Appeal No. UKEAT/0072/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 & 9 September 2016
Judgment handed down on 7 December 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

THE REVEREND CANON J C PEMBERTON — APPELLANT

THE RIGHT REVEREND RICHARD INWOOD, FORMER ACTING BISHOP OF SOUTHWELL AND NOTTINGHAM — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR SEAN JONES (One of Her Majesty's Counsel) and MR JUSTIN GAU (of Counsel) and MS HELEN TROTTER (of Counsel) Instructed by: Messrs Thomson Snell & Passmore Solicitors Corinthian House Galleon Boulevard Crossways Business Park Dartford Kent DA2 6QE
For the Respondent	MR THOMAS LINDEN (One of Her Majesty's Counsel) and MR MATTHEW SHERIDAN (of Counsel) Instructed by: Messrs Herbert Smith Freehills LLP Exchange House Primrose Street London EC2A 2EG

SUMMARY

SEX DISCRIMINATION - Marital status

SEXUAL ORIENTATION DISCRIMINATION

HARASSMENT

Discrimination - marital status - sexual orientation

Qualifications bodies - relevant qualification - sections 53 and 54 ***Equality Act 2010***

Exceptions from liability - religious requirements relating to marriage - schedule 9 paragraph 2 ***Equality Act 2010***

Harassment - section 26 ***Equality Act 2010***

The Claimant is a Church of England Priest who married his long-term partner. This was a marriage between two persons of the same sex, made permissible by virtue of the **Marriage (Same Sex Couples) Act 2013**, the enactment of which the Church of England had opposed. As a result of this marriage, the Respondent revoked the Claimant's Permission to Officiate ("PTO") and refused to grant him an Extra Parochial Ministry Licence ("EPML"), which he needed to be able to take up a post as Chaplain in an NHS Trust. The Claimant brought ET proceedings, complaining of unlawful direct discrimination because of sexual orientation and/or marital status and of unlawful harassment related to sexual orientation, his claims being brought under section 53 **Equality Act 2010** ("EqA") which applies to qualifications bodies, as defined by section 54(2) **EqA**. The Respondent denied he was a qualifications body but, in the alternative, contended that any relevant qualifications (defined by section 54(3)) were for the purposes of employment for the purposes of an organised religion, falling within the exemption allowed by schedule 9 paragraph 2 of the **EqA** and he had applied the requirement that the Claimant not be in a same sex marriage because that was incompatible with the doctrine of the Church of England in relation to marriage ("the compliance principle"). The claim of harassment was further denied on its facts.

The ET found the Respondent's refusal to grant the EPML did fall under section 53 **EqA** and was a "relevant qualification" within the meaning of section 54. That was not the case, however, in respect of the revocation of the Claimant's PTO. The ET further held, however, that the EPML qualification was for the purposes of employment for the purposes of an organised religion and the compliance principle was engaged; thus the Respondent was exempt from liability by reason of paragraph 2 of schedule 9 of the **EqA**. As for the harassment claim, although the Claimant was caused distress by the Respondent's conduct, which he found humiliating and degrading, this did not amount to harassment. Context was everything. The Claimant would not have experienced that (admittedly, unwanted) conduct if he had not defied the doctrine of the Church. Moreover, the Respondent had acted lawfully pursuant to schedule 9; it would be an affront to justice if his conduct was found to constitute harassment.

Upon the Claimant's appeal and the Respondent's cross-appeal.

Held: *dismissing both the appeal and cross-appeal*

The ET had correctly held that the EPML was a relevant qualification (and the Respondent thus a qualifications body) for the purposes of sections 53 and 54 **EqA**; the Respondent's cross-appeal against this finding was dismissed. Equally, however, the ET had been entitled to find that the PTO was not a relevant qualification: it would not have "facilitated" the grant of the EPML on the facts of this case; it was the Claimant's lack of "good standing" within the Church of England that underpinned the Respondent's decision in respect of both.

The ET had further reached a permissible conclusion that the qualification was for the purposes of employment for the purposes of an organised religion, notwithstanding that the employer would have been the NHS Trust and not the Church. The Trust required its Chaplain to have an EPML for the purpose of carrying out the ministry of the Church of England; that was the purpose of the qualification and the employment. As for the doctrines of the Church, this referred to the teachings and beliefs of the religion and the ET had been entitled to find these were as stated by Canon B30 ("*marriage is ... a union ... of one man with one woman ...*"),

evidenced, in particular, by the House of Bishops' Pastoral Guidance on Same Sex Marriage. The Respondent had applied a requirement that the Claimant not be in a same sex marriage so as to comply with the doctrines of the Church; it was not fatal to the ET's conclusion in that regard that a different Bishop might not have done the same.

As for the harassment claim, the ET had permissibly found that the particular context of this case was highly significant and meant that it was not reasonable for the Respondent's conduct to have the effect required to meet the definition of harassment under section 26 **EqA**. The Claimant had been aware that his marriage would mean that he would not be seen as in "good standing" within the Church of England. The Respondent's decision was exempt from liability by reason of schedule 9 and there were no aggravating features arising from his decision or its communication. These were relevant factors to which the ET was entitled to have regard.

HER HONOUR JUDGE EADY QC

Introduction

1. This case raises novel questions relating to qualifications bodies and the exemption provided by schedule 9 of the **Equality Act 2010** ("EqA"), in respect of qualifications for the purposes of employment for the purposes of an organised religion. It is important in terms of the legal principles it addresses but is of particular significance for the parties involved.

2. I refer to those parties as the Claimant and the Respondent, as they were in the underlying proceedings. This is the hearing of the Claimant's appeal and the Respondent's cross-appeal against the Reserved Judgment of the Employment Tribunal sitting at Nottingham (Employment Judge Britton sitting with Mrs Daibell and Mr Austin, over 8 days during the summer of 2015, with an additional two days in chambers; "the ET"), sent to the parties on 28 October 2015. Representation below was as it has been on this appeal.

The Background

3. Since 1982[1], the Claimant has been an ordained Church of England Priest. He had enjoyed a distinguished clerical career when in 2007, for personal reasons, he resigned his parish. It was at this time that the Claimant separated from his wife and in due course they divorced, albeit remaining on good terms. By 2008, the Claimant had returned to the ministry and, in April 2008, was licensed by the then Bishop of Southwell as a Community Chaplain.

4. The laws which govern the Church of England are (in broad terms) contained within Measures and Canons. More specifically, Measures passed by the General Synod (the National Assembly of the Church of England) and approved by Parliament are part of the law of the

land; Canons Ecclesiastical are another form of primary legislation whose application is specific to the Church of England and which may be made and promulgated by the General Synod only with the Royal Assent and Licence (see per Lewison LJ, in his overview of the constitutional structure of the Church of England, in **Sharpe v Bishop of Worcester** [2015] ICR 1241 CA). The licence granted to the Claimant fell under the **Extra Parochial Ministry Measure 1967** ("the EPMM"), which is described as follows:

> **"A Measure passed by the National Assembly of the Church of England to authorise the Minister of a parish to exercise his ministry outside the parish for the benefit of persons on the electoral roll of the parish; and for licensing a Minister to exercise his ministry at or for the benefit of an institution without the consent of and without being subject to the control of the Minister of the parish."**

5. By section 2, the **EPMM** provides (relevantly):

> **"2.** ***Ministry at or for the benefit of certain institutions***
>
> **(1) The Bishop of the diocese in which any university, college, school, hospital or public or charitable institution is situated, whether or not it possesses a chapel, may license a clergyman of the Church of England to perform such offices and services as may be specified in the licence on any premises forming part of or belonging to the institution in question, including residential premises managed by the institution and occupied by the members of staff of the institution."**

6. Returning to the chronology, in June 2008, the Claimant had met a new partner and by the autumn they were known to be living together. That caused no difficulties as the Claimant thereafter progressed his career, becoming the Deputy Senior Chaplain and Deputy Bereavement Services Manager for the United Lincolnshire Hospitals NHS Trust ("ULHT").

7. It is NHS practice that Church of England Priests will not be appointed as Chaplains without a licence from the Church; that is, authorisation by the Bishop of the Diocese or such person lawfully authorised by him pursuant to the **EPMM**. As he was taking up a Chaplaincy post falling within the Diocese of Lincoln, the Claimant was granted a further Extra Parochial Ministry Licence (an "EPML")[2], authorised by the then Suffragan Bishop of Grantham.

8. When granted his EPML, the Claimant confirmed his Oath of Canonical Obedience as a Priest, as provided by Canon C14:

> **"3. Every person who is to be ordained priest or deacon shall first take the Oath of Canonical Obedience to the bishop of the diocese by whom he is to be ordained in the presence of the said bishop or his commissary, and in the form following:**
>
> > **"I, AB, do swear by Almighty God that I will pay true and canonical obedience to the Lord Bishop of C and his successors in all things lawful and honest: So help me God."**
>
> **…**
>
> **5. Every bishop, priest or deacon who is to be translated, instituted, installed, licensed or admitted to any office in the Church of England or otherwise to serve in any place shall reaffirm the Oath of Canonical Obedience or his solemn affirmation taken at this ordination or consecration to the archbishop of the province or the bishop of the diocese (as the case may be) by whom he is to be instituted, installed, licensed or admitted in the presence of the said archbishop or bishop or his commissary in the form set out in this Canon."**

9. Subsequently, on 24 February 2011, the Claimant was granted a Permission to Officiate (a "PTO"), by the Respondent's predecessor as Bishop of Southwell and Nottingham. A PTO enables a Church of England Priest - within the Diocese for which it has been granted - to undertake (without remuneration) ministerial services, such as giving sermons, at the request of the incumbent vicar (Canons 8.2 and 8.3).

10. On 17 July 2013, the Claimant and his partner became engaged; they planned their wedding for 12 April 2014, and, on 30 December 2013, the Claimant emailed the then Suffragan Bishop of Sherwood and Acting Bishop of Southwell and Nottingham, to inform him of these plans. He similarly informed the Bishop of Lincoln. I return to the Bishops' respective responses and subsequent communications with the Claimant below.

11. On 12 April 2014, the Claimant and his partner were married. As both are male, this was a marriage between two people of the same sex, as permitted by the **Marriage (Same Sex Couples) Act 2013** ("the Act"), which came into force on 17 July 2013. There was a prominent report of the marriage by the Mail on Sunday[3], which included a photograph of the

couple and an interview with the Claimant. This press interest was not instigated by the Claimant but he co-operated with it to the extent that he agreed to be interviewed and to the photograph. In response to the publicity, the Church also issued a press statement.

