Neutral Citation Number: [2026] EAT 68

Case No: EA-2024-000701-OO

EMPLOYMENT APPEAL TRIBUNAL

Fetter Lane, London, EC4A 1NL

Date: 12 May 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

CLIFTON DIOCESE	**Appellant**
- and –	
MISS JANET PARKER	**Respondent**

Mark Green (instructed by Worknest Law) for the **Appellant**
Maureen Spencer, Direct Access for the **Respondent**

Hearing date: 18 February 2026

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JUDGMENT

SUMMARY

Religion or belief discrimination

The Employment Tribunal erred in law in its approach to the burden of proof in considering a complaint of religion or belief discrimination and a linked complaint of harassment. The judgment includes some sense checks that may assist in such analysis.

HIS HONOUR JUDGE JAMES TAYLER

The issue

1. The issue in this appeal is whether the Employment Tribunal erred in law in its analysis of the burden of proof when determining complaints of direct religion or belief discrimination.

The Judgment appealed

2. The appeal is against the judgment of an Employment Tribunal, Employment Judge Midgley, sitting with members, after a hearing held at Bristol by video on 1, 3, 6, 7 November 2023. The panel met in chambers on 8 and 9 November 2023. The judgment was sent to the parties on 26 April 2024.

The outline facts

3. I take the facts from the judgment of the Employment Tribunal.

4. The respondent is the Catholic diocese covering the West of England.

5. The claimant described herself as non-Catholic.

6. The Employment Tribunal described the claimant and set out her significant qualifications and experience:

> 20. The claimant is a qualified Chartered Accountant and a Fellow of the Institute of Chartered Accountants in England and Wales ("ICAEW"). She has been a member since January 1998. She is significantly experienced in Charity Sector accounts, having worked in that sector since 2009. She is a very intelligent, articulate, and able woman, obtaining a degree from Cambridge and subsequently working in London as a Manager of the Financial Services Audit and Advisory Group at Deloittes, before spells at Credit Swisse and Danske Bank.

7. The Employment Tribunal described the respondent, and its finances:

> 21. The respondent is a registered Charity which is subject to the regulation of the Charity Commission, and to the requirements of the Company Act. The respondent has a turnover of approximately £12 million a year and assets exceeding £200 million.

8. On 25 February 2016, the claimant was appointed as Diocesan Financial Administrator. On 6 January 2017, the claimant's job title was changed to Head of Finance.

9. The Curia is the administrative office of the Diocese. The claimant headed the Finance Department of the Curia. Her role was not a "reserved" role the holder of which was required to be of the Catholic faith.

10. The claimant was a member of the respondent's Senior Management Team and reported to the Chief Operating Officer, Lyn Murray.

11. The Bishop of Clifton, Declan Lang, appointed a Moderator of the Curia to oversee curial matters. That position was held by Monsignor Bernard Massey.

12. The Employment Tribunal described the claimant's role:

> 27. The Finance Department was responsible for the financial management of the respondent's parishes, its schools, trusts and grants, and the charitable donations made to the Diocese. At the time of her appointment, the Department had six staff but that grew over time to seven. The claimant was responsible for managing the Finance Department's staff, and for their training and development. She was the only accountant in the Department. She therefore sought to persuade the respondent to recruit a part qualified accountant as a Management Accounts Officer, and to train the staff on the use of SAGE and Excel.
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> 28. The claimant was responsible for oversight of all regulatory submissions to Companies House, HRMC, and the Charity Commission, and as her role developed, for Trusts and Grants. As the only accountant the claimant was also responsible for preparing the respondent's accounts; that included the production of the Statement of Financial Activity ("SOFA"), the balance sheet and the cashflow statement.
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> 29. Given the nature of the respondent's operation, the production of its management accounts, tax returns and business accounts is a complex and time consuming activity. In the early years of her appointment the claimant worked to produce written policies and procedures to formally record the processes that were retained only in the minds of the Finance Department's staff, and to streamline those processes. That included updating the SAGE software used by the respondent and migrating the written records, such as the fixed asset register, to SAGE.
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> 30. In 2018 the respondent became a company limited by guarantee with charitable status. This added various elements of regulatory compliance to the claimant's role. At the same time two members of the Finance Department left and their replacement took some time.

13. The Employment Tribunal held that, prior to the events that formed the subject of the claimant's complaints, she was regarded as an excellent employee.

14. Mrs Murray's appraisals of the claimant's work in 2017 and 2018 were very positive.

15. The Employment Tribunal described some issues the claimant had with her mental health and how she informed the respondent about them:

> 32. Prior to her appointment the claimant had experienced periods of poor mental health, particularly anxiety and depression, which was first diagnosed in February 2013 and which was managed with antidepressant medication.

> 33. In the summer of 2019, the claimant's medication was changed and regrettably she then experienced symptoms of dizziness, light-headedness and nausea. In July 2019 she was diagnosed with 'antidepressant discontinuation syndrome' by her GP who produced a fit note which recommended amended duties for two weeks, requiring the claimant to avoid driving and to work from home. She emailed Mrs Murray, explaining she had been taking antidepressant medication for 6 years, and subsequently sent the fit note to Mrs Murray, who authorised her to work from home.
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> 34. That arrangement was continued into mid August 2019 as a result of a further fit note; the claimant's GP believed that the claimant's symptoms of dizziness, hypersensitivity to noise, nausea, headaches and fatigue might be connected to a thyroid issue. Again, the claimant kept Mrs Murray fully informed of those developments.

16. In 2017, the claimant applied to adopt a child. The Employment Tribunal described how the claimant told Mrs Murray about her plan to adopt, and Mrs Murray's alleged reaction:

> 36. In February 2018 the claimant openly discussed her application with Mrs Murray. Mrs Murray was in principle supportive; in September she wished the claimant well with her foster panel interview and advised her that the HR Committee had approved an enhanced maternity and adoption leave policy which permitted employees 18 weeks full pay, and then statutory pay. She sent the policy to the claimant.
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> 37. On 26 November 2019 the local authority approved the claimant's applications for fostering and adoption. The claimant immediately informed Mrs Murray of that fact. The claimant alleges that from that point Mrs Murray's attitude towards the process and the claimant's application changed because the application was no longer theoretical, but actual.

17. The claimant had difficulties in discussing the practical arrangements for her adoption leave with Mrs Murray, whom she found to be unsympathetic. The adoption was delayed by the Covid pandemic. On 14 July 2020, the claimant began a period of 3 weeks annual leave prior to taking adoption leave.

18. On 20 July 2020, the respondent recruited Rachel Lawes as cover for the claimant on a 12-month fixed term contract. Mrs Lawes is a member of the Chartered Institute of Public Finance and Accountancy, but is not a qualified accountant, nor an auditor.

19. Handover arrangements were put in place. The claimant provided some assistance in finalising the 2019 accounts.

20. On 9 September 2020, the formal adoption order was made allowing the claimant to adopt her child.

21. On 12 February 2021, Mrs Murray held a one to one meeting with Mrs Lawes. Mrs Lawes did not raise any concerns about the accounts or the information prepared by the claimant, noting that all the Trust funds had been reconciled.

22. The claimant told Mrs Murray that she wished to return to work on 29 June 2021, three days a week, to fit with the nursery provision she had been able to make for her child.

