, the importance of freedom of political speech has been emphasised, see **R (ex parte Prolife Alliance) v BBC** [2004] 1 AC 185, per Lord Nicholls:

> "6. Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts..."

This is consistent with the jurisprudence of the European Court of Human Rights, which, in the case of **Vajnai v Hungary** [2008] ECHR 1910, made clear that there is:

> "47. … little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest.".

46. The law also grants latitude as to the manner in which political views are expressed. In **De Haes and Gijsels v Belgium** [1997] 25 EHRR 1, in upholding a complaint of a breach of article 10 **ECHR** brought by two journalists, it was observed:

> "46. ⋯ the Court reiterates that freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation ….
> …
> 48. Although Mr De Haes and Mr Gijsels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 … protects not only the substance of the ideas and information expressed but also the form in which they are conveyed …."

47. **Miller** concerned the expression (on Twitter) of gender critical views regarding transgender issues; at first instance it was noted as follows:

> "250. … there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.
> 251. The Claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1). I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg's

> evidence, which shows that many other people hold concerns similar to those held by the Claimant.
> 252. The Defendants submitted that this contextual evidence was not relevant to the issues in this case. I disagree. It is relevant because in the Article 10 context, special protection is afforded to political speech and debate on questions of public interest: see eg *Vajnai v Hungary* …"

48. On appeal (see **R (oao Miller) v The College of Policing** [2021] EWCA Civ 1926), the Court of Appeal endorsed this approach, observing:

> "68. The concept of a chilling effect in the context of freedom of expression is an extremely important one. It often arises in discussions about what if any restrictions on journalistic activity are lawful; but … it is equally important when considering the rights of private citizens to express their views within the limits of the law, including and one might say in particular, on controversial matters of public interest. …"

49. Thus, the right in article 10(1) to freedom of expression is of fundamental importance. It is, however, also recognised (see **Giniewski v France** (2007) 45 EHRR 23) that, via article 10(2), the exercise of that right:

> "43. … carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs…"

50. In **Overd and ors v Chief Constable of Avon and Somerset Constabulary** [2021] EWHC 3100, Linden J observed that the principle stated in **Giniewski**:

> "45. … focusses on the quality or nature of the speech, whether it makes a meaningful contribution to public debate and/or whether it infringes the rights of others. But, of course, other bases on which offensive speech may be restricted include public safety and the prevention of disorder or crime."

Further noting:

> "[Counsel for the claimants] referred on a number of occasions to the officers in this case having a '*positive duty'* to protect the speaker's Convention rights even where what they say is unpopular or offensive. That may be true, as far as it goes. But as those rights are qualified any such duty does not mean, as he appeared to contend, that police officers must always side with the speaker in

> such a case and must always ensure that they are able to say what they wish to say. It does, however, mean that any action which they take to inhibit the speaker's freedom of expression must be 'justified' … and proportionate. Moreover, these provisions must be applied having regard to the importance of the relevant rights, and the justification for any infringement must therefore be convincing ..."

51. There are clear similarities between the approach to be taken in relation to complaints of infringement of rights protected by articles 9 and 10 **ECHR**. Both require first that the essential nature of those rights must be recognised. Both rights are, however, then qualified, with articles 9(2) and 10(2) setting out the circumstances under which the right to religion or belief, or to freedom of expression, can be limited or restricted: (i) it must be prescribed by law; (ii) it must be in pursuit of one of the legitimate aims identified; and (iii) it must be necessary in a democratic society.

52. As to whether the interference with rights under article 9 or 10 is "*prescribed by law*", it is well established that "*law*" in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law (**Huvig v France** (1990) 12 EHRR 528; **Kruslin v France** (1990) 12 EHRR 547; **Purdy v DPP** [2010] 1 AC 345 HL). Accessibility requires that the measure must be such that "*it must be possible to discover, if necessary with the aid of professional advice, what its provisions are … it must be published and comprehensible*"; foreseeability means that it must be possible for a person to foresee the consequences of the law for them (see *per* Lord Sumption at paragraph 17 **In Re Gallagher** [2019] 2 WLR 509).

53. The legitimate aim in cases such as the present is generally identified as being concerned with the protection of "*the rights and freedoms*" (article 9(2)) or "*reputation and rights*" (article 10(2)) of others. Thereafter, consideration must be given to the question of whether restriction is "*necessary in a democratic society*"; that is to say, that there is a "*pressing social need"*

(**Vogt v Germany** (1996) 21 E.H.R.R 205 at paragraph 52), albeit, as Lord Bingham emphasised in **R v Shayler** [2003] 1 AC 247, "*necessary*" in this sense:

> "23. … is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' …. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient …"

54. It is in this regard that a proportionality assessment is required, answering the four questions identified by Lord Reed JSC at paragraph 74 **Bank Mellat v HM Treasury (No 2)** [2014] AC 700: (i) is the objective of the measure sufficiently important to justify the limitation of a protected right; (ii) is the measure rationally connected to the objective; (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. As Lord Bingham made clear in **R (on the application of SB) v Denbigh High School Governors** [2007] 1 AC 100, the judge's task is to:

> "30. ….make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816*, paras 62–67. Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246* para 51. … it is in my view clear that the court must confront these questions, however difficult. ..."

