



EMPLOYMENT TRIBUNALS

Claimant: Mr R Page

Respondent: NHS Trust Development Authority

Heard at: Croydon **On:** 1 to 4 August 2017 and
11 September 2017 (in Chambers)

Before: Employment Judge K Bryant
Ms H Bharadia
Mr J Gautrey

Representation:

Claimant: Mr P Stroilov (representative)

Respondent: Mr D Massarella (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims for direct and indirect religion or belief discrimination and for harassment and victimisation fail and are dismissed.

REASONS

Claims and issues

1. The claims and issues arising in this case were discussed at a Preliminary Hearing ('PH') on 12 January 2017 and recorded in the written record of that PH.
2. This is a claim of unlawful religion or belief discrimination, harassment and victimisation. The Claimant relies on three alleged detriments:
 - 2.1 His suspension as a Non-Executive Director of the Kent and Medway NHS and Social Care Partnership NHS Trust (**'the Trust'**)

- on 21 March 2016 which continued until the expiration of his fixed term appointment on 12 June 2016;
- 2.2 An investigation initiated by the Respondent on 21 March 2016 which lasted until 2 August 2016;
 - 2.3 The decision of a Termination of Appointments Panel ('**TAP**'); the TAP hearing took place on 2 August 2016 and its decision was communicated to him by letter dated 19 August 2016.
3. The Claimant makes the following claims: he says that each of the above detriments:
 - 3.1 was an act of direct discrimination because of his religion and/or belief; for this purpose he relies on his Christianity and also his belief that it is always in the best interests of a child to be brought up by a mother and a father;
 - 3.2 amounted to indirect discrimination; the detail of this aspect of his claim will be discussed further below;
 - 3.3 amounted to harassment because it was unwanted conduct related to his religion or belief that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him;
 - 3.4 was an act of victimisation because of a series of protected acts as set out at paragraphs 17-28 of his ET1.
 4. At the start of the hearing the tribunal discussed the claims and issues with the parties. The Claimant confirmed that he accepted that the record of the PH was an accurate summary of his claims but he sought clarification from the Respondent as to its position on protected acts and limitation.
 5. The Respondent confirmed that it accepted that the Claimant had done protected acts, although not to the extent pleaded in the ET1. With regard to limitation the Respondent accepted that the claims concerning the last of the three detriments outlined above, ie the TAP's decision as communicated by letter dated 19 August 2016, was in time. The Respondent had previously raised a time point in relation to the claims concerning the first and second detriments outlined above, ie suspension and investigation, but said at the hearing that it intended now to put forward no positive case on limitation and left the matter for the tribunal to determine having heard the evidence.
 6. The parties also informed the tribunal that there appeared to be a dispute as to the correct hypothetical comparator(s) for the purposes of the direct discrimination claim and as to provisions, criteria or practices ('**PCPs**') and the correct pool for comparison with regard to the indirect discrimination claim. The parties set out their respective positions and the tribunal indicated that it would hear submissions on these matters once the evidence had been heard.

Documents, evidence and findings of fact

7. The tribunal was provided with the following documents at the start of the hearing:
 - 7.1 A trial bundle of documents, to which a number of further documents were added during the course of the hearing;
 - 7.2 Written opening submissions from both parties;
 - 7.3 A chronology from the Claimant (which was not agreed by the Respondent);
 - 7.4 Witness statements from the parties' respective witnesses:
 - 7.4.1 On the Claimant's side there was a statement from the Claimant himself;
 - 7.4.2 On the Respondent's side there were statements from Andrew Ling (Chair of the Trust), Janice Scanlan (Head of Non-Executive Development of the Respondent) and Caroline Thomson (Deputy Chair of the Respondent).
8. Following the conclusion of evidence both parties provided written closing submissions, together with a number of authorities. Further written submissions and authorities were then sent to the tribunal by both parties after the conclusion of the main hearing and before the tribunal reconvened in Chambers to deliberate; the further submissions were provided, pursuant to a direction from the tribunal, to deal with a point raised by the Claimant in closing submissions and on which he wished to have the opportunity to make further submissions in writing.
9. The Claimant gave evidence on his own behalf by reference to his written witness statement. The Respondent called the three witnesses identified above, each of whom again gave evidence by reference to their written witness statements.
10. The tribunal should make clear at this stage that it is aware, from the evidence presented to it, that the Claimant has brought separate discrimination proceedings against the Lord Chancellor and the Lord Chief Justice (and possibly others) concerning his removal from the magistracy. This forms part of the background to this case and so will be referred to to some extent below in the findings of fact. However, nothing in the following findings is intended to, or should be read as, binding or in any way 'treading on the toes of' any tribunal dealing with the Claimant's other case.
11. In light of all the evidence read and heard by the tribunal, it has made the following unanimous findings of fact:
 - 11.1 The Claimant is a devout Christian. He also firmly believes that it is always in the best interests of every child to be brought up by a mother and a father. He therefore believes, as he accepted in evidence, that it is not in the best interests of any child to be adopted by anyone other than a mother and a father. He said that

it is 'not normal' to be adopted by a single parent or same sex couple.

- 11.2 The Claimant has been involved with NHS Trusts for many years, including in a number of Executive Director roles, specifically as Director of Finance. His most recent role, which he occupied from 2012 until his fixed term of appointment expired in June 2016, was as a Non-Executive Director of the Trust.
- 11.3 The Trust, of which Mr Ling is Non-Executive Chair, provides mental health services in the Kent and Medway areas. Its catchment area includes about 1.7m people. It operates over about 50 sites and has some 3,300 employees. Its work covers inpatient and outpatient units and it also has teams based in the community.
- 11.4 The parties agree that there were about 8 Non-Executive members of the Trust's Board, including the Claimant and Mr Ling, and 7 Executive members.
- 11.5 The Claimant, in his role with the Trust, was a very hands-on Non-Executive Director. He told the tribunal, and the tribunal accepts, that he regularly visited Trust facilities and met with staff and patients. He accepted in evidence that he had a high profile within the Trust.
- 11.6 Both parties accepted in evidence that lesbian, gay, bisexual and transgender ('LGBT') members of the community suffer disproportionately from mental health problems. Both parties also accept that there have been significant difficulties with a lack of willingness on the part of LGBT members of the community to engage with mental health services such as those provided by the Trust.
- 11.7 The Trust (and the Respondent) see it as vital that its staff and Board should not do or say anything that could be perceived as giving rise to a risk of losing the confidence of trust of any section of the community it serves, including those, such as LGBT individuals, where there has been historic distrust and difficulty with engagement. The Claimant accepted that it was vital that LGBT members of the community should feel welcome in the Trust and should be encouraged to access its services if they need them.
- 11.8 The Professional Standards Authority issues Standards for members of NHS Boards and Clinical Commissioning Group governing bodies in England. As their name suggests, these set out the standards expected of members of NHS Boards. They apply, as the Claimant accepted, to Non-Executive Directors of the Trust. The Trust also has its own Equal Opportunities Policy which also applied to the Claimant. The Claimant accepted that the standards expected of him included requirements to:
 - 11.8.1 uphold the provisions of the Equality Act 2010 that prohibit discrimination on grounds of sexual orientation, including in relation to adoption;
 - 11.8.2 promote equality for LGBT members of the community;
 - 11.8.3 resolve any conflicts arising from his personal interests, including his religious beliefs, that could influence or be thought to influence his decisions as a Board member;

- 11.8.4 act as a role model within the Trust;
- 11.8.5 reflect on how his behaviour may affect those around him;
- 11.8.6 support and follow reasonable instructions from the Chair of the Trust.

