



EMPLOYMENT TRIBUNALS

Claimant: Lynda Hancock

Respondent: Secretary of State for Justice

Heard at: Birmingham

On: 25, 26 & 27 October 2023

Before: Employment Judge J. Connolly
Members: Ms. R. Addison and Mr C. Ledbury

Representation

Claimant: In person

Respondent: Ms. S. Garner (Counsel)

JUDGMENT was sent to the parties on 30 October 2023 and is annexed to these Reasons. Written reasons were requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided:

REASONS

Introduction

1. This is a claim of direct religious discrimination, or religious related harassment brought against the claimant's former employers. It relates to a period prior to the termination of her employment. Early conciliation started on 7 June 2022 and concluded on 19 July 2022. The claim was presented on 29 July 2022.
2. The claimant has presented a subsequent and second claim relating to the termination of her employment. For various reasons, that claim has not yet been case managed such that there has been no disclosure of documents or exchange of witness statements. In the circumstances, although it would have been preferable to hear the claims together, that has not been possible and both parties have agreed to proceed to final hearing on the first claim alone.

The Issues

3. At the outset of the hearing, we took time with the claimant to clarify and refine the complaints and the issues which were set out in Employment Judge Meichen's Case Management Order. We confirmed the Issues again at the beginning of Closing Submissions.

4. The claimant is Jewish. The issues were identified as set out below:

Direct discrimination because of religion (Equality Act 2010, section 13)

- 4.1 Did the respondent do the following things:

- 4.1.1 after 1 February 2022, when the Claimant lodged a complaint about a proposal to paint a mural of Marcus Rashford, did the respondent permit the painting of the mural to continue?
- 4.1.2 fail to deal with the claimant's complaint promptly?
- 4.1.3 fail to log the complaint until the 14 March 2022?
- 4.1.4 fail to progress the complaint between 1 February 2022 and 14 March 2022 and/or
- 4.1.5 fail to allocate the complaint to the lead for the protected characteristic of faith and religious belief prior to the 14 March 2022?

- 4.2 If so, did the respondent act or fail to act because of religion or the claimant's Jewish faith?

Harassment related to religion (Equality Act 2010, section 26)

- 4.3 Alternatively, if the respondent did or failed to do any of the above,

- 4.3.1 did it amount to unwanted conduct,
- 4.3.2 did it relate to religion and
- 4.3.3 did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5. The Case Management Hearing proceeded on the basis that the claim appeared to be out-of-time even if calculated from the last act of which the claimant complained. It was therefore anticipated that there was a time issue to be determined at final hearing. Ms. Garner very properly raised a query as to whether the claim was, in fact, out-of-time. The Tribunal, with the assistance of the parties, recalculated time limits and took the view that the earliest date an act could be in time was 8 March 2022. The claimant's last complaint is in respect of failures up to 14 March 2022. The respondent accepted that the last act complained of was in time and that the claimant was ostensibly complaining of a single act extending over a period, such that all the claims were in time. We accepted the claims were presented within the statutory time limit (subject to any argument in respect of a single act).
6. At the conclusion of the evidence, it was clear to us that the central issues were issues of fact and inference: what was the reason why the mural was permitted to progress, the reason why there was any delay in dealing with the claimant's complaint and/or the reason why there was a failure to follow any particular process in respect of her complaint.

Relevant Law

7. **Section 39 of the Equality Act 2010 ‘EqA’** prohibits an employer from discriminating against its employees by subjecting them to any detriment. **Section 40** of the same Act prohibits an employer from harassing its employees.

Direct Discrimination

8. **Section 13 EqA** defines direct discrimination as follows:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.”