12. Press interest in the Claimant's marriage was related to the fact that the Church of England had opposed the coming into force of **the Act** (albeit, **the Act** acknowledges the Church's constitutional legal independence: it preserves the effect of any Canon of the Church which makes provision about marriage being the union of one man with one woman, and does not allow two persons of the same sex to marry according to the rites of the Church of England). Within the Church there was considerable debate about the subject of same sex relationships, specifically same sex marriages and the issues raised were the subject of a report of the House of Bishops' Working Group on human sexuality chaired by Sir Joseph Pilling, published on 28 November 2013 ("the Pilling Report"). Whilst acknowledging the on-going debate, the Pilling Report concluded the majority opinion within the Church of England was that marriage was between a man and a woman for the purpose of the doctrines of the Church.

13. On 15 February 2014, the House of Bishops (one of three Houses of the General Synod) produced a document entitled "*Pastoral Guidance on Same Sex Marriage*" ("the Guidance"). Under cover of a letter to the clergy and people of the Church of England - signed by the Archbishops of Canterbury and York, on behalf of the House of Bishops - the Guidance was set out in an Appendix headed "*The Church of England and the Marriage (Same Sex Couples) Act 2013 - The Church of England's teaching on marriage*". The letter itself explained:

> **"As members of the Body of Christ we are aware that there will be a range of responses across the Church of England to the introduction of same sex marriage. As bishops we have reflected and prayed together about these developments. … we are not all in agreement about every aspect of the Church's response. However we are all in agreement that the Christian understanding and doctrine of marriage as a lifelong union between one man and one woman remains unchanged."**

14. The detailed Appendix then opened with the statement:

> **"1. The Church of England's long standing teaching and rule are set out in Canon B30: 'The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity."**

15. In addressing the effect of **the Act**, the Appendix continued:

> **"9. … the first same sex marriages in England are expected to take place in March. From then there will, for the first time, be a divergence between the general understanding and definition of marriage in England as enshrined in law and the doctrine of marriage held by the Church of England and reflected in the Canons and the Book of Common Prayer.**
>
> **10. The effect of the legislation is that in most respects there will no longer be any distinction between marriage involving same sex couples and couples of opposite genders. The legislation make religious as well as civil same sex weddings possible, though only where the relevant denomination or faith has opted in to conducting such weddings. …**
>
> **11. The Act provides no opt in mechanism for the Church of England because of the constitutional convention that the power of initiative on legislation affecting the Church of England rests with the General Synod, which has the power to pass Measures and Canons. The Act preserves, as part of the law of England, the effect of any Canon which makes provision about marriage being the union of one man with one woman, notwithstanding the general, gender free definition of marriage. As a result Canon B30 remains part of the law of the land.**
>
> **12. When the Act comes into force … *it will continue not to be legally possible for two persons of the same sex to marry according to the rites of the Church of England*. In addition the Act makes clear that *any rights and duties which currently exist in relation to being married in Church of England churches do not extend to same sex couples*." (Original emphasis)**

16. The Appendix then considered particular areas in which it was considered that further guidance was necessary. Specifically, in respect of clergy and ordinands, it provided:

> **"22. The preface to the Declaration of Assent, which all clergy have to make when ordained and reaffirm when they take up a new appointment, notes that the Church of England '*professes the faith uniquely revealed in the Holy Scriptures and set forth in the catholic creeds, which faith the Church is called upon to proclaim afresh in each generation*.' …**
>
> **23. At ordination clergy make a declaration that they will endeavour to fashion their own life and that of their household '*according to the way of Christ*' that they may be '*a pattern and example to Christ's people*'. A requirement as to the manner of life of the clergy is also directly imposed on the clergy by Canon C 26, which says that '*at all times he shall be diligent to frame and fashion his life and that of his family according to the doctrine of Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ.*'**
>
> **24. The implications of this particular responsibility of clergy to teach and exemplify in their life the teachings of the Church have been explained as follows; '*The Church is also bound to take care that the ideal is not misrepresented or obscured; and to this end the example of its ordained ministers is of crucial significance. This means that certain possibilities are not open to the clergy by comparison with the laity, something that in principle has always been accepted*' …**
>
> **25. The Church of England will continue to place a high value on theological exploration and debate that is conducted with integrity. That is why Church of England clergy are able to**

> **argue for a change in its teaching on marriage and human sexuality, while at the same time being required to fashion their lives consistently with that teaching.**
>
> **26. Getting married to someone of the same sex would, however, clearly be at variance with the teaching of the Church of England. The declarations made by clergy and the canonical requirements as to their manner of life do have real significance and need to be honoured as a matter of integrity.**
>
> **27. *The House is not, therefore, willing for those who are in a same sex marriage to be ordained to any of the three orders of ministry. In addition it considers that it would not be appropriate conduct for someone in holy orders to enter into a same sex marriage, given the need for clergy to model the Church's teaching in their lives.***
>
> **28. The Church of England has a long tradition of tolerating conscientious dissent and of seeking to avoid drawing lines too firmly, not least when an issue is one where the people of God are seeking to discern the mind of Christ in a fast changing context. Nevertheless at ordination clergy undertaken to '*accept and minister the discipline of this Church, and respect authority duly exercised within it.*' We urge all clergy to act consistently with that undertaking." (Original emphasis)**

17. After the Guidance had been issued, the Bishop of Lincoln wrote to, and met with, the Claimant, warning him he might be vulnerable to complaint if he went ahead with his marriage. Similarly, the Respondent's predecessor wrote to the Claimant, on 17 March 2014, stating he hoped the Claimant would follow the Pastoral Guidance and not get married; reiterating:

> **"… it would not be appropriate conduct for someone in holy orders to enter into a same sex marriage … Like every clergyperson, at your ordination you undertook to 'accept and minister the discipline of this Church, and respect authority duly exercised within it …"**

18. Following the Claimant's wedding, on 23 April 2014 the Bishop of Lincoln issued a rebuke to the Claimant as he had:

> **"… chosen to marry, knowing that for an ordained priest to enter into a same-sex marriage is contrary to the teachings of the Church of England and the clear, recent statement of the House of Bishops."**

Which the Bishop of Lincoln considered was:

> **"… inconsistent with your ordination vows and your canonical duty to live in accordance with the teachings of the Church of England. …"**

19. Meanwhile, in May 2014, the Claimant had applied for a salaried position as Chaplain and Bereavement Manager at the Sherwood Forest Hospitals NHS Trust ("the Trust"). In due course, he was offered the appointment subject to certain pre-conditions, relevantly the

necessary authorisation (an EPML) from the Respondent, who had become Acting Bishop of Southwell and Nottingham on 7 April 2014 and within whose Diocese the Trust fell.

20. Prior to the Trust's offer, by letter of 24 April, the Respondent had asked to see the Claimant. It was made clear that:

> **"… As far as the content of the meeting is concerned, I would want to discuss your position in the light of the House of Bishops guidance on same sex marriage …"**

21. Thus, on 29 May, the Respondent met with the Claimant to discuss the potential implications of his marriage; this was their first meeting. As one of the possible courses of action open to the Respondent as the relevant Bishop, reference was made to his discretion to revoke the Claimant's PTO. The Claimant informed the Respondent of his pending application to the Trust and that, if successful, he would be seeking an EPML from the Respondent. The Respondent explained it would be unusual to issue an EPML if a PTO had been revoked.

22. On 2 June 2014 the Respondent revoked the Claimant's PTO, explaining:

> **"In accordance with the House of Bishops Guidance on Same Sex Marriage … I have decided to revoke your Permission to Officiate with immediate effect. I do so by exercising my discretion as Acting Bishop of Southwell and Nottingham. …"**

23. The ET concluded that this was:

> **"82. … essentially because the Claimant by marrying is not complying with the current doctrine and by defying the House of Bishops is in breach of his duty of canonical obedience and thus constitutionally his duty of obedience in such matters to the Respondent."**

24. On 10 June 2014, the Trust made its conditional offer to the Claimant. On 23 June, it wrote to the Respondent confirming its offer to the Claimant, explaining that he was:

> **"… our preferred candidate for the post, subject to the usual checks, and [I] wish to ask you for a license to enable him to undertake the role …"**

25. The Respondent asked the Trust for a copy of the job description for this role, to enable him to make an informed decision. This was forwarded, with the Trust observing:

> **"The job description does describe the managerial duties more fully, but he would be expected to fulfil the duties as required by all of our Chaplains, it is a small team and he will be a "hands-on" Chaplain, including participation in our Out of Hours on-call".**

26. The job description itself included the following requirements:

> **"6. Meet the requirements of the Church of England … in the provision of a chaplaincy service throughout the Trust.**
>
> **…**
>
> **8. Provide Spiritual Care to patients, relatives, carers and visitors.**
>
> **…**
>
> **11. Provide support to parents following neonatal death - including … religious ceremonies …"**

It was required that the post-holder:

> **"… have authorisation by the relevant faith community and have extensive chaplaincy experience."**

And an essential requirement in the person specification was that the post-holder be:

> **"Anglican or Roman Catholic ordained priest, eligible to be licensed by the Bishop.**
>
> **OR**
>
> **Free Church … eligible for authorisation by appropriate Church authority"**

27. On 7 July 2014, the Respondent responded to the Trust (by letter, copied to the Claimant), refusing to grant the Claimant the EPML. He explained:

> **"In its pastoral guidance on same sex marriage, the Church of England House of Bishops reaffirmed that a same-sex marriage is inconsistent with the Church's teaching on marriage. Entering into such a marriage involves the cleric acting in a way which is inconsistent with both his or her ordination vows and the canonical duty of all clergy to model the Church's teaching in their lives. As Canon Pemberton recently contracted such a marriage, I revoked his Permission to Officiate in the Diocese of Southwell and Nottingham.**
>
> **In the light of this, it would be inconsistent if I were to issue a licence to Canon Pemberton at this time."**

28. The ET accepted that the Respondent set out his reason for refusing the licence in this way because he wished to ensure the Trust knew there was nothing "sinister" about the reason for not granting the licence (see paragraph 93 of the ET's Reasoning).

29. On 25 July, the Trust wrote again to the Respondent to clarify the position, as follows:

> **"… It is our understanding that the Bishop has revoked Jeremy's Permission to Officiate. Jeremy has told me that he is still able to undertake all functions that we would require in terms of Baptisms, services, Communions funerals etc as he is still ordained. I have to say my understanding was that is not the case, I would appreciate some clarification …"**

30. The Respondent replied on 30 July 2014, clarifying that, absent grant of the EPML, the Claimant would not be able to officiate as a Priest of the Church within the Trust.