55. Returning to the particular provisions of the domestic statute with which I am concerned, guidance is provided in **Page** (*supra*), where Underhill LJ explained that:

> "49. … The first question for the Tribunal was what conduct on the Appellant's part caused the Authority to discipline him: that necessarily involved, in one sense, a consideration of its reasons. The answer is straightforward: it was responding to the Appellant's having expressed his views about homosexuality in the media (compounded by his having done so without giving the Trust prior notice). The next question is whether his expression of those views constituted

> a manifestation of his religious belief in the sense explained in *Eweida* … in answering *that* question it is not relevant to consider the [employer]'s thinking. …"

56. Exploring the questions arising in a claim involving the holding, or manifestation, of a belief, Underhill LJ further observed:

> "68. … In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it…. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself."

See also **Wasteney v East London NHS Foundation Trust** [2016] ICR 643 EAT at paragraphs 54-55.

57. Thus, in establishing *the reason why* the relevant decision-maker acted as they did (a question requiring an investigation into that person's subjective mental processes or motivation (albeit not motive), which may be conscious or unconscious; see **Page** at paragraph 29), it will not be possible to rely on a distinction between an objectionable manifestation of a belief and the holding or manifestation of the belief itself if the action taken is not a proportionate means of achieving a legitimate aim. If, however, the action or response can be justified and is found to be by reason of the objectionable manner of the manifestation, then, as was noted in **Page**:

> "74. … in such a case the 'mental processes' which cause the respondent to act do not involve the belief but only its objectionable manifestation … Also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it. It

> is obviously highly desirable that the domestic and Convention jurisprudence should correspond."

58. Where, however, the reason for the employer's impugned conduct is in fact a prohibited reason arising from another party's discriminatory motivation, then that will be *the reason why*. The fact that the employer was responding to (for example) the (actual or perceived) demands of a customer (see **Centrum Voor Gelkijheid Van Kansen v Firma Feryn NV** [2008] IRLR 732 CJEU), or was seeking to avoid industrial unrest (**Din v Carrington Viyella Ltd** [1982] ICR 256, EAT), will not avoid such a finding: the decisive factor is the reason why the employer acted as it did, regardless whether it might have had some benign intention in doing so; if it acts for a prohibited reason, the respondent's intent is irrelevant (see *per* Baroness Hale at paragraph 82 **R (oao European Roma Rights Centre) v Immigration Office at Prague Airport** [2005] IRLR 115).

The Grounds of Appeal and the Claimant's Submissions in Support

59. The claimant's appeal was permitted to proceed on seven amended grounds. By ground 1, the claimant contends the ET erred in law in failing to consider the proportionality of the interference with the manifestation of her religious/philosophical beliefs; relatedly, by ground 2, it is said the ET failed to consider whether that interference was "*prescribed by law*". Ground 3 is a complaint that the ET wrongly held that the respondent could lawfully restrict the claimant's right to freedom of speech to the language of an ET pleading. By ground 4, it is said that the ET reached an impermissible, or inadequately explained, conclusion, in attributing Mr Conlan's reasons to all other decision-makers. Ground 5 is a complaint that the ET was wrong to find the respondent did not discriminate against the claimant when it investigated and dismissed her because of the complainant's objection to her beliefs; relatedly, by ground 6, it is said the ET erred and/or reached a perverse conclusion, in holding that it was reasonable for third parties, reading the claimant's posts, to conclude she was homophobic or transphobic. Finally, by ground 7, the claimant says

it was perverse for the ET to find the reason for her dismissal was because of the views of third parties, and, in any event, it was apparent she was dismissed because a (discriminatory) stereotype was applied to her views.

60. Addressing **ground 1**, the claimant contends that although the ET acknowledged it was bound to interpret the **EqA** in accordance with articles 9 and 10 **ECHR**, it then failed to consider all elements of the test (see paragraphs 37 and 68 **Page v NHS Trust Development Authority** [2021] EWCA Civ 255). The ET was first required to determine whether the claimant was manifesting her beliefs (at which stage, the respondent's thinking was irrelevant, paragraph 49 **Page**), but it failed to ask whether there was a sufficient nexus between the manifestation in issue and the claimant's beliefs (*per* **Eweida v UK** (2013) 57 EHRR 8 at paragraph 82); had it done so, it would have been bound to have found that there was "*a huge overlap between [her] beliefs and what she said in the posts.*" (paragraph 7 skeleton argument). It would then have been required to perform the justification exercise required by the **ECHR** in respect of qualified rights (paragraph 68 **Page**). The ET had impermissibly narrowed its task (see paragraph 30 **Bougnaoui v Micropole SA** [2018] ICR 139), and had thereby failed to undertake the necessary proportionality exercise, as set out in **Bank Mellat v HMT** [2013] UKSC 39; had it done so, the ET would inevitably have found that dismissal was disproportionate, for the reasons it set out at paragraph 65 (and see **Vogt v Germany** (1996) 21 EHRR 205).