9. There are, therefore, two ‘ingredients’ in direct discrimination, as it were: firstly, less favourable treatment by comparison with someone else and, secondly, the reason for the treatment must be a protected characteristic. Religion is a protected characteristic. Detrimental and less favourable treatment of the claimant because of her Jewish faith is unlawful by virtue of s.39 EqA read with s.13 EqA.
10. When a Tribunal considers the reason why a claimant was treated in the way they were, in some cases, the discriminatory reason for the treatment is inherent or explicit in the act itself. Where that is not the case, the Tribunal must identify the reason why the putative discriminator did the act complained of or failed in the manner complained of. This involves an enquiry into his or her mental processes, both subconscious and conscious in order to determine whether religion was a material part of the reason for their acts or failures.
11. If a Tribunal is satisfied that the protected characteristic was one of the reasons for the treatment that is sufficient to establish direct discrimination. It need not be the only, or even the main reason. It is sufficient that it is significant in the sense of being material or more than trivial. Direct evidence of discrimination is rare and Tribunals frequently have to infer discrimination from all the material facts.
12. The second ingredient is “less favourable treatment”. For the purpose of assessing whether the treatment is less favourable, **section 23 EqA** provides for a comparison with a real or hypothetical person whose relevant circumstances are the same or not materially different to the claimant’s. In an appropriate case a tribunal may focus, not on the comparison exercise, but on what happened and the reason why it happened and avoid potentially confusing disputes about comparators.

Harassment

13. **Section 40 EqA** prohibits an employer from harassing its employees. **Section 26 EqA** defines harassment as follows

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

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- 14. Ms. Garner helpfully referred us to the 'stepped' approach set out in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT [10] – [16]**, revisited and updated by Underhill LJ in **Pemberton v Inwood [2018] EWCA Civ 564** at [88], and as reflected in the List of Issues above.
- 15. For the purpose of this case, again, where any unwanted conduct is not inherently or explicitly related to religion, the Tribunal must consider the reason why the claimant was subject to unwanted conduct and whether that reason related to religion.
- 16. When determining the issue of whether the conduct created the proscribed environment, the Tribunal must consider both whether the claimant perceived herself to have suffered the effect in question (the subjective question), and whether it was reasonable for the conduct to be regarded as having that effect (the objective question) and, of course, all circumstances of the case (**s.26(4) EqA**).
- 17. It should be noted that conduct which amounts to harassment cannot be direct discrimination by virtue of **s.212(1) EqA**.
- 18. Finally, in respect of both the direct discrimination and the harassment claims, the Tribunal must take account of the shifting burden of proof in **section 136 EqA**. **S.136** provides as follows:
 - “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) has contravened [the Equality Act] the Tribunal must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

19. In **Madarassy v Nomura International [2007] ICR 867** Mummery LJ held that “could conclude”, (or could decide as the wording above now states) in the context of the burden of proof provisions, meant that a reasonable Tribunal could *properly* conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It should, however, be noted that the bare facts of a difference in status and a difference in treatment are not, without more, sufficient to amount to a *prima facie* case of unlawful discrimination.
20. In **Hewage v Grampian Health Board [2012] ICR 1054** Lord Hope addressed the role of the burden of proof provisions. At paragraph 32 he recognised that:
- “They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. ...”
21. We remind ourselves that discrimination is rarely open; it may not even be conscious. If we adopt the approach of focusing on the reason why the conduct occurred, we must take care not to ignore the potential for subconscious discrimination.

Evidence

22. The claimant gave evidence herself. The respondent called three witnesses: Mr Lennard (the Acting Head of Reducing Offending at the time), Mr Hall (Managing Chaplain and Head of Faith and Pastoral Care) and Mr West (the Governor in Charge at the relevant time). The Tribunal was provided with an agreed bundle of 262 pages and Ms Garner produced a very helpful Chronology, Cast List and Written Submissions.
23. The claimant has a history of depression and was particularly anxious in respect of the hearing. We endeavoured to create an environment where she could give the best evidence possible and present her case as effectively as possible. We arranged a waiting room exclusively for her use, we staggered the time at which the parties entered the hearing room, the respondent’s witnesses agreed to sit out of the claimant’s sight line, particularly when she was giving evidence and we took regular breaks at the claimant’s request or offered breaks when it seemed she was struggling. We were grateful to the claimant who, while emotional from time to time, did an excellent job of articulating her case while all the time remaining courteous to the respondent witnesses and the tribunal. We were grateful to the respondent’s witnesses and Counsel for the readiness with which they agreed to any suggested adjustments.

