EMPLOYMENT TRIBUNALS

Claimant: **Mr Q Akbar**

Respondent: **DHL Services Limited**

Heard at: **Birmingham**

On: **4, 5, 6 and 7 December 2023**
(and 19 December 2023 in chambers)

Before: **Employment Judge Kenward**
Ms S Bannister
Mr D Spencer

Representation
Claimant: **in person**
Respondent: **Mr R Lassey (counsel)**

RESERVED JUDGMENT

1. The following complaints are well-founded and succeed:

   (a) the complaint of direct discrimination on the grounds of religion or belief in respect of:

   (i) the Claimant's dismissal;

   (ii) the rejection of the Claimant's appeal;

   (b) the complaint of harassment related to religion or belief due to the comments made at an appeal hearing on 29 September 2022;

   (c) the complaint of unfair dismissal.

2. The following complaints are not well-founded and are dismissed:

   (a) the complaint of direct discrimination on the grounds of religion or belief in respect of:

   (i) the Respondent's alleged failure to deal with the Claimant's points raised in his appeal against dismissal;

(ii) the comments made at an appeal hearing on 29 September 2022;

(b) the complaint of indirect discrimination on the grounds of religion or belief.

3. A remedy hearing will be listed to determine the remedy in respect of the complaints which have succeeded.

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REASONS

1. The Respondent is a large company which provides logistics support to various customers including Jaguar Land Rover ("JLR") under a commercial contract at several sites operated and owned by JLR. The Claimant was employed at one such site, namely Castle Bromwich. He gives his dates of employment as between 18 October 1998 and 6 September 2022. At the time of his dismissal he was employed as a Warehouse Co-ordinator. He claims that his dismissal amounted to unfair dismissal as well as discrimination on the grounds of religion or belief, in addition to making other related complaints of discrimination. The Respondent claims that his dismissal was on the grounds of gross misconduct and any treatment of the Claimant was not discriminatory.

Proceedings and issues

2. An ACAS certificate was issued on 31 October 2022 in respect of early conciliation which began with ACAS being notified of the prospective Claim on 29 October 2022. Proceedings were commenced on 26 November 2022 by an ET1 Form of Claim in which the Claimant complained of unfair dismissal and discrimination on the grounds of religion or belief. The Respondent filed Grounds of Resistance which denied liability.

3. The case was subsequently listed before Employment Judge Jones for a preliminary hearing to identify the issues and make directions. The resultant Case Management Order identified the complaints raised as being those set out below:

(1) Unfair dismissal.

(2) Direct discrimination on the grounds of religion or belief about the following:
(a) dismissal;
(b) alleged comments made to the Claimant at the appeal hearing by Mr Mark Westwood;
(c) the Respondent's alleged failure to deal with the Claimant's points raised in the appeal;
(d) the rejection of the Claimant's appeal against dismissal.

(3) Indirect discrimination on the grounds of religion or belief on the basis that the Respondent's Diversity and Respect at Work Policy amounted to a provision, criterion or practice ("PCP") which put the Claimant, as a Muslim, at a particular disadvantage when compared with non-Muslims in that the expression of Islamic beliefs about homosexuality gave rise to disciplinary action.

(4) Harassment related to religion or belief due to the alleged comments made by Mark Westwood at the appeal hearing.

4. On the basis that these were the complaints before the Tribunal, the resultant Case Management Order also contained a List of Issues to be determined by the Tribunal at the final hearing and made it clear that if either party considered that the List of Issues was wrong or incomplete, then that party should write to the Tribunal by 19 May 2023.

5. The Respondent's Amended Grounds of Resistance maintained its position of making no admissions as to whether the Claimant's religion or belief amounted to a "*belief*" within section 10 of the Equality Act 2010.

6. The Respondent also did not admit that applying its Diversity and Respect at Work Policy amounted to a PCP. In the alternative, if this did amount to a PCP, any disadvantage was denied. Alternatively, it was contended that any such PCP was a proportionate means of achieving a legitimate aim, namely to maintain appropriate standards of conduct and behaviour, to ensure that its own employees and employees of JLR are treated with dignity and respect and to enforce its own policies.

Evidence

7. In addition to listing the case for a final hearing, the Case Management Order also made directions for disclosure of documents and the production of a bundle of documents for the final hearing. As a result, we were provided with a bundle of 223 pages containing the documents disclosed by both parties.

8. Directions were also made for Statements of Evidence to be provided. The Claimant provided his own Statement witness statement as well as Statements from Mr John Aston, who accompanied him at the disciplinary hearing and Mr Paul Doherty who accompanied him at the appeal hearing. The Respondent served Statements of Evidence from Mr Roy Yates, who was the Operations Manager who made the decision to dismiss, and Mr Mark Westwood, the Senior Operations Manager who had conducted the appeal hearing.

9. All of these witnesses also gave oral evidence with the exception of John Aston. The Respondent indicated on the first day of the hearing that it was not seeking to cross-examine John Aston. In the circumstances, the Tribunal indicated that there was no need for John Aston to attend to confirm his evidence and his Statement would be taken as read. The Claimant had suggested that he might want to ask some questions of John Aston. It was established that he was seeking to get John Aston to confirm the content of a note (of half a page in length) which was made by John Aston in relation to the disciplinary hearing and which was already in the bundle. The note essentially set out points being made by or on behalf of the Claimant at the disciplinary hearing. It was clear from other documents that these were points being made by the Claimant, both in the internal proceedings and in the Tribunal proceedings, and these points were taken into account on that basis.

Findings of fact

10. The Claimant is a Muslim. It is his belief that "*you cannot be gay and be a Muslim*". He states that this is what his religion has taught him, and this belief is part of his religion as a Muslim.

11. The Respondent has a Diversity and Respect at Work Policy (the "Policy") which it applies to its employees. In the Policy, in relation to the purpose of the Policy, it is recorded that "*DHL are committed to providing a working environment free from harassment and bullying and ensuring that all staff are treated, and treat others, with dignity and respect*". It is also recorded that "*all employees are required to behave at all times in a manner which complies with* [the Policy] *and fulfils the requirements of equality legislation*". Thus, it is stated that ignorance "*of the law is no defence and employees will have no excuse if they act in a way which is contrary to* [the Policy]". Further at page 3 of the Policy, it is recorded that the Respondent "*will take any allegation of harassment, bullying or improper conduct seriously and will deal with matters in an appropriate way and according to the circumstances of each case*". The Tribunal accepts that the Policy has the aim of ensuring that everyone working at its sites, whether they work for the Respondent or JLR or anyone else, is able to work in a positive and inclusive work environment, free from harassment and bullying.

12. The Policy makes it clear that allegations of improper conduct will be taken seriously and that this could include formal action in accordance with the Respondent's disciplinary and grievance procedures. Examples of improper conduct were provided including "*lewd comments or abusive language which denigrates or ridicules a person, insults which are discriminatory in nature, mimicking accents, speech or mannerisms, offensive comments about dress or religious dress or customs, appearance or physique or speculation about a person's private life and / or sexual activities*".

13. The Claimant would have been aware of the Policy. He would have known that it was available and accessible. The Respondent provides managers, such as Roy Yates, with diversity and equality training. However, there was no evidence of the Claimant having been provided with diversity and equality training.

14. The Respondent's Disciplinary Policy lists various examples of conduct which will be treated as potentially amounting to gross misconduct. The examples include conduct "*which causes, or has the potential to cause, unacceptable loss, damage (physical or reputational) or injury*" and "(d)*iscriminatory conduct, harassment or any other action contravening the Diversity & Respect at Work Policy or the DHL Code of Conduct*".

15. The Claimant's job as a Warehouse Co-ordinator involved working in the Respondent's Receiving Office, on the JLR site at Castle Bromwich. A number of colleagues also worked at desks or workstations in the Receiving Office. The lay-out of the Receiving Office included a window which had an open hatch where visitors, including JLR employees, could be attended to and seen.

16. On 11 August 2022, at about 7.30 am, Ms Karen Jones, a freight driver employed by JLR, attended the Receiving Office in order to hand in / collect paperwork.

After coming out of the Receiving Office, she made a report by telephone to her Group Leader regarding comments that she had overheard. The Group Leader told her to speak to a Supervisor about the matter.