61. As for **ground 2**, the claimant contends that the ET had also failed to address the question whether the interference with her **ECHR** rights was "*prescribed by law*". It is the claimant's case that the respondent's code of conduct was insufficiently precise as to enable her to understand it to apply to her Facebook posts, or to foresee the consequences of her actions, so that she could regulate her conduct without breaking the law (see paragraph 40 **Purdy v DPP** [2010] 1 AC 345 HL). The ET had not engaged with this

question, but had found the allegations "*were not set out as clearly as they might have been*" (ET, paragraph 57); as such, had it considered the point, the ET would inevitably have found that the interference was not prescribed by law.

62. In support of **ground 3**, the claimant relies on the ET's observation, at paragraph 62, that it was the respondent's evidence that:

> "62. … had [the claimant's] beliefs been simply stated on her Facebook page in the form which they appear [in her case before the ET] in paragraph 30 above, no further action could or would have been taken against her. …"

63. The claimant says the ET erred in finding that this was consistent with article 10 **ECHR**: article 10 protects the manner of expression as well as the substance of a belief and allows impassioned debate, expressed in strong terms. Restricting the claimant to expressing her views in the form set out in the pleading would have breached article 10 as it effectively meant she was "*not allowed to debate the great interests of the day*" (skeleton argument paragraph 31). The ET's finding (paragraph 60) that the language used by the claimant was "*florid and provocative*" was perverse: her language had been measured, she was passing on the language of the post. In any event, "*florid and provocative*" language was protected under article 10 **ECHR** (see **De Haes and Gijsels v Belgium** [1997] 25 EHRR 1); a principle that, the claimant contends, must apply more widely when "*in the internet age, bloggers and the like are as important to political debate as journalists*" (skeleton argument, paragraph 38) and see the observations in **Miller** (at first instance, at paragraphs 251-2; before the Court of Appeal at paragraph 68), **Klein v Slovakia** [2010] 50 EHRR 15, and **Re Sandown Free Presbyterian Church** [2011] NIQB 26.

64. Turning to **ground 4**, the claimant emphasises that her claim concerned the respondent's conduct over the course of the process, comprising her suspension, the investigation, her dismissal and the outcome of her appeal; the ET thus had to consider the reasoning of four

different decision-makers. Mr Evans (who commissioned the formal disciplinary investigation and suspended the claimant) agreed in cross-examination that the complainant's objection had not been to the language used in the claimant's posts but to her views. Ms Dorey (the investigating officer) concluded there was a case to answer because (as she accepted in cross-examination) the claimant "*could have held discriminatory views*", including "*that she does not believe in same sex marriage and gender fluidity*". Mr Conlan (disciplinary panel chair) had agreed with the proposition that the claimant's posts "*may reasonably be perceived as evidencing a negative attitude towards LGBT people*". Finally, the appeal panel, chaired by Ms Paton, had dismissed the claimant's appeal. The ET had, however, found that the same reasoning underlay the entire process (see paragraphs 63-64), whilst relying only on the evidence of Mr Conlan.

65. As for **ground 5**, the claimant contends that if the respondent's action was taken to appease another party (even if not the main or principal reason for that action) then, if that other party's objection was founded on the claimant's protected characteristic (here, belief), the respondent must be taken to have treated the claimant less favourably by reason of that protected characteristic; see **Centrum Voor Gelkijheid Van Kansen** [2008] IRLR 732 and **IX v Wabe** [2021] IRLR 832 CJEU at paragraph 66. This was a principle recognised in domestic case-law, see **Din v Carrington Viyella Ltd** [1982] ICR 256, EAT, in which a distinction was drawn between the employer's motive for the treatment in issue (to avoid workplace unrest) and the reason for that treatment (the race discrimination that had led to the workplace unrest); also see **R (oao European Roma Rights Centre) v Immigration Officer at Prague Airport** [2005] IRLR 115 at paragraph 82, and C-188/15 **Bougnaoui**. In the present case, the complainant had acknowledged their disagreement with the claimant's views (in contrast to their own "*liberal views*") and had made stereotypical assumptions about those views, based on posts relating to a political debate about what

should be taught in schools (see paragraph 250 **Miller**); if the complainant's views had influenced the respondent, the decisions in issue would be similarly tainted.

