Neutral Citation Number: [2018] EWCA Civ 564

Case No: A2/2017/0211

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(HH Judge Eady QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2018

Before :

LADY JUSTICE GLOSTER
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE UNDERHILL
and
LADY JUSTICE ASPLIN

- -

Between:

THE REVEREND CANON JEREMY PEMBERTON	**Appellant**
- and -	
THE RIGHT REVEREND RICHARD INWOOD, FORMER ACTING BISHOP OF SOUTWELL AND NOTTINGHAM	**Respondent**

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- -

Sean Jones QC, Justin Gau and Helen Trotter (instructed by **Thomson Snell &Passmore LLP)** for the **Appellant**
Thomas Linden QC and Matthew Sheridan (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing dates: 31 January and 1 February 2018

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Judgment Approved

Lady Justice Asplin:

1. This is an appeal from the decision of Her Honour Judge Eady QC in the Employment Appeal Tribunal (the "EAT") in Appeal No: UKEAT/0072/16. It raises questions in relation to the construction of sections 26, 53 and 54 and Schedule 9 paragraph 2 Equality Act 2010 (the "2010 Act").

2. The Appellant, the Reverend Canon Pemberton, (the "Canon") is an ordained priest of the Church of England who in April 2014, following the enactment of the Marriage (Same Sex Couples) Act 2013, married his same sex partner. As a result, on 2 June 2014, the Respondent, the Right Reverend Richard Inwood, former Acting Bishop of Southwell and Nottingham (the "Bishop") revoked the Canon's "Permission to Officiate" ("PTO") at services in the Diocese of Southwell and Nottingham ("the Diocese"). Further, by a letter of 7 July 2014 to the Divisional General Manager at the Kingsmill Hospital, Sutton in Ashfield, (the "7 July Letter") the Bishop explained that he declined to grant the Canon an Extra Parochial Ministry Licence ("EPML") which was a necessary requirement for the post of Chaplaincy and Bereavement Manager in the Faith Centre at the Kingsmill Hospital run by the Sherwood Hospitals NHS Trust within the Diocese. As a result, the Canon was not appointed to the post.

3. The Canon's claim for direct discrimination pursuant to sections 13 and 53 of the Equality Act 2010 (the "2010 Act") and his claim for harassment pursuant to sections 26 and 53 of that Act in relation to the revocation of the PTO and the refusal to grant an EPML were dismissed by the Nottingham Employment Tribunal (the "ET") in a determination promulgated on 28 October 2015. The ET held that: the PTO was not a "relevant qualification" for the purposes of section 53 of the 2010 Act; that the EPML was a "relevant qualification" and that accordingly, the Bishop was a "qualifications body" for the purposes of section 53 of the 2010 Act: [40] – [48] and [120] – [125]; that the Bishop was able to rely upon the defence in Schedule 9 paragraph 2 of the 2010 Act and therefore, the claim failed: [188], [234] - [237]; and that there was no harassment pursuant to section 26 of the 2010 Act because the refusal to grant the EPML was lawful and there were no aggravating factors: [244], [245], [251], [259] and [270]. In the EAT, Her Honour Judge Eady QC dismissed the appeal and the cross appeal in relation to whether the PTO and the EPML respectively were "relevant qualifications" and dismissed the appeal both in relation to the availability of the Schedule 9 defence and the ET's decision on harassment.

4. The Grounds of Appeal to this court are lengthy and complex. In summary, they are: (1) the good standing argument, namely that the EAT was wrong to rely upon the ET's finding that in getting married despite the guidance of the House of Bishops, the Canon was in consequence no longer in good standing; (2) the PTO argument, namely that the EAT was wrong to conclude that the PTO was not a relevant qualification because it facilitated the grant of an EPML; (3) the Schedule 9 paragraph 2 argument, that the EAT at [110] and following erred in not asking for whose purposes was the employment or finding that it was for the purposes of the NHS Trust and not the purposes of an organised religion and in determining that the requirement not to be married to a same sex partner was so as to comply with the doctrines of the Church of England; and (4) the Harassment argument that the EAT was wrong at [124] to conclude that the Canon's awareness that his marriage would mean that he was not in good standing and the existence of the Schedule 9 defence were contextual factors which had the effect that it

was not reasonable for the refusal to grant the EPML to have the effects required for the purposes of section 26 of the 2010 Act.