17. On 15 August 2022, Mr Peter Quinton, an Operations Manager for JLR, emailed Mr Angus McNaughtan, a Senior Operations Manager, setting out the content of a telephone conversation with Karen Jones that morning. The subject line of the e-mail referred to an allegation of homophobic remarks with the content of the e-mail then setting out that Karen Jones had overheard the Claimant referring to homosexual women by saying that they "*are just rug munchers, pussy lickers*" and "*I wouldn't want a dildo up my arse from her*". When someone in the office corrected him by asking if he meant "*lesbian*", he was stated to have replied "(y)*ea, rug munchers, they are all the same*". Karen Jones was outside the office when she heard this being said, and then went into the office to take issue with what had been said.

18. Although the Claimant was to take issue with the allegations of Karen Jones being provided in the form of an e-mail which he described as amounting to hearsay, the Tribunal is satisfied that the e-mail contains the evidence of Karen Jones which was effectively being forwarded by Peter Quinton. This is because the content of the e-mail is essentially consistent with the content of two handwritten statements later provided by Karen Jones.

19. It is to be noted that the Claimant has always denied using these words. His case is that he was watching a video on the TikTok social media site on his mobile phone at his desk at approximately 7:30 a.m. In the video someone described themselves as "*a lesbian and a Muslim*", to which the Claimant made the remark that "*you cannot be gay and be a Muslim*". This was said out aloud but was said to himself rather than to anyone in particular. The Tribunal is satisfied that it was said fairly loudly. The Claimant conceded as much in his evidence. Thus, it would have been heard by the others in the office. It may not have been heard by Karen Jones. She has not referred to these words being said. However, the Tribunal does not think that it was said in a way which was aggressive.

20. The Claimant was suspended from work on 15 August 2022. For these purposes, Ms Laura Henderson, an HR officer of the Respondent, gave advice, by e-mail, as to the wording of the suspension letter. The e-mail in which she did so is part of an e-mail chain which began with the original e-mail from Peter Quinton setting out the substance of the complaint. In providing the advice she stated that "*I know the phrases he used are quite vulgar but we need to make sure we use the specific wording used as part of the investigation*". This part of the e-mail can be criticised on the basis that it should have been referring to the phrases or wording in issue as alleged phrases or alleged wording. The final sentence of the e-mail was asking to be notified as to the outcome of the investigation "*and I'll pick up the DPH next week*", which seems to be referring to making arrangements for a disciplinary hearing before the investigation had taken place. This sentence ended with a smiley face emoji, which appears to be unprofessional given the serious matters being dealt with in the e-mail.

21. When the Claimant was, in due course, invited to a disciplinary hearing, he was provided with a pack of evidence. This included the e-mail from Peter Quinton,

but also included, as part of the e-mail chain, the e-mail from Laura Henderson providing advice as to the suspension letter. This was clearly an oversight in that it had not been intended to provide the Claimant with a copy of this e-mail from Laura Henderson. The Claimant was subsequently to point out that the wording and content of the e-mail appeared to be prejudging the disciplinary allegations. It is understandable that he should be concerned that this should be the case. Ultimately, the Tribunal was satisfied that the decision itself was not made by Laura Henderson. However, she continued to be involved in the disciplinary process in an HR advisory capacity and also as a notetaker, as well as preparing the first draft of the appeal decision letter (to reflect the decision made by the manager hearing the appeal). The fact that the Claimant had developed a lack of trust in the integrity of Laura Henderson as a result of seeing this e-mail probably contributed to the fact that subsequent parts of the process did not go particularly smoothly and, in particular, the later appeal hearing developed into a difficult meeting.

22. The suspension letter signed by Mr Patrick McCarthy, Operations Manager, only particularised the disciplinary charge being faced by the Claimant by saying that it was "*alleged that you used multiple homophobic references during a conversation with a colleague*" which was alleged to constitute a breach of the Diversity and Respect at Work Policy. The Claimant was invited to an investigation interview to be conducted by Mr Colin Round, Operations Manager, who had been appointed as the investigation manager.

23. The Respondent undertook investigations in so far as it obtained statements from the other occupants of the office. The Tribunal has not been provided with any documentation or other evidence as to what they were being asked to deal with in their statements, or any questions or issues which they had been asked to address.

24. Mr Calvin Greaux, who worked for the Respondent as a Transport Clerk, provided a typed and signed statement dated 15 August 2022. The statement consists of four fairly short paragraphs on a single page. The first paragraph can be argued to be consistent with the Claimant's case that he said that "*you cannot be both*" gay and Muslim. However, the second paragraph could be said to support, at least in part, the version of events of Karen Jones. He says that the Claimant "*was very explicit, vocal and aggressive, in his views and most women regardless of sexual orientation would be degrading, demeaning and obscene* (sic)", although the sentence was not particularly well written so that it is not entirely clear what is being referred to as meriting the words "*degrading, demeaning and obscene*". From the context of the paragraph as a whole, the Tribunal thinks that it is most likely that the witness was referring to the language used by the Claimant. The next sentence says that two of the words used by the Claimant were "*pussy and dildo*". This is consistent with the version of events of Karen Jones who also refers to these two words being used. The rest of the statement is also consistent with the evidence of Karen Jones in that the witness describes the Claimant having been "*unaware that a JLR driver overheard his views and took great offence to his remarks and views and was clearly visually upset by it*". This caused her to come into the office and make it clear to the Claimant that she had overheard the conversation and would be reporting it.

25. A further statement was provided by Mr Carlton Brock who also worked in the office as a First Line Manager. The statement is typed, signed and dated 15 August 2022. It is less than half a page in length. The first paragraph is consistent with the Claimant's case in that he says that he heard the Claimant "*make a reference regarding something to do with being gay and Muslim*". However, it is clear from the statement that other things were then said by the Claimant as well. Thus, this witness refers to the Claimant having "*continued talking*", but states that he does not know what was said as he was "*zoned out*" and concentrating on his work. However, he does seem to have heard Karen Jones saying that she was going to make a complaint and having asked the Claimant "*if it was him who was talking*".

26. Another signed statement dated 16 August 2022 was provided by Ms Kerry Vincent. This statement was handwritten and less than half a page in length. The first paragraph confirms the Claimant's version of events in that the witness says that he was listening or watching something and said, "*you cannot be gay and Muslim you can be one or the other but not both*". She then states that she heard "*a lady from the delivery hatch say that* (she) *heard that and she was going to report him*". The lady concerned then came into the office and asked the Claimant "*if it was him who had said it and he answered maybe*". The conversation ended with the lady saying that she was going to report the Claimant to which the Claimant "*said have a nice day and she replied yes you too*".

27. Another signed statement dated 17 August 2022 was provided by Ms Diane Congrave. This statement was handwritten and half a page in length. She confirmed that the Claimant was watching or listening to something on his phone when he said that "*you ent* (sic) *Muslim if you are gay*". She then said to the Claimant that "*you can't say that*" and "*you are what you are*". The Claimant then said, "*that is what I believe in I am entitled to my opinion*". Ms Congrave was walking out of the office when a lady came into the office and asked the Claimant "*is it you shouting your mouth off*" to which the Claimant replied "*maybe*". The lady then said that she was reporting the Claimant. The Claimant "*then said have a nice day*" and "*the lady said you too*".

28. A disciplinary investigation meeting then took place on 18 August 2022. This was effectively an investigatory reinterview of the Claimant. The Claimant attended the meeting alongside a companion, Mr Mansoor Zamir. Colin Round (Operations Manager) chaired the meeting as the investigation manager. During the meeting the Claimant accepted that he was aware of the Policy. The Claimant denied making the comments alleged by Karen Jones. His version of events was that he had been looking at TikTok on his mobile phone, and as a result of seeing a "*video of a Muslim woman who was a lesbian*", he commented that "*you can't be gay and Muslim*". He described this as "*my core belief, you can't be Muslim and gay … homosexuality is not accepted as part of the core beliefs of Islam*".