The ET Proceedings, Conclusions and Reasoning

31. By ET proceedings lodged on 1 September 2014, the Claimant complained of unlawful direct discrimination because of sexual orientation and/or marital status and/or of unlawful harassment related to sexual orientation. His claims were brought under section 53 **EqA**, which applies to qualifications bodies, as defined by section 54(2). The Respondent denied he was a qualifications body but, alternatively, contended that any relevant qualifications (defined by section 54(3)) were for the purposes of employment for the purposes of an organised religion, falling within the exemption allowed by schedule 9 of the **EqA** and thus he could avail himself of paragraph 2(5) of schedule 9: his actions were necessary because to be in a same sex marriage was incompatible with the doctrine of the Church of England in relation to marriage ("the compliance principle"). The claim of harassment was further denied on its facts.

32. The ET first considered whether the Respondent was a qualifications body. Upon his appointment as Acting Bishop of Southwell and Nottingham, the Respondent became the

relevant authority within the Church of England to confer a PTO or EPML; did either amount to a "relevant qualification" as defined by section 54(3) **EqA**?

33. The Claimant conceded that an authorisation for the purposes of facilitating engagement in a trade or profession must facilitate employment; that is, paid remuneration (**British Judo Association v Petty** [1981] ICR 660 EAT). Although the PTO was "*obviously an authorisation*" (paragraph 41, ET Reasons), here it was voluntary and the ET concluded that, as such, it was not a relevant qualification for the purposes of section 54(3) (ET Reasons, paragraph 43). The ET further found (paragraph 45.1) that the PTO was not a requirement for the Claimant's previous two hospital chaplaincy appointments and had been revoked before the Trust applied to the Respondent for authorisation (paragraph 45.2); in the circumstances, the appointment to the chaplaincy position within the Trust was not dependent upon having a PTO (paragraph 45.3). Moreover, even if the Claimant had no PTO to revoke, the Respondent would have refused to grant the EPML because of what he considered was a non-compliance or doctrinal issue (paragraph 45.4). The PTO did not facilitate engagement in the profession of chaplaincy and was not a relevant qualification for section 53 purposes.

34. The ET then turned to the EPML. It referred to the House of Bishops' Guidance and recorded it was not in dispute that the statement "*it would not be appropriate conduct for someone in holy orders to enter into a same sex marriage*" (paragraph 27 of the Guidance, see above) meant the Claimant, if he entered into such a marriage, would not be "of good standing" within the Church of England (ET Reasons paragraph 66). The Respondent had refused to grant the Claimant the EPML for the purpose of the employment as Trust Chaplain because he saw the Claimant's failure to comply with the Guidance to mean he was not of good standing

and could not be held out as such for the purposes of Ministry (ET paragraph 66). That was also why he had earlier revoked the Claimant's PTO (ET paragraph 82).

35. In determining whether the EPML was a "qualification", the ET had regard to another first instance decision in which a licence had been withdrawn by the Church of England, **Ganga v (1) Chelmsford Diocesan Board of Finance and (2) Bishop of Chelmsford** ET Case No. 3200933/2013. In the context of the licence in issue in **Ganga**, the test was also one of "good standing". It was seen as relevant (both in **Ganga** and the present case) that each Diocese will maintain a file on all practising Priests, akin to a Human Resources file, in which any issues of concern will be recorded and to which regard would be had should a Priest from that Diocese apply for a position in a different Diocese. In such circumstances, the Church operates a process known as a Clergy Current Status Letter ("CCSL"): the receiving Diocese will apply for a CCSL, which will be supplied according to a pro forma, structured document referenced to Guidance notes. By Part A, the sending Bishop gives a value judgement on the Priest's history and suitability (ET paragraph 112); Part B contains "*objective based recorded information such as a criminal conviction; insolvency; safeguarding issues; or action under the CDM*":

> **"113. … no different from the reporting mechanism and assessment which might for example be used to justify not issuing a Practising certificate to a Solicitor".**

36. Whilst the CCSL procedure was not engaged in the Claimant's case (he was not transferring into another Diocese), the ET considered the process showed:

> **"116. … sufficient objectivity and the exercise of judgment devoid of simply prejudice to pass muster as a [sic] evaluation to an objective standard in the context of the Church"**

37. Against that background, the ET concluded:

> **"120. … It is a core part of the qualifying of a priest for ministry within the Church that he conforms to Canonical Obedience … clearly the Claimant's non-compliance with the Pastoral**

> **Guidance, and given the warnings he then received as to what might be the implications if he went ahead with his marriage, this is objectively a situation where it can be therefore seen, and the objective bystander would undoubtedly reach that conclusion, that the Claimant is on the face of it not complying with his Canonical Oath of Obedience. …**
>
> **121. … "not being of good standing" is capable of objective assessment.**
>
> **122. … [Further] … if the licence is granted, it clearly confers a status on the Claimant in that he is held out to therefore be an authorised minister of the Church. Clearly, it is not being granted for commercial or political purposes; and it is an accreditation that he can perform the ministry, that is of the Church. Without the granting of the licence, he cannot, because of the Church Measures, perform the functions of a priest at the Trust. …**
>
> **123. But is the authorisation/licensing for the purposes of the public? … A hospital trust is clearly serving the needs of the public, any member of which can by and large use its services. When it is requiring proof of, for instance, a doctor's qualification or confirmation that a nurse has kept up her registration, it is not doing so just for the purposes of the its [sic] employment but also, obviously in terms of the wider duty of the NHS to maintain professional standards. Similarly in the context of the priesthood, given the interface to the public in the context of chaplaincy and the very high level of integrity expected of a priest in such circumstances, the requirement for the authorisation, is that in effect if granted, it is a kite mark by the Church that the priest concerned is in all respects in good standing and thus fit to be held out to the public as a Chaplain.**
>
> **124. Finally … as the granting of the EPML before appointment as an NHS Chaplain is … a NHS wide practice, clearly the granting of the same "facilitates engagement in, a particular trade or profession"."**

38. On that basis, the ET held the EPML was a relevant qualification and the Respondent a qualifications body. The failure to grant the EPML because the Claimant had entered into a same sex marriage would therefore amount to an act of direct discrimination unless the Respondent could rely on the exception allowed under paragraph 2(3) of schedule 9 **EqA**.

39. In this regard, the ET first asked whether this was "*employment for the purposes of an organised religion*"; if not, schedule 9 would not apply. The ET considered it obvious from the job description and essential requirements, which included the ability to minister, that the Trust did not wish the post to be a secular one (ET paragraph 137): although the Trust was the employer, set the job description, conducted the interviews and made the appointment:

> **"144. … it was an integral part of what the Trust wanted that the Claimant be able to minister as a Church of England priest and thus be licensed so to do. In … ministering as a Church of England priest, he is acting for the purposes of that organised religion. … there is a duality of function. …"**

40. Noting that paragraph 2(1)(a) of schedule 9 did not stipulate that there must only be one purpose, the ET turned to the question whether, in relation to a relevant qualification (here, the EPML) the Respondent had applied a requirement as specified by paragraph 2(4) (not to be married to a person of the same sex) which engaged the compliance principle; that is, whether the requirement was applied so as to comply with the doctrines of the religion (paragraph 2(5))? The ET explained its approach to this question as follows:

> **"151. … if there is a clear doctrine relating to the nature of marriage and which excludes same sex marriage for the purposes of the Church, rather than the State, and that doctrine requires obedience from the Priest by way of the Canons, then that is an end to the matter for our purposes. It matters not [what] we think about the appropriateness of the doctrine to current times. It is not for us to reconstruct the Church's doctrines. Furthermore the transition between Civil Partnerships and Same Sex Marriage … is irrelevant. … there is the distinction between the Church and State. The constitutional convention means that the State cannot impose same sex marriage upon the Church."**

41. Ultimately the ET considered the answer "*so obvious*":

> **"188. … the present doctrine of the Church is clear; marriage for the purposes of the Church of England is "between one man and one woman"."**

42. The ET had, however, also to find why the requirement had been applied: if applied for reasons other than as identified at paragraph 2(5), the exemption would not apply. It was, however, not in dispute that, given the House of Bishops' Guidance, on entering into a same sex marriage, the Claimant would not be seen as "*of good standing*" within the Church (ET Reasons, paragraph 66) and the ET accepted the Respondent's evidence that:

> **"202. The reason for not granting the licence is a) the Respondent's duty to uphold the Church's doctrine: marriage between a man and a woman only within the Church; and b) the Claimant having "clearly and consciously acted in a way which was fundamentally inconsistent" with therefore the reiteration of the doctrine via the Pastoral Guidance and the clear stricture in relation to the consequences for priest[s] such as the Claimant if he did not. That to us interposes issues of incompatibility by way of the marriage doctrine and also breach of the doctrine, because that is what it is, of Canonical obedience."**

43. Focusing on that reasoning, the ET concluded:

> **"234. … objectively we can find that there was a clear reasonably [sic] decision by him that there had been a breach of the doctrine and that this therefore meant that the Claimant was conflicting with his canonical duty of doctrinal obedience.**

> **235. The Respondent was then, in taking action, acting consistently within the terms of the Pastoral Guidance in that he could therefore objectively find the Claimant was not of good standing. Objectively, therefore we can find that he acted as he did because the Claimant's action was incompatible with the doctrine.**
>
> **236. … Mr Jones [for the Claimant] assert[ed] that there is no doctrine precluding same sex marriage. Therefore, there is no right given to the Bishop to dictate to the Claimant that he should not enter into a same sex marriage or rather more punish him when he does. Of course, once we have determined that there is a doctrine, then it is back to whether or not the Claimant's position is incompatible with that doctrine and once we found that it is, then in terms of the actions of the Respondent, it logically follows … that implicitly the action is a proportionate one."**

44. On that basis, the ET held that the Respondent had established all aspects of the defence afforded by paragraph 2 schedule 9; the direct discrimination complaint would be dismissed.

45. Finally, the ET turned to the complaint of harassment. The Claimant complained of unlawful harassment in respect of the invitation to the 29 May meeting and the meeting itself; the decision to revoke the PTO, communicated by letter of 2 June; and the refusal to grant the EPML, communicated to the Trust by letter of 7 July, copied to the Claimant. The ET accepted the conduct was unwanted and related to the Claimant being a gay man (had he not been, he would not have entered into a same sex marriage); the question was whether it was harassment.