Relevant Facts

The Parties

24. The claimant was employed as a senior prison officer at HMP Stafford. At the time of the events with which we are concerned she had been employed in the prison service for some 35 plus years, 18 of which had been at Stafford.

She worked part-time and her working pattern was 1 week on and 1 week off.

Background

25. By way of background, there seemed to us to be three relevant matters. Firstly, before the events with which we are concerned, the claimant had been line-managed by Mr Lennard. The claimant and Mr Lennard agreed they had enjoyed a very good working relationship. Mr Lennard asserted, and the claimant accepted, that he had been supportive of her at times when she had faced personal and mental health difficulties which affected her at work. She also maintained that she had been supportive of him in terms of his potential to progress to management roles.
26. The second matter of background is that the claimant stated she had been subject to a number of very offensive discriminatory comments over her years of service but she had not raised these matters formally. The occasion with which we are concerned was the first occasion she had raised an issue formally. It was therefore a very significant matter in her mind.
27. Thirdly, we wanted to outline the respondent's structure in respect of equality, diversity and inclusion. The respondent's structure includes a team titled Safety, Social Care & Equalities. The team is headed up by a Ms. Sandar. She had a number of deputies, three in total and about eight members of staff at lower bands. Although the team covered more than Equality issues, such issues were a central part of their function. In addition, each Head of Function within the respondent's organisation was allocated responsibility for each of the protected characteristics which the respondent calls 'strands'. In this case, relevantly, Mr Lennard was the lead for the 'race strand' and Mr Hall, the Chaplain, was the lead for the 'faith and belief strand'. There were monthly meetings of the Equalities Team which included members of this department, each of the strand leads, prisoners, visitors and other stakeholders. Those meetings were also attended by both the Governor in charge and the Deputy Governor. The Governor in Charge, Mr West, gave evidence that this was at his behest in order to emphasise the importance that he and HMP Stafford attached to Equality, Diversity and Inclusion issues.
28. The monthly meetings were used as an opportunity to report work done in the preceding month, to disseminate information, as a learning opportunity by means of presentations by third parties and to determine what needed to be done in the upcoming month/s.

The mural

29. Within the grounds of HMP Stafford, there is a single-storey standalone building, the end wall of which is used to display murals painted by the prisoners. Those murals are changed every few or perhaps every six months. The subject matter for this mural was determined by the equalities group within the prison. That group is a mixture of prisoners and staff. There are a number of other murals around the site where the input may be different.
30. By 1 February 2022, the previous mural had been painted white in preparation for a new one. On that date, the claimant learned from one of the prisoners that the plan was to paint a picture of an inspirational person and

that Marcus Rashford, the Manchester United football player, had been selected as the subject of the next mural.

31. The claimant understood Mr Rashford was considered inspirational because of his campaign to support vulnerable children, during the Covid pandemic, in particular, and for which he had been awarded an MBE. She, however, had a different perspective on Mr Rashford. In the previous week or two, he had been pictured with a rapper who was known for his antisemitic comments on Twitter (as it then was). The claimant took the view that this indicated Mr Rashford was friendly with or supported that rapper and, by inference, the rapper's antisemitic views.