29. In the course of the investigatory interview, the version of events of Karen Jones (taken from the e-mail sent by Peter Quinton) was read out to the Claimant who suggested that Karen Jones was making an assumption that it was him. He said that "*it could have been either one of us*". In fact, in giving evidence to the Tribunal, the Claimant made it clear that it was his case that the words alleged by

Karen Jones were not heard by anyone in the office at all (so it was not a case of Karen Jones mistakenly attributing to the Claimant words said by someone else). The statements from the other occupants in the office were also read out to the Claimant and his comments sought. The Claimant's response to the statement of Calvin Greaux (which has references to two of the offensive words alleged by Karen Jones) was "*if I did I can't recall*", but it is not clear from the interview record what he is referring to when he stated, "*if I did*". Clarification was sought from the Claimant at the end of the interview regarding this reply to which he responded, "*it was a conversation with myself, if I can't recall, I didn't say that*" He was asked in the interview if he had ever had any issues with the complainant before and confirmed that he did not know her and had never seen her before.

30. Although it does not appear in any written version of events provided by Karen Jones, the Claimant was also asked at the end of the interview if he told "*the lady to fuck off as she left the office*". The Claimant denied this.

31. At the end of the investigatory interview the Claimant was told by Colin Round that as "*2 statements say pussy and dildo, that's enough evidence to take this forward*" under the disciplinary procedure.

32. Thus, the outcome of the disciplinary investigation was that there was a case to answer and that the matter should proceed to a disciplinary hearing on the basis of the comments allegedly being in breach of the Dignity and Respect at Work Policy.

33. The Claimant was invited to a disciplinary hearing by way of letter dated 24 August 2022. The meeting was scheduled for 30 August 2022. In the letter, the Claimant was informed of the allegations against him, as well as his right to be accompanied. The specific allegation set out in the letter was that the Claimant "*made multiple homophobic references in the presence of a Jaguar Land Rover colleague*" which "*constitutes a breach of the Disciplinary Diversity at Work Policies*". The Claimant was also notified that the allegations were "*very serious and could constitute gross misconduct for which the disciplinary action could be up to summary dismissal*".

34. The disciplinary pack provided with the letter included the policies to which reference had been made, the notes of the investigation interview and the statements from the other occupants of the office. At this stage, there was no separate statement from the complainant, but the Claimant was provided with the e-mail in which Peter Quenton had set out the version of events which the complainant had provided to him.

35. The disciplinary hearing took place on 30 August 2022. It was conducted by Roy Yates, Operations Manager. Laura Henderson was present as a representative from HR. The Claimant attended this meeting with a companion, John Aston.

36. By the time of the disciplinary hearing, Roy Yates had decided that a statement was needed from the complainant. Accordingly, he had requested that a statement be obtained. The original handwritten statement subsequently provided by Karen Jones was dated 24 August 2022. Although she provided a detailed description of the events on the morning when she was attending at the office

where the Claimant worked, she did not set out the actual words used by the Claimant about which she was complaining but said "*I have not wrote down the words here, I will tell you them face-to-face*".

37. This resulted in Roy Yates requesting that the statement set out the actual words used. This request was passed on to the complainant with the Karen Jones then providing a further statement in which she simply stated that the words used were "*pussy licker, rug muncher, and dildo up the arse*".

38. It is to be noted that neither statement provided by Karen Jones refers to the Claimant having made comments about not being gay and Muslim.

39. These two handwritten statements from the complainant were not in the pack of evidence which had been provided with the letter convening the disciplinary hearing and were only provided shortly before the disciplinary hearing itself. This resulted in the Claimant having to request an adjournment. The request was granted and the meeting was adjourned and reconvened on 6 September 2022.

40. From the oral evidence of Roy Yates, when questioned by the Tribunal, it also transpired that he had sought to make further enquiries himself of the other witnesses, but had been informed that they had nothing to add to their statements.

41. The Claimant's position at the disciplinary hearing was that the conversation alleged by Karen Jones had not taken place. The Claimant's position was that he had simply made the comments about not being gay and Muslim. He was suggesting that the focus of Karen Jones on him could be explained by her being Islamophobic. Insofar as there is a degree of consistency between the statements of Calvin Greaux and Karen Jones, he said that this could be explained by collusion. He accepted that he had known Kerry Vincent, Diane Congreve and Calvin Greaux for years, but he did not really know Carlton Brock. He suggested that Calvin Greaux might have been motivated by ill feeling as the Claimant had been asked to cover his duties when Calvin Greaux was due to be moved to a different role although Calvin Greaux had ultimately refused to go.

42. At the end of the disciplinary hearing, there was a break for approximately half an hour. The hearing then reconvened and Roy Yates announced the outcome. He believed that the Claimant had said the explicit words about which complaint had been made. He relied upon the statement of Karen Jones being corroborated by that of Calvin Greaux. Insofar as the statements of Kerry Vincent and Debbie Congreve were not as "*comprehensive as they could have been*", he appeared to suggest that this was because of the Claimant's long-standing relationship with them. The Claimant's actions were in breach of the Policy and had brought the Respondent company into disrepute. The decision was to dismiss the Claimant with immediate effect.

43. The outcome of the disciplinary hearing was confirmed in a letter dated 8 September 2022. The letter contained a number of bullet points setting out a summary of the discussion and evidence. The letter then stated that the summary dismissal was on the grounds of gross misconduct. Although reasons for the decision had been provided orally at the end of the hearing, as recorded on the

form for the notes of the disciplinary hearing, the letter itself did not really set out the reasoning by which Roy Yates had arrived at that decision.

44. The Claimant's letter of appeal from 13 September 2022 was to complain about the dismissal letter having provided no "*explanation or basis in relation to the outcome reached by Mr Yates*". This seems to have resulted in a revised letter of dismissal been provided which was dated 21 September 2022, to which Roy Yates had added his reasons for his decision, which was set out over the course of four bullet points. Essentially, the fact that key parts of the statement of Karen Jones had been corroborated by Calvin Greaux had led him to conclude, on the balance of probability, that the phrases in issue had been used, taking account also of the fact that Karen Jones did not know the Claimant and Roy Yates did not believe that she had any cause to fabricate the complaint. In so far as the Claimant had sought to suggest that the three other statements had been in his favour, Roy Yates pointed out that one of those witnesses had stated that he did not clearly see or hear what was said, so that his evidence was inconclusive.

45. The Claimant's letter of appeal extended to two typed pages in which he made various points. This included emphasising his length of service and the absence of any previous complaints of homophobic views. Having regard to this mitigation, he claimed that the decision maker had failed to consider any alternative or lesser sanction. He suggested that the complaints amounted to challenging him in respect of his religious beliefs and he relied upon his freedoms in respect of religion and belief and the right of expression. He suggested that Calvin Greaux had been seen on a walkway talking to Karen Jones which should be recorded on CCTV and was proof of collusion. He suggested that three of the witnesses corroborated his version of events and insufficient weight had been given to these statements. As there was a conflict of evidence, he suggested that any such dispute should be resolved through the witnesses being tested on their evidence and that this should take place through the appeal being conducted as a rehearing. Various further points were listed over the course of 22 bullet points. Mostly these were matters which had been raised by him in the course of the disciplinary hearing. He asked for these points to be considered and stated that he would go through these points thoroughly at the appeal hearing.

46. By letter dated 22 September 2022, the appeal hearing was arranged for 29 September 2022. Mark Westwood was the appeal hearing manager. Laura Henderson, HR Resolution Manager, attended as the HR representative. Her role was both as a notetaker and to provide HR advice when needed. The notice of the appeal hearing described the Claimant as having attended accompanied by a First Line Manager, Mr Paul Doherty, as his employee representative. Although Paul Doherty is a trade union member and former shop steward, he was representing the Claimant informally rather than in a formal trade union capacity.

47. A template document was used for setting out the typed notes of the appeal hearing. Laura Henderson was taking a note during the hearing, but this was not a verbatim note. The Tribunal did not hear evidence from Laura Henderson, for example as to what happened to her original note and the extent to which the draft note of the hearing which was originally sent to the Claimant for his potential agreement had been tidied up or altered from the original note. It seems clear that her notes omitted some of what was said, for whatever reason. This may

have been because it would have been difficult to keep up with the speed at which people were talking, particularly when the hearing became heated, or it may have been that not everything was being noted where there were issues of relevance or repetition.