5. The good standing argument is expressed in more detail in the Grounds of Appeal as follows: the EAT at [34] relied on a finding of the ET that by getting married in spite of guidance issued by the House of Bishops, the Canon was in consequence no longer in "good standing". However, the parties were agreed that: the question of "good standing" was a matter of discretion for the individual bishop; the permissions and licences in issue were conferred or maintained on the basis of "good standing"; the Canon continued to hold a licence in the Diocese of Lincoln and thus, was in good standing in that Diocese; such an inconsistency was a key element in the Canon's case that the defence in Schedule 9 of the 2010 Act could not be made out; and the Canon did not concede that by marrying he would cease to be in good standing.

6. The PTO argument is set out in more detail in the following manner: the EAT at [103] concluded that the PTO was not a relevant qualification because the Bishop determined that the Canon was not in "good standing" and that the revocation of the PTO and the refusal to grant the EPML were consistent. However, since the test for the grant of both are identical, holding a PTO would have facilitated the grant of the EPML and since the latter was an essential requirement for the appointment as the Chaplaincy and Bereavement Manager, a PTO would have facilitated engagement in that profession.

7. The Schedule 9 argument is set out in more detail as follows: even if one purpose of the employment was that the Canon would hold religious services, that was still the purpose of the NHS Trust and not that of the Church of England; and there is no doctrine on civil same sex marriage in the Church of England. Therefore, the EAT erred implicitly in concluding to the contrary at [112] and it erred further at [114] by treating the "compliance" principle as being a matter for the assessment of individual bishops.

8. The Harassment argument in more detail is as follows: in fact, the Canon was not aware that his marriage would mean that he was not in good standing; he remained in good standing in the Diocese of Lincoln; even if he had been aware, it does not mean that objectively, it is unreasonable for his dignity to have been violated nor does it preclude the creation of an unlawful environment; and in requiring some additional "aggravating factor" where the Schedule 9 defence is available to a direct discrimination claim, the EAT glossed the statute in an impermissible manner despite accepting that the defence was to be interpreted strictly.

9. The Bishop cross appeals on the basis that the ET should have dismissed the Canon's claim on the grounds that the EPML was not a relevant qualification and/or the Bishop was not a qualifications body for the purposes of sections 53 and 54 of the 2010 Act and that the EAT erred in upholding its decision on those issues.

10. The appeal and the cross-appeal raise, therefore, the following issues: the proper construction of "qualifying body" and "relevant qualifications" for the purposes of section 53 of the 2010 Act; the breadth of the defences to a claim for discrimination in Schedule 9 paragraph 2(3) of the 2010 Act on the facts of this case; and if the defences apply, whether the revocation of the PTO and the refusal to grant the EPML and the communication of those decisions to the Canon can in themselves amount to harassment for the purposes of section 26 of the 2010 Act or whether something more is necessary.

Relevant background and materials

11. There is no dispute that a person discriminates against another, if because of a protected characteristic, he treats that person less favourably than he would treat others, that marriage is a protected characteristic and that in the case of marriage, section 13 of the 2010 Act applies to a contravention in relation to work only if the treatment is because the person is married: section 13(1) and (4) 2010 Act.

12. Although there was some debate before us, there is also no dispute about the nature of either a PTO or an EPML. A PTO is often granted to retired clergy and is held at the discretion of the bishop of the particular diocese. It is granted pursuant to Canon C8 of the Canons of the Church of England (the "Canons") (which where relevant is set out below). As its title suggests it permits the clergyman in question to officiate (in the sense of holding services) within a diocese, without the need also to be the incumbent of a benefice. (However, the consent of the incumbent is also necessary before the holder of a PTO can officiate within the benefice.) It is not disputed that in order to be granted a PTO it is necessary for a clergyman to be in "good standing" with the Church of England.