The claimant's complaint

32. The claimant immediately completed a form known as a 'DIRF' – a discriminatory incident report form (p204). In it she stated she was Jewish and was very deeply offended that Mr Rashford was to be feted in this way. She said that she had been told *"the photo-op was an accident so it's ok. It is not."* Her complaint was that the mural was offensive to her and Jewish people in general in the circumstances that had prevailed in the previous weeks.
33. We note that on the DIRF the claimant only referred to the photo of Mr Rashford with the rapper obliquely: she called it 'the photo op'; she did not name the rapper, she did not explain his history of antisemitic comments, what they were or explain on what basis she felt Mr Rashford had associated himself with them. It is fair to say one would gain a limited understanding of the issues on reading the DIRF alone. Further, in the section which asked, 'What should happen next', she stated *"another inspirational figure should be chosen"*. She did not explicitly state that she wanted all work on the mural to be paused.

The appropriate complaint process

34. There was some debate in the evidence as to whether the claimant's complaint was rightly or wrongly submitted on the DIRF form or whether it should have been a grievance and whether this, in turn, contributed to the way it was progressed. On the face of the Ensuring Equality Policy, which covers DIRFs, neither that policy nor DIRFs themselves are applicable to a complaint against a member of staff for discrimination against another member of staff (p57 paragraph 1.1). This policy and DIRF's ostensibly relate to discriminatory behaviour by a prisoner or a visitor which might be witnessed by a member of staff. The exclusion of complaints by staff about staff is repeated on the face of the DIRF (p233). On the face of the Grievance Policy, this is the one which would apply to a complaint about the conduct of a member of staff.
35. In this case, however, the claimant understood that the decision about which she wished to complain had been made by both staff and prisoners and the mural would be painted by prisoners. She felt the DIRF was the appropriate form on which to raise such a complaint. We accept and, in the final analysis, the respondent did not dispute, that the policies are unclear as to how this particular situation should be dealt with. In the circumstances, we do not

accept that the claimant used the wrong form or process to report her concern.

36. In any event, we did not find this issue relevant to our decision for two reasons. Firstly, at the time, the claimant's DIRF was accepted as a DIRF and dealt with as a DIRF and no one said to her that they thought it was on the wrong form. Secondly, whichever policy is applicable, the fact is she had a complaint or concern. Whether it was a grievance or a DIRF, both needed to be logged or recorded under their respective policies (the DIRF as set out on p61 – paragraph 6.6 and the grievance as set out on p52 – 5.1). Both also needed to be dealt with under specified timescales. The DIRF within 14 days maximum (p206) and a grievance meeting was required within 20 days (p51).

How the complaint progressed – logging and allocation

37. The claimant intended to post her DIRF into the boxes available for such forms on site. When she sought to do so, she met a member of administrative staff emptying the boxes so she handed it directly to her. That member of staff took it to the Equalities Office where she met Ms. Sandar, Head of Safety Social Care and Equalities. We have not heard evidence from Ms. Sandar, but we read a report by her in which said she understood the claimant's complaint was related to race (p190). Ms Sandar advised the administrator to give the DIRF to Mr Lennard, the race lead. Ms. Sandar accepts that she should have ensured it was logged before she did so but explains in the report that she failed to do so because of an oversight and in the absence of the designated administrative staff member for equalities.
38. The member of staff to whom the claimant had handed the form, in accordance with Ms Sandar's instructions, handed it to Mr Lennard. He was not aware that it had not been logged. On reading it, it was plain to him the issue raised was one of faith or religion, for which he was not the lead. Nonetheless, he retained it because he had a good working relationship with the claimant and he thought he was well placed to resolve or decide the issue.

How the complaint progressed - timeframes and delay

39. Within a day or two of receipt of the DIRF and on 3 February 2022, Mr Lennard emailed Mrs Hancock (p195). The subject line was DIRF and he asked, "Can you pop in and see me when you are next in please?" In evidence, the claimant said she was uncertain if that was, in fact, the text of the email she received at the time, because she had felt the email was curt whereas that in the bundle was not curt. By sending the email within a day or two, of receipt of the DIRF, we find that that Mr Lennard accorded the matter appropriate priority.
40. The claimant stated in evidence that she replied to the email but there was no reply in the bundle. The claimant further asserted that, in response to the email, she attended Mr Lennard's office and she telephoned him on a number of occasions but he was not in. She was unable to say when she attended the office, or on how many occasions. She did not email Mr Lennard to inform him she had attended but had not been able to find him, nor did she leave a voicemail on his telephone. We find that somewhat surprising given

that, by the 11 February (p199), she stated that she had written to her MP about the issue. Further, she was in email contact with another member of the respondent's staff with whom she had discussed the matter. We do however accept that the claimant was struggling with her mental health at this time.