23. A Human Resources Committee meeting was held on 12 March 2021. The minutes recorded, for the first time, Mrs Murray raising concerns about the claimant's performance:

> Mrs Murray has some concerns over the performance of the [claimant] prior to going on adoption leave, which have come to light over the past few months. Mrs Murray will seek further advice from Mr Cook as there are many levels to consider.

24. Mr Cook was the respondent's HR advisor and a member of the HR Committee.

25. On 16 March 2021, Mrs Murray had a one to one meeting with Mrs Lawes. Mrs Lawes raised some concerns about the claimant's manner of dealing with the Fixed Asset Register. A specific concern was raised as to whether proceeds from the sale of the respondent's St Joseph's Mass Centre had been put into a designated account for restricted funds or a general account.

26. On the 18 March 2021, Mrs Murray met with Mr Cook and discussed the concerns about the issues with the St Joseph's sale proceeds. It was agreed that Mrs Murray would conduct a review when the claimant returned from adoption leave.

27. The matter was to be treated as a performance issue rather than potential misconduct.

28. On 7 July 2021, Mrs Lawes gave notice to terminate her fixed term contract early, with effect from 10 August 2021.

29. The claimant discussed her return to work with Mrs Murray on 29 July 2021:

> 70. On 29 July 2021, Mrs Murray and the claimant met via Teams. The claimant's child was with her at the time of the meeting; the meeting was in the school holidays, and the nursery which the claimant had secured a place at was term-time only. Mrs Murray's displeasure at that was apparent to the claimant, notwithstanding that the claimant was on leave and was not working.
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> 71. Mrs Murray asked whether the claimant had been able to find a nursery which would support 5 days a week or one which could take her child for a further two days a week. The claimant confirmed that, as she had expected, she had been unable to do so, she

> repeated her assertion that she would need to reduce her hours to part-time for 3 days a week. Mrs Murray told the claimant that it was not possible for her role to be done on a part-time basis.
>
> 72. The claimant therefore suggested that on days when she did have not a space at the nursery (for the three-month period between September and November) she could work from home; to that end she asked Mrs Murray for details of the home working policy, suggesting that she could work around the hours her daughter was awake, for example in the evenings. Mrs Murray said the policy had not yet been approved but it was not intended to provide a replacement for childcare, adding that in any event it would not be feasible for the claimant to work from home or to work part-time as she had to manage a team, and the team worked from 9am until 4:30pm. Mrs Murray was firmly of the view that the claimant could not focus on her work and look after a child and that she had an obligation to ensure that she had childcare to cover her contractual hours. Mrs Murray raised the concept that the claimant could take annual leave to cover the days she did not have a nursery place; but given that was 62 days Mrs Murray knew the proposal was unworkable.
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> 73. The claimant's evidence, which we accepted, was that the impression Mrs Murray created was one of opposition to any alternative to the claimant working her contractual hours of 9am to 4:30pm, 5 days a week, largely from the office, and that the moment the claimant proposed a possible alternative, Mrs Murray closed it down without engaging with it to explore whether it was feasible. That that was the case is apparent from Mrs Murray's stance: she required the claimant to work as we had described, notwithstanding that the claimant had not previously worked either five days a week from the office, nor 9am – 4:30pm. The respondent had agreed changes so that the claimant could work from home on one day a week every other week, and could attend at 9:45 – 5:15. Moreover, during the lockdown, the claimant had worked entirely from home. Mrs Murray did not seek to analyse in any meaningful way how many hours the claimant needed to be available to supervise her team, whether that supervision could be provided by telephone or by Teams rather than in person, or how regular such supervision needed to be; for example whether a fortnightly meeting would provide an appropriate opportunity to conduct reviews, appraisals etc, and other support could be provided remotely when the claimant was not in the office. The claimant was particularly upset by Mrs Murray's approach given it seemed to her that Mrs Murray was quite prepared for the claimant to work from home in her words 'with a baby on her lap' in August 2020, when Mrs Murray needed the accounts completed because she had not arranged cover to begin from the point that the claimant's adoption leave had begun.
>
> 74. Mrs Murray then told the claimant that performance issues had come to light which she would discuss with the claimant on her return, that the accounts had been restated as a consequence, and that she would be required to adopt the procedures that Mrs Lawes had put in place during her tenure.

30. The Employment Tribunal held that Mrs Murray was extremely negative about the claimant's wish to work part-time and flexibly, to allow her to care for her child. It was during a conversation about this issue that the alleged problems with the claimant's performance were first raised with the

claimant.

31. The Employment Tribunal found that the claimant decided to seek work elsewhere at about this time:

> 76. At or about the same time, 29 July, the claimant sent her CV to the recruitment agency and asked them to propose her for vacancies. She had made the decision to resign as she could no longer envisage working with Mrs Murray and needed to 'a back-up plan' as she had exhausted her savings during the period of her adoption leave.

32. On 30 July 2021, the claimant sent Mrs Murray a three-page email attaching a flexible working request. The Employment Tribunal described the email:

> The email was highly critical of Mrs Murray. In summary, the claimant complained that Mrs Murray had ambushed her with allegations of wrongdoing, and objected to Mrs Murray unilaterally making changes to the manner in which the Finance Team was to be managed without any consultation with her, particularly the suggestion that there should be constant supervision of the team by the claimant. The primary focus of the claimant's ire and criticism was Mrs Murray's inherent opposition to the claimant's need for flexible working.

33. On 12 August 2021, Mrs Lawes conducted a handover with Mrs Murray. Mr Cook subsequently produced a document entitled "Synopsis of Events" which detailed the concerns that Mrs Lawes had reported to Mrs Murray.

34. The HR Committee met on 13 August 2021:

> 86. On 13 August 2021, HR Committee met. Mrs Murray, Mr Cook, and Mrs Hipkiss were amongst the attendees. In a closed session of the meeting the flexible working request was reviewed. The Committee noted that the application did not meet the statutory requirements and agreed that the application could be reconsidered if a revised application was submitted before the next board meeting, which was scheduled for 8 October. Mrs Murray reported to the Committee that Mrs Lawes had identified several errors in the accounts, and the Committee agreed that an independent expert should conduct an investigation into what were described as "potential competency issues." It will be noted that Mrs Murray did not describe the concerns as potential gross negligence or gross misconduct. There is no evidence to suggest that the Synopsis was presented to the HR Committee at that stage.

35. The same day, 13 August 2021, Bishop Lang contacted Carole Lawrence, the Financial Secretary for the Diocese of Shrewsbury. Mrs Lawrence is a Fellow of the ICAEW and had been a partner in a firm of Chartered accountants as a Registered Auditor for 12 years prior to her appointment as the Financial Secretary of Shrewsbury in 2009. Bishop Lang asked Mrs Murray to

conduct an investigation into the actions of the claimant.

36. On 16 August 2021, the HR committee responded to the claimant's flexible working request, stating that it could not "agree to your request as it stands."