66. Turning to **ground 6**, the ET had found it was reasonable for third parties, reading the claimant's posts, to conclude she was homophobic or transphobic, but the claimant objects that it thereby failed in its duty to uphold human rights: it ought properly to have attributed to the reasonable person reading those posts a commitment to human rights, including freedom of speech. By analogy with **Lee v Ashers Baking Company Ltd and ors** [2018] UKSC 49, the claimant was objecting to the expression of certain views by whomsoever they were expressed; it was stereotyping to infer from her disagreement with the LGBT agenda for education that she was homophobic or transphobic (see **Miller** paragraph 250).

67. Finally, by **ground 7**, the claimant argues that, in any event, the ET was wrong to find that the reason for her dismissal was because of the views of third parties; that was perverse as Mr Conlan had made clear that the respondent was exercising its own judgement as to the claimant's views, adopting its own stereotype of those holding such views in respect of their capacity to relate to pupils. To the extent that the respondent was thus acting on its view that the claimant's beliefs were discriminatory, the ET was required (but failed) to decide for itself whether they were beliefs (or manifestations of beliefs) protected by article 9 and/or 10 **ECHR**. Answering that question, the only permissible conclusion was that the posts were not discriminatory.

The Respondent's Case

68. The respondent's initial position on **grounds 1 and 2** of the appeal can be summarised as follows: (1) the ET was entitled to approach the case through the **EqA**, albeit in the wider context of articles 9 and 10 **ECHR** (**Page**, paragraph 37); (2) in a claim of direct discrimination, the key question was "*the reason why*" the respondent acted as it did; (3)

asking itself that question, the ET concluded that the act of which the claimant was accused, and eventually found guilty, was *"posting items on Facebook that might reasonably lead people who read her posts to conclude that she was homophobic and transphobic"* (ET, paragraphs 61 and 63); (4) it was entitled to find the words shared and endorsed by the claimant might *reasonably* be regarded as having that effect (ET, paragraphs 54 and 60); (5) the ET permissibly then found that the action was *"not on the ground of her beliefs but rather for a completely different reason, namely that as a result of her actions she might reasonably be perceived as holding beliefs that would not qualify for protection (… beliefs that she denied having)"* (ET, paragraph 64).

69. In oral submissions, however, Ms Grennan accepted that it was difficult to say that the claimant's actions had not amounted to a manifestation of her beliefs, given the ET's finding (in relation to the harassment claim) that it was:

> "70. … possible to see some sort of connection between her beliefs and [the respondent's] treatment. The posts in question clearly expressed those beliefs, both in relation to same sex marriage and gender fluidity. …"

70. In those circumstances, it was conceded by the respondent that there was a manifestation of the claimant's beliefs. Although the ET appeared to have found that the claimant's posts were not sufficiently linked to her underlying beliefs to meet the **Eweida** test, its reasons did not demonstrate how it had made that distinction.

71. The respondent accepted that the ET had not undertaken the requisite balancing exercise under articles 9(2) and 10(2) **ECHR**, due to its finding that the claimant's treatment:

> "70. … was not a consequence of her expressing [her] beliefs in a temperate and rational way. Rather, it was because the [respondent] felt that the language used in those posts might reasonably lead someone who read them to conclude that she held views (homophobic and transphobic) that she expressly rejected."

72. Acknowledging, however, that even an inappropriate manifestation or expression of beliefs had to be tested against the rights afforded by articles 9 and 10, the respondent further accepted that it was hard to see that the ET had engaged with this issue: it had failed to consider whether any interference was "*prescribed by law*" or to test the proportionality of such interference with the claimant's rights. Although it might have been open to the ET to hold that the manner of manifestation of the claimant's beliefs was improper and, therefore, unprotected (see **Chondol v Liverpool City Council** UKEAT/0298/09; **Grace v Places for Children** UKEAT/0217/13; **Wasteney v East London NHS Foundation Trust** [2016] ICR 643; **Kuteh v Dartford and Gravesend NHS Trust** [2019] IRLR 716; and **Page**), the reasoning failed to demonstrate that it had carried out the required balancing exercise in this case.

73. The respondent did not, however, accept that there was merit in the remaining grounds of appeal. In respect of **ground 3**, it objected that it was a mischaracterisation of the ET's reasoning to assert that it found the respondent could lawfully restrict the claimant's right to freedom of speech to the language of an ET pleading: at paragraph 62, the ET was doing no more than noting (in response to the assertion that she was being required to renounce her beliefs) that a "*temperate and rational*" manifestation of the claimant's beliefs would have caused no difficulty. As for **ground 4**, having heard from all relevant witnesses, the ET had found that the crux of the respondent's concern, from start to finish, was that the terminology used/endorsed by the claimant was likely to lead readers of her posts to conclude that she was homophobic and transphobic; it permissibly concluded that this was what lay at the heart of *all* the actions taken against the claimant.