41. In light of the lack of clarity in the claimant's evidence, we were unable to find, on the balance of probabilities, that she attended Mr Lennard's office. We noted that she made no mention of any such attendance in the emails she sent during the relevant period. In any event, even if she had done so, we accepted Mr Lennard would have been unaware of this. We took the view, overall, that it would be proper to describe her approach towards meeting Mr Lennard as 'passive'. The claimant expected Mr Lennard to make the effort to arrange a meeting with her rather than vice versa. We also accept that, because of her working pattern, 1 week on and 1 week off, it was easy for a week to go by where she was less able to do anything to progress the requested meeting and we say, again, that we accept she was unwell at this time.
42. After the email of 3 February 2022, the matter drifted. It is not clear for how long, but it seems likely to have been one or two weeks. We find that, at some point before 21 February, Mr Lennard saw the claimant prior to prisoner visits. We accept that he asked her to come and see him about the DIRF after visits were over. We reached that conclusion on the basis of Mr Lennard's evidence to this effect and the claimant's email (p197). In the claimant's email she referred to Mr Lennard having asked her to visit him once by email and "*again at visits*". In evidence the claimant was unable to recollect Mr Lennard asking her to come and see him on this occasion but she was quick to say that she wanted to be fair to him and she did not deny the conversation took place.
43. On the 20 February 2022 (p198), the claimant sent an email to another member of staff with whom she had discussed the issue of the mural. She copied in Mr Lennard and she stated simply "nothing heard, painting now completed". This prompted a reply from Mr Lennard on 21 February 2022 stating that he had asked her on a couple of occasions to come and see him to discuss and requesting "can you make yourself available". This was his third attempt to arrange a meeting but this was prompted by the claimant's own email. By this stage, given the lapse of time since the DIRF was submitted and the timescales set out under the policies, in our view, it would have been preferable for Mr Lennard to have fixed a time for the meeting or, at the very least, to have provided the claimant with times when he would be available. He was better placed than the claimant to stipulate a time given his capacity as a head of function.
44. His email prompted a somewhat accusatory email from the claimant on the same date (p197) in which she said, he had emailed once and asked once but had done nothing; that the painting had been completed and that she would have expected it to have been put on hold until he had spoken to her. This was the first time the claimant indicated that a temporary pause in the painting was one of her desired outcomes. In her email the claimant was critical of the fact that Mr Lennard had not telephoned her or tried to contact her on the radio. She signed off by saying "The one time I have an issue, it is ignored". What the claimant did not say was that she had tried unsuccessfully

to see Mr Lennard on numerous occasions nor did she set out a time or date on which she intended to see him in the future.

45. Mr Lennard replied on 26 February 2022 and was also combative in tone (p197). In that email he fixed a meeting for Monday 7 March. Thus, 3 weeks and 2 days after the DIRF was submitted, a meeting to discuss the issues was fixed. The meeting was scheduled to take place almost 5 weeks after the DIRF was submitted (no doubt in part due to the claimant's work pattern). The respondent was therefore outside the timescales set down in either the Ensuring Equality Policy or the grievance Policy. Unfortunately, the claimant was unable to attend work on the 7 March by reason of illness. She told the Tribunal she suffered a mental breakdown. The scheduled meeting did not therefore take place. The claimant, in fact, was unfit to attend work again from that date until the termination of her employment almost 1 year later on the 14 April 2023.
46. We ought to say at this point that, in evidence, Mr Lennard asserted he telephoned the claimant on two occasions and asked her to attend the office. We are unable to find on the balance of probabilities that these calls occurred. We were unable to so find for similar reasons to those which left us unable to find that the claimant attended his office: we found that there was no clarity from Mr Lennard as to when he telephoned nor any detail as to the content of the discussion. Further, Mr Lennard did not refer to any such telephone calls in the emails he sent in February and March 2022. In fact, the first time he referred to telephone calls to the claimant was in a statement as part of an internal investigation within the respondent in August 2022. Curiously, this assertion was not repeated in his witness statement for Tribunal.