- 11.9 The Trust itself is not a Respondent in these proceedings (it was, but the case against it was dismissed on withdrawal at the PH in January 2017). The Respondent is the NHS Trust Development Authority which is now part of NHS Improvement, a national body responsible for overseeing foundation trusts, NHS trusts and independent healthcare providers which provide NHS-funded care. As part of its functions, the Respondent is responsible for appointment and other matters concerning the tenure of Chairs and Non-Executive Directors of NHS Trusts, including the Trust; such responsibility falls in the first instance on the Secretary of State pursuant to the National Health Service Trusts (Membership and Procedure) Regulations 1990 (SI 1990/2024) (the relevant provisions of which are set out below) but was delegated to the Respondent by the National Health Service Trust Development Authority Directions 2013 (**'the 2013 Directions'**) and, since 1 April 2016, by the National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 (**'the 2016 Directions'**).
- 11.10 At the time of his appointment as a Non-Executive Director of the Trust, the Claimant had already been appointed, since 1999, as a lay magistrate sitting on the Central Kent Bench. In July 2014 he sat with two other magistrates as part of a family panel to consider an adoption application by a same sex couple. The application was granted, the other two magistrates voting in favour and the Claimant against.
- 11.11 The Claimant told this tribunal that both of the other magistrates and the court clerk raised complaints against him following the adoption case. He says that they alleged that he had dissented from the majority decision because he was prejudiced against same sex couples. He says that he denied the allegation. The tribunal makes no specific findings on these matters as it is unnecessary to do so for the purposes of this case and they may form part of the factual matrix of the Claimant's parallel tribunal proceedings as mentioned above.
- 11.12 In any event, it is clear that a disciplinary process ensued and it is a matter of public record that the Claimant was reprimanded by the Lord Chancellor and the Lord Chief Justice; a statement was issued by the Judicial Conduct Investigations Office dated 30 December 2014 in the following terms:
- 'The Lord Chancellor and Lord Chief Justice have issued Mr Richard Page JP, a Magistrate assigned to the Central Kent Bench with a reprimand. Mr Page, whilst sitting in the Family Court, was found to have been influenced by his religious beliefs and not by the evidence. The Lord Chancellor and Lord Chief Justice considered that this amounted to serious*

misconduct and that Mr Page should have recused himself from the matter.'

- 11.13 On or shortly before 17 January 2015 the Claimant gave what appears to have been his first interview to the national press; articles then appeared on DailyMail Online on 17 January and in the Mail on Sunday on 18 January 2015. The articles concern the reprimand given to the Claimant. The tribunal notes that the online article refers to the Claimant as *'an experienced NHS manager'* thereby making a link to the NHS, albeit not specifically to his work with the Trust. The article also includes a number of quotes from the Claimant, including that *'There is tremendous pressure to keep quiet and go along with what is seen to be politically correct'* and *'I think there is something about a man, a woman and a baby, that it's natural and therefore the others are not'*.
- 11.14 It is not clear who first approached whom but the Claimant confirmed in evidence that he spoke with anyone from the press who wanted to speak with him, that he has continued to do so to date and that he intends to do so in future. He says that he has never thought this may be a bad idea and he has never thought about the effect it may have on others, be it staff or patients or potential patients of the Trust or anyone else.
- 11.15 The Claimant did not inform the Trust or the Respondent at the time of the disciplinary process that was being undertaken with regard to his role as a magistrate or its outcome or of the press interview he had given.
- 11.16 The disciplinary proceedings came to the attention of Mr Ling and he wrote to the Claimant on 19 January 2015 saying that as it had not previously been brought to his attention by the Claimant he wanted to meet with him to discuss the situation further.
- 11.17 A meeting was arranged for 22 January 2015. The day before the meeting, and again without informing the Trust, the Claimant took part in a live phone-in on Radio Kent. The area covered by Radio Kent's broadcasts includes the catchment area of the Trust.
- 11.18 A meeting took place on 22 January 2015 between the Claimant and Mr Ling as arranged. The Claimant confirmed that he had given an interview to the Mail on Sunday and had taken part in a radio phone-in the day before the meeting. Mr Ling asked the Claimant to consider whether readers of the newspaper and/or listeners to the radio phone-in might make a connection between the views he was expressing about same sex couples and his role with the Trust. The Claimant said that he had not thought about that. Mr Ling asked him why he had not alerted the Trust to the impending media coverage. He again said that he had not thought about it. Mr Ling told the Claimant that it was important that he alert him if there was going to be any further media coverage.
- 11.19 On 3 February 2015 the Trust received a formal complaint by email concerning the Claimant, including as to his press and radio interviews. The complaint was from the Chair of the Trust's LGBT Staff Network. It referred to the views expressed by the Claimant in the media and said that *'This opinion is highly offensive to some*

sex parents, and if nothing is done about Mr Page's statements, then [the Trust] will be seen as complicit with that attitude' and that 'It would be highly damaging if the LGBT community, and society in general, were to see [the Trust] as harbouring this type of opinion without action.'

- 11.20 Mr Ling then arranged to meet with the Claimant again together with the Trust's Chief Executive and a further meeting took place on 11 February 2015. The Claimant confirmed his view that children need a mother and a father and that he stood by that view. The Claimant was asked to give an assurance that he would not express his views in a public forum but he would not give that assurance. He did, however, accept that he should have told the Trust about his contact with the media.
- 11.21 There was then further correspondence between Mr Ling and the Claimant. Mr Ling reiterated that it was the Claimant's public expression of his views in the media that could undermine confidence that he would exercise his judgment in a way that was not affected by those personal views. The Claimant said in a letter dated 12 March 2015 that he was sorry that there had been an impact on the Trust. He apologised for any problems he may have caused and confirmed that his actions, discussions and decisions within the Trust would continue to conform strictly with the Trust's policies and procedures and with the standards for NHS Boards.
- 11.22 The matter had been reported by the Trust to the Respondent but, in light of Mr Ling's instruction to the Claimant to inform him of any media interest and the fact that the Claimant had by then undertaken further equalities training, it was taken no further at that stage. As far as the Trust and the Respondent were aware, the matter had been resolved and there was no ongoing issue for the remainder of 2015.
- 11.23 Unbeknownst to the Trust or the Respondent, the Claimant continued to engage with the media. On 12 March 2015, the same day as the Claimant's letter as mentioned above, he appeared live on BBC Breakfast News and, as the tribunal understands it, made much the same comments as he had in previous press and media appearances. The Claimant did not inform the Trust about this appearance and they did not find out until much later.
- 11.24 However, the Claimant's further media engagement did lead to further disciplinary proceedings relating to his role as a magistrate which took place during the remainder of 2015 and eventually resulted in a decision in early 2016 that he should be removed from the magistracy. The Claimant did not inform the Trust of the ongoing disciplinary proceedings at any time during 2015.
- 11.25 The decision to remove him from the magistracy was communicated to the Claimant by letter dated 28 February 2016.
- 11.26 A statement was then issued by the Judicial Conduct Investigations Office on 9 March 2016 which read as follows:
'Mr Richard Page JP, a magistrate assigned to the Central Kent Bench has been removed from the magistracy. The Lord Chancellor and Lord Chief Justice found that Mr Page's

comments on national television would have caused a reasonable person to conclude he was biased and prejudiced against single sex adopters; they consider this to be serious misconduct which brought the magistracy into disrepute. They have therefore removed Mr Page from the magistracy ...'

11.27 The first the Trust knew of the further disciplinary proceedings and their outcome was on Thursday 10 March 2016 when someone at the Trust spotted the public statement issued the previous day and notified Mr Ling. On the same day the Claimant sent a text message to Mr Ling which said: *'Just to let you know that I am having a bit more trouble with to [sic] magistrates. ...'* Both the Claimant and Mr Ling were away at that time but Mr Ling replied by text suggesting that they speak the following week.

11.28 The Claimant then took part in a number of media interviews over the next few days. Articles appeared in a number of national newspapers on 10, 13 and 14 March 2016. These included quotes from the Claimant, although it is unclear whether these were the result of new interviews or recycled quotes from previous interviews.

11.29 What is clear is that the Claimant had accepted invitations from, and was interviewed by, ITV News and Good Morning Britain, both on Monday 14 March 2016. Both interviews were shown on national television. The tribunal has seen, and taken into account, a transcript of the entire interview by Susanna Reid and Piers Morgan on Good Morning Britain. The interview began with discussion of the Claimant's dismissal from the magistracy but then moved onto wider issues. At no point did the Claimant decline to answer any of the questions put to him. Key passages include these:

'PM: You talk[ed] about natural earlier. Do you think being gay is unnatural?