74. Turning to **ground 5**, the respondent argued this was inconsistent with the ET's finding of fact that the complainant objected to the particular content of the Facebook posts, reasonably considering these to exhibit animus against the LGBT community (ET, paragraphs 54; 70); it was not required to find that investigating and taking disciplinary action in response to a

complaint by a reader of the posts - who had reasonably concluded they were homophobic and transphobic - thereby amounted to discrimination against the claimant. As for **ground 6**, the ET had permissibly reached the conclusion that it was reasonable for a reader of the posts to conclude that the person who shared and endorsed them was homophobic and/or transphobic; perversity appeals must meet a very high hurdle and this ground did not begin to meet the threshold for such a challenge.

75. Finally, in relation to **ground 7**, the respondent again contended that this was a mischaracterisation of the ET's findings. It did not find the dismissal was because of the views of a third party; it was because the claimant had chosen to share and endorse posts of the particular nature and content, the respondent's concern being that *"by reason of her posts, she would be perceived as holding unacceptable views in relation to gay and trans people…"* (ET, paragraph 63). On the ET's findings, the respondent's actions were not because this particular complainant had taken exception (still less placed any pressure on the respondent to take any type of action), but because any reader of the posts could reasonably conclude that the claimant was homophobic and/or transphobic. Moreover, although a complaint had been made, it did not follow that the complainant had a discriminatory motive; indeed, as the ET found, the complainant's response to the posts was reasonable (ET, paragraph 54). As for the respondent's motivation, there was no finding it had engaged in stereotyping any protected characteristic; this challenge did not meet the threshold required for a perversity appeal.

Submissions on behalf of the Intervenor

76. The intervenor is a registered charity, established under the **National Institutions Measure 1998** to co-ordinate, promote, aid and further the work and mission of the Church of England ("CoE"). As well as its direct interest in ensuring freedom of religion or belief, the CoE considers it has a duty to protect the free practice of all faiths and, as it serves every community in the country, to seek to engender social cohesion. Recognising that public debate has become

increasingly strident, and reconciliation of opposing views harder to achieve, the CoE has sought to promulgate a framework (set out in "*Pastoral Principles*") to help its members engage in difficult discussions, including the manner in which a strongly held conviction is expressed; seeking to create space for difference, the CoE considers people should be free to express their views in an environment of mutual respect and tolerance.

77. Maintaining a neutral position on the current appeal, the intervenor was given permission to make submissions on how the European and domestic legal requirements might be integrated, in the light of the policy considerations arising in this field, and to propose a proportionality assessment applicable to the issues in these proceedings and other similar situations. It is the intervenor's submission that, pursuant to the case-law under both the **ECHR** and the **Framework Directive**, two essential points can be identified: (1) rights to freedom of religion or belief, and to freedom of speech, are based on the core values of pluralism, tolerance, and dialogue; and (2) any limitation of those rights must be strictly proportionate to the aim pursued. The intervenor submits, however, that difficulties can arise as to when "*objection could justifiably be taken*" to the manifestation of a religion or belief, such that the reason why an employer acts is no longer because of the religion or belief but because of the objectionable manner of its manifestation (*per* **Page**, paragraph 68); this may create an uncertainty that can itself have a chilling effect on the rights in question.

78. It is the intervenor's position that, in the application of articles 9(2) and 10(2) **ECHR**, a strict proportionality assessment is required (*per* **Bank Mellat**), which must be undertaken with the need to encourage pluralism, tolerance and dialogue firmly in mind. In the employment context, practical considerations would include: (a) the content of the manifestation: all speech is protected (whether popular or not), although gratuitously offensive views may require to be restricted; (b) the tone of the manifestation: calm and collected explanations are likely to weigh differently, compared to hectoring and aggressive speech; (c) the worker's

understanding of the audience's views: an awareness that they are speaking to those who are broadly in agreement, or do not have strong views, will impact on the appropriateness of the tone taken compared to where it is known that the audience holds strongly opposing views; (d) the extent and nature of any intrusion on others' rights, including whether it gives rise to a substantial impact on the employer's ability to run their business; (e) whether the manifestation is to a wide disparate audience on social media, or a smaller group of people closely connected to the workplace; (f) whether the worker has made it clear that the views are personal, or whether they could fairly be seen to represent the views of the employer; (g) the nature of the worker's role: whether there is any power imbalance between the worker and a person whose rights are intruded upon; (h) the nature of the employer's business: consideration may be given to whether clients or service users are particularly vulnerable, such that protection from certain manifestation of beliefs is necessary; (i) whether there are less intrusive measures open to the employer.