46. The ET did not consider either the Respondent's invitation to the meeting or the meeting itself had the purpose or effect required under section 26 **EqA**. Although the revocation of the PTO and the refusal to grant the EPML would have been humiliating and degrading for the Claimant (ET Reasons, paragraph 244), absent any aggravating features, the ET did not consider the decisions taken - given that they were "protected by law" from amounting to acts of discrimination - could give rise to unlawful acts of harassment (paragraphs 245 and 251, ET Reasons). It further rejected the Claimant's case that there were aggravating features arising from the language used to communicate the decisions, the explanation given to the Trust for refusing to grant the EPML or the issuing of a press release. In respect of the letter to the Trust,

A the ET noted (paragraph 255) that the Respondent had wanted to make clear there was no sinister inference to be drawn from his refusal: it was only to do with entering into a same sex marriage and, thus, conflict with the doctrines of the Church. As for the press release, given the Claimant's interview with the Daily Mail: the Church needed to have a press statement. Although there had been unwanted conduct that had, objectively speaking, created an adverse environment for the Claimant and was on the grounds of his sexual orientation, it was not reasonable for the conduct to have had the effect of violating his dignity given:

> **"270. … the Claimant would never have been in this position had he not defied the doctrine of the Church. In this case, context is all. We conclude in the context of matters, given that the Church via the Respondent acted lawfully pursuant to schedule 9 and is therefore not liable pursuant to s53, that it would be an affront to justice if we were to nevertheless find that what occurred constituted harassment. In the context of events we conclude that it was not."**

47. The ET thus rejected the Claimant's harassment claim.

Grounds of Appeal, Cross-Appeal and the Parties' Submissions

48. The grounds of appeal and cross-appeal fall to be considered under three headings:

(1) Qualifications bodies - relevant qualification.

(2) The application of paragraph 2 schedule 9 **EqA**.

(3) Harassment.

(1) Qualifications bodies - relevant qualification

49. The starting point for both the appeal and cross-appeal is the question raised by section 53 **EqA**: whether the ET was correct in determining that the Respondent was not a qualifications body in respect of the PTO (first ground of appeal) but was in respect of the EPML (first ground of cross-appeal). Both parties agree the Respondent will be a qualifications body for the purposes of section 53 if he can properly be said to have conferred a relevant qualification under section 54(3).

The Claimant's Case

50. For the Claimant it is contended that the statutory definition provided by section 54(3) breaks down into two halves: (1) the type of things that might confer a relevant qualification, and (2) the use made of the thing in question, whether it confers a meaningful status (noting that "*needed for, or facilitates engagement in*" casts a very wide net). Whilst a qualification must confer a status in a meaningful sense, that did not necessarily require the application of a standard of competence (and, in **Ali and anor v McDonagh** [2002] ICR 1026, the Court of Appeal (at paragraph 28) was indicating the kind of cases that might fall within this provision, not laying down a blanket requirement). Further, whilst some objective standard should be applied (**Watt v Ahsan** [2008] 1 AC 696 HL) that did not rule out an exercise of judgement by the qualifications body. Finally, an authorisation does not need to be for the purpose of engaging in a paid trade or provision, provided it *facilitates* it, i.e. "*makes it easy or less difficult*" (**Patterson v Legal Services Commission** [2004] ICR 312 CA, at paragraph 36; **British Judo Association v Petty** [1981] ICR 660 EAT at p663).

51. As for the present case, whilst "profession" requires some payment for services, that did not mean the PTO was not a relevant qualification. On the facts, the PTO *facilitated* the obtaining of the EPML. The test was not one of necessity but of facilitation: if the PTO had not been revoked it would have been easier for the Claimant to obtain the EPML. Had the ET asked (as it should have done) what would have happened if the Claimant had a non-revoked PTO, then - on the evidence - it could not have found that the Respondent would still have declined to grant the EPML (consistency being fundamental to his reasoning). As for whether the PTO could otherwise amount to a relevant qualification under section 53, it was apparent it could for the reasons provided by the ET in respect of the EPML.

52. The ET had permissibly found the EPML was necessary for (ET reasoning, paragraph 122) and facilitated (ET paragraph 124) employment as a Chaplain with the Trust. The Respondent's argument that an EPML merely facilitates a Priest to exercise ministry, focused on what he might have intended, is contrary to the approach laid down in **Petty**. Further, that the EPML was directed at a specific position did not mean it could not be a relevant qualification: to so hold would enable qualifications bodies to avoid the application of section 53 by simply stating their decisions were related to particular positions. In any event, the profession of Hospital Chaplain (subject to a Code of Conduct[4] requiring "*a recognised or accredited status within [their] faith community* ...") would always require a Church of England Chaplain to have an EPML: it was necessary for access to that profession. Moreover, when determining whether to grant the EPML (and to revoke the PTO), the Respondent had made a general assessment of good standing; he was saying nothing about the Claimant's competence for the job. And the "good standing" test had the necessary degree of objectivity (per **Watt v Ahsan**), applied for other than purely internal purposes: this was not a **Tattari** case (**Tattari v Private Patients Plan Ltd** [1997] IRLR 586 CA). The EPML was, furthermore, plainly for the public. The ET so found by looking past the Trust and considering the wider public expectation (ET paragraph 123) but, adopting a narrower view (per Lord Hoffman in **Watt v Ahsan**), "the public" could include employers such as the Trust itself.

The Respondent's Case

53. For the Respondent, it is observed that the definition has to be read as a whole, not in a piecemeal fashion (**Tattari**). Adopting that approach, it was clear that a relevant qualification was not simply an internal authorisation (**Ali**; **Tattari**): a qualifications body must vouch to the public for the qualification of the candidate; the public could thus rely upon the qualification in offering employment or a professional engagement (**Watt v Ahsan**). The qualifications body

must have the power to set a particular standard and declare that a candidate has attained that standard (**Tattari**, **Patterson v LSC**, and **Kulkarni v NHS Education Scotland** UKEATS/ 0031/12); and the standard had to be objective and applied transparently (**Watt**) and to relate to *competence*, that is, the candidate's skill and ability in their trade or profession (**Ali**).

54. In requiring that the Claimant hold an EPML, the Trust wanted it to be lawful for him to officiate for the purpose of the Church of England. The Respondent then made a subjective judgement on good standing; it was not sufficient that the judgement was made on objective facts, it had to be an objective assessment of those facts. As different Bishops could reach different conclusions as to "good standing" (for example in the circumstances of a divorce or a bankruptcy) that was not applying an objective standard. Moreover, section 53 **EqA** was concerned with decisions to confer a general "status" on an individual, as opposed to decisions about whether to authorise a person for a particular position. The definition at section 54(3) referred to the qualification being needed for, or facilitating engagement in, a particular trade or profession, not a particular role; relatedly, the decision maker must vouch "to the public" (**Watt v Ahsan**), not just a particular institution in respect of a particular job. The grant of an EPML would not vouch to the public but to the Trust; it was specific to one position. As an ordained Priest, the Claimant was already qualified; the grant of the EPML was concerned only with whether the Respondent would allow a specific grant of work. Further, the ET was wrong to hold that the Trust could vouch to the public for its Chaplain's qualification; that had to be the qualifications body (paragraph 18, **Watt v Ahsan**).

55. As for the PTO, the Claimant could not get over the hurdle that the Trust had not taken this into account; it did not meet Lord Hoffman's requirement (**Watt v Ahsan**) that the public (which included work providers) should be able to take the qualification into account in

deciding whether to offer paid employment. The PTO was for the purpose of the Church itself; it did not (and could not) facilitate paid employment. Furthermore, section 53(3) required that the qualification must facilitate the obtaining of paid employment, not just the obtaining of another qualification. In any event, the Respondent had not refused the EPML because he had revoked the Claimant's PTO; the reason for both decisions was that the Claimant was not in good standing with the Church: the granting of an EPML would not have been consistent with the revocation of the Claimant's PTO *because* he was not in good standing.

(2) The application of paragraph 2 schedule 9 ***Equality Act 2010***

56. The grounds of appeal falling under this heading divide into two points of challenge:

(i) Whether the ET erred in finding the employment in issue in this case was *for the purposes of* an organised religion (paragraph 2(1)(a) schedule 9).

(ii) Whether the ET erred in concluding that the Respondent applied a requirement that engaged the compliance principle (paragraph 2(5) schedule 9).

The Claimant's Case

57. These questions raised novel points of law, in particular as to the construction of schedule 9, which should be informed by the following principles: (1) statutory words should be given their natural meaning, and (2) an exception should be construed narrowly (**R (acting on behalf of Amicus) v Secretary of State for Trade and Industry** [2007] ICR 1176 QB). The approach did not change because the Respondent was seeking to rely on the Church's Article 9 rights under the **European Convention on Human Rights** ("the Convention"). Where competing rights were engaged (here, Articles 8 and 9) a substantial margin of appreciation was afforded to the individual State. The UK's enactment of schedule 9 protected the Church's Article 9 rights but was intended to be construed narrowly to allow respect for

A other **Convention** rights. Those ECHR cases that similarly involved a balancing of competing rights under Articles 8 and 9 showed that Article 9 would not always triumph (see **Obst v Germany** (application no. 425/03) and **Schüth v Germany** (application no. 1620/03)). The case of **Fernández Martínez v Spain** (application no. 56030/07) - involving a teacher of Catholic religion and ethics in a State school, where the Catholic Church had input into what was taught and defined the group from which teachers were to be selected - was very different to the present case; even then, the Court had reiterated that individual States had a broad margin of appreciation where a balance of competing rights was required (see paragraph 124).

(i) "Employment for the purposes of an organised religion"

58. There was no definition of "organised religion" but it was clear this was to be construed narrowly; in particular given the absence of any test of proportionality (see **Amicus** paragraphs 90, 91 and 117). Adopting that approach, the purposes of the employment would need to be those of the employer; where the employer was not an organised religion and the organised religion did not fix the purposes of the employment, the employment was not for the purposes of an organised religion. As to whether the chaplaincy at the Trust was "*for the purposes of an organised religion*", the job description made clear the purpose of the role was part of the holistic provision of health care; it was employment by the Trust for its own purpose. The ET's reasoning wrongly elided the purpose of the employment with one aspect of the employment. The test was not whether the employment involved a function which could be said to be for the purposes of the organised religion but whether the employment itself was for that purpose. Moreover, to the extent that the employment involved a religious activity, it was because the Trust and its patients wanted that to be carried out; it was not the Church's purpose.

(ii) Whether the ET erred in concluding that the Respondent applied a requirement that engaged the compliance principle (paragraph 2(5) schedule 9)

59. Even if the Claimant was wrong about "purpose", the question arose as to whether the withdrawal of the PTO (if a relevant qualification), or the refusal to confer the EPML, was necessary for compliance with doctrine. The test was an objective one (see **Amicus**): the requirement must be something that doctrine properly requires, not something the qualifications body subjectively believes it requires. The doctrine identified by the ET was that marriage for the purposes of the Church of England "*is between one man and one woman*" (ET paragraph 188). That is indeed what Canon B30 provides but, on its face, that also required a life-long union and for marriage to be for the purposes of having children, whereas the Church allowed for divorce and re-marriage and accepted marriage might be between those who are infertile. In truth, the word "marriage" had two meanings: on the one hand, it described a civil union; on the other, something for the purposes of the Church, as defined by Canon B30 (subject to permitted exceptions). There was no provision for civil unions; the most the Church had done was to issue Pastoral Guidance under cover of the House of Bishops' letter (the House of Bishops could not determine Church of England doctrine; that required a vote by all three houses of the General Synod); it had then been left to individual Bishops to decide what should be done.