RP: It is not what is best for a child.

PM: That wasn't the question I asked you. Do you think being gay is unnatural

RP: Being homosexual ... err ... in scripture it doesn't say that being homosexual is good or bad ...

PM: What is your belief

RP: What is wrong is homosexual activity

PM: Really[?]

RP: Yes. As sex outside marriage is not right

...

PM: You don't agree with same sex marriage

RP: I do not agree with same sex marriage

PM: You don't agree with same sex adoption

RP: I do not see that could ever be the best for the child ... that is my responsibility

...

11.30 The Claimant had not informed the Trust that he intended to engage again with the media, including appearances on live

national television. Mr Ling found out at some time during the day on 14 March 2016 and watched the interview on catch-up that evening.

- 11.31 Mr Ling and the Claimant met on 15 March 2016. They discussed recent events. Mr Ling said that he would not support an extension of the Claimant's term of office when the current term expired in June 2016 because he wished to 'refresh' the Board and seek members with a different mix of styles and skills. With regard to the Claimant's current position, and in light of their discussions in 2015 and the Claimant's further engagement with the media without telling him, Mr Ling set out two options, namely that the Claimant could resign voluntarily or the matter would have to be reported to the Respondent with a request that the Claimant be suspended pending investigation. The Claimant said that he wanted to stay with the Trust, that he wanted an extension to his current term and that the Trust needed his expertise; he also said that he had good ideas which were not being listened to. Mr Ling suggested that the Claimant reflect on matters and they would meet again on 17 March 2016.
- 11.32 Mr Ling and the Claimant met again as arranged on 17 March 2016. The Claimant's position was unchanged.
- 11.33 Mr Ling wrote the same day to the Respondent asking for authority to suspend the Claimant; authority to suspend Non-Executive Directors rests with the Respondent rather than the Trust or its Chair. Mr Ling's letter raised a number of concerns, including the impact of the Claimant's actions on staff, on patients and on the reputation of the Trust. He said that it was a concern that the media attention the Claimant appeared to have sought would mean that a large number of patients would be aware of his views and would have less confidence that the Trust would treat them fairly. He also raised the fact that the Claimant had not kept him informed of the disciplinary process leading to his removal from the magistracy or of his continued engagement with the media, even though he had been told in 2015 to do so. After this Mr Ling had no further relevant dealings with the Claimant.
- 11.34 By letter dated 21 March 2016 the Chair of the Respondent's Appointments Committee, Dame Christine Beasley, reiterated the key concerns raised by Mr Ling and confirmed the Respondent's decision to suspend the Claimant pending further consideration of his position; the letter said that suspension would be with effect from the date he received the letter but in fact a copy of the letter was emailed to the Claimant that day.
- 11.35 The reasons for the Respondent's decision to suspend the Claimant were his engagement with the media, with the likely consequent impact on staff and patients, and the Claimant's failure to keep the Trust informed of the Judicial Conduct Investigation Office's disciplinary processes or of recent television interviews in spite of specific requests that he do so.
- 11.36 The Claimant was invited to give a formal response to the concerns raised and he did so by letter dated 24 April 2016. He said that

nothing he had said either in court or in the media gave any indication that he was anti-gay or anti-lesbian people. He said that his comments to the press and media gave no indication of discrimination. He said that any impact on staff or patients must have come from the Lord Chancellor or Lord Chief Justice or from the media and did not come from him. He denied courting publicity. He denied expressing any adverse feelings towards LGBT people. He said that he did inform the Chair of the Trust that there were accusations against him and media reports, although he accepted that he did not keep him up to date on all the press and media publicity.

- 11.37 By letter dated 10 June 2016 (in fact misdated 10 July 2016 but sent on 10 June) the Claimant was informed that the matter would be referred to the TAP to consider whether his appointment as a Non-Executive Director should be terminated on the basis that it was not in the interests of the health service for him to continue to hold that office. The letter noted that the Claimant's current term expired on 12 June 2016 and that the TAP would not be able to consider the matter by then. The Claimant was asked whether he would prefer his term to elapse without further action being taken. This would, however, affect his ability to apply for Non-Executive Director positions in NHS Trusts in the future. The Claimant replied on 16 June 2016 saying that he did want the TAP to continue to consider the matter.
- 11.38 A TAP meeting was then scheduled for 2 August 2016. Ms Scanlan, the Respondent's Head of Non-Executive Development, gathered relevant documentation, including various press articles and records of media interviews, and prepared a written report for the TAP which summarised events to date, the allegations raised against the Claimant and also appended the documentation she had collected.
- 11.39 One aspect of the Claimant's case before this tribunal concerns an investigation which he says continued from 21 March until 2 August 2016. However, other than inviting the Claimant to give his formal response to the concerns raised, gathering documentary evidence that was already in existence and summarising relevant matters in a written report for the TAP, the tribunal finds that there was no investigation as such by Ms Scanlan or anyone else from the Respondent. Investigation by the TAP itself consisted of considering the documentary evidence gathered by Ms Scanlan and hearing from the Claimant at the meeting on 2 August 2016.
- 11.40 In advance of the meeting the Claimant sent a letter dated 21 July 2016 which he asked the TAP to take into account, which the tribunal finds they did. The Claimant was provided with copies of Ms Scanlan's written report and the documents appended to it in advance of the meeting.
- 11.41 The meeting took place on 2 August 2016 as arranged. The Claimant attended and was accompanied by a friend. The TAP comprised five members, all of whom occupied senior NHS roles, and was chaired by Caroline Thomson, a Non-Executive Director of

NHS Improvement and Chair of the Appointments and Remuneration Committee. The meeting lasted for just under an hour and it is clear to the tribunal that the Claimant was given every opportunity to respond to the concerns raised in whatever way he saw fit.

- 11.42 The outcome of the TAP meeting was set out in a letter to the Claimant dated 19 August 2016. The decision was unanimous. The TAP concluded that it was not in the interests of the health service for the Claimant to serve as a Non-Executive Director in the NHS. The reasons for the TAP's decision, as set out in the letter, centred on the Claimant's public response to the decision to remove him from the magistracy, the events following that decision and their conclusion that his position in relation to those matters was likely to have a negative impact on the confidence of staff, patients and the public in general in the Claimant as a local NHS leader. The TAP noted its concern that, when questioned on these issues, the Claimant failed to accept that statements made in public might impact on his credibility as a Non-Executive Director, failed to accept that he had any personal responsibility for ensuring that public statements he made were not open to misinterpretation and failed to demonstrate any remorse or insight into the impact that his actions might have.
- 11.43 Of particular importance to the TAP in reaching its decision was the Claimant's apparent inability or unwillingness to distinguish between his personal views and what it was appropriate, given his role as a Non-Executive Director with a high profile in the Trust, to say to the press and other media. Further, the TAP concluded that although the Claimant had denied courting publicity, he had actively engaged with the media and had accepted a number of invitations to appear on local radio and national television. This was compounded by the fact that Mr Ling had told the Claimant in 2015 to keep him informed of any impending publicity which he had failed to do. The TAP concluded that the Claimant was likely to engage actively with the media in future if the opportunity arose; the Claimant confirmed to the tribunal that he continued and still continues to be willing to talk to anyone from the media if asked and this was demonstrated during the course of the tribunal hearing by a number of appearances on television news programmes.