48. The Claimant and his representative, Paul Doherty, do not themselves seem to have been taking notes. Thus, when, after the appeal hearing, a draft version of the notes was provided for their possible agreement, in suggesting any possible additions or amendments they were largely reliant on their recollection as to what was said. However, it is clear that a number of their proposed additions or amendments were accepted, presumably on the basis that the original draft notes were missing these passages. This indicates to the Tribunal that the Claimant and / or Paul Doherty did have a good recollection of what had been said at the point in time when they were being asked to agree the minutes. There also seems to have been a degree of compromise on the part of the Claimant and / or Paul Doherty in ultimately accepting the final version of the minutes which did not include all of their suggested amendments or additions. They had come to understand that a decision on the Claimant's appeal could not be reached until the notes of the appeal hearing had been agreed. Thus, the Tribunal was satisfied that the final version of the minutes represented something of a compromise with the Claimant and his representative unable to insist that Laura Henderson include additions or amendments where she was insisting otherwise.

49. In disputing some of the proposed additions or amendments, Laura Henderson provided comments explaining the basis upon which she was doing so. Sometimes this was because the point being made was captured elsewhere in the notes. This made it difficult to be sure as to the extent to which certain passages were omitted not because the passages did not record what had been said, but because the passages were repeating what had been said elsewhere.

50. The first part of this template form for the record of the appeal hearing sets out a script by way of options at the start of the hearing. This includes an introductory paragraph to the effect that the appeal hearing would proceed by hearing the grounds of appeal which would involve the employee being asked to explain the grounds of his appeal and there then being a discussion around those grounds of appeal and any new evidence. This was effectively the way in which the appeal proceeded, although there was no new evidence as such.

51. Thus, at the outset, the Claimant was invited by Mark Westwood to "*talk me through the grounds of appeal*". After explaining the issue which he had in relation to the complainant only having produced her two handwritten statements on 24 and 25 August 2022, the Claimant was invited by Mark Westwood to "*talk me through the race/religious aspect*" of his appeal. The point essentially being made by the Claimant was that the complainant had assumed that she had heard him speaking because "*I was the only Asian in the room*".

52. There was then a discussion about the video which the Claimant had been watching. The hearing then moved on to focus on the evidence of Calvin Greaux whose evidence had been treated as corroborating the complainant's evidence as to some of the words used. The Claimant made it clear that he was disputing

this part of the statement but pointed out that the first part of the statement was corroborating his case that he had said that a person cannot be Muslim and gay.

53. There was then a discussion about the evidence of Kerry Vincent who had also confirmed the Claimant saying that "*you can't be Muslim and gay*" and had suggested that the complainant said that she had heard that. The Claimant was asked as to why he had said to the complainant "*have a nice day*". His reply suggested that the complainant had not looked upset, but the Claimant then suggested that if "*she might be upset about my religious beliefs but that's on her*". This then prompted a question from Mr Mark Westwood as set out below.

    "*Why do you think it's fair to share your beliefs in an office*".

    The Claimant replied as below.

    "*Me having a moment where I momentarily said something doesn't mean I'm sharing it*".

    This reply then prompted a further question from Mark Westwood as set out below.

    "*MW – do you not think saying you can't be gay and be a Muslim is homophobic*".

    The Claimant simply replied "*No*", but the notes record Mark Westwood effectively pressing the point by asking the same question as below.

    "*You don't think it's homophobic to say that*".

    The Claimant replied as below.

    "*No I don't, it's my religion*".

54. These were all amendments to the minutes made by the Claimant and his representative. In other words, they did not appear in Laura Henderson's original minutes. She has effectively conceded that Mark Westwood asked the question set out above on two occasions.

55. The amended version of the minutes of the appeal hearing put forward by the Claimant and his representative had then included the word set out below.

56. "*(MW kept asking the same question for at least 6-8 times, I responded asking the same question over and over again would not get a different reply)*".

57. This addition was not agreed by Laura Henderson. She indicated, with her initials, that this proposed addition was disputed and added comments that "*MW did not ask question this many times, over-exaggeration and not factually accurate to the conversation*".

58. In his Statement of Evidence, Mark Westwood stated that "*I asked Qaysar whether he had said that you can't be gay and a Muslim and he said that he had. I asked him whether he thought that that was an appropriate comment to make. I*

did this to try to understand a number of things: the context and manner in which the comments were made; whether or not the comments were linked to Qaysar's religious belief and whether or not Qaysar could understand that it might not be a belief which everyone shared and could potentially be considered offensive".

59. Having heard evidence from the Claimant, Paul Doherty and Mark Westwood, the Tribunal has concluded that the question was probably not asked as many as six to eight times. This is probably an exaggeration. That said, it probably reflects the impression which the Claimant had of the question being asked a number of times. Mark Westwood was prepared to concede that the question was asked at least three times; so more than the number of times agreed by Laura Henderson. There was, effectively, agreement between the witnesses at the Tribunal that the question had been asked multiple times. The Tribunal concludes that it is likely that it was asked at least three or four times, as Mark Westwood sought to press the point in the absence of the Claimant agreeing to the view that Mark Westwood was effectively putting forward, namely that he considered the remarks to be homophobic.

60. The Tribunal considers that Mark Westwood appeared to be attaching undue significance to the use of these words given that (1) all of the witnesses in the office, including the Claimant, agreed that he said words to the effect that you cannot be Muslim and gay, and (2) the disciplinary allegation was based on the words alleged by Karen Jones who did not refer to the Claimant having used words to the effect that one cannot be gay and Muslim.

61. Mark Westwood is then recorded as having said that "*5 witnesses heard what you said*" which would appear to be referring to the comment that "*you can't be gay and being Muslim*", albeit this was not specifically referred to by Karen Jones.

62. The Claimant took issue with the line of questioning of Mark Westwood. The Claimant suggested that he was being persecuted for his religious belief which prompted Mark Westwood to seek to justify the line of questioning by saying "*I'm asking if you think people might feel about the comments*". However, this was not the way in which the question had been put. In both cases where the question appears in the minutes, the question had been seeking the Claimant's views to the effect that what he had said in relation to not being gay and Muslim was homophobic.

63. There then seems to have been a short adjournment and the appeal hearing resumed by discussing the various statements of the witnesses. It is noteworthy that, immediately after the adjournment, Laura Henderson appeared to be leading this part of the discussion. Paul Doherty raised issues regarding the steps taken to obtain the version of events of Karen Jones. This then developed into a discussion regarding the e-mail sent by Laura Henderson advising as to the wording of the suspension letter. Laura Henderson suggested that the e-mail should never have been shared with the Claimant but also acknowledged that, as it was internal correspondence, she did not use the word "*alleged*" in describing the conduct in issue. The issue was also raised regarding Colin Round having asked in the investigatory interview whether the Claimant had told Karen Jones to "*fuck off*" even though this was clearly in none of the statements. Laura Henderson made it clear that this had been "*dismissed*" at the disciplinary stage,

by which she presumably meant that it had been accepted that it was not part of the disciplinary case against the Claimant. At one point the Claimant referenced his grounds of appeal in terms of his point that he was entitled to the freedom to express beliefs and opinions. However, most of the discussion in this part of the appeal hearing related to the content and significance of the various statements of evidence.

64. After 35 minutes, there was another short adjournment, following which Paul Doherty returned and stated that "(w)*e don't need to add anything else*". From this, the Claimant and Paul Doherty were presumably content that the appeal hearing had covered all of the points that they wanted to cover, even though this had not been all of the points raised in the appeal letter. Mark Westwood replied making it plain that, because "*of the points you've raised I'm not in a position to make a decision today*". This would seem to indicate that he was taken account of various points raised.

65. The appeal meeting ended with a discussion about the minutes. Paul Doherty was adamant that the correct procedure was for the notes of the meeting to be printed off so that they could be reviewed there and then. Much of this discussion was not reflected in the final version of the minutes. However, Mark Westwood agreed that, although it did not appear in the final version of the minutes, there had been a discussion which had clearly become heated. The Tribunal thinks that it is likely that Laura Henderson took issue with comments from Paul Doherty on the basis that she considered that he was telling her how to do her job and Mark Westward felt the need to tell Paul Doherty not to speak to Laura Henderson in the way in which he had been doing. However, it is noteworthy that the proposed amendments in respect of this exchange do not involve the Claimant saying anything at this stage.