60. It was because the Respondent could not rely on any Church doctrine in respect of civil marriage that reliance had to be placed on issues of canonical obedience but that was an oath of obedience to a particular Bishop (whose powers were weak, as recognised in **Sharpe v Bishop of Worcester** per Arden LJ, at paragraph 88); it was not a duty of canonical obedience still less a duty owed to the House of Bishops. There was, moreover, no evidence that there was a *requirement* not to enter into a same sex marriage. The House of Bishops' Guidance did not state that those who entered into a same sex civil marriage would be deemed as no longer in

good standing; this was left for individual Bishops to determine (thus the Claimant could remain in good standing in Lincoln but not in Southwell and Nottingham); such a discretion was inconsistent with an occupational requirement. The Respondent had not said his decision was taken on the basis of the Claimant's breach of obedience to an instruction and he could not rely on what had been said at the meeting of 29 May 2014 as that was after the Claimant's marriage.

The Respondent's Case

61. As the Explanatory Notes to the **EqA** made clear, Parliament intended that decisions as to who could serve for the purposes of the ministry of religion should fall within the exception from liability permitted by paragraph 2 of schedule 9; an approach consistent with the **Convention** (paragraph 128 **Fernández Martínez**). Whilst the ECHR in **Fernández Martínez** had reiterated that individual States had a margin of appreciation, a national court was not applying that margin but had to interpret domestic law in the light of the **Convention** (and see section 13 **Human Rights Act 1998**, which expressly provided that "particular regard" was to be given to the importance of the rights of religious organisations to freedom of thought, conscience and religion). Respecting religious autonomy, it was clear that, other than in very exceptional circumstances, courts should not be involved in determining the legitimacy of any religious belief (**Fernández Martínez** paragraph 128).

(i) "Employment for the purposes of an organised religion"

62. For the Respondent it is contended that if it was open to the ET to hold that a PTO (on the Claimant's case) or an EPML (as the ET found) were "relevant qualifications" then they had to be qualifications for the purposes of employment for the purposes of an organised religion within the meaning of paragraph 2(3)(a) schedule 9 **EqA**, read together with paragraph

2(1)(a). Applying the statutory test, the purposes of the employer were either irrelevant or, at least, not determinative (and see **Amicus** at paragraphs 116-117: the employment had to be for the purposes of an organised religion, not a religious organisation).

63. The first issue was as to the purpose of the qualification and the purpose of the qualifications body in conferring it. As to the employment, it was clear that the exception could apply to employers other than religious bodies: it was the purpose of the employment that was relevant, not the identity of the employer. In so far as they were relevant qualifications, the purpose of both the PTO and EPML was to permit recipients to officiate as Priests of the Church of England, that is, to work as representatives of an organised religion and for its purposes. Neither a PTO nor an EPML authorised a Priest to perform any employment other than the ministry of the Church. Insofar as the purpose of the employer was relevant, in the present case the purposes of the Trust included those of the Respondent; it was an essential part of the proposed chaplaincy appointment that the Claimant be licensed to officiate as a Priest. In any event - as the ET allowed - the statutory test does not require the qualification to be *solely* for the purposes of employment for the purposes of an organised religion.

(ii) Whether the ET erred in concluding that the Respondent applied a requirement that engaged the compliance principle (paragraph 2(5) schedule 9)

64. Whilst not open to the Respondent to simply assert what the doctrine of the Church was, the Court's role remained limited: it was not for the Court to determine issues of doctrine (see per Richards J in **Amicus**, paragraphs 37 and 38 and the cases cited therein), still less to take issue with the beliefs of the religion (**Fernández Martínez** paragraph 128). It was for the Respondent to prove the official beliefs or teaching of the religion at the time his decision was taken. That was sufficient: "doctrine" could not be limited to that which was meant by

ecclesiastical law; it must mean that which would be commonly understood as such, that is the teaching or beliefs of a religion (adopting the dictionary definition of doctrine), not least as other religions might have no concept of "doctrine" as understood within the Church of England. Adopting that approach, the Respondent had been entitled to rely on the House of Bishops' Guidance (of particular significance as anything touching on doctrinal matters had to be approved by the House of Bishops before being passed (or not) by the General Synod) as evidencing the beliefs of the Church. As for the argument that the Church has no belief on civil marriage, there was a distinction between the institution of marriage (on which the Church clearly had a belief) and the particular form of the ceremony that accompanies it. The **2013 Act** does not provide that there are two forms of marriage - Church and civil - simply that there may be same sex marriage.

65. More specifically, the question for the ET was whether the Respondent's decision was applied so as to comply with Church doctrine (not whether there was a more general requirement on the Claimant under that doctrine). Arguments on consistency did not arise: if the Respondent was right that it was incompatible with the doctrines of the Church for the Claimant to enter into a same sex marriage, it would be irrelevant if a different Bishop took a different view; it was an objective matter. As for the issue of canonical obedience; it could not be disputed that Priests have to obey canonical law and the oath of canonical obedience to the Bishop of the Diocese was a promise to obey the Bishop in matters of canon law (rather than a promise to obey him generally), see **Long v Bishop of Cape Town** [1863] 15 English Reports 756 at 776 and **Calvert v Gardiner** [2002] EWHC 1394 QB, at paragraphs 44-45, 58 and 63 (cited with approval in **Sharpe v Bishop of Worcester**, at paragraphs 87 and 88). The Respondent acted so as to comply with the doctrines of the Church of England: the Church believes marriage is "*in its nature a union … of one man with one woman*" and that its Priests

should exemplify the teachings of the Church and act consistently with those teachings. It was clear the Claimant had not complied with canon law, even after the Respondent's position had been made clear prior to his wedding.

(3) Harassment

66. The Claimant appeals against the ET's rejection of his complaint of harassment on the basis that its conclusion was based on erroneous reasoning: (1) influenced by its finding that the Claimant had brought the harassment on himself ("victim-blaming"), and (2) wrongly allowing that the schedule 9 defence meant that the Respondent should not be held liable for harassment.

67. The Respondent resists those grounds of appeal and also pursues a cross-appeal against the ET's finding that the requisite environment was created by the Respondent or that any of his decisions/their manner of communication were related to the Claimant's sexual orientation.

The Claimant's Case

68. The ET had found that the Respondent's conduct would have been "*humiliating ... and degrading*" (ET paragraph 244) and "*inevitably ... a stunning blow*" (paragraph 258). The statutory test required the ET to ask whether it was reasonable for the unwanted conduct to have had the requisite effect (see **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 EAT); there was no basis for substituting the different question, whether it was reasonable for the Respondent to have engaged in the relevant conduct. There were ample grounds for the ET's finding that the necessary environment had been created; the cross-appeal had to fail.

69. The ET had, however, proceeded to make two errors; see paragraph 270 of its reasoning. First, in being guided by its view that the Claimant had brought the harassment on

himself: "*the Claimant would never have been in this position had he not defied the doctrine of the Church*". Second, in its finding that the protection afforded the Respondent under schedule 9 meant the conduct in issue could not amount to harassment, notwithstanding the fact that the defence under schedule 9 does not extend to harassment claims: "*given … the Respondent acted lawfully pursuant to schedule 9 … it would be an affront to justice if we were to nevertheless find that what occurred constituted harassment*".

The Respondent's Case

70. The Respondent noted the Claimant's pleaded case had been that decisions in respect of PTO and EPML of themselves amounted to acts of harassment; complaints as to the communication of the decisions were added during the proceedings. As the ET rightly held, if - as a matter of law - those decisions were authorised by schedule 9, they could not be rendered unlawful by being re-classified as harassment; that had equally to be the case in respect of the communication of the decisions. Absent aggravating features (which the ET found not to exist), the relevant context included the fact that the Respondent was communicating decisions allowed under schedule 9, which took into account the Respondent's own **Convention** right to religious belief. Similarly, it was not "victim-blaming" (a term which assumed that which the Claimant had to prove) to have regard to the Claimant's own conduct in determining his perception of events: whilst not determinative, it was not irrelevant. In any event, the ET found only that the Claimant was subjectively distressed and/or found the Respondent's actions humiliating; it did not find the requisite environment was created by the decisions or by their manner of communication. Context was relevant to the question whether a hostile environment had been created (see **Land Registry v Grant (EHRC intervening)** [2011] ICR 1390 CA) and, by way of cross-appeal, an environment had to be a state of affairs, not a single incident (**Weeks v Newham College** UKEAT/0630/11 and **GMB v Henderson** UKEAT/0073/14).

71. Further, the ET ought properly to have held there was no basis for concluding that the Respondent's decisions and/or their manner of communication were related to the Claimant's sexual orientation (as distinct from the fact he had entered into a same sex marriage).

The Relevant Provisions of the *Equality Act 2010*

72. The Claimant's claims in respect of the revocation of his PTO and the refusal to grant an EPML were pursued as allegations of unlawful direct discrimination, defined by section 13:

> **"(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."**

73. He also pursued a claim of unlawful harassment, as defined by section 26:

> **"(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.**
>
> **(5) The relevant protected characteristics are -**
>
> **…**
>
> **sexual orientation."**

It should be noted that the definition of harassment does not extend to conduct related to the protected characteristic of marital status.

74. The Claimant contended that the discrimination and harassment which he claimed to have suffered was rendered unlawful by section 53 of the **EqA**, which provides (relevantly):

> **"53. *Qualifications bodies***
>
> **(1) A qualifications body (A) must not discriminate against a person (B) -**
>
> **(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;**
>
> **(b) as to the terms on which it is prepared to confer a relevant qualification on B;**
>
> **(c) by not conferring a relevant qualification on B.**
>
> **(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification -**
>
> **(a) by withdrawing the qualification from B;**
>
> **(b) by varying the terms on which B holds the qualification;**
>
> **(c) by subjecting B to any other detriment.**
>
> **(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass -**
>
> **(a) a person who holds the qualification, or**
>
> **(b) a person who applies for it."**

75. Section 54 provides the interpretation for section 53 purposes, relevantly as follows:

> **"54. *Interpretation***
>
> **(1) This section applies for the purposes of section 53.**
>
> **(2) A qualifications body is an authority or body which can confer a relevant qualification.**
>
> **(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession."**

76. Section 212(1) **EqA** is also relevant in so far as it provides that a profession can include "a vocation or occupation". Otherwise the terms "trade or profession" are not defined, although "vocation" has been said to be "*a word of wide signification*", analogous to a "*calling*" - the "*way in which a man passes his life*", **Partridge v Mallandaine** [1886] 2 TC 179.