Submissions

12. As noted above, by the time the tribunal reconvened to deliberate both parties had provided it with three sets of written submissions. The parties also gave oral submissions towards the end of the main hearing. The tribunal has taken all of the parties' submissions into account. The tribunal will not attempt to set out the parties' submissions in detail below, but merely to give a brief summary of what it sees as the key points raised.
13. The parties also referred the tribunal to a large number of authorities. Some seemed to the tribunal to be more directly relevant than others, but

in any event the tribunal has taken them all into account (as well as the relevant statutory provisions as set out further below). The authorities relied on by the parties (and/or raised by the tribunal) are (in chronological order) as follows:

<i>Vogt v Germany</i>	(1996) 21 EHRR 205, ECtHR
<i>Fuentes Bobo v Spain</i>	(2001) 31 EHRR 50, ECtHR
<i>Chief Constable of West Yorkshire Police v Khan</i>	[2001] IRLR 830, HL
<i>Shamoon v Chief Constable of the Royal Ulster Constabulary</i>	[2003] ICR 337, HL
<i>R (Williamson and others) v Secretary of State for Education and Employment</i>	[2005] 2 AC 246, HL
<i>Copsey v WWB Devon Clays Ltd</i>	[2005] IRLR 811, CA
<i>R (SB) v Governors of Denbigh High School</i>	[2007] 1 AC 100, HL
<i>Azmi v Kirklees Metropolitan Borough Council</i>	[2007] ICR 1154, EAT
<i>Chondol v Liverpool City Council</i>	UKEAT/0298/08, unreported 11 February 2009
<i>Richmond Pharmacology Ltd v Dhaliwal</i>	[2009] IRLR 336, EAT
<i>Secretary of State for the Home Department v AF (No. 3)</i>	[2010] 2 AC 269, HL
<i>Grainger plc v Nicholson</i>	[2010] ICR 360, EAT
<i>Chagger v Abbey National plc</i>	[2010] IRLR 47
<i>Islington London Borough Council v Ladele</i>	[2010] ICR 532, CA
<i>McFarlane v Relate Avon Ltd</i>	[2010] IRLR 872, CA
<i>Martin v Devonshires Solicitors</i>	[2011] ICR 352, EAT
<i>Chief Constable of West Yorkshire Police v Homer</i>	[2012] ICR 704, SC
<i>Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No. 2)</i>	[2013] 1 WLR 2105, UT
<i>Eweida and others v United Kingdom</i>	[2013] IRLR 231, ECtHR
<i>Onu v Akwivu and another</i>	[2013] ICR 1039, EAT
<i>R (Chester) v Secretary of State for Justice</i>	[2014] AC 271, SC
<i>Mba v Merton London Borough Council</i>	[2014] 1 WLR 1501, CA
<i>R (Hicks and others) v Commissioner of Police of the Metropolis</i>	[2014] 1 WLR 2152, CA
<i>R (Core Issues Trust) v Transport for London</i>	[2014] PTSR 785, CA
<i>Wastenev v East London NHS Foundation Trust</i>	[2016] IRLR 388, EAT
<i>R (Hicks and others) v Commissioner of Police of the Metropolis</i>	[2017] 2 WLR 824, SC
<i>Trayhorn v Secretary of State for Justice</i>	UKEAT/0304/16, unreported 1 August 2017

14. **Claimant's submissions**

As noted above, the Claimant relies on three alleged detriments, as to which he identifies the following decision-makers:

- 14.1 With regard to his suspension, he says that this was a decision of Dame Christine Beasley;
- 14.2 With regard to investigation he says that the written report to the TAP by Ms Scanlan was a detriment, as was the fact that he was required to answer allegations;

- 14.3 As for the decision communicated to him in the letter of 19 August 2016, he says that was a decision of the TAP, chaired by Ms Thomson.
15. The essence of the Claimant's case is that the action taken by the Respondent was in response to his public media statements that it was in the best interests of a child to be brought up by a mother and father and, at least by implication, that he therefore favoured adoption by a 'traditional' or 'normal' couple rather than a same sex couple (both words in inverted commas were used in the Claimant's submissions). The Claimant says that it was the content of the Claimant's public statements that was the reason for the Respondent's action and not the manner of its delivery. He also says that it is, in any event, impossible to make any meaningful distinction between the content and manner of expression of his public statements; he describes this as a 'false distinction'.
16. The Claimant relies on his Christianity as his religion and also on what he describes as the narrower belief that it is in the best interests of a child to have a mother and a father. He says that these two are complementary rather than advanced as alternatives.
17. For his direct discrimination case the Claimant says that each of the three alleged detriments was because of his religion and/or belief. He says that the appropriate comparator is a hypothetical one and is a public official who expressed views in public on same sex adoption but views that are different from those expressed by the Claimant. For example, the Claimant says, the hypothetical comparator may express the view that same sex adoption is equally good, or possibly better, for a child as adoption by a mother and father. He says that the hypothetical comparator would not have been suspended or investigated or subject to an adverse TAP finding. He says that what was said in media interviews cannot be separated from the circumstances or manner in which it was said and that any detriment as a result of the media interviews therefore necessarily amounts to direct discrimination.
18. With regard to his claim for indirect discrimination, the Claimant has raised three PCPs in the following terms:
- 18.1 *'in assessing suitability of a Non-Executive Director for the office, the Respondent considers that expressing a critical view of same-sex adoptions has a negative impact on the confidence of staff, patients and the public in a Non-Executive Director of an NHS Trust';*
- 18.2 *'in assessing suitability of a Non-Executive Director for the office, the Respondent gives a high priority to securing the confidence and/or approval of the so-called 'LGBT community'';*
- 18.3 *'in assessing suitability of a Non-Executive Director for the office, the Respondent gives greater weight to the actual or perceived views of the so-called 'LGBT community' than to the views of Christians and others who adhere to the traditional sexual morality'.*

19. The Claimant relies on all Non-Executive Directors of NHS Trusts as the appropriate pool for comparison. He contends that his belief that adoption by a mother and father is in the best interests of a child, and adoption by a same sex couple is therefore not, is a belief shared by most Christians. He also says that it is a belief shared by many non-Christians but not shared by many other non-Christians. When asked during oral submissions what evidence was relied on to support the Claimant's case on group disadvantage, the reply from the Claimant's representative (which the tribunal presumes was on the basis of instructions from the Claimant) was that the group disadvantage hurdle is easy to overcome, especially in an Article 9 case, that '*the bible says that homosexuality is an abomination*', that the tribunal should assume that a significant number of Christians would hold the same view and that group disadvantage should therefore be assumed.
20. The Claimant's victimisation claim relies principally on the media interviews in which he said that the Lord Chancellor and Lord Chief Justice had discriminated against him because of his religion or beliefs. He says that those media interviews were protected acts and that the Respondent's actions were because of those media interviews. He says that amounts to victimisation.
21. The Claimant says that if the other causes of action outlined above fail, then it remains the tribunal's duty under the Human Rights Act 1998 to remedy any violation of the Claimant's rights under the European Convention on Human Rights ('**ECHR**'). He says that this can be achieved by finding that the Respondent's actions amounted to unlawful harassment of the Claimant. It was accepted in oral submissions that the harassment claim had not been addressed in evidence 'in the traditional way' and that the Claimant's case in this regard was novel, but it was said that a breach of ECHR rights automatically satisfies the requirements of section 26 of the Equality Act 2010 ('**EqA**').
22. A further aspect of the Claimant's submissions relies on Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the ECHR. He says that this argument is relevant to all aspects of his claim. He says that domestic law, in this case the EqA, must be interpreted in a manner compatible with ECHR rights. He also says, as the tribunal understands it, that certain domestic authority decided before the judgment of the European Court of Human Rights ('**ECtHR**') in *Eweida* has effectively been overruled and so must be ignored or at least treated 'with caution'; it is on this point that the Claimant sought permission, which the tribunal granted, to put in further written submissions after the conclusion of the main hearing but before the tribunal reconvened in Chambers to deliberate. The detail of the Claimant's arguments on Articles 9 and 10 will be discussed further in the discussion section below.
23. **Respondent's submissions**

The Respondent made oral submissions before the Claimant and then gave a brief reply after the Claimant's oral submissions.