13. An EPML may be granted by the bishop of a particular diocese pursuant to section 2(1) and (2) of the Extra Parochial Ministry Measure 1967 (No.2). Section 2 of that Measure provides that the bishop of the diocese in which a particular institution such as a college, school or hospital is situated may "license a clergyman of the Church of England to perform such offices and services" as are specified in the licence at the particular place or institution. Sub-section (4) provides that the bishop of the diocese may also revoke the EPML at any time. However, it was the Bishop's evidence that there is a complex procedure in relation to the revocation of such licences which applies in the case of misconduct and that otherwise, the bishop must wait until the employment to which the licence relates, comes to an end. It is not disputed that it is necessary to be of "good standing" in order to be granted an EPML.

14. It is also accepted that every Church of England clergyman is required to swear an oath of allegiance in the form set out in Canon C15. That canon and the precise form of the oath are set out below. In summary, the clergyman is required to state that he adheres to the faith revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness. In addition, he is required to swear an oath of allegiance to the bishop in the diocese in which he ministers.

15. Although formal disciplinary proceedings were not taken against the Canon, it is important to understand a little about them. Disciplinary proceedings against a priest are effected under Clergy Discipline Measure 2003. The grounds are specified in section 8(1) and include "conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders." Disciplinary proceedings are neither initiated by the bishop nor decided by him: *Sharpe v Worcester Diocesan Board of Finance Ltd* [2015] ICR 1241 per Lewison LJ at [161] and [164]. However, in his witness statement for the purposes of the hearing before the ET, the Bishop stated that one of the options open to him would have been to invite an archdeacon to consider whether to instigate a complaint against the Canon under the relevant disciplinary legislation.

16. Further, it was the Bishop's undisputed evidence that the Church of England has no legal personality. It is separated into two geographical provinces, being the province of Canterbury and the province of York and consists of forty-two dioceses each of which is headed by a bishop. The structure has many more sub-divisions which are not relevant for our purposes.

17. Although the status of the various sources of teaching of the Church of England were the subject of some debate before us, and Mr Jones QC and Mr Gau on behalf of the Canon submit that the "doctrine" of the Church of England is unclear, and at the same time restricted, ultimately it is accepted that the Church itself states that its doctrine is contained, in particular, in the Thirty-Nine Articles of Religion, the Book of Common Prayer and the Ordinal, the latter of which is concerned with the ordination of bishops, priests and deacons: Canon A5 of the Canons. It is also not in dispute that the Canons are part of the law of England and Wales and together with ecclesiastical common law and Measures (which are a form of legislation) form the body of Ecclesiastical law. The Canons can only be implemented if they are proposed and passed by the General Synod of the Church of England. Under Article 7 of the Constitution of the General Synod contained in Schedule 2 of the Synodical Government Measure 1969, any legislation "touching doctrinal formulae or the services or ceremonies of the Church of England" before being passed by the General Synod must have first been referred to the House of Bishops. It has the right to amend the legislation before it is placed before the General Synod for final approval.

18. We were referred to the Canons which are relevant in this matter. As they are central to the argument in this appeal, I will set them out in full:

> **"A5 Of the doctrine of the Church of England**
>
> The doctrine of the Church of England is grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures.
>
> In particular such doctrine is to be found in the Thirty-nine Articles of Religion, *The Book of Common Prayer,* and the Ordinal.
>
> . . .
>
> **B 30 Of Holy Matrimony**
>
> 1. 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.

2. The teaching of our Lord affirmed by the Church of England is expressed and maintained in the Form of Solemnization of Matrimony contained in *The Book of Common Prayer.*

3. It shall be the duty of the minister, when application is made to him for matrimony to be solemnized in the church of which he is the minister, to explain to the two persons who desire to be married the Church's doctrine of marriage as herein set forth, and the need of God's grace in order that they may discharge aright their obligations as married persons.

. . .

C 8 Of ministers exercising their ministry

1. Every minister shall exercise his ministry in accordance with the provisions of this Canon.

2. A minister duly ordained priest or deacon, and, where it is required under paragraph 5 of this Canon, holding a licence or permission from the archbishop of the province, may officiate in any place only after he has received authority to do so from the bishop of the diocese or other the Ordinary of the place.