77. By schedule 9 of the **EqA**, various exceptions are permitted in respect of liability for discrimination in the work context. By part 1, exceptions are provided in respect of occupational requirements. Specifically, by paragraph 2:

> **"2. *Religious requirements relating to sex, marriage etc, sexual orientation***
>
> **(1) A person (A) does not contravene [a relevant provision of the EqA] … by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that -**
>
> > **(a) the employment is for the purposes of an organised religion,**
> >
> > **(b) the application of the requirement engages the compliance or non-conflict principle, and**
> >
> > **(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).**
>
> **…**
>
> **(3) A person does not contravene section 53(1) or (2)(a) or (b) by applying in relation to a relevant qualification (within the meaning of that section) a requirement to which sub-paragraph (4) applies if the person shows that -**
>
> > **(a) the qualification is for the purposes of employment mentioned in sub-paragraph (1)(a), and**
> >
> > **(b) the application of the requirement engages the compliance or non-conflict principle.**
>
> **(4) This sub-paragraph applies to -**
>
> > **…**
> >
> > **(ca) a requirement not to be married to a person of the same sex;**
> >
> > **…**
> >
> > **(f) a requirement related to sexual orientation.**
>
> **(5) The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.**
>
> **(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.**
>
> **(7) A reference to employment includes a reference to an appointment to a personal or public office.**
>
> **…"**

78. This is to be contrasted with the more generally applicable Genuine Occupational Requirement exception allowed by paragraph 1 schedule 9; specifically, there is no proportionality test under paragraph 2. I further note that the defence permitted by paragraph 2(3) allows that qualifications bodies may impose the requirements listed at sub-paragraph (4)

either in deciding whether to confer a relevant qualification (section 53(1)) or in determining whether a person may retain a relevant qualification and, if so, on what terms (section 53(2)(a) or (b)); it does not extend to detriments for the purposes of section 53(2)(c), nor does it apply to harassment under section 53(3).

79. The Explanatory Notes to the **EqA** state that paragraph 2 of schedule 9 provides for a specific exception, which:

> **"790. … applies to employment for the purposes of an organised religion, which is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion. Where employment is for the purposes of an organised religion, this paragraph allows the employer … to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only if -**
>
> > **● appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or,**
> >
> > **● because of the nature or context of the employment, employing a person who meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions."**

The Notes continue:

> **"791. The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. Applying the requirement must be a proportionate way of meeting either of the two criteria described in paragraph 790 above.**
>
> **792. The requirement can also be applied by a qualifications body in relation to a relevant qualification (within the meaning of section 54), if the qualification is for employment for the purposes of an organised religion and either of the criteria described in paragraph 790 above is met.**
>
> **…**
>
> **EXAMPLES**
>
> > **● This exception would apply to a requirement that a Catholic priest be a man and unmarried.**
> >
> > **● This exception is unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if he is gay, but it may apply if the youth worker mainly teaches Bible classes.**
> >
> > **● This exception would not apply to a requirement that a church accountant be celibate if he is gay."**

Discussion of the Case Law

(1) Qualifications body and relevant qualifications

80. A qualifications body is simply defined as an authority or body which can confer a relevant qualification (section 54(2) **EqA**); a "relevant qualification" is then defined by section 54(3). Although much of the case law addressed to this question arose under different statutory provisions (largely, the legacy Acts, now replaced by the **EqA**), the language used remains materially the same. Whilst each of the cases to which I have been taken needs to be seen in the light of its own facts, some guiding principles can be seen to emerge.

81. Firstly, "relevant qualification" is broadly defined and is concerned not with the intention of the qualifications body but with the effect of the qualification; whether, as a matter of fact, it is needed for, or facilitates engagement in, a particular trade or profession. Thus, a national referee certificate granted by the British Judo Association was a relevant qualification as it facilitated engagement as a judo coach, regardless of the fact the Association did not grant the certification to that end; **British Judo Association v Petty** [1981] ICR 660 EAT. Similarly, the award of a franchise for the provision of legal services could amount to a relevant qualification as it facilitated engagement - made it "*easier or less difficult*" - in the applicant's profession as a solicitor; **Patterson v Legal Services Commission** [2004] ICR 312 EAT (paragraph 36) and CA (paragraph 75).

82. Whilst the definition is expressed in broad terms, it remains directed to the grant of the qualification, not a requirement for that qualification by another body for the purpose of access to particular engagements under its own commercial arrangements. It did not, therefore, extend to the requirement by a private health insurer, Private Patients Plan Limited ("PPP"), that doctors applying to be added to its list had to hold (or have held) a substantive NHS Consultant

post or a certificate of higher specialist training given by the relevant committee of the Royal College of Surgeons; **Tattari v PPP** [1997] IRLR 586 CA, per Beldam LJ:

> **"23. … [section 53], referring as it does to an authority or body which confers recognition or approval, refers to a body which has the power or authority to confer on a person a professional qualification or other approval needed to enable him to practise a profession, exercise a calling or take part in some other activity. It does not refer to a body which is not authorised to or empowered to confer such a qualification or permission, but which stipulates that for the purpose of its commercial agreements a particular qualification is required."**

83. Similarly, it would not cover the appointment of a professional to a particular panel for the purpose of carrying out remunerated work for clients; something more would be required, see **Loughran and Kelly v Northern Ireland Housing Executive** [1998] IRLR 593 HL, in particular per Lord Clyde:

> **"74. [Section 53] is concerned with the exercise or non-exercise of a power to confer a qualification … That is something more than a decision to demand a particular qualification before accepting someone as a recognised practitioner for the purposes of particular operations (*Tattari* …). It is also something more than selecting someone to provide for oneself the professional services which that person is qualified to perform. …"**

84. The point was considered by the Court of Appeal in **Ali and anor v McDonagh** [2002] ICR 1026 CA, in which it was observed that an obvious application of the section (where there would be the requisite "something more") would include cases where:

> **"28. … a body has among its functions that of granting some qualification on, or authorising, a person who has satisfied appropriate standards of competence, to practice a profession, calling or trade. …"**

In **Ali**, it was argued that the qualifications body was the Labour Party. The Court of Appeal disagreed: in selecting a candidate (assuming being a councillor could amount to engagement in a profession), the Labour Party was not conferring an authorisation or qualification:

> **"35. … It is not the type of qualifying body to which the section is intended to apply, its activities being for its own political purposes just as the activities of Private Patients Plan Ltd were for its commercial purposes. … we cannot accept that there is any conferment of approval … No status in any meaningful sense is … conferred. …"**

85. Further, the qualifications body takes responsibility for the grant of the qualification, upon which others are able to rely. As opined in **Watt (formerly Carter) and ors v Ahsan** [2008] 1 AC 696 HL (another Labour Party case), an "authorisation" or "qualification":

> **"18. … suggests some kind of objective standard which the qualifying body applies, an even-handed, not to say "transparent", test which people may pass or fail. The qualifying body vouches to the public for the qualifications of the candidate and the public rely upon the qualification in offering him employment or professional engagements. …"**

86. In the case of **Kulkarni v NHS Education Scotland and anor** UKEATS/0031/12, Lady Smith sought to provide a route map for the assessment required under section 53:

> **"24. Where an issue arises as to whether or not a respondent is a "qualifications body", the tribunal's task is, essentially, set by the words of the statute. It requires first to decide what are the facts in the particular case. That involves determining what as a matter of fact was the interrelationship between the claimant and respondent, if any. Then, applying the statutory terminology, the tribunal requires to ask whether, in the context of that interrelationship, there was anything that the respondent could do which amounted to granting to the claimant an authorisation, qualification, recognition, registration, enrolment, approval or certification? The contextual setting for that list is clearly one of formality and connotes B (as referred to in section 53) being specifically declared by A as having attained a particular set standard. If A does not have the power to set such a standard and make such a declaration then A cannot be a qualifications body within the meaning of section 53."**

(2) Schedule 9 paragraph 2

87. Paragraph 2(3) of schedule 9 **EqA** provides for certain exemptions from liability in respect of qualifications for the purposes of employment for the purposes of an organised religion, where an (otherwise discriminatory) requirement is applied to comply with the doctrines of that religion.

88. The first stage thus requires a determination of the purpose of "the qualification" and then of "the employment". The test is an objective one and does not require that the court determine the purpose of the qualifications body or of the employer; simply that of the qualification and the employment. It is for that reason that it matters not whether the employer is actually a religious organisation; even if it is, there is no blanket exemption, it will still depend on the purpose of the employment; so, a non-religious body is not excluded from the

exception if the employment is for the purposes of a religious organisation. That said, as a derogation from the principle of equal treatment, the provision should be construed narrowly; a point recognised in Parliamentary debates on the earlier regulations providing for a similarly (although not identically) worded exception, see as cited by Richards J in **R (Amicus) v Secretary of State for Trade & Industry** [2007] ICR 1176 QB, at paragraph 91:

> **"When drafting [the legislation] we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion.**
>
> **… this is no 'blanket exception'. It is quite clear that [it] does not apply to all jobs in a particular type of organisation. On the contrary, employers must be prepared to justify any [relevant] requirement … on a case by case basis. The rule only applies to employment which is for the purposes of 'organised religion', not religious organisations. There is a clear distinction in meaning between the two. A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque." (per Lord Sainsbury of Turville, Minister of State, Hansard (HL Debates) 17 June 2003)**

89. It is also an objective test that is to be applied at the second stage, when determining *why* the requirement has been applied, see per Richards J in **Amicus**, at paragraph 117:

> **"117. … the condition … that the employer must apply the requirement "so as to comply with the doctrines of the religion", is to be read not as a subjective test concerning the motivation of the employer, but as an objective test whereby it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion. …"**

90. More generally, as Richards J went on to observe (paragraph 123, **Amicus**):

> **"123. The exception involves a legislative striking of the balance between competing rights. It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field. …"**

91. And, that it was inappropriate for courts or tribunals to seek to resolve issues of theological dispute was clear:

> **"37. In *R (Williamson) v Secretary of State for Education and Employment* [2003] QB 1300, … Arden LJ observed … that the court's function at the fact-finding stage was to decide what the claimants' beliefs were and whether they were genuinely held: "Religious texts often form the basis from which adherents develop specific beliefs. It is not the court's function to judge whether those beliefs are fairly based on the passages said to support them." … [that approach] is one that seems to me to have a great deal to commend it.**
>
> **38. A more extreme case, relating as it did to a doctrinal assessment of the fitness of a rabbi, but again one that points to the appropriateness of judicial restraint in this general area is *R v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwealth, Ex p***

> ***Wachmann*** **[1992] 1 WLR 1036. In that case Simon Brown J stated … that "the court would never be prepared to rule on questions of Jewish law" and that, in relation to the determination of whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office, the court "must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state".**"

92. That desire to reduce the involvement of courts and tribunals in areas of particular religious sensitivity was made explicit during the Parliamentary debates referred in the **Amicus** judicial review, see again as cited at paragraph 91, as follows:

> **"… [W]e do not believe that [the legislation] should interfere with religious teachings or doctrine, nor do we believe it appropriate that doctrine should be the subject of litigation in the civil courts …**
>
> **… [Government needs] to take a lead … [The legislation] resolves the problem of interfering with doctrine and teachings while remaining consistent with the [Equal Treatment] Directive. We believe [it] is lawful because it pursues a legitimate aim of preventing interference with a religion's doctrine and teaching and it does so proportionately because of its narrow application to a small number of jobs and the strict criteria which it lays down …"**

93. Accepting the Secretary of State's position (essentially as expressed in the Parliamentary debates cited), Richards J agreed: the exception was indeed lawful.