37. On 17 August 2021, Mr Cook sent Mrs Murray a note ("the Note") containing advice on conducting a disciplinary process and a briefing on conducting an investigation ("the Briefing") of which the Employment Tribunal held:

> 91. We make the following observations about the Note. First, it records that the allegations were regarded as prima facie potential gross misconduct. Secondly, it is slanted towards dismissal. It begins "a dismissal should be carried by someone of seniority…" in circumstances where it is in fact addressing the point that a disciplinary hearing should be carried out by someone of seniority. Whilst it records that the purpose of the investigation was to establish whether there was a sufficient basis to proceed to disciplinary action on the basis of gross misconduct, and, almost in passing, notes that one possible outcome is that the investigator may recommend that no action or action short of disciplinary sanction would be appropriate, the direction of travel in the Note is entirely towards dismissal. For example, the Note records as a matter of fact issues which were for investigation and determination as part of the disciplinary investigation:
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>> "In this case we are dealing with potential gross negligence which has misrepresented the financial position of the employer to such an extent that accounting rules may have been broken and decisions have been taken, or could have been taken, based on a false picture of the financial position of the Diocese. This did or could have had a negative impact on the Diocese's financial position and/or reputation" (emphasis added)
>
> 92. Similarly, it records that there "remains a wider issue of loss of trust and confidence on the part of the Trustees and Executive in the [claimant's]'s ability to perform [her] role." There is no evidence that the Trustees or the Executive had reached that conclusion; it was certainly not a view expressed at the HR Committee meeting only days before. Moreover, if that were an expression of a concluded view that had been shared with Mr Cook, it was one that necessarily had been reached before the claimant's explanations had even been considered.
>
> 93. The Briefing directly addressed the manner of the initial investigation meeting with the claimant, noting the fact that she was then on adoption leave. It proposed a meeting in person, but noted,
>
>> "She may indicate she cannot do this due to her childcare circumstances. An alternative would then be to try and arrange this via Teams, emailing her the allegations."
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> 94. Mr Cook recorded that it may be necessary to arrange a follow-up the claimant if further clarification of her response to the allegations was required.

38. On 19 August 2021, Mrs Murray sent the Note, the Briefing and the Synopsis of Events to Mrs Lawrence.

39. On 24 August 2021, Msgr Massey sent an email to the claimant attaching a letter asking her to attend an investigation meeting on 1 or 3 September 2021. The letter stated that "a very serious matter has come to light regarding the Diocesan finances which necessitates an investigation to be undertaken as soon as possible", but provided no further details.

40. The claimant replied that day stating that she was unable to attend a meeting because she was still on statutory adoption leave and would not be returning to work until 9 September 2021. The claimant stated:

> I'm not willing to attend an investigation meeting without knowing beforehand what is to be discussed. I find it extremely upsetting and disappointing that just before I am due to return to work following my statutory adoption leave I'm suddenly being accused of wrongdoing. The timing of this is very suspicious indeed.
>
> Please provide details of the 'very serious matter' that has <u>suddenly</u> come to light regarding the Diocesan finances. [original emphasis]

41. On 25 August 2021, Msgr Massey sent a letter, which had been drafted by Mr Cook, to the claimant, suspending her on full pay. The Employment Tribunal held that the decision to suspend the claimant was that of Msgr Massey.

42. The respondent immediately suspended the claimant's access to her work email and the respondent's financial systems.

43. On 31 August 2021, the claimant submitted a formal grievance against Mrs Murray, asserting that Mrs Murray had bullied her, particularly in relation to return to work discussions during her adoption leave, with the intention of preventing her from returning to work, and had made an allegation of gross misconduct against her "in order to pre-empt the grievance that she is worried I will make against her."

44. I note that at this stage the core factual finding of the Employment Tribunal was that the claimant's treatment arose primarily because of Mrs Murray's antagonism against the claimant because she wanted to work flexibly on return from adoption leave.

45. The Employment Tribunal stated that the claimant concluded her grievance letter in what might be regarded as an "inflammatory manner":

> This behaviour is not in accordance with the professed beliefs of the Catholic Church. I know that the Catholic Church does not have a blemish-free history when it comes to adopted children or children in care, but I hoped that this kind of prejudice had been eradicated long ago. Maybe I am wrong.

46. On 10 September 2021, Msgr Massey wrote to the claimant and stated that Mrs Lawrence had decided that an investigation meeting would proceed on 13 September 2021.

47. Correspondence by email ensued in which the claimant complained that she did not have detailed allegations to which she could properly respond. Msgr Massey replied asserting that the claimant had "everything that is legally required for such a meeting".

48. The Employment Tribunal held that Msgr Massey and Mrs Lawrence thought that the claimant was being obstructive and wanted the disciplinary procedure to be "conducted on her terms not ours."

49. The Employment Tribunal noted of the respondent's disciplinary procedure:

> 125. The respondent has a disciplinary policy. The introduction to the policy identifies that poor job performance will normally be addressed through performance management systems and, as a last resort, through a capability procedure. It notes that in the case of persistent or wilful failure to reach appropriate standards the disciplinary procedure may be invoked.
>
> 126. The policy provides for informal discussions where performance is not at the required standard, moving to a formal disciplinary procedure where the required improvement is not demonstrated, or in circumstances where there has been any breach of Diocesan rules, procedures, or policies, or a breach of standards of good conduct, quality of work or performance.
>
> 127. Amongst the principles listed for the management of poor performance is the need for an employee's line manager to take prompt corrective action through informal coaching and counselling or, if the breach is serious, through the formal disciplinary procedure. The policy expressly provides that no formal disciplinary action should be taken unless the case has been fully investigated and, where applicable, written statements from witnesses had been obtained. Counselling is specified where minor breaches of rules or conduct occurred, or where job performance standards are deemed to be inadequate.
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> 128. Summary dismissal is specified as being reserved for occasions where an employee commits an act of gross misconduct. Amongst the examples of gross misconduct listed is serious negligence which causes or might cause unacceptable loss.

50. On 13 September 2021, Mrs Lawrence held the investigation meeting in the claimant's absence. The Employment Tribunal held that Mrs Lawrence relied on what she was told by Mrs Lawes and only considered limited supporting documentation. Mrs Lawrence produced a report setting out numerous failings on the part of the claimant that had not been the subject of detailed allegations put to the claimant before the investigation meeting.

51. The claimant attended a grievance meeting with Stephen McNulty, a Trustee of the respondent, on 16 September 2021.

52. On 3 October 2021, Mrs Lawrence submitted a formal report to the ICAEW under its misconduct procedures, raising complaints about the claimant.

53. On 5 October 2021, Msgr Massey sent the claimant a letter instructing her to attend a disciplinary hearing on 13 October 2021. The letter was drafted by Mr Cook. Msgr Massey attached the investigation report and spreadsheets containing the Fixed Asset Register and Reserve Transfers for 2020. The letter set out disciplinary allegations that mirrored those in the investigation report, but included a further allegation that the claimant had failed to follow a reasonable management instruction to attend the investigation meeting.

54. There was correspondence prior to the disciplinary hearing in which the claimant asked that the disciplinary hearing should be conducted remotely because of increased mental health symptoms.

55. The Employment Tribunal held that Msgr Massey was out of his depth and relied entirely on Mr Cook.

56. On 11 October 2021, the claimant's grievances were rejected by Mr McNulty.

57. The claimant sought a postponement of the disciplinary hearing, but her application was refused.

58. The disciplinary hearing went ahead on 13 October 2021 before Msgr Massey and Mrs Lawrence. The claimant provided a detailed written document defending her actions and raised what the Employment Tribunal identified as 11 lines of enquiry.