Analysis and Conclusions

79. This case concerns claims of direct discrimination because of religion or belief, and of harassment relating to religion or belief (see sections 13 and 26 **EqA**). The ET had accepted that the claimant held (or did not hold) beliefs that fell within the protection of the **EqA**, as follows: (a) a lack of belief in "*gender fluidity*"; (b) a lack of belief that someone could change their biological sex/gender; (c) a belief in marriage as a divinely instituted life-long union between one man and one woman; (d) a lack of belief in "*same sex marriage*" (as contrary to Biblical teaching); (e) an opposition to sex and/or relationship education for primary school children; (f) a belief that when unbiblical ideas or ideologies are promoted, she should publicly witness to Biblical truth; (g) a belief in the literal truth of the Bible (in particular Genesis 1v 27). It was the claimant's contention that the respondent's actions against her (her suspension; the disciplinary process; her

dismissal; the refusal of her appeal) were all either because of, or related to, this protected characteristic. The key question for the ET, therefore, was why, in each of the respects complained of, the respondent had acted as it did: was that because of, or related to, the claimant's protected characteristic of belief?

80. Having heard from each of the relevant decision-takers, the ET concluded that no distinction could be drawn between the reasons that informed each of the actions in issue: "*the entire proceedings … were motivated by a concern … that, by reason of her posts, [the claimant] would be perceived as holding unacceptable views in relation to gay and trans people*" (ET, paragraph 63). The claimant complains (ground 4) that the ET thereby impermissibly attributed the reasoning of one actor (Mr Conlan) to all; alternatively, that – given the different explanations provided by the different decision-takers (see the sample extracts from the evidence, summarised at paragraphs 10, 14, and 16 above) - it failed to adequately explain this conclusion. I do not consider, however, that this is a valid complaint. I keep in mind the danger of seeking to draw my own conclusions from the samples of evidence presented to me: as any participant in an adversarial trial process will be aware, selective citations from witness testimony provide no substitute for being present for the entire hearing. In any event, having regard to the answers relied on, I do not consider the ET can be said to have reached an impermissible view in concluding that each of the relevant decisions was motivated by the same underlying concern. Although it is understandable that the propositions put in cross-examination sought to present binary choices (and the responses need to be seen in that context), the ET was entitled to find that the motivations of each of the decision-takers – seen in terms of the evidence as a whole – were more nuanced, and its conclusion in this regard was adequately explained.

81. Returning then to the ET's finding as to the reason for the respondent's actions in this case, it stated that it considered that this was not because of, or related to, the claimant's

actual beliefs but because of the concern that her posts might be seen as evidence that she held *other* beliefs, which might be described as "*homophobic*" or "*transphobic*". Putting to one side the dangers that can arise from the use of labels that might mean different things to different people (see the discussion at paragraph 250 **R (oao Miller) v College of Policing and anor** [2020] EWHC 225 (Admin), and the observations of Underhill LJ at paragraph 18 **Page v NHS Trust Development Authority** [2021] EWCA Civ 255), the difficulty with the ET's analysis is that it did not engage with the question whether this was, nonetheless, because of, or related to, the claimant's *manifestation* of her beliefs. In answering *that* question, the views or concerns of the respondent were not relevant (**Page**, paragraph 49); applying the test laid down at paragraph 82 **Eweida v UK** (2013) 57 EHRR 8, the ET needed to consider whether there was a sufficiently close or direct nexus between the claimant's protected beliefs and her posts (relied on by her as amounting to a manifestation of those beliefs).

82. To the extent that the ET addressed the question identified in **Eweida**, it is apparent that it did so through the prism of the respondent's view of the claimant's posts. The respondent's views were relevant when determining whether there had in fact been any interference with the claimant's right to manifest her beliefs and to freedom of expression – whether its treatment of her was because of, or related to, her exercise of those rights – but could not be determinative of the prior question, whether there was a sufficiently close or direct link between the claimant's posts and her beliefs such as to mean that those posts were to be viewed as a manifestation of her beliefs. If they were, then the ET needed to determine the "*reason why*" question by asking itself whether this was because of, or related to, that manifestation of belief (prohibited under the **EqA**), or whether it was in fact because the claimant had manifested her belief in a way to which objection could justifiably be taken. As was made clear in **Page** (see paragraph 68), in the latter case, it is

the objectionable manifestation of the belief that is treated as the reason for the act complained of. In order to determine whether or not the manifestation can properly be said to be "*objectionable*", however, it is necessary to carry out a proportionality assessment: keeping in mind the need to interpret the **EqA** consistently with the **ECHR**, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under articles 9(2) or 10(2) **ECHR** (and see **Page** at paragraph 74; **Wasteney v East London NHS Foundation Trust** [2016] ICR 643 at paragraph 55).