Save that:

(a) The minister having the cure of souls of a church or chapel or the sequestrator when the cure is vacant or the dean or provost and the canons residentiary of any cathedral or collegiate church may allow a minister, concerning whom they are satisfied either by actual personal knowledge or by good and sufficient evidence that he is of good life and standing and otherwise qualified under this Canon, to minister within their church or chapel for a period of not more than seven days within three months without reference to the bishop or other Ordinary, and a minister so allowed shall be required to sign the services register when he officiates; . . .

. . .

3. The bishop of a diocese confers such authority on a minister either by instituting him to a benefice, or by admitting him to serve within his diocese by licence under his hand and seal, or by giving him written permission to officiate within the same.

4. No minister who has such authority to exercise his ministry in any diocese shall do so therein in any place in which he has not the cure of souls without the permission of the minister having such cure, except at the homes of persons whose names are entered on the electoral roll of the parish which he serves and to the extent authorized by the Extra-Parochial Ministry Measure 1967, or in a university, college, school, hospital, or public or charitable institution in which he is licensed to

officiate as provided by the said Measure and Canon B 41 or, in relation to funeral services, as provided by section 2 of the Church of England (Miscellaneous Provisions) Measure 1992 or in the case of a bishop's mission order to the extent authorized by section 80(11) of the Mission and Pastoral Measure 2011, read with section 80(14) of that Measure.

. . .

C15 Of the Declaration of Assent

1(1) The Declaration of Assent to be made under this Canon shall be in the form set out below:

PREFACE

The Church of England is part of the One, Holy, Catholic and Apostolic Church worshipping the one true God, Father, Son and Holy Spirit. It 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. Led by the Holy Spirit, it has borne witness to Christian truth in its historic formularies, the Thirty-nine Articles of Religion, *The Book of Common Prayer* and the Ordering of Bishops, Priests and Deacons. In the declaration you are about to make will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making him known to those in your care?

Declaration of Assent

I, A B, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.

. . .

C26 Of the manner of life of clerks in Holy Orders

2. A clerk in Holy Orders shall not give himself to such occupations, habits, or recreations as do not befit his sacred calling, or may be detrimental to the performance of the duties of his office, or tend to be a just cause of offence to others; and 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."

19. We were also referred to the statement of Pastoral Guidance on Same Sex Marriage from the House of Bishops dated 15 February 2014. It formed an appendix to a pastoral letter from the Archbishops of Canterbury and York addressed to the clergy and people of the Church of England. Amongst other things, it provides as follows:

> "House of Bishops Pastoral Guidance on Same Sex Marriage
>
> …
>
> The effect of the Marriage (Same Sex Couple) Act 2013
>
> "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. In addition, the legislation provides that no person may be compelled to conduct or be present at such a wedding …
>
> 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 in March **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.**
>
> …
>
> 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***' (Issues in Human Sexuality, 1991, Section 5.13).
>
> 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 undertake 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."

20. Mr Linden QC on behalf of the Bishop also drew our attention to the existence of and the form of service used at the licensing of the Lead Chaplain at Bassetlaw Hospital and Deputy Head of Chaplaincy at Doncaster and Bassetlaw Hospitals by the Archdeacon of Newark on 15 January 2013. It is implied that such a service would have been held, if the Canon had been granted an EPML to take up the post at the NHS Trust. At the beginning of the liturgy it states that the necessary oaths and declarations were to be made by the licensee before the service. It is not in dispute that on such occasions, the

priest makes a declaration of assent in the form set out at Canon C15, and swears an oath of canonical obedience to the bishop in question and that the Canon did so when granted an EPML in order to take up his first chaplaincy in 2008. The form of the oath, as well as the declaration and the preamble to it, were set out by the ET at [34] of its decision. The oath was as follows:-

> ***"OATH OF CANONICAL OBEDIENCE***
>
> ***I JEREMY CHARLES BARING PEMBERTON***: *Clerk:*
>
> *do swear by Almighty God that I will pay true and canonical obedience to the Lord Bishop of Southwell & Nottingham and his successors in all things lawful and honest: So help me God."*