66. After the appeal hearing, Mark Westwood wrote to the Claimant on 11 October 2022 with his decision. The format of the letter was similar to that which had given the outcome of the disciplinary hearing. In other words, there was a summary of the discussion and evidence from the appeal hearing. This involved a summary of the points being pursued by the Claimant, albeit this was an incomplete summary. The third bullet point made reference to the Claimant having admitted "*making a statement that you cannot be gay and Muslim, in the earshot of an open plan office*". It is noteworthy that this part of the decision letter does not suggest that this had been said in a way which was loud and aggressive. It is simply being suggested that what was said could be heard by other people in the office. It was then stated that the Claimant had "*stated that you didn't believe this statement to be offensive and have the right to express your religious beliefs regardless of who they offended*". The Claimant had not actually been recorded as having asserted his right to express his religious beliefs in these precise terms, so the reference to having the right to express his religious beliefs regardless of any offence caused was partly Mark Westwood's interpretation of the position.

67. The fourth bullet point of the letter referenced the specific words alleged by Karen Jones and the fact that Calvin Greaux confirmed that two of these words had been used.

68. The letter confirmed that the decision was that the original disciplinary action of dismissal would remain. The reasons given were that Mark Westwood believed, on the balance of probabilities, that the Claimant "*did make an unsolicited offensive statement about sexual orientation in the earshot of your colleagues*". In this regard, he stated that, whilst the statements from Karen Jones and Calvin Greaux were not identical, it was more than a coincidence that they both claimed to have heard the same words, namely "*dildo*" and "*pussy*". The reasoning ended with a bullet point stating that "*I believe the allegations you make regarding the investigation not being conducted properly were taken into account by the Hearing Manager and these were corrected in time for the hearing, to create a fair process*".

69. In effect, this sought to deal with a number of the points being made by the Claimant's appeal, without dealing with the specifics of the points themselves.

70. In his Statement of Evidence, Mark Westwood, made it clear that "*I did also take into account the fact that he had said that you can't be Muslim and gay; the manner in which this was said and the fact that Qaysar hadn't shown any insight into how his actions could offend other people*". The manner in which it was being suggested that the Claimant had said this would seem to involve Mark Westwood believing that this had been said in a way which was "*loud and aggressive*". This, in turn, seemed to be based upon the statement of Diane Congrave having described Karen Jones saying to the Claimant "*is that you shouting your mouth off?*" However, it was far from clear from the statement of Diane Congrave that this related to the comments about not being gay and Muslim. In her statement she had simply described the Claimant as saying this which had then prompted a discussion in which he had said "*that is what I believe in I'm entitled to my opinion*". It was difficult to see that this, in itself, described the Claimant as being loud and aggressive when he made the comments about not being gay and Muslim. The statements of Kerry Vincent and Carlton Brock do not suggest that he was being loud and aggressive. Calvin Greaux did refer to the Claimant being vocal and aggressive, but this was in the second paragraph of his statement where he was describing the Claimant having used explicit and obscene language, but this seemed to be referring to the offensive words complained about by Karen Jones.

71. Ultimately, the Tribunal concluded that the Claimant had certainly said "*you cannot be gay and Muslim*" so that it could be heard by the other people in the office, but the suggestion by Mark Westwood that it had been said in a way which was loud and aggressive, as was suggested in his Statement of Evidence, was a retrospective attempt to justify having taken these comments into account, when this reason for doing so did not appear in the appeal decision letter.

72. In terms of the substance of the complaint of Karten Jones, the Tribunal did not find the Claimant's attempts to undermine the evidence of Karen Jones, whether in the evidence given at the investigatory interview and disciplinary hearing, as set out above, or subsequently, particularly persuasive. His position did seem to have changed from the suggestion that any words had been mistakenly attributed to him to one which seemed to be suggesting that the words cannot have been said. Given that a significant part of the evidence of Karen Jones had been corroborated by Calvin Greaux, the Tribunal ultimately concluded that it was

more likely than not that the words alleged by Karen Jones had been said. In arriving at this conclusion, the Tribunal also found the suggestion that there may have been collusion between Karen Jones and Calvin Greaux, which effectively raised the possibility that the allegations had been fabricated, to be unsupported by any meaningful evidence and similarly unpersuasive.

Relevant law

(1) Burden of proof in discrimination cases

73. Equality Act 2010 section 136 provides for a shifting burden of proof, as set out below.

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

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

74. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paragraphs 25-32). In *Efobi v Royal Mail Group Limited* [2021] ICR at paragraph 26, Lord Leggatt made it clear that Equality Act 2010 section 136 had not made any substantive change to the previous law.

75. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of his religion or belief. At the first stage, when considering what inferences can be drawn from the primary facts, the Tribunal must ignore any explanation for those facts given by the Respondent and assume that there is no explanation for them. It can, however, take into account evidence adduced by the Respondent insofar as it is relevant in deciding whether the burden of proof has moved to the Respondent. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decisions or treatment.

76. In *Hewage v Grampian Health Board* [2012] ICR 1054, in a passage recently endorsed by Lord Leggatt in *Efobi* at paragraph 38*,* Lord Hope stated that it was important not to make too much of the role of the burden of proof provisions:

"*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*" (paragraph 32).

(2) Direct discrimination and harassment

77. Equality Act 2010 section 13 provides that 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*".

78. Thus, direct discrimination takes place where a Claimant is treated less favourably, because of the relevant protected characteristic, than the employer treats or would treat others. This can involve comparing the treatment of a Claimant with that or perceived by an actual comparator, comparing the Claimant's treatment with that which would have been received by a hypothetical comparator.

79. Under Equality Act 2010 section 23, the purposes of any comparison, there must be no material difference between the circumstances relating to each case.

80. Harassment, contrary to Equality Act 2010 section 26, occurs where a person (a) engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person.

81. In deciding whether the conduct has the effect referred to at (b) immediately above, Equality Act 2010 section 26(4) states that each of the following must be taken into account: (a) the perception of the person alleged to have been harassed; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

82. Where complaints of direct discrimination and / or harassment are brought on the basis of a manifestation of a religion or belief, guidance as to the approach to determining these complaints is as set out in *Higgs v Farmor's School [2023] UKEAT 89*, where the EAT recently set out the legal principles applicable.

(3) Religion or belief as a protected characteristic

83. Section 10 of the Equality Act 2010 is in the terms set out below.

"(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

84. Human Right Act 1998 section 3(1) is as set out below

"(1) In so far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the convention rights".

85. Article 9 of the European Convention on Human Rights is as set out below.

"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".

86. Article 10 of the European Convention on Human Rights is as set out below.

"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. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

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".

87. Therefore, whilst the freedom to a belief is protected, the freedom to express or manifest the belief is qualified under Articles 9(2) and 10(2) of the European Convention on Human Rights ("ECHR").

(4) Manifestation of religion or belief

88. In *Eweida and others v United Kingdom [2013] ECHR 37*, the European Court of Human Rights stated that to count as a manifestation within Article 9 ECHR, there must be a sufficiently close and direct nexus between the act and the underlying belief (see also *Higgs v Farmor's School [2023] ICR 1072, EAT*, at paragraph 82). In a direct discrimination case, an employer will not be found to have discriminated if the reason for its actions was not the belief but the inappropriate manner in which it was manifested by the employee.

89. In *Page v NHS Trust Development Authority [2021] EWCA Civ 255, CA*, Underhill LJ approved the distinction from earlier case law, between those cases where the reason for less favourable treatment is the fact that the Claimant holds or manifests a protected belief. This would amount to direct discrimination because of belief, and those cases where the reason for less favourable treatment is that the Claimant has manifested that belief in some particular way to which objection could justifiably be taken. In these cases, it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the treatment

complained of. However, if the consequences of the objectionable manifestation are not such as to justify the action taken against the employee, this cannot sensibly be treated as separate from an objection to the belief itself. Whether an individual's manifestation of their belief is inappropriate should be tested by reference to Article 9(2) of the ECHR. This was described in as a proportionality test, balancing the Claimant's freedom against the legitimate interests set out in ECHR Article 9(2).