24. The Respondent did not suggest that the Claimant's religion and belief as relied on in his submissions are not genuinely held. However, the Respondent does say that the two must not be elided; the case based on religion and that based on belief must be considered separately.
25. With regard to the direct discrimination claim, it was said (relying on *Martin v Devonshires*) that, although the 'conventional' approach would involve identifying an actual, or constructing a hypothetical, comparator and then asking whether that comparator was or would have been treated less favourably before asking, as a final step, whether any less favourable treatment was because of a protected characteristic, the tribunal may find it more convenient in this case to ask itself a single question, ie the reason why the Claimant was treated in the way that he was. If the answer to that single question is religion or a relevant belief and the treatment in question amounted to a detriment then he would succeed. If the reason for the treatment was not religion or belief then the claim for direct discrimination would fail.
26. The Respondent said that this case is analogous to *Chondol*, a case in which the EAT approved use of the 'reason why' approach and also accepted that a distinction may validly be drawn, if supported by the evidence, between a claimant's religious beliefs and inappropriate promotion of those beliefs.
27. If the tribunal adopts the comparator approach then the Respondent says that the comparator relied on by the Claimant is inappropriate. Instead, the following comparators should be used:
 - 27.1 In respect of the case based on religion, a Non-Executive Director of an NHS mental health trust who is not Christian and who, disregarding a warning not to do so and without notifying his trust, gave interviews to the print and broadcast media in which he expressed the same views as were expressed by the Claimant;
 - 27.2 In respect of the case based on belief, a Non-Executive Director of an NHS mental health trust who, disregarding a warning not to do so and without notifying his trust, gave interviews to the print and broadcast media in which he expressed a different strongly held belief in the course of which he expressed discriminatory views.
28. The Respondent says that whichever approach is adopted, whether the 'reason why' or a hypothetical comparator, the claim fails. It was also pointed out that it was not even put to Ms Scanlan that her written report to the TAP was in any way discriminatory.
29. With regard to the indirect discrimination claim, the Respondent says that it is for the Claimant to prove that the requirements of section 19(2)(a) to (c) of the EqA are met in this case. Only then would the question of

objective justification arise. The Respondent denies that either of the first two PCPs relied on by the Claimant was applied and denies that the third PCP relied on is a neutral PCP at all. Further, on group disadvantage the Respondent says that there is simply no evidence to support a finding in the Claimant's favour. The Respondent suggested that there may well be many Christians who would disagree with, or even be offended by, the Claimant's views and many non-Christians who would share them.

30. With regard to the victimisation claim, the Respondent accepted that the question is whether a protected act or acts played a material part in any relevant decision, but added that it is possible to separate the protected act(s) in this case, ie things that the Claimant said in media interviews, from the fact that he chose to say them on national prime time television. In this case, the Respondent's actions were because the Claimant chose to express his views through print and broadcast media in the way that he did, even though he had been asked not to do so the year before, rather than because he said that he had been discriminated against.
31. As for the Claimant's harassment claim, which now appears to be put on the basis that any breach of the ECHR automatically satisfies the requirements of section 26 of the EqA, the Respondent said that this was just wrong as a matter of law. The Respondent added that there is no evidence whatsoever to support a harassment claim in this case; the Claimant had put forward no evidence of violation of his dignity or the creation of an intimidating, hostile, degrading or humiliating environment and nor was any such case put to any of the Respondent's witnesses.
32. The Respondent said that ECHR rights could only be relevant to the Claimant's indirect discrimination claim. It was said that they could not, in fact, take the Claimant's case any further.
33. With regard to Article 9, the Respondent accepted that the right to freedom of thought, conscience or religion is absolute, but said that the right to manifest religion or belief is conditional. The Respondent said that Article 9 was not engaged in this case. Reference was made to the judgment of Lord Hoffmann in *R(SB) v Governors of Denbigh High School* in which he said that '*Article 9 does not require than one should be allowed to manifest one's religion at any time and place of one's choosing.*' The Respondent also referred to the judgment of Lord Neuberger MR in *Ladele*.
34. The Respondent said that it could not see how Article 10 fed into interpretation of domestic law, in particular the EqA.

Relevant statutory provisions

35. The tribunal has reminded itself of the following key provisions of the Equality Act 2010:

'PART 2 KEY CONCEPTS
Chapter 1 Protected characteristics

...

10 Religion or belief

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

...

Chapter 2 Prohibited conduct

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;
 - marriage and civil partnership;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

...

23 Comparison by reference to circumstances

(1) *On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

...

(3) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married to a person of the opposite sex is not a material difference between the circumstances relating to each case.*

(4) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to a person of the same sex while another is married to a person of the opposite sex is not a material difference between the circumstances relating to each case.*

...

26 Harassment

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

(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) *the conduct has the purpose or effect of—*

(i) *violating B's dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

...

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) *the perception of B;*

(b) *the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect.*

(5) *The relevant protected characteristics are—*

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

27 Victimisation

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*

(a) *B does a protected act, or*

(b) *A believes that B has done, or may do, a protected act.*

(2) *Each of the following is a protected act—*

(a) *bringing proceedings under this Act;*

- (b) *giving evidence or information in connection with proceedings under this Act;*
- (c) *doing any other thing for the purposes of or in connection with this Act;*
- (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) *This section applies only where the person subjected to a detriment is an individual.*
- (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

...

PART 5 WORK
Chapter 1 Employment etc

50 Public offices: appointments, etc.

- (1) *This section and section 51 apply in relation to public offices.*
- (2) *A public office is—*
 - (a) *an office or post, appointment to which is made by a member of the executive;*
 - (b) *an office or post, appointment to which is made on the recommendation of, or subject to the approval of, a member of the executive;*
 - (c) *an office or post, appointment to which is made on the recommendation of, or subject to the approval of, the House of Commons, the House of Lords, the National Assembly for Wales or the Scottish Parliament;*
 - (d) *an office or post, appointment to which is made by the Lord Chief Justice or the Senior President of Tribunals.*
- (3) *A person (A) who has the power to make an appointment to a public office within subsection (2)(a), (b) or (d) must not discriminate against a person (B)—*
 - (a) *in the arrangements A makes for deciding to whom to offer the appointment;*
 - (b) *as to the terms on which A offers B the appointment;*
 - (c) *by not offering B the appointment.*
- (4) *A person who has the power to make an appointment to a public office within subsection (2)(a), (b) or (d) must not, in relation to the office, harass a person seeking, or being considered for, the appointment.*
- (5) *A person (A) who has the power to make an appointment to a public office within subsection (2)(a), (b) or (d) must not victimise a person (B)—*
 - (a) *in the arrangements A makes for deciding to whom to offer the appointment;*

- (b) as to the terms on which A offers B the appointment;
- (c) by not offering B the appointment.
- (6) A person (A) who is a relevant person in relation to a public office within subsection (2)(a), (b) or (d) must not discriminate against a person (B) appointed to the office—
 - (a) as to B's terms of appointment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by terminating the appointment;
 - (d) by subjecting B to any other detriment.
- (7) A person (A) who is a relevant person in relation to a public office within subsection (2)(c) must not discriminate against a person (B) appointed to the office—
 - (a) as to B's terms of appointment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by subjecting B to any other detriment (other than by terminating the appointment).
- (8) A relevant person in relation to a public office must not, in relation to that office, harass a person appointed to it.
- (9) A person (A) who is a relevant person in relation to a public office within subsection (2)(a), (b) or (d) must not victimise a person (B) appointed to the office—
 - (a) as to B's terms of appointment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by terminating the appointment;
 - (d) by subjecting B to any other detriment.
- (10) A person (A) who is a relevant person in relation to a public office within subsection (2)(c) must not victimise a person (B) appointed to the office—
 - (a) as to B's terms of appointment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by subjecting B to any other detriment (other than by terminating the appointment).

...

52 Interpretation and exceptions

- (1) This section applies for the purposes of sections 49 to 51.
- (2) "Personal office" has the meaning given in section 49.
- (3) "Public office" has the meaning given in section 50.
- (4) An office or post which is both a personal office and a public office is to be treated as being a public office only.
- (5) Appointment to an office or post does not include election to it.

- (6) “Relevant person”, in relation to an office, means the person who, in relation to a matter specified in the first column of the table, is specified in the second column (but a reference to a relevant person does not in any case include the House of Commons, the House of Lords, the National Assembly for Wales or the Scottish Parliament).

Matter	Relevant person
<i>A term of appointment</i>	<i>The person who has the power to set the term.</i>
<i>Access to an opportunity</i>	<i>The person who has the power to afford access to the opportunity (or, if there is no such person, the person who has the power to make the appointment).</i>
<i>Terminating an appointment</i>	<i>The person who has the power to terminate the appointment.</i>
<i>Subjecting an appointee to any other detriment</i>	<i>The person who has the power in relation to the matter to which the conduct in question relates (or, if there is no such person, the person who has the power to make the appointment).</i>
<i>Harassing an appointee</i>	<i>The person who has the power in relation to the matter to which the conduct in question relates.</i>

...