Further relevant background

21. In addition, in 2014, the Canon was already acting as a chaplain at a hospital in the Diocese of Lincoln and had been granted what has been treated for the purposes of these proceedings as an EPML by the Suffragan Bishop of Grantham in relation to that post. After the Canon's marriage to his same-sex partner, the Bishop of Lincoln did not revoke the EPML which he had been granted but instead issued a rebuke in the form set out at [18] of the EAT judgment. In essence, the Bishop of Lincoln stated that he considered the Canon's same sex marriage to be "inconsistent with [your] ordination vows and your canonical duty to live in accordance with the teachings of the Church of England". However, that EPML was not revoked.

Is the Bishop a "qualifications body" for the purposes of section 53 and are the PTO and/or the EPML "relevant qualifications" for the purposes of sections 54(2) ad (3) of the 2010 Act?

22. The first question is whether the Bishop is a "qualifications body" for the purposes of section 53 of the 2010 Act. It is accepted that the answer to that question turns upon whether the PTO and/or the EMPL are "relevant qualifications" for the purposes of section 54.

23. The relevant statutory provisions are as follows:

> **"53** (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; . . .
>
> (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.
>
> . . .
>
> 54 (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.
>
> . . . "

In addition, section 212 provides that "profession" should be interpreted to include "vocation or occupation". It is not in dispute that the position of Chaplaincy and Bereavement Manager at Kingsmill Hospital amounted to a "vocation" for the purposes of the statute.

24. Her Honour Judge Eady QC dealt with the issues at [101] – [109] of her Judgment. In relation to the ET's rejection of the Canon's claim that the PTO is a relevant qualification, she noted that: it was accepted that "profession" requires some payment for services; the PTO did not lead directly to remuneration; but that the Canon's case was that the PTO facilitated the obtaining of the EPML which in turn facilitated the paid employment by the NHS Trust. She also noted that the Bishop might have stated in the 7th July Letter that the grant of the EPML "would be inconsistent" given his revocation of the PTO but stated that that was not a concession that the grant of the EPML was dependent upon the holding of the PTO. She went on to state that the ET had found as a fact that even if the Canon had not had a PTO to be revoked, the Bishop would have refused to grant the EPML: [102]. She rejected the Canon's appeal in relation to the ET's decision on the status of the PTO having stated as follows:

> "103. The Claimant said 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 became 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."

25. Her Honour Judge Eady QC went on to consider the EPML and the Bishop's cross appeal against the finding that the EPML was a relevant qualification and that he was a qualifications body, at [105]. She noted that the test applied by the Bishop in determining whether to grant recognition, was one of "good standing" as understood within the Church of England and that the ET had found at [98] of its judgment that the Canon was not in "good standing" because he had acted "in defiance of the Pastoral Guidance and thus in breach … of his oath of canonical obedience … and doctrinal conformity …": see EAT judgment at [106]. She went on at [108]:

> " . . . The Respondent [the Bishop] was asked to make a decision as to whether the Claimant [the Canon] 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 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."

26. Accordingly, she dismissed the appeal against the ET's conclusion that the PTO was not a "relevant qualification", and the Bishop's cross appeal against the conclusion that the EPML is a "relevant qualification" and consequently on the Bishop's status as a "qualifications body": see [109].

27. Mr Jones QC on behalf of the Canon submits that both the PTO and the EMPL are "relevant qualifications" and that accordingly, the Bishop is a "qualifications body." He drew attention to the breadth of section 54(3) and in particular, to the fact that a "relevant qualification" may be one which "facilitates engagement" in a vocation.

28. It is accepted that an EPML would have allowed the Canon to perform "such offices and services" as were specified in the licence at the hospitals specified and that the offer of work as a Chaplaincy and Bereavement Manager was conditional upon the Canon holding such a licence. Mr Jones submitted that it was quite clear from the job description which included a broad range of tasks and obligations including general bereavement counselling and a requirement to meet the requirements of the Church of England in the provision of the chaplaincy services and in the personal conduct of the role and to "provide support to parents following neonatal death – including . . . religious ceremonies . . ." (see paragraphs 6, 7 and 11 of the job description under the heading "Key Result Areas") that both the PTO and the EMPL are "relevant qualifications".