59. The Employment Tribunal held that, in reality, the disciplinary hearing was conducted by Mrs Lawrence with virtually no input from Msgr Massey. The Employment Tribunal accepted the claimant's evidence that Mrs Lawrence spoke to the claimant "as if she was a naughty school child" and that the claimant was humiliated and degraded by Mrs Lawrence's attitude and demeanour. The Employment Tribunal held that the claimant had raised a number of matters that required investigation.

60. The Employment Tribunal held that towards the end of the meeting the claimant raised the issue of her mental health and said that she had not had a panic attack because she had taken her medication, to which Mrs Lawrence replied "that's good" in a mocking manner.

61. The Employment Tribunal held of Msgr Massey's approach to determining the charges against the claimant:

> 165. At the close of the meeting, Msgr Massey said that he believed he could make a decision in half an hour. He had not at the stage read or considered all of the documents produced by the claimant to support her defence, nor had he conducted any investigation of those matters we have detailed arising from the claimant's written response to the allegations or the points she raised in the hearing. He was unable to provide any credible explanation as to why he did not chose to adjourn the disciplinary to enable the claimant to submit the documents she wished to answer the allegations (even if limited to those where she had expressly said that she had had insufficient time to respond to them) or to allow him to read them and consider them before making his decision, as he had proposed to Mr Cook on 11 October. He provided no explanation for his decision not to conduct any further investigation into any of the points the claimant had raised.

62. At 16:07 on 13 October 2021, Msgr Massey sent a letter to the claimant by email stating that she was dismissed for gross misconduct with immediate effect, without specifying the reasons. In response to a request for reasons from the claimant, Msgr Massey sent a copy of the allegations with only the words "proven" or "not proven" next to each allegation. The Employment Tribunal noted that the letter included:

> 168. … no assessment of whether the proven conduct was misconduct, gross misconduct generally or by reference to the respondent's disciplinary policy, no reference or assessment of mitigation, and no expression of how the conclusion that the appropriate sanction was gross misconduct had been reached.

63. The claimant responded using strong language to criticise the decision.

64. The Employment Tribunal held that the claimant downloaded documents that she wanted to preserve for her appeal:

> 172. On 18 October 2021, the claimant downloaded the entire SharePoint file for the financial department. She did so in order to secure evidence to present as part of her appeal. The respondent subsequently referred the claimant to the police in respect of the download, and, rather than face a criminal trial in relation to the allegations, the claimant accepted a police caution.

65. On 19 October 2021, the claimant appealed against her dismissal.

66. That day, Mrs Lawrence sent an email to Mrs Murray and Mr Cook with a draft letter which included the reasons for the claimant's dismissal, which the Employment Tribunal held Mrs Lawrence "purported to have recorded from her discussions with Msgr Massey".

67. An appeal hearing was held on 17 November 2021 before Cathy Hipkiss, a Trustee of the respondent, and Ian Burrell, a qualified accountant and member of the ICAEW.

68. On 5 January 2022, the ICAEW wrote to Mrs Lawrence providing the outcome to complaints about the claimant. Mrs Lawrence's complaints against the claimant were entirely rejected. Mrs Lawrence did not provide Mrs Hipkiss with a copy of the outcome letter.

69. On 13 January 2022, Mrs Hipkiss sent the claimant the outcome to her appeal, which was rejected. The Employment Tribunal stated that:

> 188. … In relation to the disciplinary allegations, the outcome letter did not identify which allegations were found proven or why, and Mrs Hipkiss was unable to explain what conclusion she had reached in relation to each at the time of the Tribunal hearing.

The Employment Tribunal's direction as to the law

70. The Employment Tribunal set out the relevant legal principles with care and in some detail, including the burden of proof in discrimination complaints.

Unfair dismissal

71. Unsurprisingly, the Employment Tribunal held that the dismissal of the claimant was unfair. The Employment Tribunal clearly thought that the treatment of the claimant was appalling. The Employment Tribunal found that Msgr Massey and Mrs Hipkiss relied on the material provided by Mrs Lawrence without properly considering it themselves. The Employment Tribunal found that "the

respondent's investigation fell so far short of what was reasonably required as to be far outside the range of reasonable responses". The Employment Tribunal found that Mrs Lawrence's investigation was "derisory in its depth, unbalanced, and focussed on establishing fault" and that "it fell far outside the range of reasonable responses open to a reasonable employer". The Employment Tribunal held that Mrs Lawrence "entirely failed to look for any exculpatory evidence" and she adopted the approach "that it was for the claimant to disprove the allegations". The Employment Tribunal found that the disciplinary hearing "was rushed and the claimant did not have sufficient time to respond to the allegations". The Employment Tribunal found of the allegations against the claimant that "no reasonable employer could have regarded them as constituting "serious negligence" so as to amount to gross misconduct". The Employment Tribunal summarised its conclusion:

> 288. The claim that the claimant's dismissal was unfair because the respondent failed to follow a fair procedure and because dismissal was outside the range of responses available to a reasonable employer is therefore well founded and succeeds.

72. Mrs Lawrence was the subject of the most extensive criticism in respect of the investigation and disciplinary process, that were found to fall very far short of being fair.

73. The Employment Tribunal declined to make any Polkey reduction or a reduction for contributory conduct.

Wrongful dismissal

74. The Employment Tribunal found that the claimant was not guilty of gross misconduct that would have entitled the respondent to dismiss her without notice. The Employment Tribunal held that:

> 298. In reaching that conclusion we took into account, when assessing Mrs Murray's credibility, that she had repeatedly told untruths to the HR committee about the claimant's return to work, that her evidence to the Tribunal relating to the concerns raised by Mrs Lawes was inconsistent with the contemporaneous documents, contradictory between her own accounts to us, and, we concluded, untrue, and that she had failed to disclose her notebook entries relating to those discussions (which demonstrated their untruth) in response to the claimant's DSAR or in the disclosure process in these proceedings.

> 299. **Specifically, Mrs Murray and Mr Cook had concluded as at 18/19 March that the concerns were not misconduct and would be treated as performance issues and that that position persisted as at 16 July at the time of the HR Committee.** We rejected Mrs Murray's explanation as to why those same concerns were suddenly escalated to matters of gross misconduct (for the reasons detailed in the paragraph above). **Consequently, we were left with a position where the only credible explanation was that advanced by the claimant, namely that as a result of the discussion with the claimant on 29 July 2021** (which Mrs Murray had contrived with Mr Cook to **recategorise the performance issues as matters of gross misconduct so as to precure the claimant's dismissal.** That was consistent with Mrs Murray's comment in the grievance investigation that that discussion had "forced the issue" and with the fact that Mrs Murray knew that a number of the disciplinary allegations were entirely untrue (as we have detailed in our findings) but permitted them to proceed to a disciplinary hearing. [emphasis added]

75. Although the wording of the relevant passage is a little garbled, it is clear that the Employment Tribunal concluded that the principle reason why allegations of gross misconduct were brought against the claimant was the discussion between the claimant and Mrs Murray on 29 July 2021, when the claimant stated that she wished to return to work on a part-time flexible basis because of her childcare responsibilities.

Discrimination because of religion or belief

76. The Employment Tribunal found that the claimant had been subject to discrimination because of religion or belief in four respects. The Employment Tribunal summarised its conclusions:

> 332. In summary, the claims of direct discrimination on the grounds of the claimant's religion or belief succeed in relation to allegations concerning (a) the addition of disciplinary allegations, (b) rushing the investigation and disciplinary process and (c) failing to take the claimant's health into account, and (d) mocking the claimant during the disciplinary hearing.