83. As the respondent acknowledged in its oral submissions, the ET's reasoning demonstrates that, had it properly engaged with the **Eweida** question, it would have concluded that there was a close or direct nexus between the claimant's Facebook posts and the beliefs that she had relied on in her claims: as it stated, "*The posts in question clearly expressed those beliefs*" (ET, paragraph 70). That did not mean that it was bound to find that the respondent's actions necessarily amounted to direct discrimination or harassment, but, in determining the reason for the treatment complained of, the ET needed to assess whether those actions were prescribed by law, and were necessary for the protection of the rights and freedoms of others. And, in carrying out that assessment, the ET needed to first recognise the essential nature of the claimant's right to freedom of belief and to the freedom to express that belief (a recognition that must carry with it an understanding of the foundational nature of those rights for any democracy; see **Sahin v Turkey** (2007) 44 EHRR 5 and **Handyside v UK** (1979-80) 1 EHRR 737), before undertaking the proportionality assessment laid down in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 (see paragraph 54 above).

84. The problem with the ET's approach is that it by-passed any engagement with the nature of the claimant's rights, and failed to carry out the requisite balancing exercise, when

seeking to determine whether the mental processes which caused the respondent to act did not involve the claimant's beliefs but only their objectionable manifestation. As the claimant objects (ground 1 of the appeal), the ET's approach meant that it impermissibly narrowed the task it had to undertake. It was not enough to find that the respondent had been motivated by a concern that the claimant could be perceived to hold "*wholly unacceptable views*" (ET, paragraph 70); the ET needed to consider whether that motivation or concern had arisen out of the claimant's manifestation of her beliefs (accepted to be protected under the **EqA**) or by a justified objection to that manifestation.

85. Contrary to the submission made under ground 3 of the appeal, I do not consider the ET made the mistake of finding that the respondent was entitled to limit the expression of the claimant's beliefs to the way they had been characterised in the pleadings, nor do I agree that it was perverse for the ET to find that the language used in the claimant's posts was "*florid and provocative*" (indeed, the claimant effectively accepted as much in the internal proceedings when she volunteered: "*I should have used my own wording or put a link instead*"). I do, however, consider that there is merit in the claimant's broader objection – more effectively made by ground 1 of the appeal - that the ET failed to engage with the nature of the claimant's rights, which included the right to hold and to express views on controversial matters of public interest (**R (oao Miller) v The College of Policing** [2021] EWCA Civ 1926), even where those views may "*offend, shock or disturb*" (see **De Haes and Gijsels v Belgium** [1997] 25 EHRR 1). Moreover, although it may have been open to the ET to find that the respondent was genuinely concerned as to how the claimant's posts might be interpreted, a valid point is raised under grounds 5 to 7 of the appeal as to whether that concern was informed by assumptions (whether made by the respondent or imported from the complainant, see **Centrum Voor Gelkijheid Van Kansen v Firma Feryn NV** [2008] IRLR 732 CJEU) as to the nature of her views, drawing an inference of

discriminatory attitudes from what might otherwise be seen as an unsophisticated and unsubtle expression of opposition to relationships education in primary schools (see **Miller** at first instance, paragraphs 250-252; before the Court of Appeal at paragraph 68).

86. Recognising the claimant's right to manifest her beliefs, even when expressed in terms that may disturb or offend, does not mean, however, that no restriction or limitation could be placed upon that right. Under the **ECHR**, it is clear that these are qualified rights that may be limited to the extent that is prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.

87. The ET's reasoning does not reveal any consideration as to whether the restriction placed on the claimant's manifestation of her beliefs was "*prescribed by law*", in the sense that the basis for the respondent's actions was accessible to her, such that she could foresee the potential consequences of her conduct (see **In Re Gallagher** [2019] 2 WLR 509). Although there is no challenge to the finding that the claimant had no real expectation of privacy in relation to her Facebook posts, as she points out (ground 2), it is apparent that the ET considered "*the allegations were not set out as clearly as they might have been*". I do not agree that this means that the ET would have been bound to find that the respondent's measures were not "*prescribed by law*" but, as the respondent concedes, the reasoning does not demonstrate any engagement with this question and potentially renders the decision unsafe.

88. As for the requirement that the restriction must be in pursuit of a legitimate aim, although not expressly identified in its reasoning, it is apparent that the ET considered the respondent's actions were concerned with the protection of the rights, freedoms and reputation of others – that much is plain from its finding that the respondent was concerned about the potential "*negative impact in relation to … pupils, staff and the wider community*" (ET, paragraph 61). The ET did not, however, then go on to consider the

necessity of the measures taken by the respondent to meet that concern. Specifically, it failed to carry out any assessment of the proportionality of the respondent's actions; a task that would (in summary) have required it to balance the interference with the fundamental rights of the claimant against the legitimate interest arising in respect of the rights, freedoms and/or reputation of others (**Bank Mellat**, paragraph 74; **Page**, paragraph 52).

89. The claimant says that although the ET failed to undertake the task thus required of it, had it done so, it is apparent that it would have found that the limitations imposed by the respondent – in particular, in dismissing the claimant from her employment – were disproportionate, as a less intrusive measure could have been used without unacceptably compromising the achievement of the respondent's objective. Specifically, the claimant relies on the ET's observation that, had this been a claim of unfair dismissal, it "*might be contended that there was a different course of action [the respondent] could have taken* …" (ET, paragraph 65).