29. In relation to the PTO he referred us to the terms of the 7 July Letter which was also sent to the Canon under cover of another letter of the same date. In the latter, which was headed "Strictly Private and Confidential", (the "Confidential Letter") the Bishop stated: "I know this will be a disappointment to you, but for reasons of consistency, I am unable to issue a licence in the present circumstances." In the 7 July Letter, the Bishop had stated as follows:

> " . . .
>
> 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 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."

Mr Jones submits, therefore, that it was harder to obtain an EPML because the PTO had been revoked because to grant the former would create inconsistency, the latter having been revoked. Therefore, had the Canon retained his PTO, Mr Jones submits that it would have facilitated the grant of an EPML. Accordingly, he says that both the PTO and the EPML fall within the definition of "relevant qualification" because having a PTO would have facilitated the grant of the EPML which was a condition of the paid employment on offer.

30. In this regard, Mr Jones also relies upon an email from the Chaplaincy Manager of the NHS Trust (who is also a Church of England clergyman) to the Bishop dated 24 July 2014. The Chaplaincy Manager pointed out that as a result of the lack of an EPML he had been unable to recommend that the NHS Trust proceed with the appointment of the Canon and noted that "the Trust's Job Description required the Bishop's Licence; and Chaplaincy's professional standards require a chaplain to have recognised or accredited status with their faith community." Mr Jones points to the use of the terms "professional standards" and "status" and submits that they are consistent with the EPML amounting to a vouching to the public.

31. Mr Jones took us to a number of authorities the first of which was *British Judo Association v Petty* [1981] ICR 660. It was a case concerned with predecessor legislation to the 2010 Act, the Sex Discrimination Act 1975, but nothing turns on that. On Mrs Petty's complaint to an industrial tribunal that she had been refused a referee's certificate on the grounds of her sex, contrary to section 13 of the Sex Discrimination Act 1975, the tribunal found that although her activities as a referee were voluntary, the certificate was a qualification which facilitated her engagement as a judo coach for which she was paid and therefore facilitated her trade or profession. The claim had been framed as one of indirect discrimination, the view having been taken that she could not claim under section 6 because she was not employed as a referee, it being a voluntary, unpaid activity.

32. Browne-Wilkinson J (as he then was) sitting in the EAT considered the nature of the appropriate question to pose at 663E – 664B as follows:

> "Mr Beloff first submitted that section 13 had no application since the national referee certificate was not an authorisation or qualification which facilitated engagement in a profession or trade. He submitted, and Mr. Keith for the complainant accepts, that the purpose or intention of the association in awarding the certificate to the complainant was not to facilitate her profession as a judo instructor but to set and maintain the standards of refereeing in an entirely amateur sport. Mr. Beloff contended that section 13 ought to be narrowly construed to apply only to those cases where the purpose of the certifying body in issuing the certificate was to facilitate the certificate holder's profession or trade. The test, said Mr. Beloff, was not the objective test adopted by the industrial tribunal, "Did the certificate facilitate the complainant's profession or trade? " but the subjective test, "Did the association issue the certificate for the purpose of facilitating the complainant's profession or trade?"
>
> We have no hesitation in rejecting this first submission. There is no warrant for it in the words used in the section and we can discern no policy behind the Act which requires the section to be so construed. On the contrary, there seem to us to be good reasons why it should not be construed in such a limited manner. On Mr. Beloff's construction if driving examiners were instructed to insist on higher standards for women than for men in relation to the driving test, a woman who needed to drive for the· purposes of her job would have no redress: the purpose of the driving test would not be to enhance the driver's chances of employment and therefore, on Mr. Beloff's test, the section would have no application. In our view, section 13 covers all cases where the qualification in fact facilitates the woman's employment, whether or not it is intended by the authority or body which confers the authorisation or qualification so to do."

In just the same way, Mr Jones says that the question is not whether a PTO (which itself does not lead to paid employment) is issued for the purpose of facilitating employment whether as a chaplain or otherwise, but whether it actually does so.