94. Although **Amicus** was concerned with a challenge that focussed on compatibility with an EU Directive, the sensitivity of the issues raised has similarly been recognised in cases brought under the **Convention**. Thus, the ECHR in **Fernández Martínez** emphasised that:

> **"128. … but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate … Moreover, the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty …"**

95. That said, the autonomy afforded to religions is not absolute, as the ECHR continued:

> **"131. … a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake …"**

96. The task of the national court is thus to scrutinise that which is relied on by any particular religion as amounting to a threat to its autonomy; it is not to interfere with religious autonomy by itself attempting to determine the legitimacy of particular beliefs.

97. Where competing **Convention** rights are engaged, the role of the court is given a special importance (see paragraph 129 **Fernández Martínez**): thus, when the assertion of a right to religious autonomy interferes with Article 8 rights to respect for private or family life, the court is required to carry out an "in-depth examination" and "a thorough balancing exercise", to ensure the impugned interference does not go beyond that which is necessary. Allowing that States have a margin of appreciation in making the initial assessment as to where the balance should fall, it is for national courts to make the final evaluation of whether the interference is necessary in the circumstances of the particular case (**Martínez** paragraph 124).

(3) Harassment

98. Both parties place reliance on the guidance provided by the EAT (Underhill P, as he then was, presiding) in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 EAT, which held that the definition of "harassment" focuses on three elements: (1) unwanted conduct; (2) having the purpose or effect of either (i) violating the complainant's dignity, or (ii) creating an adverse environment for them; (3) related to the prohibited grounds. Recognising that there will often be considerable overlap between these elements, the EAT nevertheless opined that it would normally be a healthy discipline for ETs to address each factor separately and make factual findings on each. More specifically, in relation to "purpose or effect", the EAT offered the following guidance:

> **"14 … it is important to note the formal breakdown of "element (2)" into two alternative bases of liability - "purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been**

> **shown to have done so). … in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose …**
>
> **15 … [Further], although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be *reasonable* that that consequence has occurred. That … creates an objective standard. … The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. …**
>
> **…**
>
> **22 … Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused … it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. …"**

99. That guidance was approved in **Land Registry v Grant** [2011] ICR 1390 CA, where, rejecting a criticism that **Dhaliwal** confused purpose and effect, Elias LJ held:

> **"13. … When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable."**

100. The question of context and the creation of a hostile environment also arose for consideration before the EAT (Langstaff P presiding) in **Weeks v Newham College** UKEAT/0630/11, where it was observed:

> **"21. … it must be remembered that the word is "environment". An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant. …"**

See to similar effect, paragraphs 98-99 **GMB v Henderson** UKEAT/0073/14 (Simler J).

Discussion and Conclusions

(1) Qualifications body and relevant qualification

101. Although the first question is whether the Respondent's decision might be rendered unlawful by section 53 **EqA** because he was acting as a qualifications body, it is agreed that the real issue in this case is whether either the PTO or the EPML were relevant qualifications for the purposes of section 54: if they are "relevant qualifications", the Respondent has to be a "qualifications body" for those purposes.

102. Taking first the Claimant's appeal against the ET's rejection of his case in respect of the PTO, I note that (at least at this level) the Claimant accepts that "profession" requires some payment for services. He does not accept, however, that this means that the PTO was not a relevant qualification in this context; he contends that, on the facts, the PTO facilitated the obtaining of the EPML, which, in turn, facilitated, paid remuneration within the Trust. This submission is founded upon the Respondent's statement (responding to the Trust on 7 July 2014) that the grant of the EPML "*would be inconsistent*" given his earlier revocation of the Claimant's PTO. The straightforward answer to the appeal on this point is, however, that this is not what the ET found. The Respondent might have referred to consistency as between his decisions but that was not a concession that the grant of the EPML was dependent upon the holding of the PTO. Having heard from the Respondent, the ET found:

> **"45.4. … even if the Claimant had not [had] a PTO to be revoked, he would have refused to grant the EPML …"**

concluding:

> **"46. … Yes the Respondent needed to be consistent in refusing the [EPML] … but the fact is that had there been no PTO, he would nevertheless still have refused to grant the authorisation."**

103. The Claimant says the ET was there answering the wrong question; it should, rather, have asked what would have happened if his PTO had not been revoked? Had it done so, it would have been bound to conclude that - given the need for consistency - the PTO would have facilitated the grant of the EPML and, thus, the obtaining of the paid employment with the Trust. The difficulty with that submission is, however, that it fails to engage with the ET's key finding that the reason for the revocation of the PTO was the Respondent's view of the Claimant's loss of "good standing". Had the PTO not been revoked that would have been because the Respondent had not reached that conclusion. And, had he not reached that conclusion then, equally, he would have had no reason not to grant the EPML. The arguments become circular because they skate around the real issue: the decisions were consistent because they reflected the Respondent's view of the Claimant's standing; they were not interdependent, one did not facilitate the other.

104. Given my conclusion based on the ET's findings, I do not consider I need address the Respondent's further arguments on this point; indeed, as I take the view that cases under section 54(3) will be fact-dependent, I do not consider it would be helpful for me to do so.

105. I therefore turn to the Respondent's cross-appeal, against the finding that the EPML was a relevant qualification for section 54(3) purposes. In so doing, I follow the route sign-posted in **Kulkarni**: in the context of the interrelationship between the parties, was there anything the Respondent could do which amounted to granting to the Claimant an authorisation, qualification etc, connoting that he was specifically declared by the Respondent to have attained a particular standard?

106. There are certain situations which will obviously fall within the definition at section 54(3); such as qualifications - for example in the fields of medicine or law - granted upon the passing of an exam or test (see paragraph 28 **Ali**). The statutory language is, however, far broader than such examples would imply. It includes a "recognition" or an "approval", and it can apply to any "trade or profession". It is not suggested that section 53 could never apply in the context of a religious calling and yet it is readily apparent that the standards applied to those who are to exercise the Church's ministry are less likely to be open to a straightforward test of competence of immediate comprehension to the wider public. And that is why third parties (the Trust in this case) look to the Church to state whether an individual Priest is qualified, recognised or approved to carry out its ministry. In determining whether to grant that recognition, the test applied by the Respondent was one of "good standing", as that was to be understood within the Church of England. For a lay person that might seem to be matter of subjective assessment but, as the ET found (following the earlier ET decision in **Ganga**), within the Church of England it is essentially a term of art: the Claimant was judged not to be in "good standing" because he had acted:

> **"98. …in defiance of the Pastoral Guidance and thus in breach … of his oaths of canonical obedience … and doctrinal conformity …"**

107. That was not simply the subjective view of the Respondent, reached capriciously or on a whim; it was a transparent assessment against the Pastoral Guidance and the Respondent's understanding of the doctrines of the Church, and there was no suggestion other than that he would have reached the same assessment, applying the same standards, on the same facts in any other case. This was not akin to the selection of a political candidate, as envisaged at paragraph 18 of **Ahsan**; that a different Bishop might have taken a different view does not mean the assessment took on the same subjective quality as a candidate's selection by a political party,

any more than would be implied by the fact that different examiners, marking medical or legal exam papers might award different results.

108. I bear in mind that the grant of an EPML will be specific to a particular position and can allow that this will stand in contrast to many qualifications, which will be more general in their application. I do not, however, consider this to be fatal for the purposes of section 54(3). The role of Hospital Chaplain is plainly a vocation or calling such as to meet the broad definition of "profession". Granting a qualification for the purpose of a particular position which facilitates engagement in that profession meets the requirements of section 54(3). Furthermore, the fact that the Trust's interest was simply in the EPML is nothing to the point: it was content that the Respondent should judge whether that approval would be given. Its position was no different to the students who might have been more likely to utilise Ms Petty's services as a judo instructor because she held a national referee certificate: it was not her ability to referee that was the issue but the recognition afforded by the grant of the certificate (**British Judo Association v Petty**). Equally, from the Respondent's point of view, it was apparent that his assessment and decision was for the benefit of third parties, not for the purposes of the Church itself; this was not a **Tattari** case. The Respondent was asked to make a decision as to whether the Claimant was approved to carry out the ministry of the Church in an external role, employed by a third party. The Trust - as the employer - thus stood in the place of the wider public. The ET's decision in this regard goes somewhat further than it needed: seeing how the Claimant would be held out to the wider public when acting as Hospital Chaplain. As made clear in **Watt v Ahsan**, however, those who offer employment on the basis of a relevant qualification stand to be considered as "the public" (see paragraph 18 **Ahsan**): the key point is that the body granting the qualification is not simply applying a standard for its own purposes but is signifying that the individual meets

a particular standard in circumstances where others will rely on that authorisation such that it will provide or facilitate access to a particular profession.

109. I therefore dismiss both the appeal against the ET's conclusion on the PTO as a relevant qualification and the cross-appeal against the conclusion on the EPML and, consequently, on the Respondent's status as a qualifications body in this regard.

(2) The application of paragraph 2 schedule 9 ***Equality Act 2010***

110. In determining whether the Respondent could rely on the exception allowed by paragraph 2 of schedule 9, the first question for the ET was whether the qualification (here, the EPML) was for the purposes of employment for the purposes of an organised religion (paragraph 2(3)(a) read together with paragraph 2(1)(a)). There is a certain attraction to the Claimant's objection that this was employment within the NHS; not the Church: the Trust's appointment of a Hospital Chaplain was part of its holistic provision of health care; the Church of England played no part in setting the job description for the role and had no involvement in the selection of candidates. Why should the Church be permitted to create a discriminatory block to the appointment of the Claimant when the Trust had determined he was the best candidate for the role? The answer to that question lies, however, in the fact that the exception permitted by paragraph 2 of schedule 9 is not limited to employment within a religious organisation, just as it does not extend to all appointments within such an organisation. It is not the nature of the organisation that is in issue but the purpose of the employment. And here the ET's finding is clear: authorisation to be able to minister as a Church of England Priest was an essential requirement of the employment (paragraph 137); it was an integral part of what the Trust intended for the role (paragraph 144).