77. The last of the four issues was also found to be an act of religion or belief related harassment.

78. I will consider the reasoning of the Employment Tribunal in more detail after considering the relevant law.

The law relevant to complaints of direct religion or belief discrimination

79. Religion or belief is a protected characteristic, for the purposes of section 4 of the **Equality Act 2010 ("EQA**").

80. Section 10 **EQA** provides:

> 10 Religion or belief
>
> (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**. [emphasis added]

81. The claimant's lack of Catholic Christian religion and/or belief was accepted to be a protected characteristic.

82. Discrimination in employment is made unlawful by section 39 **EQA**:

> 39 Employees and applicants …
>
> (2) **An employer (A)** must not discriminate against an employee of A's (B)— …
>
> (c) by **dismissing B**;
>
> (d) by **subjecting B to any other detriment**. [emphasis added]

83. Section 109 **EQA** provides:

> (1) **Anything done by a person (A)** in the course of A's employment **must be treated as also done by the employer.** [emphasis added]

84. Direct discrimination is defined by section 13 **EQA**:

> 13 Direct discrimination
>
> (1) **A person (A)** discriminates against another **(B)** if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. [emphasis added]

85. Generally, in the **EQA** the discriminator is "A" and the person discriminated against is "B" (albeit that rather unhelpfully in section 109 **EQA** the employer is referred to as B). In this analysis I shall refer to the alleged discriminator as A, the person allegedly discriminated against as B and other employees as C.

86. Harassment is defined by section 26 **EQA**:

> 26 Harassment
>
> (1) **A person (A)** harasses another **(B)** if—

> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect. [emphasis added]

87. Section 212(1) **EQA** provides that "detriment" does not generally include conduct that amounts to harassment:

> "detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

88. Conduct cannot be both a detriment because of religion or belief and religion or belief related harassment; it can only be one or the other.

89. Section 136 **EQA** makes provision as to the burden of proof in discrimination complaints:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are **facts from which the court could decide**, in the **absence of any other explanation**, that **a person (A)** contravened the provision concerned, the court must hold that the contravention occurred. [emphasis added]
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision. [emphasis added]

90. The correct approach to Section 136 **EQA** was set out in an Annex to **Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong** [2005] EWCA Civ 142, [2005] I.C.R. 931:

> (1) Pursuant to section 63A of the 1975 Act, **it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination** against the claimant which is

unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that **it is unusual to find direct evidence of sex discrimination**. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by **the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**

(5) **It is important to note the word “could”** in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, **the tribunal must assume that there is no adequate explanation for those facts**.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice. [emphasis added]

91. The approach described in **Igen** was approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054:

> 29. In *Igen Ltd v Wong* (para 16) Peter Gibson LJ said that, while it was possible to offer practical help (as to which see para 17 of his judgment quoted in para 14, above), there was no substitute for the statutory language. And in *Madarassy v Nomura International plc* (para 9) Mummery LJ emphasised that the Court of Appeal had gone out of its way in *Igen* to say that its guidance was not a substitute for statute. As he put it, '**Courts do not supplant statutes. Judicial guidance is only guidance.' In para 11 he said that there was really no need for another judgment giving general guidance: 'Repetition is superfluous, qualification is unnecessary and contradiction is confusing.'** And in para 12:
>
> > 'Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in Igen Ltd v Wong meets these criteria. It does not need to be amended to make it work better.'
>
> 30. Nevertheless Mummery LJ went on in his judgment in *Madarassy v Nomura International plc* (paras 56 et seq) to offer his own comments as to how the guidance in *Igen Ltd v Wong* ought to be interpreted, which I would respectfully endorse. In para 70, having restated what the tribunal should and should not do at each stage in the two-stage process, he pointed out that from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:
>
> > 'The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.'
>
> 31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference (para 107) to its being required to make an assumption, he said:
>
> > 'In my judgment, it is unhelpful to introduce words like "presume" into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. **The tribunal is told by the section to assume the absence of an adequate explanation.** The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove

> that he did not commit an unlawful act of discrimination.'
>
> **The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established.** The wording of sec 63A(2) of the 1975 Act and sec 54A(2) of the 1976 Act is quite explicit on this point. **The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful.** So the prima facie case must be proved, and it is for the claimant to discharge that burden.
>
> 32. **The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance.** Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* (para 39), **it is 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.** That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance. [emphasis added]

92. The fundamental point is that, where an Employment Tribunal applies section 136 **EQA**, it must first consider whether there is evidence from which an inference of discrimination could be drawn. At the first stage the Employment Tribunal must assume that there is not, in the words of the **EQA**, any "other explanation".

93. That analysis was approved by the Supreme Court in **Efobi v Royal Mail Group Ltd** [2021] UKSC 37, [2021] I.C.R. 1263.

94. I considered the extent to which the assumption that there is not any "other explanation" precludes consideration of anything the respondent has said, or not said, about its actions: **London Ambulance Service NHS Trust v Sodola** [2026] EAT 6, [2026] IRLR 282.

95. Not only is it important "not to make too much of the role of the burden of proof provisions", Employment Tribunals should guard against the risk that the application of the burden of proof provisions distracts from analysing complaints of discrimination logically, in a manner rooted firmly in common-sense. There may be occasions on which considering whether to draw an inference of discrimination without recourse to the burden of proof, as would have been done before the

introduction of the burden of proof provisions, may be the best way forward: **King v Great Britain-China Centre**: [1992] I.C.R. 516.

96. Where the burden of proof provisions are applied, the main focus should be on the statutory wording. While yet further guidance on the burden of proof may be the last thing that anyone wants or needs; there are a few common-sense questions that may provide a helpful sense check when considering whether to draw an inference of direct discrimination:

(1) What is the act, or are the acts, of alleged discrimination done to B. Sometimes it may be possible to analyse more than one act together. Whether it is appropriate to do so will depend on matters such as whether the acts were allegedly committed by the same person, are similar in nature and their timing (in the rest of this discussion I shall use the term "the Act" to refer to a single act, or acts that can properly be analysed together).

(2) In respect of the Act, who is the alleged discriminator, or discriminators, A.

(3) Did A do the Act to B

(4) Are there facts from which the Employment Tribunal could decide, in the absence of any other explanation, that A did the Act to B because of the relevant protected characteristic. Generally, things said or done by another person or other people, C, are unlikely to assist in analysing whether A did the Act to B because of the relevant protected characteristic. There may be cases where a lack of proper equal opportunities policies, poor compliance with relevant policies or the EHRC Code of Practice and/or a culture in which discriminatory language or practices are allowed to develop, may make it more likely that A discriminated against B, but that will generally require some analysis.

(5) If, on a logical analysis, there are facts from which the Employment Tribunal could decide, in the absence of any other explanation, that A did the Act to B because of the relevant protected characteristic, then the inference of discrimination must be

drawn unless "A shows that A did not contravene the provision", in other words, A proves that the Act was not done to B because of the relevant protected characteristic.

97. Section 136 **EQA** does not provide a simpler alternative to a logical and rigorous analysis of the facts. Equivalent rigour is generally required in determining whether there are facts from which an inference "could" be drawn for the purposes of Section 136 **EQA**, as in determining whether to draw the inference on a **King** analysis. The Employment Tribunal must always consider with care what it is about the facts that could lead to an inference that A did the Act to B because of the relevant protected characteristic. The actions of A may be grossly unfair but that will not necessarily provide any evidence that suggests that the Act was done to B because of the protected characteristic: **Bahl v Law Society** [2004] EWCA Civ 1070, [2004] IRLR 799.