(5) Proportionality assessment

90. The broad approach to proportionality in cases involving ECHR rights is set out in *Bank Mellat v HM Treasury (No 2) [2014] AC 700, SC*, where four questions were identified by the Supreme Court, as set out below.

(1) Is the objective of the measure sufficiently important to justify the limitation of the protected right?

(2) Is the measure rationally connected to the objective?

(3) Could a less intrusive measure have been used without unacceptably compromising the achievement of the objective?

(4) 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?

91. In *Higgs v Farmor's School [2023] ICR 1072, EAT*, the Employment Appeal Tribunal laid down (at paragraph 94) five basic principles that should "*underpin the approach*" taken when assessing the proportionality of any interference with ECHR Article 9 and Article 10 rights, as set out below.

"*(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".

(6) Indirect discrimination

92. Equality Act 2010 section 19 is as set out below.

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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

93. The burden of proof is on the Respondent to establish justification (see *Starmer v British Airways [2005] IRLR 862 at paragraph 31*).

94. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it (see *Hardys & Hansons plc v Lax* [2005] IRLR).

(7) Unfair dismissal

95. Section 98 of the Employment Rights Act 1996 ("ERA 1996") sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within ERA 1996 section 98(2). Conduct is a potentially fair reason for dismissal. In *Abernethy v Mott, Hay & Anderson [1974] IRLR 213, CA*, it was said that "*a reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee*".

96. Once the employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the Claimant for that reason. ERA 1996 section 98(4) states that this (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.

97. In relation to a conduct dismissal, *British Home Stores Limited v Burchell [1978] IRLR 379, EAT*, sets out the test to be applied where the reason relied on is conduct. The Tribunal must first decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

98. In *Whitbread plc v. Hall [2001] EWCA Civ 268*, it was confirmed that the Tribunal must consider the issue of both substantive and procedural fairness, as set out below.

"*Section 98(4) of the 1996 Act requires the Tribunal to determine whether the employer 'acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee' and further to determine this in accordance with the 'equity and the substantial merits of the case'. This suggests that there are both substantive and procedural elements to the decision to both of which the 'band of reasonable responses' test should be applied*".

99. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within ERA 1996 section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones [1982] IRLR 439*, *Sainsbury's*

Supermarkets Limited v Hitt [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small [2009] IRLR 563*).

100. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (*Taylor v OCS Group Limited [2006] IRLR, 613*).

101. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and, if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

102. In most circumstances the tests applicable to discrimination complaints under the Equality Act 2010 must be given separate consideration to the test of fairness in ERA 1996. A complaint of unfair dismissal should not be treated as "*parasitic*" on a complaint of discrimination in the sense that that the unfair dismissal complaint did not need to be considered on its merits at all and that it would fail if the discrimination complaints failed and succeed if they succeeded. And it did not automatically follow that it was unfair to dismiss an employee for a discriminatory reason (see *Perratt v City of Cardiff Council [2016] UKEAT/0079/16*) The issues in respect of each cause of action are different and the relevant statutory tests must be applied to the facts to determine each individual complaint.

103. If the dismissal was unfair, the issue arises, in accordance with the principles established in the case of *Polkey v A E Dayton Services Limited [1988] AC 344, HL*, as to whether any adjustment should be made to any compensatory award to reflect the extent of any possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

104. The ACAS Code is also relevant to compensation. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if the Claim concerns a matter to which the Code applies and there is an unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

105. Under ERA 1996 section 122(2), the Tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so. Under ERA 1996 section 123(6), where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

106. In assessing contribution, the Tribunal should (1) identify the relevant conduct; (2) assess whether it is objectively culpable or blameworthy; (3) consider whether it caused or contributed to the Claimant's dismissal; and (4) If so, determine to what extent it is just and equitable to reduce any award (See *Steen v ASP Packaging Ltd [2013] UKEAT/0023/13/*).

Conclusions

107. The Tribunal looked first at the complaints of direct discrimination. These complaints included a complaint that the dismissal and the rejection of the Claimant's appeal amounted to direct discrimination on the grounds of religion or belief. In his closing submissions, Mr Lassey accepted that, if a conclusion was made to the effect that the dismissal was directly discriminatory, then this would be potentially relevant as far as the complaint of unfair dismissal is concerned, in that the dismissal would necessarily not be a fair dismissal (on the basis that the Claimant's religion, as distinct from any unreasonable manifestation of his religion, was part of the reason for his dismissal).

108. In support of his complaint of direct discrimination, the Claimant relies upon four alleged detriments. It is convenient to take two of those detriments together, as the Respondent did in its closing submissions, namely the detriments of dismissal and the rejection of the Claimant's appeal against dismissal.

109. In order to determine whether or not the Claimant was dismissed and / or had his appeal rejected because of his religious beliefs, the Respondent submitted that the Tribunal first needed to determine the exact words or phrases on which the Respondent's decisions were based. The Tribunal then needs to consider whether those words or phrases constituted a manifestation of the Claimant's religion or religious beliefs. The Respondent's case was that the decision to dismiss was based upon the words alleged by Karen Jones, with the words being used being those of "*they are just rug munchers, pussy lickers*", "*I wouldn't want a dildo but my arse from her*", and "*rug munchers, they are all the same*".

110. The Tribunal has, on the balance of probability, concluded that the words alleged by Karen Jones were used by the Claimant. It is also clear that a finding to the effect that these words were used by the Claimant was the primary reason for the decision to dismiss him and uphold that decision on appeal. However, the Tribunal is also satisfied that, at the appeal stage, Mark Westwood based his decision, in part, on the Claimant having said that he did not believe that you could be a Muslim and gay. Mark Westwood confirmed as much in his own Statement of Evidence where he said, "*I did also take into account the fact that he had said that you can't be Muslim and gay; the manner in which this was said and the fact that Qaysar hadn't shown any insight into how his actions could offend other people*". This can be broken down into three constituent parts. However, it is clear that one of the constituent parts was the simple fact that the Claimant had said that you "*can't be Muslim and gay*". This is consistent with the line of questioning pursued by Mark Westwood in the appeal hearing from which it is clear that he considered that the words on their own were homophobic. The Tribunal was not persuaded that the manner in which the Claimant said this was a factor. It is not referred to in the appeal decision letter. It was the simple fact that he had made the comment that has been taken into account. As discussed in our findings of fact, whilst the Claimant had said this fairly loudly, so that it would have been heard by others within the office, the Tribunal did not accept that the evidence established that it had been said aggressively. Moreover, in terms of any lack of insight, Mark Westwood had interpreted the fact that the Claimant did

not see anything wrong in having said this, and the fact that he justified this on the basis of it being his religious belief, as amounting to a failure to understand that his "*actions*" might offend people.

111. The written submissions of the Respondent realistically recognised the possibility that, having regard to the written evidence of Mark Westwood, the Tribunal might conclude that Mark Westwood had taken into account the Claimant's statement that you cannot be gay and a Muslim. Anticipating this eventuality, the Respondent contended, in the alternative, that this did not have a "*significant influence*" on his decision to reject the Claimant's appeal (per Lord Nichols in *Swiggs v Nagarajan [1999] UKHL 36*). The Tribunal was satisfied that, based on the reasoning set out by Mark Westwood at paragraph 28 of his Statement, as quoted above, the comments to the effect that you cannot be gay, and a Muslim did have a significant influence on the decision to reject the Claimant's appeal. It is clear from the line of questioning being pursued in the appeal hearing that Mark Westwood considered that this was a significant part of the factual matrix in that the words were admitted by the Claimant, and Mark Westwood considered them to be homophobic. Further, at paragraph 28, Mark Westwood relies upon the fact that the Claimant admitted using these words to support his conclusion that the specific phrases alleged by Karen Jones had been said. He stated that if "*Qaysar accepted saying the comment and the witness evidence made clear that the way in which it was said was loud and aggressive, I thought it reasonable to believe that that wasn't all that he had said*".

112. Having concluded that Mark Westwood did take into account the comments that you cannot be gay and a Muslim and that this had a significant influence on the decision to reject the appeal, the Tribunal next needed to consider whether the comments amounted to a manifestation of the Claimant's religion or belief.