33. He also referred us to *Tattari v Private Patients Plan Ltd* [1998] ICR 106 which was approved and applied in *Kelly v Northern Ireland Housing Executive & Ors* [1999] 1 AC 428. In the case of *Tattari* the Court of Appeal held that the industrial tribunal and the EAT had correctly held that Private Patients Plan Ltd ("PPP") was not a qualifying authority or body within the meaning of section 12 of the Race Relations Act 1976 (the '1976 Act'). Dr Tattari held a Greek medical qualification. She applied to be added to PPP's list of specialists but was refused because she did not meet their requirements, as the certificate recognising her Greek qualification was insufficient. She claimed that that amounted to unlawful indirect discrimination under section 12 of the 1976 Act. Beldam LJ, with whom Roch LJ and Sir John Balcombe agreed, held at [21] of his judgment that PPP was not a qualifying body within the meaning of section 12 and that "the kind of

bodies referred to are those similar to authorities which are empowered to grant qualifications or recognition for the purposes of practising a profession, calling, trade or activity."

34. Mr Jones contrasted those cases with *Ali & Anr v McDonagh* [2002] ICR 1026 in which would be Labour Party candidates in local elections were suspended for alleged breaches of the party's rules, pending disciplinary hearings, claimed that they had been unlawfully discriminated against on grounds of race under section 12 of the 1976 Act. The Court of Appeal held that the Labour Party when selecting a candidate for local elections was not a body which "can confer an authorisation or qualification which is needed for, or facilities, engagement in a particular profession" for the purposes of section 12. Peter Gibson LJ gave the judgment of the Court of Appeal and at [28] stated as follows:

> ". . . The obvious application of the section is to cases where 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. . . "

Mr Jones' submission is that these are not the only circumstances in which a body or individual can be a "qualification authority." He also drew attention to the passage at [35] in which it was stated that the Labour party was not the kind of qualifying body with which the section was concerned, its activities being for its own political purposes. Peter Gibson LJ went on:

> " . . .we cannot accept that there is any conferment of approval by the Labour Party when a member who has nominated himself or been nominated as a local government candidate has his name go forward to the pool available for selection. No status in any meaningful sense is thereby conferred. . ."

35. Similar circumstances were addressed by the House of Lords in *Watt (formerly Carter) & Ors v Ahsan* [2008] 1 AC 696. The applicant for selection by the Labour Party as a candidate for local elections brought a claim under section 12 of the 1976 Act alleging unlawful discrimination on racial grounds. The House of Lords held, amongst other things, that in selecting candidates for local elections the Labour Party was not a body which conferred an authorisation or qualification needed for engagement in a profession or trade within section 12. Lord Hoffmann, with whom Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Carswell and Lord Brown of Eaton-Under-Heywood agreed, dealt with the question of whether the Labour Party was a "qualifying body" for the purposes of section 12 at [18] in the following way:

> "18 . . . logically the first question to be answered is whether the Labour Party is a qualifying body for the purposes of section 12. In my opinion, for the reasons given by Peter Gibson LJ in Ali v McDonagh [2002] ICR 1026, it is not. The notion of an "authorisation or qualification" 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. That is why

> section 12 falls under the general heading of discrimination "in the employment field". But that is far removed from the basis upon which a political party chooses its candidates. The main criterion is likely to be the popularity of the candidate with the voters, which is unlikely to be based on the most objective criteria. That will certainly be true of selection by vote of the branch and I doubt whether greater objectivity can be expected of a selection committee. The members or selection panel want to choose the candidate who, for whatever reason, seems to them most likely to win or at least put up a respectable showing in the election."