PART 11 ADVANCEMENT OF EQUALITY
Chapter 1 Public Sector Equality Duty

149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) tackle prejudice, and
 - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;
 - pregnancy and maternity;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

...

150 Public authorities and public functions

- (1) A public authority is a person who is specified in Schedule 19.
- (2) In that Schedule—
 - Part 1 specifies public authorities generally;
 - ...
- (3) A public authority specified in Schedule 19 is subject to the duty imposed by section 149(1) in relation to the exercise of all of its functions unless subsection (4) applies.
- (4) A public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions.
- (5) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.'

36. The following are the key provisions of the National Health Service Trusts (Membership and Procedure) Regulations 1990 ('**the 1990 Regulations**')

3 Appointment of directors

- (1) Subject to regulation 4(5), the non-executive directors of an NHS trust shall be appointed by the Secretary of State.

- (2) *The executive directors of an NHS trust shall be appointed by the relevant committee.*

...

9 Termination of tenure of office of chairman and non-executive directors

- (1) *The chairman or a non-executive director of an NHS trust may resign his office at any time during the period for which he was appointed by giving notice in writing to the Secretary of State.*
- (2) *Where during his period of directorship a non-executive director of a trust is appointed chairman of the trust, his tenure of office as non-executive director shall terminate when his appointment as chairman takes effect.*
- (3) *Subject to paragraph (8), if the Secretary of State is of the opinion that it is not in the interests of the health service for a person appointed as a chairman or non-executive director of an NHS trust to continue to hold that office, the Secretary of State may forthwith terminate that person's tenure of office.*

...

9A Suspension of chairman and non-executive directors

- (1) *The Secretary of State may suspend an appointee from performing the appointee's functions as chairman or director while the Secretary of State considers whether—*
- (a) *to remove the person from office under regulation 9(3) or (6);*
or
- (b) *the person is disqualified for appointment under regulation 11, or was so disqualified at the time of appointment.*
- (2) *The Secretary of State shall notify a person suspended under paragraph (1) of the decision to suspend, and the decision shall take effect upon receipt of such notification.*
- (3) *Subject to paragraphs (4) and (5), a period of suspension under paragraph (1) shall not exceed 6 months.*
- (4) *The Secretary of State may at any time review a suspension and shall review a suspension after 3 months if so requested in writing by the person who has been suspended.*
- (5) *On reviewing a suspension, the Secretary of State may—*
- (a) *revoke the suspension, in which case it shall cease to have effect; or*
- (b) *suspend the appointee from performing the appointee's functions as chairman or director for a period of not more than 6 months from the expiry of the current period of suspension.'*

37. The powers vested in the Secretary of State by the above provisions of the 1990 Regulations have been delegated to the Respondent by paragraph 3 of the 2013 Directions and, since April 2016, by paragraph 4 of the 2016 Directions.

38. The Claimant has relied on, and the tribunal has reminded itself of, the following provisions of the Human Rights Act 1998 ('HRA'):

2 Interpretation of Convention rights.

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
- whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.
- (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.
- (3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—
- (a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;
- ...

3 Interpretation of legislation.

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- (2) This section—
- (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
- ...

6 Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

- (b) *in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*
- (3) *In this section “public authority” includes—*
 - (a) *a court or tribunal, and*
 - (b) *any person certain of whose functions are functions of a public nature,**but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*
- ...
- (5) *In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.*
- (6) *“An act” includes a failure to act but does not include a failure to—*
 - (a) *introduce in, or lay before, Parliament a proposal for legislation; or*
 - (b) *make any primary legislation or remedial order.’*

39. The following are the provisions of the ECHR relied on by the Claimant:

‘Article 9 Freedom of thought, conscience and religion

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

Article 10 Freedom of expression

- 1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’*

Discussion

40. **Jurisdiction**

As noted above, the Respondent raised a time point during the course of proceedings but put forward no positive case at the hearing that any aspect of the claim was out of time. However, since limitation goes to the tribunal's jurisdiction it is something that should be considered in any event.

41. The ET1 was presented on 17 November 2016. The Early Conciliation ('EC') period, unusually, amounts to a single day, namely 20 October 2016. The three alleged detriments relied on by the Claimant are his suspension on 21 March 2016, an investigation which he says took place from then until the TAP hearing on 2 August 2016 and then the TAP decision which was communicated to him in a letter dated 19 August 2016.

42. The primary time limit for a claim of discrimination (before any EC period is taken into account) is three months from the date of the act of alleged discrimination (see EqA, s123). Therefore, the complaint concerning the decision letter dated 19 August 2016 was clearly presented in time.

43. Because of the effect of EqA, s140B(4), a complaint concerning events on 2 August 2016 would also be in time. Since the investigation, or such investigation as took place, continued up to 2 August 2016 the tribunal has concluded that the second aspect of the Claimant's claim is also in time.

44. Even allowing for the EC period, a complaint presented on 17 November 2016 concerning events on 21 March 2016, ie the date of suspension, would on the face of it be out of time. However, the tribunal has considered the provisions as to continuing acts in EqA, s123(3)(a) and has concluded that the events from the Claimant's suspension up to the TAP decision should properly be considered to have been part of a continuing series of events or, to use the statutory language, an act extending over a period. That being so, all of the matters of which the Claimant complains were presented in time and the tribunal has jurisdiction to hear them.

45. Although not a matter in dispute between the parties, the tribunal notes here that although the Claimant was not an employee of the Respondent (or of the Trust) and so his case cannot fall within the more familiar provisions of EqA, s39, he was the holder of a public office within the meaning of EqA, s50 and so has equivalent protection against discrimination, harassment and victimisation under that provision. Since it is the Respondent that has power to appoint and make other decisions concerning the position of Non-Executive Directors of the Trust, the Respondent is the appropriate respondent to this claim.

46. **Religion or belief**

As noted above, the Claimant relies on Christianity as his religion and a belief that it is always in the best interests of a child to be brought up by a

mother and a father as his philosophical belief for the purposes of EqA, s10. That the Claimant genuinely follows that religion and holds that belief have not been disputed by the Respondent and, in any event, have been the subject of specific findings above.

47. Christianity clearly falls within the definition of religion for purposes of the EqA. Belief for the purposes of the EqA is to be given a wide interpretation (see, for example, the guidance given by Burton J in *Grainger plc v Nicholson*). In summary, a belief must (a) be genuinely held, (b) concern a weighty and substantial aspect of human life and behaviour, (c) attain a certain level of cogency, seriousness, cohesion and importance and (d) be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.
48. Had the belief relied on by the Claimant been the wider views expressed in his Good Morning Britain television interview in March 2016, ie that 'homosexual activity' is wrong then the tribunal may well have concluded that this was not a belief that was worthy of respect in a democratic society and/or one that was compatible with the fundamental rights of others. However, the specific belief relied on by the Claimant is more narrow, ie that it is in the best interests of a child to have a mother and a father. That, the tribunal has concluded, is a belief that falls within the definition of philosophical belief for the purposes of EqA, s10.
49. **ECHR, Articles 9 and 10**
The Claimant relies on Articles 9 and 10 of the ECHR. He says that both were engaged and both were breached by the Respondent's actions. He says that this point is relevant to all of his claims. It is therefore convenient to consider this matter at this point in the tribunal's discussion before dealing with the various specific causes of action raised.
50. The provisions of Articles 9 and 10 of the ECHR have been set out above as have the provisions of the HRA relied on by the Claimant. The tribunal accepts, as it must, that it is bound by the provisions of the HRA. Pursuant to HRA, s2, it must, for example, take into account relevant judgments of the ECtHR as to interpretation of the ECHR. It must also, pursuant to HRA, s3, construe domestic legislation in a way that is compatible with the ECHR 'so far as it is possible to do so'.
51. The third provision of the HRA relied on by the Claimant, s6, provides that a public authority, which would include the tribunal, must not act in a way that is incompatible with rights under the ECHR. However, s6(2) provides, in effect, that the prohibition on acting in a manner incompatible with ECHR rights does not apply where a public authority cannot act differently because of provisions of primary domestic legislation which cannot be construed so as to be ECHR-compliant. The tribunal also notes the provisions of HRA, s3(2) which provides that where primary legislation cannot be construed so as to be compatible with the ECHR the incompatibility does not render that legislation invalid or unenforceable.