113. The Tribunal accepted that the phrases alleged by Karen Jones did not amount to a manifestation of the Claimant's religion or belief. The Claimant admitted himself that such comments would not have been connected to his religion or belief and stated that the comments did not express his religion or beliefs in any way.

114. However, the Tribunal was satisfied that there was "*a sufficiently close and direct nexus*" (applying the criteria in *Eweida* at paragraph 82) between the Claimant's comment that it is not possible to be a Muslim and be gay. This was the effect of the Claimant's evidence. It is his belief that "*you cannot be gay and be a Muslim*". He states that this is what his religion has taught him and this belief is part of his religion as a Muslim. The Claimant was not meaningfully challenged as to this evidence, either in respect of his own belief as a Muslim or in respect of this being part of the Islamic religion. Indeed, at paragraph 71 of the Respondent's written submissions, it was accepted that the Claimant's comment that it is not possible to be a Muslim and be gay is likely to constitute a manifestation of his religious belief under the *Eweida* criteria.

115. Having concluded that these particular comments are a manifestation of the Claimant's religion or belief, it was necessary to deal with the Respondent's

submission that the decision to dismiss and / or reject his appeal would have been clearly proportionate interferences with his rights under Article 9(2) ECHR in that both measures were: (a) prescribed by law (in the sense of being accessible to the Claimant who would have been able to foresee the consequences of his actions), and (b) necessary (and proportionate) in a democratic society for the protection of the rights and freedoms of others.

116. The Respondent relied upon the measures it had taken in dismissing the Claimant and in rejecting his appeal as being provided for in the Diversity and Respect at Work Policy which effectively reflected the protection given in domestic law to individuals, such as employees, protecting them against conduct which is discriminatory in nature. Clearly, this argument would apply more easily in relation to the specific comments complained about by Karen Jones. It was rather less obvious that a dismissal which took account of the comments that you cannot be Muslim and gay amounted to an interference with the Claimant's rights under article 9 which was prescribed by law.

117. In any event, the Tribunal was not satisfied that the actions of the Respondent in taking account of the comments that you cannot be gay, and Muslim could be said to be necessary and proportionate in a democratic society. This involves considering whether (1) the objective pursued (i.e. the protection of the rights and freedoms of others) was sufficiently important to justify the limitation of a protected right (i.e. Article 9); (2) the treatment was rationally connected to the objective; (3) no less intrusive means could have been used to achieve the objective; and (4) the detrimental effects of the treatment were outweighed by the importance of achieving the objective.

118. The focus of the submissions of the Respondent was on justifying the disciplinary action by reference to the comments complained of by Karen Jones. The Respondent did not seek to set out separate justification in respect of having taken into account the comments that you cannot be gay and Muslim. It was difficult to see that this could be justified on its own. Ultimately, this involved a proportionality assessment which has to be conducted by the Tribunal on an objective basis. The Tribunal was not satisfied that it was necessary to take these comments into account in the appeal stage of a disciplinary process, in arriving at a decision to uphold the dismissal, in order to protect the rights and freedoms of others. Any objective would have been achieved by not taking the comments into account. In any event, this was an employee of long service and with a good record. Viewed objectively, the Tribunal was not satisfied that alternatives to dismissal would not have achieved the objective of protecting the rights and freedoms of others.

119. It follows that the Tribunal was satisfied that the appeal decision took into account, in arriving at the decision and as part of the reason for the decision, comments which were a manifestation of the Claimant's religion or belief. To the extent that the Respondent did so, in relation to the comments that you cannot be Muslim and gay, it cannot be said that the basis for taking into account these comments was the objectionable manner in which the Claimant chose to manifest his religion or belief, rather than the religion or belief itself.

120. Given that the decision to dismiss was ultimately upheld on the basis of an appeal decision which was tainted with discrimination in this way, the effect is that both the decision to dismiss and the rejection of the Claimant's appeal amounted to direct discrimination on the grounds of religion or belief.

121. We turn to consider the Claimant's next complaint. The Claimant also complained separately about the comments made to him at the appeal hearing by Mark Westwood as the manager conducting the appeal. This complaint was pursued on the basis of both harassment, or in the alternative, direct discrimination. The less favourable treatment or unwanted conduct complained of was Mark Westwood repeatedly saying to the Claimant at the appeal hearing "*do you not think saying you can't be gay, and a Muslim is homophobic*".

122. The Respondent sought to argue that these comments could not be construed as constituting a detriment in the sense that the Claimant could not reasonably be said to have been caused to be at a disadvantage. We disagree. Mark Westwood was essentially suggesting that the Claimant's comments were homophobic and, further extension, Muslims with the same beliefs were homophobic.

123. Alternatively, it was argued by the Respondent that the actions of Mark Westwood did not violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. To the extent that Mark Westwood's questioning did have one or more of these effects on the Claimant, it was argued that it was clearly not reasonable for it to have done so. The Respondent relied upon the guidance in *Grant v HM Land Registry [2011] EWCA Civ 769*, to the effect that the significance of these words must not be cheapened. The Respondent effectively submitted that these were trivial acts causing minor upsets and so cannot fall within the definition of harassment. Although the Claimant was upset by the manner in which the questions were asked of him during the appeal meeting, that was a far cry from attracting the epithets required to constitute harassment.

124. Ultimately, we disagreed with this submission. We have made a finding that the question was put to the Claimant three or four times. In effect, Mark Westwood repeatedly pressed for an answer. On both of the occasions where the question is recorded as having been asked in the minutes, the agreed answer recorded is that the Claimant answered the question in the negative. As such, it is difficult to see the basis for repeating the same question. It seems clear from the notes of the appeal hearing that the line of questioning contributed to the appeal hearing becoming heated. It was not simply a question of being upset by the comments effectively being made by Mark Westwood; it is clear from the notes of the minutes that the Claimant was offended.

125. It was further argued by the Respondent that, as the appeal officer, it was necessary for Mark Westwood to ask questions about the incident in order to understand precisely what was said, why it was said, and how it was said. Again, the Tribunal disagreed. Those particular comments were accepted by the Claimant, were not those in dispute, and did not form the subject matter of the complaint of Karen Jones.

126. As stated above, in its written submissions, the Respondent did not seek to dispute that the Claimant's comments that it is not possible to be a Muslim and be gay were likely to constitute a manifestation of his religious belief under the *Eweida* criteria. The Tribunal has already concluded that this was the case. Equally, it follows that, if the Claimant's comments were related to religion or belief, for the purposes of the provisions in respect of harassment under Equality Act 2010 section 26, the alleged unwanted conduct in questioning him about his comments, was related to a protected characteristic

127. On the basis that these comments or questions did involve the Claimant being subjected to unwanted conduct, and the Claimant's comments were a manifestation of a religious belief, the Tribunal next has to consider whether the treatment of the Claimant amounted to a proportionate means of achieving a legitimate aim.

128. The Respondent's argument was that Mark Westwood was clearly seeking to protect the rights and freedoms of others and / or public morals in asking these questions, and there was no less discriminatory measure available to him under the circumstances. The Tribunal did not accept that this was the position. The comments concerned were not in dispute. They were not specifically complained about by Karen Jones or even referred to in her complaint. The way in which the questions were recorded as having been asked (in the agreed minutes) did not involve seeking to establish the relevant factual circumstances in relation to the alleged misconduct involved but involved putting to the Claimant an opinion in respect of the comments. In that he was being invited to agree to this opinion; it involved expressing a negative view as to the particular comments.

129. Accordingly, the Tribunal concludes that the comments amounted to harassment related to religion or belief contrary to Equality Act 2010 section 26. Treatment which amounts to harassment contrary to section 26 is excluded from also amounting to direct discrimination under Equality Act 2010 section 13, so that the complaint of direct discrimination in relation to this treatment is dismissed on this basis.