The detailed analysis of the Employment Tribunal

98. The Employment Tribunal gave two somewhat different analyses of the connection between the claimant's lack of Catholic faith and her treatment. In a case summary at the start of the judgment the Employment Tribunal stated:

> 5. The claimant alleges that **the respondent failed properly to respond to her request for flexible working following the adoption of her child**, **arguing that the respondent's approached was tainted by negative views of adoption, emanating from the religious beliefs of its staff.** She raised an informal grievance about her line manager's rejection of her flexible working request.
>
> 6. She alleges that **when she presented a formal grievance in relation to the rejection of the flexible working request, her line manager inflated concerns about the systems she had in place the management of her staff and month end reconciliations to create charges of gross misconduct.** Additionally, she argues that **during the resulting disciplinary process she was treated less favourably as a non-Catholic than a Catholic would have been treated, and that her dismissal was therefore unfair and discriminatory.** She further argues that her dismissal was a detriment done because she made a flexible working request and/or the principal reason for the dismissal was that she had made such a request. [emphasis added]

99. This suggests that the initial animus was to the request for flexible working because of unspecified views about adoption held by Catholic staff. It was then suggested that there was discrimination against the claimant as a non-Catholic during the disciplinary process.

100. When analysing the complaint of direct religion or belief discrimination in its conclusions,

the Employment Tribunal stated:

> 327. The claimant has argued that **from the moment she challenged the respondent, particularly from the point at which she referenced the Catholic Church's treatment of vulnerable children, her card was marked**, and **the respondent closed ranks to protect itself and dismiss her.** Those are very serious allegations; the claimant is required to produce some evidence from which we could, properly directing ourselves, conclude that the reason for the matters she complains of was her religion or belief – i.e. that she was a non-Catholic. [emphasis added]

101. This suggests that the animus against the claimant developed at a later stage when she criticised the Catholic Church's treatment of vulnerable children, which must be a reference to the claimant's formal grievance submitted on 31 August 2021, and cannot be relevant to prior events.

102. The Employment Tribunal made no findings of fact about the religion or beliefs of those whose actions it criticised, including what, if any animus, they had against the claimant because she was not a Catholic.

103. The Employment Tribunal said of its approach to the religion or belief discrimination complaint:

> 325. In the circumstances, **we concluded that this was an appropriate case to focus our inquiry on the reason why the conduct occurred** i.e. is was the claimant's status as a non-Catholic the reason why the respondent:
>
> 325.1. Suspended the claimant;
>
> 325.2. Added allegations after the commencement of an investigation;
>
> 325.3. Permitted Mrs Lawrence such a degree of influence over the conduct of the disciplinary hearing;
>
> 325.4. Rushed the investigation and disciplinary process; and
>
> 325.5. Mrs Lawrence mocked the claimant at the disciplinary.

104. This suggested that the Employment Tribunal intended to adopt the approach approved in **Hewage** of moving directly to the "reason why" question, rather than adopting a Section 136 **EQA** two stage approach. However, the Employment Tribunal then went on to apply a two stage analysis.

105. The Employment Tribunal first considered whether there were facts from which it could infer discrimination:

328. In our view, the following matters were matters which were more than just 'unreasonable' conduct and which were therefore potentially matters from which we could draw an inference to support the claimant's allegations and in respect of which the respondent was unable to provide any explanation:

328.1. The **disciplinary allegations were contrived** by **Mrs Murray** and **Mr Cook**;

328.2. **Mrs Murray withheld her notebooks**, which demonstrated that the disciplinary allegations were contrived, and failed to disclose them either in response to a data subject access request or as part of the disclosure process in the Tribunal. Their existence was only revealed as a consequence of questioning from the Judge.

328.3. **The decision that the claimant should not be alerted to the existence of the Employee's Assistance Program**, evidenced by Mr Cook's email in which he stated that such a course might "backfire", which was **made by Mr Cook and endorsed by Mrs Murray and/or Msgr Massey**.

328.4. The fact that **Mrs Murray continued to be included in decisions relating to the disciplinary notwithstanding the claimant's allegation in a formal grievance** that she had contrived the allegations.

328.5. The **deliberate and conscious decision** made by **Msgr Massey, Mr Cook and Mrs Murray not to inform Mrs Lawrence that the claimant had acute mental health issues**, which formed part of the basis for her request for a remote hearing, with the result that she refused the claimant's request for the investigation hearing to be conducted remotely.

328.6. The fact that **Msgr Massey and Mrs Murray failed to raise matters during the disciplinary process which demonstrated that the factual basis of certain disciplinary allegations was false** and without basis, notwithstanding their first-hand knowledge of those matters, because they involved in the meetings/decisions in questions.

328.7. **Msgr Massey's decision not to adjourn the disciplinary hearing** (whether initially to permit the claimant more time to respond to the allegations or after the initial meeting to investigate the matters raised by the claimant) notwithstanding that he had canvassed that possible course previously.

328.8. **Mrs Lawrence's failure to draw the ICAEW outcome letter to Mrs Hipkiss' attention prior to the determination of the appeal**. [emphasis added]

106. The criticisms were primarily made against Mrs Murray, Mr Cook and Msgr Massey. The only criticism of Mrs Lawrence was her failure to provide the ICAEW outcome letter to Mrs Hipkiss prior to the determination of the appeal.

107. The Employment Tribunal next referred to a lack of any explanation for the conduct that it

had criticised:

> 329. **In determining whether we could draw an inference** from those matters **we took into account that the respondent was unable to provide any explanation for the majority of them**, as we have detailed above. **Each of those actions was one which cried out for an explanation.** [emphasis added]

108. The Employment Tribunal concluded that the burden of proof had passed to the respondent to disprove discrimination:

> 330. We were **persuaded therefore that the burden transferred to the respondent to demonstrate that the claimant's religion or beliefs had no influence whatsoever on the factual allegations which we have found were proved**.

109. The Employment Tribunal then considered whether "the respondent" had proved, in respect of the acts the Employment Tribunal found had occurred, that the claimant's religion or belief had no influence whatsoever:

> 331. The respondent advanced the following reasons or arguments in relation to those matters:
>
> > 331.1. **The claimant's suspension**: The claimant was suspended because of concerns that she could or might seek to alter financial records once alerted to the allegations and/or seek to influence members of her department to do so. Whilst we are not concluding that there was a reasonable basis for that concern, it is a common one when serious allegations are made, and a common response is suspension. **Msgr Massey made the decision** and was **able to articulate the rationale that applied. Given we have not found that Msgr Massey was not involved in the initial discussion between Mrs Murray and Mr Cook when the disciplinary allegations were contrived, we accepted his evidence on this matter, which fell at an early stage of the process, and it was credible. The respondent has therefore proved a non-discriminatory reason for the suspension. The claim in respect of it is not well founded and is dismissed.**
> >
> > 331.2. **The addition of allegations**: the **decision was Mrs Lawrence's**. **Miss Spencer did not develop the claimant's arguments on this point with any force when cross-examining her.** Nevertheless, despite the allegation being clearly identified in the list of issues, Mrs Lawrence did not identify any reason for the addition of the allegations in her witness statement. Given the allegation relating to Parker Chapman Ltd did not directly relate to the claimant's performance of her role, and was therefore outside the common or usual form of allegation which might be added, we concluded that it required an explanation from Mrs Lawrence. **She stated that she had added the allegation because she looked at all matters which effected the claimant's status as a member of the senior leadership team and any matter that was relevant to her role as an employee. That is a reason unconnected to the claimant's religion.**
> >
> > 331.3. However, **we rejected that as being the true reason** because:

331.3.1. **Mrs Lawrence did not provide that explanation previously** and had produced no evidence to support that it was her practice as she alleged, and

331.3.2. **she categorised the offence as gross-misconduct which in itself called for an explanation** as, in the Tribunal's experience, such matters would rarely if ever be regarded as that serious in the absence of actual damage to an employer's reputation,

331.3.3. **the investigation was desultory and one-sided** as detailed above,

331.3.4. **Mrs Lawrence failed to provide the ICAEW letter to Mrs Hipkiss**, which would have been a key indicator or fairness, and provided no explanation for that failure, and

331.3.5. **Mrs Lawrence's was found to have been untruthful in her account about mocking the claimant.**

331.4. **Mrs Lawrence conducted the investigation and disciplinary hearing – Mrs Lawrence's account, which was provided in her statement, was that it was necessary for her to lead and guide the disciplinary process because of the detailed and specialist subject matter of the allegations.** That is a reason unconnected to religion. We accept that it was inevitable that Mrs Lawrence would lead the disciplinary discussions because (a) she had not had an opportunity to explore the claimant's account at an investigation meeting and would want to do so and (b) because of her experience as an accountant and auditor; that had been the reason for her appointment as the investigator. **We accept that that was the reason for the degree of her involvement; it is not connected to the claimant's religion or belief. This allegation is not well founded and is dismissed.**

331.5. **Rushing the investigation and disciplinary hearings and failing to take the claimant's health issues into account.** We found that the respondent has acted as detailed above, and that the burden transferred to the respondent to demonstrate that they were in no way influenced by the claimant's religion or belief. The respondent was unable to provide any or any reasonable or coherent explanation for why it acted as it did. **We have addressed those matters at length above; it is unnecessary to repeat them here. The respondent has therefore failed to discharge the burden to show a nondiscriminatory reason for its actions.** The claims relating to these allegations are well founded and succeed.

331.6. **<u>Mrs Lawrence</u> mocked the claimant.** We have found that Mrs Lawrence mocked the claimant as she suggests. **Mrs Lawrence has advanced no explanation for acting as we found she did, rather she denied the allegation. The respondent has therefore failed to discharge the burden to demonstrate a non-discriminatory reason for that action. The claim is therefore well founded and succeeds.**

332. **In summary, the claims of direct discrimination on the grounds of the claimant's religion or belief succeed** in relation to allegations concerning (a) **the**

> **addition of disciplinary allegations**, (b) **rushing the investigation and disciplinary process** and (c) **failing to take the claimant's health into account**, and (d) **mocking the claimant** during the disciplinary hearing. [emphasis added]

110. The main, and possibly only, person found to have discriminated against the claimant was Mrs Lawrence. She is the only person who was specifically stated to have discriminated against the claimant in the judgment. In respect of rushing the investigation and disciplinary process, and failing to take the claimant's health into account, the Employment Tribunal did not explain whether the finding was made against some or all of those involved in the investigation and disciplinary procedure. In its findings of fact, the criticisms about the investigation and disciplinary proceedings were made against Mrs Lawrence.

111. The Employment Tribunal went on to uphold the complaint of harassment against Mrs Lawrence:

> 333. **A necessary consequence of our conclusion that Mrs Lawrence mocked the claimant and that her actions constituted direct discrimination on the grounds of religion and belief is that the claimant's religion or belief was more than a trivial cause of Mrs Lawrence's comment.** That is sufficient to establish the necessary nexus or connection required by section 26(1)(a) EqA 2010 when determining whether the conduct 'related to' the claimant's religion or belief.
>
> 334. **We unhesitatingly conclude that the conduct was unwanted** for the purposes of s.26(1)(a) and that **it violated the claimant's dignity and created a hostile, degrading, humiliating and offensive environment**. The claimant's immediate and marked reaction to the comment is clear proof of those matters, and we accepted her evidence about the effect of the remark on her. **It was, in our view, reasonable in the circumstances of the case for the claimant to form that view and for the remark to have had that effect on her.**

The grounds of appeal

112. It is helpful to analyse the grounds of appeal permitted to proceed out of order.

113. Ground 4 asserts:

> Ground 4 – Blanket approach to allegations at the first stage, failure to deal with each allegation separately.
>
> 16. At para 328, the Tribunal gave a list of matters which it considered allowed it to draw an inference in relation to all acts of discrimination. It failed to analyse whether the burden of proof had shifted in relation to each allegation, rather it took a blanket approach. This was an error of law (cf *Essex County Council v Jarrett* EAT 0045/15).

> 17. This was particularly problematic as **the failures relied upon at para 328 mainly related to Mrs Murray and Mr Cook, but the allegations of discrimination did not relate to them. The blanket approach therefore used the conduct of Mrs Murray and Mr Cook as a reason why, for example, there was a prima facie case of discrimination established against Mrs Lawrence.** This was a clear error of law and an example of the Tribunal taking into account an improper factor.

114. This ground is made out. It is not helpful to encrust the approach to be adopted to a section 136 **EQA** analysis with hard and fast rules. It is often necessary to decide whether the analysis was logically permissible on the facts found. The matters that were relied on to shift the burden of proof were almost entirely the actions of Mrs Murray, Mr Cook and Msgr Massey. The only matter that related to Mrs Lawrence was her failure to provide the ICAEW letter to Mrs Hipkiss. There was no explanation why this failure to provide Mrs Hipkiss with the ICAEW letter suggested that Mrs Lawrence had discriminated against the claimant because of the claimant's lack of Catholic religion or belief. The only allegation in respect of Msgr Massey was dismissed. The Employment Tribunal did not explain why the things it found were done by Mrs Murray, Mr Cook and Msgr Massey could lead to an inference that Mrs Lawrence had discriminated against the claimant because of her lack of Catholic religion or belief, by doing different acts. I conclude that the reasoning was perverse and/or the analysis of the Employment Tribunal was not adequately explained.

115. When analysing the acts of Mrs Lawrence that were held to be discriminatory, the Employment Tribunal referred to a number of reasons why it rejected her evidence, but that was done in the context of the Employment Tribunal having already decided that the respondent was required to establish that the claimant's religion or beliefs had no influence whatsoever on Mrs Lawrence's treatment of her. The factors referred to at paragraph 331.3 might possibly have been relevant at stage 1 of the analysis, but they were instead relied on at stage 2. If these matters had been analysed at stage 1, the Employment Tribunal would have had to explain why the actions suggest the possibility that Mrs Lawrence discriminated against the claimant because of her lack of Catholic religion or belief. The mere fact that Mrs Lawrence treated the claimant unfairly would not be sufficient to suggest such a connection.