90. Although I agree that this reference suggests that the ET *might* well have found that the action taken by the respondent (at least, insofar as the claimant's dismissal was concerned) was disproportionate, I cannot go so far as to find this to be a *necessary* inference from its reasoning. In particular, I am bound to note the caveats used by the ET – "*It might be contended*", "*a reasonable employer might have taken the view …*" (emphases added) – and its clear indication that this was not a matter that it had properly considered: "*We were not concerned to decide …*" (ET, paragraph 65), "*That was not a subject canvassed before us, for the simple reason that it was irrelevant to our considerations*" (ET, paragraph 66). The questions identified in **Bank Mellat** required the ET to undertake an evaluation of the proportionality of the respondent's actions, making a value judgment by reference to the circumstances prevailing at the relevant time (**R (oao SB) v Denbigh High School Governors** [2007] 1 AC 100). That is not an exercise that can be undertaken on appeal by

searching through the ET's decision for "*signs of the missing elements … to try to amplify these by argument into an adequate set of reasons*" (see paragraph 26 **Anya v University of Oxford** [2001] EWCA Civ 405).

91. While, therefore, the appeal should be allowed, this is not a case where it can properly be said that only one outcome is possible, and the appropriate disposal must be for this matter to be remitted for determination (**Jafri v Lincoln College** [2014] EWCA Civ 449). That remission should be on the basis that it has already been found that the Facebook posts in issue had a sufficiently close or direct nexus with the beliefs relied on by the claimant in these proceedings such as to amount to a manifestation of those beliefs (per **Eweida**). It will, however, be for the ET on the remitted hearing to determine, recognising the essential nature of the claimant's rights to freedom of belief and freedom of expression: (1) whether the measures adopted by the respondent were prescribed by law; and, if so, (2) whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others. Undertaking that analysis will enable the ET to determine whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were in fact due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant's rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others.

92. In carrying out the task required at (2), the ET will need to address the questions identified in **Bank Mellat**. In so doing, it will need to bear in mind the particular circumstances of this case. For the intervenor, however, it is submitted that more general guidance should be provided, not only to assist the ET in carrying out the proportionality assessment required, but to better inform employers and employees as to where they stand on issues arising from the manifestation of religious or other philosophical beliefs. The respondent

supports that submission; the claimant contends that the considerations identified by the intervenor allow for too many restrictions on the rights in issue.

93. For my part, I consider that a danger can arise from any attempt to lay down general guidelines in cases such as this. Experience suggests that issues arising from the exercise of rights to freedom of religion and belief, and to freedom of expression, are invariably fact-specific. Although the public debate around these issues tends to be conducted through the prism of categories and labels, that is not an approach that can properly inform the decisions taken in individual cases. The values that underpin the right to freedom of religion and belief and of freedom of expression – pluralism, tolerance and broadmindedness (*per* **Sahin v Turkey** (2007) 44 EHRR 5; **Handyside v UK** (1979-80) 1 EHRR 737) – require nuanced decision-making; there is no "one size fits all" approach.

94. All that said, I can see that, within the employment context, it may be helpful for there to at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.

(1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.

(2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly

understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.

(3) Whether a limitation or restriction is objectively justified will always be context-specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.

(4) It will always be necessary to ask (*per* **Bank Mellat**): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervenor are likely to be relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable

service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.

95. Those are questions that will need to be considered at the remitted hearing in this case. No further evidence should be required and the ET's underlying findings of fact will remain, albeit that the determination of the "*reason why*" question will need to be undertaken afresh, in the light of the guidance provided in this judgment.

Disposal

96. For the reasons provided, the claimant's appeal is allowed and this matter is to be remitted for the determination of the question whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant's rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others. In answering that question, the ET will need to be satisfied that the measures adopted were prescribed by law and, recognising the essential nature of the claimant's rights to freedom of belief and freedom of expression, that they were necessary (that is, proportionate) in pursuit of the protection of the rights, freedoms and reputation of others.

97. Should the parties wish to make any representations as to whether remission is to the same ET (to the extent this remains practicable) or to a differently constituted ET, they should do so in writing (limited to two sides of A4) at least 24 hours before the date fixed for the handing down of this judgment. Any other consequential applications or representations should be made in writing at the same time.

98. Finally, I apologise to the parties for the delays that have occurred in dealing with this appeal. In part this was due to the difficulties arising from the pandemic, the ensuing back-

log of appeals, and the heavy workload that has since been experienced in the Employment Appeal Tribunal. Delays also occurred in the listing of hearings, due to the availability of counsel and judicial resources, and because of the arrangements that were put in place to address the first recusal application. Although the time that has passed can thus be explained, this does not make it any the less regrettable.