52. Article 9(1) of the ECHR gives absolute protection for a person's right to freedom of thought, conscience and religion. That is not in issue here. Although the Claimant contends that action was taken against him by the Respondent because of his beliefs, the tribunal rejects that contention. The Respondent acted as it did because of the manner in which the Claimant expressed his beliefs. As discussed further below in the context of the direct discrimination claim, a valid distinction may be drawn between an individual's religion and/or beliefs and the way in which they express that religion and/or those beliefs. This is clear from a consistent body of authority (both pre and post-*Eweida* in the ECtHR).
53. Article 9(2) protects the right to manifest religion or beliefs. However, this protection is qualified rather than absolute. The twofold question here, before consideration is given to the impact of the ECHR on construction of the relevant provisions of the EqA, is whether Article 9(2) is engaged at all and, if it is, whether the Claimant's right to manifest his religion and beliefs has been breached.
54. As the ECtHR made clear in *Eweida*, and the domestic courts have accepted, manifestation of a religion or belief will be shown if the relevant act is intimately linked to the religion or belief. The act need not be a mandatory duty within a particular religion or belief system. For example, in *Mba* the Court of Appeal held that there was no need to establish that the matter in question, in that case an objection to Sunday working, is a core component of a particular religion. However, there must be a sufficiently close and direct nexus between the act and the underlying belief. If there is such a nexus, Article 9(2) is engaged.
55. Here, the act or acts resulting in the Respondent taking action were not the Claimant holding or expressing his views as such, but the Claimant accepting invitations to appear, and then appearing, in the press and on national television, compounded by the fact that he did so without informing the Trust when he had been expressly told to do so. Expressing his views in that context was not something that the tribunal finds was intimately linked to his religion or his beliefs. There was, in the tribunal's judgment, no sufficiently close and direct nexus between the act and the underlying belief. Article 9(2) was not, therefore, engaged.
56. The tribunal accepts that manifestation of religion or belief for the purposes of Article 9 could extend in a suitable case to the right to attempt to convince others of the merit of the religion or belief (see the comments of HHJ Eady QC to that effect in *Wasteney*) but in this case (as in *Wasteney*) the actions of the Claimant went further than that.
57. In any event, even if, contrary to the above finding, Article 9(2) was engaged then the tribunal would have found, as the ECtHR did in *Chaplin*, *Ladele* and *McFarlane* (the other three cases decided with *Eweida*), that his actions fell within the qualifications to Article 9(2) and there was therefore no breach of his ECHR rights. In the tribunal's judgment, the

Claimant's actions were clearly in conflict with the protection of health, which is the Trust's and the Respondent's principal function, and with the protection of the rights of others (two of the qualifications in Article 9(2)). The Trust is subject to the Public Sector Equality Duty under EqA, s149 which includes a duty to advance equality of opportunity and to foster good relations between persons who share and those who do not share a protected characteristic. The Claimant accepts that there were, and had been, specific issues with LGBT members of the community suffering disproportionately from mental health problems and also difficulty persuading them to engage with the Trust's services. There had also been a specific complaint from within the Trust's organisation concerning the Claimant's actions. There is clear evidence that there was a specific and genuine concern on the part of the Trust and the Respondent as to the impact of the Claimant's actions on the Trust's ability to serve the entire community in its catchment area. Given the Claimant's high profile role within the Trust, the tribunal finds that this concern was justified. The Claimant himself confirmed in evidence that although he did not think about the effect of his public statements on others, even after Mr Ling had raised it with him in early 2015, he accepted that those reading, listening to or watching his interviews might have made a connection with his role with the Trust and/or in the NHS in a wider sense and that could be damaging for the Trust or the wider NHS.

58. The tribunal finds that even if Article 9(2) was engaged, then any limitation placed on the Claimant's Article 9 rights was necessary and proportionate in all the circumstances.
59. The Claimant and his representative said a number of times during hearing words to the effect of 'but what about the rights of Christians?'. However, that rather misses the point. There has been no suggestion as far as the tribunal is aware that there was, or has ever been, any issue with Christians suffering disproportionately from mental health problems or any difficulty for Christians engaging with and/or accessing the mental health services provided by the Trust.
60. Turning now to Article 10, in his oral closing submissions the Claimant's representative said that the starting point was Articles 9 and 10. The tribunal notes that Article 10 is mentioned in the Claimant's ET1 and also in paragraph 39 of the Claimant's written opening where reference was also made to the *Fuentes Bobo* case. However, no clear argument based on Article 10 was developed further during the hearing or in the Claimant's written closing or in oral submissions or in the supplementary written submissions presented after the conclusion of the main hearing. In oral submissions the extent of the argument was, in effect, to say that Articles 9 and 10 are engaged in this case and the EqA must be construed so as to comply with the requirements of Articles 9 and 10. Although the Claimant did expand on his case based on Article 9, no specific argument based on Article 10 was developed further.

61. Nevertheless the tribunal has considered whether Article 10 adds anything of substance to the Claimant's case. The tribunal notes here that Article 10 was also raised in *Trayhorn* but, as in this case, in parallel with arguments under Article 9; those arguments were rejected by the EAT in that case.
62. Doing the best it can to analyse the Claimant's case, the tribunal cannot see, and the Claimant has not suggested, what Article 10 adds to his argument under Article 9. The Claimant has referred the tribunal to *Fuentes Bobo*, a judgment of the ECtHR on a complaint of breach of Article 10 rights, but he has not sought to argue how, if at all, this adds to his arguments under Article 9.
63. **Eweida in the ECtHR**
Before discussing the Claimant's specific claims the tribunal should address another overarching argument raised by the Claimant, namely that the ECtHR's judgment in *Eweida* in effect overrules previous domestic authority on the proper interpretation of the religion or belief provisions of the EqA, or at least that such authority should be treated with caution.
64. The Claimant has put forward a number of authorities (in particular *AF*, *Chester* and *Hicks*) in support of this proposition, although it remains unclear which previous authority of relevance to this case is said to have been overruled by *Eweida*. In any event, the authorities relied on by the Claimant in this context seem to the tribunal to establish the following (see, for example, *Hicks* in the Court of Appeal at ¶80):
- 64.1 The ECtHR provides authoritative guidance as to the meaning of the ECHR;
- 64.2 It does not provide authoritative guidance as to its application, such matters being fact-sensitive;
- 64.3 Its guidance is only binding on domestic courts if given by the Grand Chamber or where there is a clear and constant line of decisions of the ECtHR other than by the Grand Chamber.
65. *Eweida* was not a decision of the Grand Chamber and nor, in the tribunal's judgment, was it part of a clear and constant line of ECtHR decisions. Indeed, it is perhaps of note that *Eweida* was one of four conjoined cases heard by the ECtHR and was the only one of the four to succeed.
66. The tribunal also notes the judgments of the Court of Appeal in *Mba*, which are binding on this tribunal and were given after, and expressly take into account, the judgment of the ECtHR in *Eweida*. Elias LJ said this at ¶35 of *Eweida*:

'Article 9 cannot be enforced directly in employment tribunals because claims for breaches of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg court in Eweida does not seem to have appreciated that fact): see X v Y [2003] ICR 1138. The Eweida decision in Strasbourg has not, and could not,

affect the reach of the statutory jurisdiction, and therefore the claimant's article 9 right is incapable of direct enforcement in the employment tribunal. However, domestic law must be read so as to be consistent with Convention rights where possible. ...'