116. The Employment Tribunal suggested that there were two specific links between the claimant's lack of Catholic faith and her treatment, negative views about adoption, emanating from the unspecified religious beliefs of staff of the respondent and/or a negative reaction to the claimant referring to the Catholic Church's treatment of vulnerable children. The Employment Tribunal did not attribute these views to Mrs Lawrence. There were no specific findings about Mrs Lawrence's religion, belief or her reaction to the claimant's lack of Catholic religion, belief or associated matters.

117. There was also no explanation of why critically referring to the Catholic Church's treatment of vulnerable children would be a proxy for not being Catholic. There are many adherents of the Catholic faith who are critical of how the Catholic Church has at times dealt with the needs of, or allegations about, vulnerable children.

118. Ground 3 asserts:

> Ground 3 – Erred in applying the correct test for shifting the burden of proof by using a lack of explanation at the first stage.
>
> 13. The Tribunal considered that there were a number of acts which were 'more than just 'unreasonable'' (para 328). At least one of these (328.7) is an allegation of discrimination (i.e. (b) rushing the disciplinary hearing process). The Tribunal considered that the failure to explain the majority of the acts at para 328 was enough to shift the burden of proof (para 329).
>
> 14. It is averred that any explanation (or lack of explanation) is not a factor to be taken into account at the first stage of the two -stage test set out in *Igen v Wong* and is also contrary to the test set out in s136(2) Equality Act 2010. Rather, explanations should only be taken into account once the burden of proof has been shifted (cf *Efobi v Royal Mail Group Ltd* 2021 ICR 1263, SC).
>
> 15. The Tribunal therefore erred in finding that the burden of proof had shifted.

119. This ground is also made out. It was irrational to find a lack of explanation for things done nearly entirely by Mrs Murray, Mr Cook and Msgr Massey could result in an inference that Mrs Lawrence had discriminated against the claimant. When a section 136 **EQA** analysis is applied the Employment Tribunal is required, at the first stage, to work on the assumption that there is no "other explanation" for the acts asserted to be discriminatory.

120. Ground 5 asserts:

Ground 5 – Erred in finding there was no explanation for conduct when in fact the Tribunal had found elsewhere that there was an explanation. Further, erred in applying a test of ‘reasonable and coherent’ explanation rather than ‘non-discriminatory’ explanation.

18. (i) The Tribunal contradicted itself and was inconsistent in finding that the reason for the alleged discriminatory conduct was related to religion when it itself had found that there was another explanation for the conduct.

19. At para 299, the Tribunal found that Mrs Murray and Mr Cook had contrived to recategorize performance issues as misconduct issues due to the conversation of 29 July 2021 (the request for flexible working). This may have been unreasonable, but it was a non-discriminatory explanation.

20. Indeed the Claimant herself said that it was her challenge to Mrs Murray in relation to the flexible working request that led to the performance issues being raised (para 156).

21. In circumstances where the Claimant had argued and the Tribunal had concluded that there was a reason for the contrivance of the disciplinary allegations that was not related to religion, it was an error of law and indeed perverse for it to use a lack of explanation of that act as a reason to shift the burden of proof in a case of religious discrimination (para 329).

22. (ii) Moreover, as the Tribunal had very clearly identified a non-discriminatory reason that set off the whole disciplinary process, it was incumbent on it to consider whether or not this was a non-discriminatory explanation for the four successful allegations of discrimination, all of which formed part of that disciplinary process. It failed to do so (and for at least two allegations merely referred back to its unfair dismissal findings) and thus failed to take into account a relevant factor and apply the statutory test properly.

23. (iii) Furthermore, the Tribunal (at para 150-151 and 275) criticised Msgr Massey’s focus on his own mental health as his reason for rushing (i.e. not postponing) the disciplinary hearing – allegation (b). It also criticised the Respondent for focussing on inconvenience to the Respondent (as Mrs Lawrence was not available on the postponed date). There is no indication that the Tribunal disbelieved either of these reasons. However, it went on to find (at 331.5) that the Respondent was unable to provide any ‘reasonable or coherent explanation’. This is the incorrect test.

24. Moreover, regarding allegation (c), this error was repeated. The Tribunal (also at para 331.5), in support of a conclusion of discrimination, simply refers back to its findings on unfair dismissal. The unfair dismissal findings relating to issue (c) again focus (eg para 277) on whether the reason given was reasonable, not on whether there was a non-discriminatory reason.

25. These instances were errors of law. The test is not whether the explanation is ‘reasonable’, rather whether it is non-discriminatory. Alternatively, the Tribunal erred by conflating its conclusions on unfair dismissal with its conclusions on discrimination.

> 26. There was a clear non-discriminatory explanation that the Tribunal appear to have accepted as a genuine explanation – Msgr Massey's own mental health and inconvenience to the Respondent. The Tribunal therefore erred by dismissing a non-discriminatory explanation on the basis it was not a reasonable reason for rushing the disciplinary procedure.

121. To the extent that there was any proper basis for relying on things done by Mrs Murray, Mr Cook and Msgr Massey in considering whether the claimant might have been subject to discrimination because of her lack of Catholic religion or belief, it was necessary to consider the alternative reasons that the Employment Tribunal found for their actions, in other parts of the judgment. However, that is subject to the caveat that this point is only relevant if it is established that there is a logical reason why their actions could result in an inference of discrimination in respect of the specific acts of discrimination found, most, or all, of which were done by Mrs Lawrence. This ground is made out.

122. The harassment finding cannot stand as it was based on the direct discrimination determination. On remission the Employment Tribunal will have to decide whether this allegation should be analysed as harassment or direct discrimination, because it cannot be both.

Disposal

123. The matter is remitted to the Employment Tribunal to redetermine the complaints of direct discrimination because of religion or belief and, if appropriate the complaint of harassment. It will be for the Employment Tribunal to determine whether any further evidence should be permitted, in the light of the submissions of the parties, or that the matter should be determined on the basis of submissions alone.

124. I have considered the submissions of the parties on remission and the factors in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The judgment of the Employment Tribunal was not totally flawed. The Employment Tribunal made numerous detailed findings of fact that have not been challenged on appeal. The claimant succeeded in complaints of unfair dismissal and wrongful dismissal, which were not challenged in the appeal.

125. There is no reason to doubt that the Employment Tribunal will act with integrity and professionalism, and determine the remitted complaints with the assistance of the guidance in this judgment. While there has been a significant passage of time, the Employment Tribunal will have its notes and will be better placed than a newly constituted Employment Tribunal to carry out the necessary analysis. Remission to a newly constituted Employment Tribunal would be likely to be more costly and so proportionality is in favour of remission to the same Employment Tribunal.

126. The Employment Tribunal stated that the decision of Mrs Murray and Mr Cook not to refer the claimant to a free source of counselling and support was a callous and wholly unattractive act, which was entirely at odds with their Christian beliefs. As the respondent notes, the Employment Tribunal made no findings of fact about what their relevant beliefs were. On remission the focus will be on the actions of Mrs Lawrence. The Employment Tribunal can be trusted to take from this judgment the lesson that it should not make assumptions about the religious views of witnesses, or their reactions to the lack of Catholic religion or belief of the claimant, without a proper evidential basis.

127. I have concluded that the remission should be to the same Employment Tribunal, unless there are factors, in the view of the Regional Employment Judge, that make reconvening the same panel impractical.

128. Case management will be for the Employment Tribunal on remission. I note that the parties are in agreement as to the issues on remission and the particular parts of this judgment to which the Employment Tribunal should have particular regard.