Putting the mural on hold

47. Mr Lennard did not pause completion of the mural pending resolution of the complaint. When asked why he did not do so in evidence, he said that this was not part of his thought process. His thought process was to prioritise meeting the claimant, to have a discussion and understand her concerns before he took any action. The claimant gave evidence that she had experience of dealing with DIRF's because she had worked as an Equalities Officer for the Prison Service. She said she would not have dealt with matters in the same way as Mr Lennard: she would have paused the mural until the complaint had been resolved one way or another.
48. We accept there are different ways of approaching this issue. We also accept that Mr Lennard genuinely believed the appropriate approach was to meet the claimant so he could understand why she felt the way she did and why she thought the mural was discriminatory before he took any action. We took the view that this was a genuine and logical approach (without making any finding as to whether it was reasonable). We took the view this was particularly so where the DIRF contained very limited information as to why an image of Marcus Rashford might be offensive to the claimant as a Jewish person and where there was no request in the DIRF asking Mr Lennard to intervene in the painting of the mural pending the determination of her complaint. We noted Mr Lennard's approach was supported by the evidence of Mr West who explained that he, too, felt it would be premature, in the atmosphere of the prison, to require the prisoners' painting work to stop (in effect pause the

implementation of the Equalities Group decision to paint Marcus Rashford) on the basis of a concern that had not yet been investigated.

Determination of the complaint by Mr Hall

49. On 9 March 2022 the respondent held one of its monthly EDI meetings which we have previously referred to. It was attended both by Mr Lennard and Mr Hall in their respective capacities as Strand Leads. Mr Lennard raised the fact that the Claimant's DIRF was unresolved and that, in fact, it raised an issue of religious discrimination for which he was not the responsible lead. As a result, the DIRF was given to Mr Hall, the prison Chaplain and the designated lead for faith and belief. It also became apparent that the DIRF had not been logged. On 14 March it was logged on the relevant system for recording the receipt of a DIRF.
50. On the same date, Mr Hall emailed the claimant. He noted her absence from work, expressed sympathy and requested that she provide a statement setting out her concerns in more detail. She did so on 16 March (p187). In that statement she provided a little more detail about her concerns: that Mr Rashford and the photograph had been the subject of discussion in the newspapers and more detail about the impact on her. In fact, Mr Hall was in possession of significantly more detail than Mr Lennard because, on the 22 February, the claimant had spoken to him in his capacity as pastoral support and explained her issue with the mural. In her statement to Mr Hall, she also referred to a long history of discriminatory comments - such appalling things as jokes about gas chambers.
51. Mr Hall established the identity of the rapper photographed with Mr Rashford. He also established that the photograph had indeed been the subject of discussion in the newspapers, including the Jewish Chronicle. He noted, as set out in that paper, that Mr Rashford had promptly condemned the rapper's antisemitic comments and reaffirmed his opposition to antisemitism. Subsequently, Mr Hall noted, Mr Rashford had stated that he was not aware of the rapper's comments when he got pulled into the photo opportunity. In all the circumstances, Mr Hall concluded that Mr Rashford himself was not antisemitic or could not be said to be antisemitic, nor could he be said to support antisemitism because a photo had been taken with this particular rapper. Mr Hall therefore found that Mr Rashford was an appropriate subject for the mural because of his work on child hunger. He did not uphold the claimant's complaint that the mural was discriminatory because it was offensive to those of the Jewish faith. He did, however, express concern at the claimant's statement that she had suffered for years for her beliefs. He noted that this would be discrimination and he welcomed a discussion about her experiences. The claimant did not respond to this invitation.
52. It is right to note that in her complaints as clarified in this hearing and in her cross-examination of Mr Hall, the claimant made no criticism of his investigation, the promptness with which he acted or his outcome. In fact, she thanked him for the care he had taken. The situation we, as the Tribunal find ourselves in, therefore, is that we are asked to determine a complaint that the respondent failed to pause the painting of a mural or deal promptly or properly with a discrimination complaint about the mural but the claimant is no longer claiming that it was an act of discrimination or harassment to select Mr