67. This passage, including the use of 'where possible', confirms that domestic authority has not in some way been trumped or overruled by *Eweida* in the ECtHR. To the contrary, *Mba* confirms that domestic legislation and previous authorities as to its interpretation remain good law, albeit always with the requirement to take into account the provisions of the ECHR and Strasbourg case law and to construe domestic legislation in a manner consistent with the ECHR 'so far as it is possible to do so' (HRA, s3).
68. The tribunal has concluded that this particular argument does not take the Claimant's case any further. The tribunal now turns to the specific claims raised by the Claimant.
69. **Direct discrimination**
The Claimant says that the Respondent's actions in suspending him in March 2016 and subsequent events up to and including the TAP decision were acts of direct discrimination. He says that they were because of religion or belief. In fact, his primary case is that they were because of his religion and his narrower belief as outlined above but whether this is a permissible approach under the provisions of the EqA is not something that the tribunal needs to decide, in light of the findings it has already made as to the reason for the Respondent's actions.
70. Contrary to the Claimant's submissions, the tribunal has already found that the Respondent's actions were not because of the Claimant's religion or because he held or expressed his views as such, but were because he accepted invitations to appear in the press and on national television without informing the Trust and when he had been expressly told to inform them.
71. The Respondent does not accept the Claimant's contention that the Claimant's religion and/or views cannot validly be distinguished from the manner in which he expressed them. The Claimant says that this is a false distinction but it is one that has been made in a consistent line of previous cases and upheld as valid on appeal: see, for example, *Chondol*, *Wastenev* and *Trayhorn*.
72. Nor is the Claimant assisted by arguments under the ECHR. The tribunal has already found above that Article 9 was not engaged in this case and, even if it was, it was not breached. In any event, in so far as the Claimant may have been seeking to argue that a causation test is replaced by a 'sufficiently close nexus' test in such a case, this argument has already been raised and rejected by the EAT in *Trayhorn*.

73. Having found that the reason for the treatment of the Claimant was not his religion or belief, it is not necessary for the tribunal to consider further the dispute between the parties as to the correct construction of a hypothetical comparator. The 'reason why' approach (which the Claimant accepted in submissions was appropriate in this case) provides the answer to the direct discrimination claim.
74. For those reasons, the Claimant's claim for direct discrimination fails.
75. **Indirect discrimination**
The PCPs relied on by the Claimant are set out above in the context of his submissions to the tribunal. However, it is difficult to see how the first and third PCPs as formulated by the Claimant fit into the provisions of EqA, s19.
76. The first PCP can perhaps be reformulated into a criterion or practice that expressing negative views about same-sex adoption would be seen as a negative factor in any assessment of suitability to become or continue as a Non-Executive Director. However, the first difficulty with that or any other similar formulation is that this PCP was not applied to the Claimant. The reason for the Respondent's actions was not the Claimant's views or the fact that he expressed them. Rather, it was the fact that he agreed to engage with national press and television media without informing the Trust when he had been expressly told to inform them.
77. Putting on one side the Claimant's use of the phrase 'so-called LGBT community' (a phrase repeatedly used during the hearing and one which appears to the tribunal to be intended in some sort of pejorative way) and replacing it with 'LGBT members of the community', the tribunal finds that the third PCP relied on is also not one that was applied to the Claimant. It is right that the Trust and the Respondent took into account the potential adverse impact of the Claimant's actions on LGBT members of the community. That is unsurprising since they were a particularly vulnerable section of society in terms of mental health provision (as the Claimant accepts), they were the obvious category that may be affected by the Claimant's comments in the national press and on national television and there had been a specific complaint from the Chair of the Trust's LGBT Staff Network. However, the tribunal has heard no evidence as to the relative weight put by the Trust or the Respondent on the views of any particular section of the community they serve.
78. The tribunal accepts that the second PCP relied on (again setting aside the Claimant's use of the phrase 'so-called LGBT community') was applied to the Claimant. The Trust and the Respondent did and do give high priority to securing the confidence of LGBT members of the community given the particular mental health and engagement issues that arise.
79. However, the Claimant's indirect discrimination claim cannot succeed on the basis of the second PCP, and this is also a further difficulty in relation to the first and third, because there is no sufficient evidence on which the

tribunal could make any finding of group disadvantage for the purposes of EqA, s19(2)(b). The Claimant has pointed to a number of documents in the bundle, including a petition supporting his position and a number of supportive press articles, including one that quotes the former Bishop of Rochester, but these fall far short, in the tribunal's judgment, of what is required for the tribunal to make a finding that the requirements of EqA, s19(2)(b) are satisfied in this case in respect of any of the PCPs relied on.

80. The Claimant contends that where Article 9 is engaged there is no requirement to establish group disadvantage. In the alternative, he says that if there is a need to show group disadvantage then the hurdle is not high. One difficulty with these arguments is that the tribunal has already found that Article 9 is not engaged in this case. In any event, these arguments were raised and rejected by the EAT in *Trayhorn*. There is a group disadvantage hurdle to be overcome in this case and, however high that hurdle, it can only be surmounted on the basis of cogent evidence. There is no such evidence in this case and the tribunal cannot simply make assumptions, as invited to do by the Claimant, without any evidential basis.
81. The Court of Appeal confirmed in *Mba* that a requirement to establish group disadvantage is consistent with Article 9 rights and that there remains a requirement to show group disadvantage in an indirect discrimination claim brought under EqA, s19 (see, for example, Elias LJ at ¶135). The Court of Appeal also confirmed that Article 9, when engaged, comes in at the justification stage, ie when considering EqA, s19(2)(d). Given the findings above, there is no requirement for the Respondent to satisfy s19(2)(d), but even if there was, the tribunal would have found the Respondent's actions objectively justified under Article 9(2) of the ECHR and under EqA, s 19(2)(d) for the reasons already set out in the discussion of Article 9 above, the legitimate aims being the protection of health and the protection of the rights of others.
82. For all the above reasons, the Claimant's claim for indirect discrimination fails.
83. **Victimisation**
This aspect of the Claimant's case may be dealt with relatively shortly. The Respondent accepts that the Claimant did protected acts within the meaning of EqA, s27. Specifically, he said a number of times in the press and broadcast media before his suspension in March 2016 that he had been discriminated against on grounds of religion or belief by the Lord Chancellor and/or Lord Chief Justice. There is no suggestion that this was said in bad faith by the Claimant.
84. The question is, then, whether the actions taken by the Respondent were because the Claimant had done one or more protected acts. In so far as the Claimant contends that it is not possible to distinguish between what he said in various press interviews and the manner in which he said it, the tribunal has already rejected that contention. Further, the tribunal has

already made specific findings as to the reasons for the Respondent's actions, and the protected acts played no part in those reasons.

85. That being so, the Claimant's claim for victimisation fails.

86. **Harassment**

Finally, the tribunal turns to the claim for harassment. This may also be dealt with relatively shortly. This aspect of the case was not actively pursued by the Claimant or his representative during the course of the hearing but it has been raised and so must be considered.

87. The Claimant's primary case in this regard, as the tribunal understands it, is that the requirements of the ECHR and the HRA are such that the tribunal is obliged to find in the Claimant's favour by some route through the EqA, and if all others fail, as they have, then harassment is the only one left and the Claimant must automatically win by that route. As the Claimant's representative conceded in closing submissions, this is a novel point. It is also a bad one. It is contrary to all authority of which the tribunal is aware. The tribunal is obliged to interpret the EqA so as to be consistent with the ECHR where it is possible to do so but (a) the tribunal has already found that Article 9 is not engaged in this case and (b) in any event the effect of the ECHR and the HRA is not to remove the requirements of EqA, s26.

88. The Claimant's fall back position is, the tribunal understands, that the requirements of the EqA, s26 are satisfied in this case. Given the tribunal's findings above as to the reason for the Respondent's actions, the tribunal doubts that those actions were related to a relevant protected characteristic. In any event, however, the Claimant faces an insurmountable difficulty in that he has given no evidence as to any alleged violation of his dignity or intimidating, hostile, degrading, humiliating or offensive environment caused by the Respondent's actions and nor has it been suggested that that was the purpose of their actions.

89. In the circumstances, the Claimant's claim for harassment also fails.

Conclusion

90. For the reasons set out above, each of the Claimant's claims fails and all of his claims are therefore dismissed.

Employment Judge K Bryant QC

10 October 2017