130. The Claimant also complained of direct discrimination arising out of the failure to deal with the points he raised in his appeal. It is certainly the case that the Claimant provided a document which made numerous points in support of his appeal. It is also the case that not all of these points were specifically addressed by the Respondent in the appeal decision. The way in which the Respondent dealt with the appeal is clear enough. The template for the disciplinary appeal notes involves the Claimant being invited, at the start of the hearing, to explain his grounds of appeal on the basis that there would then be a discussion around the grounds of appeal. The appeal hearing began with Mark Westwood specifically asking the Claimant to "*talk me through the grounds of appeal*". There was then a lengthy discussion as to the appeal. This lasted from 9.30 am until 10.42 am albeit with two short breaks of three minutes each. When the hearing reconvened at 10.42 Mr Doherty stated that "(w)*e don't need to add anything else*".

131. At this point Mark Westwood made it plain that he would not be giving a decision on the day of the hearing as he would need time to review the matter and suggested that this was because of the points raised by the Claimant.

132. The Respondent's decision letter does not address each of the matters raised in the appeal letter but it does make clear the basis upon which the appeal was being rejected, namely that Mark Westwood considered, on the balance of probability, that the allegations were true, with the main reason being that the statement of the complainant was partly corroborated by that of Calvin Greaux. It clearly follows that the matters raised by the Claimant had not caused Mark Westwood to arrive at a different view of the evidence.

133. Ultimately, no real basis was put forward for converting any criticism of Mark Westwood's conduct of the appeal in not dealing specifically with each of the points raised by the Claimant, into any basis for making a finding of direct discrimination. The Tribunal was not satisfied that the Claimant had satisfied the initial burden of proof in establishing a prima facie case of a difference in treatment (in terms of not dealing specifically with the points raised in the appeal) which was on the grounds of religion or belief.

134. Accordingly, the Tribunal dismissed this complaint on the basis that it was unable to conclude that there was a failure to deal with the Claimant's grounds of appeal which were, prima facie, attributable to his religion or belief.

135. The Tribunal then turned to consider the complaint of indirect discrimination. The Tribunal accepted that the Dignity and Respect at Work Policy amounted to a provision criterion or practice (PCP"). It was a set of arrangements for dealing with issues which came within the scope of the policy. The Policy was clearly of general application. The PCP was also clearly applied to the Claimant in that he was ultimately dismissed on the basis of the finding that he had breached the Policy.

136. However, the Tribunal did not accept that the Policy or any PCP put Muslims at a particular disadvantage when compared with non-Muslims in that the expression of Islamic beliefs about homosexuality gave rise to disciplinary action. Applied correctly, the Tribunal was not satisfied that, under the Policy, the expression of Islamic beliefs about homosexuality gave rise to disciplinary action. The Tribunal was satisfied that it was possible to show dignity and respect to gay people and be a Muslim. As such, the Policy did not put Muslims at a specific disadvantage. It was improper conduct which attracted possible disciplinary action under the Policy, such as offensive comments or harassment.

137. The Tribunal then considered the complaint of unfair dismissal. The effect of our conclusion in relation to direct discrimination is that the Claimant's religion or belief became, at the appeal stage, part of the reason to dismiss him. As stated, in his closing submissions, in relation to the complaint of unfair dismissal, Mr Lassey accepted that, if a conclusion was made to the effect that the dismissal was directly discriminatory, then this would be potentially relevant as far as the complaint of unfair dismissal is concerned, in that the dismissal would necessarily not be a fair dismissal (on the basis that the Claimant's religion, as distinct from any unreasonable manifestation of his religion, was part of the

reason for his dismissal). Whilst the Tribunal recognises that it does not necessarily follow that a discriminatory dismissal is an unfair dismissal, the Tribunal considered that the approach adopted in the Respondent's submissions was realistic. This is because, in circumstances where the dismissal has now been found by the Tribunal to have occurred because of a protected characteristic, the Tribunal was not satisfied that the Respondent has made out a fair reason for dismissal under ERA 1996 section 98. If there was no fair reason for the dismissal, the dismissal was unfair and the subsequent question whether it was reasonable in all the circumstances does not arise. Alternatively, having found the dismissal to be an act of discrimination, the Tribunal was not satisfied that the reason to dismiss was reasonable in all the circumstances, because it was tainted with discrimination.

138. For the sake of completeness, the Tribunal considered the other parts of the test in respect of an ordinary unfair dismissal. In so far as at least part of the reason for the dismissal was the conduct of the Claimant in making the comments complained about by Karen Jones, there were reasonable grounds for that belief, based on the complaint made by Karen Jones, and the extent to which it was corroborated by Calvin Greaux.

139. The Tribunal was satisfied that, at the stage of this belief being formed, the Respondent carried out a reasonable investigation in the sense that the extent of the investigation was within the band of reasonable responses. Essentially, the Respondent obtained witness evidence from those who were in a position to hear what was alleged to have been sent by the complainant, as well as obtaining handwritten statements from the complainant confirming the substance of her complaints and interviewing the Claimant over the course of an investigatory interview. This included Roy Yates specifically taking the step of getting a statement from the complainant, which was in her own words, and getting a supplemental statement which set out the actual phrases about which she was complaining. Similarly, he had taken steps to check that there was nothing that the other witnesses could add to their written statements.

140. The Tribunal was also satisfied that the procedure followed was within the band of reasonable responses in so far as, by the time the decision was made by Roy Yates, the Claimant knew the disciplinary case which he had to meet and had been given a proper opportunity of meeting that disciplinary case.

141. However, the Tribunal considered that unfairness had developed during the course of the appeal hearing in that Mark Westwood had pursued a line of enquiry in relation to comments which the Claimant accepted making, but which were not a part of the complaint made by Karen Jones and, in doing so, had conducted the appeal hearing in a way which the tribunal has found amounted to harassment related to religion or belief.

142. Viewed in terms of a sanction being applied in relation to the conduct complained about by Karen Jones, the Tribunal was satisfied that the sanction of dismissal would have been within the band of reasonable responses. Many employers might have concluded that the conduct in issue could be dealt with through some kind of disciplinary warning, probably in conjunction with a requirement to attend equality and diversity training, but equally this was conduct

which the employer was entitled to view as gross misconduct warranting summary dismissal. However, in upholding the decision to dismiss, the reason relied upon became tainted by the discriminatory reason in respect of the Claimant's religion or belief.

143. This is not a case where the unfairness arose purely from procedural failings so that it could be said had the appropriate steps been taken, the outcome would have been that of dismissal in any event. The unfairness arises from the substantive reasons for the dismissal being tainted by discrimination. As such, the Tribunal does not consider that this is a case where any compensatory award should be reduced pursuant to *Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL*.

144. In terms of contributory fault, the Respondent's submissions invited the Tribunal to conclude that this was a case where a reduction of 100% should be made. In considering this admission, the Tribunal identified the relevant conduct as that complained about by Karen Jones. In our findings of fact set out above, we accepted, on the balance of probability, that such conduct occurred. It was clearly culpable and blameworthy. It clearly caused or contributed to the Claimant's dismissal. It was within the band of reasonable responses to dismiss for that conduct. However, as stated, in upholding the decision to do so, the reason relied upon became tainted by the discriminatory reason in respect of the Claimant's religion or belief. Had that not been the case, there is at least the possibility that the Respondent might have concluded, albeit at the appeal stage, that the conduct in issue could be dealt with through a disciplinary warning and equality and diversity training. Dismissal was certainly very likely, but not necessarily inevitable, particularly having regard to the Claimant's length of service. Thus, in terms of any possible reduction any award to take account of contributory fault, the assessment of the Tribunal based on the considerations set out above would be that a reduction of 80% would be just and equitable, with the same reason also applying to reduce any basic award by 80% to take account of the Claimant's conduct.

145. It follows that the Claimant has succeeded with his complaint of direct discrimination on the grounds of religion or belief in respect of his dismissal and the rejection of his appeal, his complaint of harassment related to religion or belief due to the comments made at an appeal hearing on 29 September 2022, and his complaint of unfair dismissal. His complaints of direct discrimination on the grounds of religion or belief in respect of the Respondent's alleged failure to deal with the Claimant's points raised in his appeal against dismissal and in respect of the comments made at an appeal hearing on 29 September 2022, and his complaint of indirect discrimination on the grounds of religion or belief, do not succeed and will be dismissed.

146. A remedy hearing will be listed to determine the remedy in respect of the complaints which have succeeded, both in relation to the basic award and the compensatory award.

Signed

Employment Judge Kenward
9 August 2024