Rashford as the subject of the mural.

Conclusions

53. We remind ourselves that the claimant is complaining of the following 4 acts as direct religious discrimination or harassment related to religion in the alternative. Taking them in a manner we think is chronological: -

- i. Her DIRF was not logged on receipt.
- ii. Her DIRF was allocated to Mr Lennard, the Race Lead, when it should have been allocated to Mr Hall, the Faith and Belief Lead.
- iii. Mr Lennard failed to progress the DIRF as promptly as he should after 3 February 2022.
- iv. The mural continued to be painted after she submitted her DIRF and was not put on hold pending resolution of her complaint.

54. The crux of the claimant's case remained, as set out in the Case Management Order of Employment Judge Meichen, that the reason why her complaint was not progressed satisfactorily was because it was a complaint by a person of Jewish faith about discrimination against those of the Jewish faith. She believed that it would have been progressed in accordance with the process and more promptly had it been a complaint by someone of a different faith (or perhaps a different protected characteristic) about discrimination against those of a different faith (or different protected characteristic). In essence, she says the respondent and Mr Lennard took complaints of discrimination against those of the Jewish faith less seriously than discrimination against other faiths (or other protected characteristics).

55. If the claimant is correct, we take the view that would be a complaint of direct discrimination, not harassment, but we will deal with both in the alternative.

56. The first issue is whether these acts or omissions happened. It is admitted the claim was not logged on receipt; it is admitted it was allocated to the Race Lead when it was a complaint about religious discrimination and it is admitted that the mural was not paused. The only fact in dispute is whether Mr Lennard delayed progressing the complaint or whether the claimant caused or contributed to that delay.

57. The second issue is the reason why any of these acts or failures occurred. Was it because of or related to the claimant's Jewish faith? We focused on the reason why the respondent acted or failed to act as alleged because we felt in a position, on the evidence, to make clear findings in that regard.

58. We deal with these two issues in respect of each complaint as set out below.

Logging the DIRF

59. It is agreed the DIRF was not logged on receipt. We accept that it was Ms. Sandar's overall responsibility to ensure it was logged and she failed to do so. Although we have not heard from Ms. Sandar, we have read her report of her actions in which she accepted this responsibility. This was not challenged in evidence by the claimant. We are not satisfied that there is any evidence from which we could properly infer that the Head of Equalities failed to log the

DIRF because the complaint was by a Jewish person or related to her Jewish faith.

60. Even if there was such evidence and the burden shifted to the respondent, we except the reason why it was not logged was a simple oversight. We find on the balance of probabilities that it occurred, as Ms. Sandar says in her report, because the person who usually logged forms was absent. Further, the form was handed to Ms. Sandar by a member of administration and Ms. Sandar immediately took the view it should be handed to Mr Lennard. This was all actioned immediately face to face and without pausing to allow it to be logged on the system. It was simply a result of the prevailing circumstances and in no way because of, or related to the fact that the claimant was Jewish or was complaining of offence caused to her as a Jewish person.