111. Moreover, that was the purpose of the qualification the Claimant sought. The EPML was the necessary licence for him, as a Church of England Priest, to carry out the Church's ministry throughout the Trust (see section 2 **EPMM**). The purpose of the EPML was thus for the purpose of employment for the purpose of an organised religion (here, the Church of England), albeit carried out whilst employed by a secular body. I find no error of law in the ET's approach to this issue, still less its conclusion.

112. The question then arises as to whether the ET erred in concluding that the Respondent had applied a requirement that engaged the compliance principle for the purpose of paragraph 2(5) schedule 9? Here, I agree with the Respondent, the "doctrines" of the religion must refer to the teachings or beliefs of that religion, not to what might more narrowly be understood by "doctrine" within a specific religious community such as the Church of England. Whilst a court will not simply accept an assertion as to the doctrines of a religion, it equally cannot be expected to enter into theological debate to determine those doctrines for itself. The ET was entitled to find that the doctrines - the teachings and beliefs - of the Church of England were as stated by Canon B30 and, with specific regard to same sex marriages permitted by **the Act**, as evidenced by the Pilling report and the Pastoral Guidance (ET paragraphs 171-187). That being so, it was equally entitled to accept that those doctrines were clear: marriage for the purposes of the Church of England was "*between one man and one woman*" (paragraph 188).

113. The ET had then to determine, however, whether the requirement applied by the Respondent (that the Claimant not be in a same sex marriage) was applied so as to comply with the doctrines thus identified. On this question, it is fair to say that the reasoning is hard to follow in places; the ET's conclusions (see paragraphs 234-236) draw upon both the apparent incompatibility of the Claimant's marriage with the doctrines of the Church *and* the conflict

that thus arose with the Claimant's "canonical duty of doctrinal obedience". That duty arose from the Claimant's oath of canonical obedience and was owed to the Respondent, as Bishop of the Diocese, to obey him in matters of canon law (see **Long v Bishop of Cape Town** [1863] 15 English Reports 756 at 776). The Respondent's predecessor as Bishop had written to the Claimant on 17 March 2014, making clear his understanding of the Church's position in respect of same sex marriage and asking that the Claimant follow the House of Bishops' Pastoral Guidance. The Claimant had declined to do so. It was that combination of circumstances that the ET permissibly concluded led the Respondent to apply the requirement that the Claimant not be in a same sex marriage (ET paragraph 202).

114. I further agree with the Respondent that the fact that another Bishop might not have applied the same requirement does not take his decision outside sub-paragraphs 2(3) and (5). The exception allowed by paragraph 2 recognises that there may not be one consistent view within any religious community (see, for example, the "non-conflict principle" at paragraph 2(6)). It was not for the ET to prefer the reaction of one Bishop rather than another in terms of determining what might be required for compliance with the doctrines of the religion. It was concerned only with whether that was the reason for the Respondent's particular application of the requirement; a question of fact rather than a value judgment for the ET.

115. For all those reasons, I consider the Respondent was, as the ET concluded, entitled to the protection from liability afforded by paragraph 2 of schedule 9. I am therefore bound to dismiss the appeal on the direct discrimination complaint.

(3) Harassment

116. As for the harassment claim, the ET apparently accepted (per **Dhaliwal**) that the conduct in issue was unwanted (element 1); that, objectively speaking, it created the requisite adverse environment for the Claimant (element 2); and was related to his sexual orientation (element 3). It then returned to the second factor - the effect of the conduct - and reminded itself that "*it should be reasonable that that consequence has occurred. That ... creates an objective standard. ...*" (**Dhaliwal** paragraph 15). Finding that "*the Claimant would never have been in this position had he not defied the doctrine of the Church*" and it would be "*an affront to justice*" for the Respondent's actions to constitute harassment when otherwise exempt from liability by reason of schedule 9, the ET concluded the harassment claim was not made out.

117. It seems to me that there are a number of difficulties with that reasoning and I find it hard to see how the ET has carried out the task required of it (per **Dhaliwal**) in terms of addressing each factor separately and making the required findings of fact in respect of each.

118. First, as to the "unwanted conduct", I note that liability under section 53 **EqA** arises in relation to the conferment of a relevant qualification. Given the ET's earlier finding - that the PTO was not a relevant qualification - I am unable to understand how this was brought back into play when considering the harassment claim (see, for example, ET paragraphs 244 and 265(2)). It is possible that I have not properly understood the nuance of the Claimant's case in this regard (it was not specifically a point before me), but I ought, at least, to be able to see how the ET made the relevant determination in this respect; I cannot.

119. Second, when turning to the question of *effect*, I am unable to see that the ET has engaged with the question as to whether the conduct in issue - the decision not to grant the

EPML and its communication - really did create an *environment* (see **Weeks v Newham** and **GMB v Henderson**). The Claimant says that can be inferred from the ET's findings that the refusal to grant the EPML obviously caused him stress, would have been humiliating and degrading for someone in his position and was a stunning blow. Those are obviously findings on which the Claimant can rely but I find it hard to see that the ET has shown how it found the requisite *environment* was thereby created. It seems to me there is merit in the cross-appeal in this respect: not that it would necessarily be impossible to find that a hostile environment had been created but that it is impossible to be sure that the ET engaged with the issue, still less understand its reasoning. Given, however, the view I have formed on the appeal under this heading, it is unnecessary for me to formally allow this ground of cross-appeal.

120. More than this, however, the ET's reasoning - at least on its face - seems inconsistent. When assessing whether the conduct in question had the proscribed effect (violation of the Claimant's dignity or the creation of an intimidating, hostile, degrading, humiliating or offensive environment), the ET correctly reminded itself that the Claimant's own perception was not determinative: it was also required to have regard to the other circumstances of the case and to whether it was reasonable for the conduct to have had the effect in question (section 26(4) **EqA**). As the EAT in **Dhaliwal** observed, that introduces an objective assessment. The ET's conclusion appears to state that it did not find - objectively speaking; given the particular circumstances of the case - it was reasonable for the conduct to have the proscribed effect (ET paragraph 270). Earlier on, however, the ET had answered the question whether the conduct had created the relevant environment as follows:

> **"… The answer objectively is that clearly the situation created an adverse environment for the Claimant in that he lost his PTO and did not get the promotion in relation to the refusal to grant him an EPML." (ET paragraph 265.2)**

121. Putting to one side the failure to relate the reasoning to the ET's earlier findings (the PTO was not a "relevant qualification"; the EPML was for the purpose of the Trust chaplaincy post, not a "promotion" as such) and assuming that the reference to "adverse environment" is to a state of affairs that was intimidating, hostile, degrading, humiliating or offensive for the Claimant, it is unclear whether this "objective" assessment was intended to meet the requirements of section 26(4), although the ET's conclusion (paragraph 270) suggests it was not. Certainly the appeal and cross-appeal have both proceeded on that basis.

122. Notwithstanding my concerns as to these aspects of the ET's reasoning, the focus of the appeal is on a different aspect of the decision. Specifically, the Claimant objects (1) to the ET's apparent focus on *his* conduct (rather than that of the Respondent) - finding that it was his decision to defy the doctrine of the Church that gave rise to the unwanted conduct - and (2) to its conclusion that it would be an "affront to justice" if a decision which was exempt from liability under schedule 9 could nevertheless constitute harassment.

123. I understand the Claimant's objection to the way in which the ET has expressed itself in these respects. It is unhelpful to characterise his conduct - manifesting his love and commitment for his long-term partner through marriage - as an act of defiance against the doctrines of the Church. That may have been the consequence (as I have concluded the ET was entitled to find) but the ET's description can be read as suggesting that was the Claimant's intention, which fails to do justice to his position. Similarly, I can see why the Claimant has objected to the ET's explanation as to why it saw the application of schedule 9 to be relevant to the determination of the harassment claim. Certainly, the use of the expression "affront to justice" seems unnecessarily hyperbolic.

124. All that said, I consider that, beneath these infelicities of expression, the ET's reasoning discloses no error of law. As it made clear, it considered the context of the case to be highly relevant; it was entitled to do so (see **Land Registry v Grant**). This was not a case where the Respondent's decision was unexpected: both parties understood each other's positions; the Claimant was aware his marriage would be seen as in conflict with the teachings of the Church (even if he did not accept the characterisation of those teachings as doctrine) and he would thus be viewed as not in "good standing", as would be understood within the Church of England. Moreover, although the Respondent's decision would otherwise have amounted to an act of direct discrimination, Parliament had permitted a specific exemption from liability. If he were not permitted to make and communicate that decision without committing an act of unlawful harassment, that would create an inherent contradiction within the statute. That is not to say that the Respondent, acting as a qualifications body, could not commit an act of harassment in relation to the conferment of a relevant qualification but that would need something - some aggravating feature - more than simply the making and communication of a decision that fell within the schedule 9 exemption. Although poorly expressed, that is what I am satisfied the ET permissibly found. It adopted the correct approach, which allowed it to have regard to the context of the case. I therefore dismiss the appeal against the ET's decision on harassment.

125. For completeness, I turn to the Respondent's cross-appeal on the question whether the conduct "related to" the Claimant's sexual orientation. On this, I consider the ET was correct: "related to" is a broad term, it does not require a direct causal link. The ET was entitled to find that the Claimant's status as someone who had entered into a same sex marriage was inextricably related to his sexual orientation. Whilst directed at the Claimant's marital status, the Respondent's conduct thus *related to* the fact that he was a gay man. Had it been necessary, I would have dismissed the cross-appeal on this point.

Disposal

126. For those reasons, I dismiss the appeal and cross-appeal. Given the importance of the legal questions involved and the novel issues arising, in particular, in respect of schedule 9, I would consider this matter suitable for permission to be given to appeal to the Court of Appeal, should such an application be made.

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[1] The ET's Reasons state that the Claimant was ordained as a Priest in 1989 (see paragraph 25) but I understand this is an error and I have therefore corrected the year in this Judgment.

[2] In fact the licence in question was referred to as a General Preacher Licence ("GPL") but it appears that the ET treated this as equivalent to an EPMM licence (which is what would have been the appropriate form of licence); I am not aware that anything turns on this point and have thus adopted the same approach as the ET.

[3] The ET refers to this as the Daily Mail; in any event, the article subsequently appeared on the "Mail Online".

[4] For the Respondent it is observed that this is subject to the caveat that the Code of Conduct is issued by the UK Board of Healthcare Chaplaincy - a voluntary organisation in the sense that Chaplains can choose whether to be a member - and applies only to its members and others who choose to adopt it.