Allocation to Mr Lennard

61. It is agreed the DIRF was allocated to and retained by Mr Lennard, the Race Lead. We find Ms. Sandar erroneously allocated the DIRF to Mr Lennard, because she misunderstood it to be a complaint of race discrimination. It is very clear to us on the evidence that Mr Lennard retained it and did not reallocate it to Mr Hall because of his previous good working relationship with the Claimant and his confidence he was well placed to understand and deal appropriately with her concerns. Again, there is no evidence upon which we could properly infer that Ms. Sandar or Mr Lennard were consciously or unconsciously influenced by the claimant's faith or any reason related to the claimant's faith in taking these decisions.
62. On the contrary, in so far as the actions of both are concerned and Mr Lennard in particular, we find his role in equalities, diversity and inclusion as a strand lead and his participation in meetings directed to education and furthering equality for all, is a contra indication that he had a dismissive attitude to any particular protected characteristic such as religion or the Jewish faith.

Mr Lennard's failure to progress the complaint promptly

63. As set out in the factual findings above, we find both Mr Lennard and the claimant could have done more to ensure the complaint was progressed by ensuring the necessary meeting took place. Mr Lennard could and should have set a meeting time or provided the claimant with his availability sometime after the 3 February and before the 21 February and not waited until a chance encounter at prison visits. The claimant, equally, could and should have made greater efforts to attend his office in response to the email of the 3 February, or his request at visits, or replied to his emails by way of an email with a suggested date or time.
64. We find that the priority or speed with which Mr Lennard first addressed matters diminished after the 3 February, not because of his attitude to the Jewish faith or discrimination against those of the Jewish faith, but as a result of the claimant's failure to respond to his requests for a meeting. There is no material from which we could properly infer that Mr Lennard thought discrimination against Jewish people less serious than other forms of discrimination. Even if the burden of proof shifted, we are satisfied that the

speed with which Mr Lennard pursued the complaint, having pursued it very promptly at the outset, was because of the claimant's lack of response and not because of or related to her Jewish faith.

Halting work on the mural

65. It is accepted that Mr Lennard did not ask that work on the mural be halted pending resolution or determination of the claimant's complaint. We have made clear findings as to the reasons for this in our factual findings above. He genuinely believed the appropriate process was to clarify the complaint before taking any decision to intervene in the painting of the mural.

Comparison

66. In the circumstances, it is unnecessary to determine whether the claimant was treated less favourably than a hypothetical comparator of a different faith or with a different protected characteristic would have been treated for the direct discrimination complaint. For the avoidance of doubt, we cannot see any basis on which we could find that such a comparator would be more favourably treated. In order to be an appropriate comparator, it seems to us that they would have had to have made an equivalent complaint, handed it in in a similar manner, have had a similar working relationship to another strand lead and responded to requests for meetings in a similar way to the claimant. Had that happened, we are not able to find that say, a hypothetical comparator of the Muslim faith complaining of religious discrimination as a Muslim would have been treated any less favourably than the claimant was in the same circumstances.

Concluding Comments

67. We wanted to make some concluding comments. We took the view that it was important to acknowledge that the claimant has a deep-seated and entirely genuine belief that those of the Jewish faith are something of an unseen minority and that the concerns of that community are not taken as seriously as the concerns of other minoritised groups. This belief seems to be, at least in part, based on what she says is her lived experience of offensive behaviour going unaddressed when drawn informally to the attention of others. We understand that this was the first time she had chosen to make a formal complaint about such perceived behaviour. As a result, the response she got from her employer was imbued with a particular significance for her. She measured that response against their policies and against what she would have done were she dealing with the complaint and she found the respondent to have fallen short. She inferred that this must speak to the attitude of Mr Lennard and others to complaints by someone of her particular faith. That is her genuine belief and is genuinely the inference she has drawn. It is not, however, in our view, supported by the evidence in this case. It is not an inference we find it appropriate to draw after having conducted a forensic and detailed examination of the events.

Employment Judge Connolly

Signed: 16 November 2023