36. In *Patterson v Legal Services Commission* [2004] ICR 312 the sole principal of a firm of solicitors claimed, amongst other things, that she had been discriminated against on grounds of race under section 12 of the 1976 Act in relation to the grant and operation of a franchise enabling the firm to receive public funds for the provision of certain legal services. It was Mrs Patterson's case that in granting a franchise and thus the right to display the relevant logo and, in effect, the right to do publicly funded work, the LSC conferred an authorisation which facilitated her engagement in the solicitors' profession. Clarke LJ gave the judgment of the Court of Appeal. He noted at [73] that the Oxford English Dictionary defines "licence" as a formal permission from a constituted authority to do something and concluded that it was thus "a form of authorisation." He went on at [77] to distinguish the case of *Kelly v Northern Ireland Housing Executive & Ors* in the following terms:

> "Lord Clyde said, at p 847, that the exercise of a power to confer a qualification on a person is something more than providing for oneself the professional services which that person is already qualified to perform. In granting a franchise the commission is not simply selecting a solicitor to perform services which he or she is already qualified to perform but satisfying itself that the applicant meets the LAFQAS standard in order to ensure that the services which he or she will perform for his or her clients will meet that standard."

Mr Jones submits that the circumstances are analogous with those in this case. The Canon was already a priest of the Church of England but as a result of the EPML would have been able to hold himself out as such for the purposes of the post offered by the NHS Trust.

37. Lastly, we were referred to the decision of the EAT in *Kulkarni v NHS Education Scotland* [2013] EqLR 34, a case which was concerned with whether NHS Education Scotland was a "qualification body" within the meaning of section 53 and 54 of the 2010 Act. Paragraph [24] is as follows:

> "24. Where an issue arises as to whether or not a respondent is a "qualifications body", the tribunal's task is, essentially, set by 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."

Mr Jones submits that the EAT was correct in its analysis and that if applied in this case, it is clear that the Bishop was a "qualification body."

38. In relation to the PTO, Mr Linden on behalf of the Bishop reminded us that it was common ground that the qualification had to facilitate paid work and it was accepted that a PTO itself did not do so. It merely enabled one to officiate within a diocese with the consent of the incumbent of the benefice in question. Mr Linden says that it is not sufficient that the PTO should facilitate the grant of another qualification. It must itself facilitate the offer of work and even if it did, in principle, the ET found that it did not do so in this case. In any event, it is Mr Linden's submission that the grant of a PTO and an EPML are not dependent upon each other and therefore, the grant of a PTO does not facilitate the grant of an EPML. The basis for both of them is good standing with the Church. However, as the ET had found having heard the Bishop's evidence and Her Honour Judge Eady QC recorded at [102] of the EAT judgment, despite the need to be consistent in refusing the EPML, even if there had been no PTO, the Bishop would nevertheless still have refused to grant the EPML.

39. Further, in relation to the EPML Mr Linden says that is more like a character reference than a qualification or authorisation. It is a one off licence in respect of a particular place and is analogous to the approval of the Bishop to be part of his mission team within the Diocese. He says that its grant requires a subjective assessment of the relevant criteria rather than an objective standard and that each bishop forms his own view in the particular circumstances.

Conclusions:

40. I shall consider the PTO first. I bear in mind that it is agreed that the PTO does not in itself lead to remuneration and that it is accepted for the purposes of this appeal that remuneration is necessary for the activity to amount to a trade, profession or vocation. I make no comment upon whether this assumption is correct. I also bear in mind that Mr Jones has focussed therefore, upon the PTO facilitating the grant of an EPML. In any event, I can see no error of law in the EAT reasoning in this regard. Quite rightly, at [102] of her judgment, Her Honour Judge Eady QC set out the ET's finding that even if the Canon had not had a PTO to be revoked the Bishop would have refused to grant him an EPML. She went on at [103] to deal with what was characterised as the correct question to ask which was "what would have happened if the PTO had not been revoked?" She concluded that the decisions in relation to the PTO and the EPML were consistent because they both reflected the Bishop's view on the Canon's "standing", but that they were not interdependent and did not facilitate each other. I agree. Although it may be true that had the Canon had a PTO it would have been more likely that he would have been granted an EPML, that is because the grant of both the PTO and the EPML

are in part dependent upon the clergyman in question being in "good standing". The fact that the same criterion is the basis for both "qualifications" (and I use the term in the loosest sense) does not mean that having one is dependent upon having the other or facilitates the grant of the other whether directly or indirectly. It is the fulfilment or failure to fulfil the necessary and identical criterion in each case which creates the similarity.

41. Further, as Her Honour Judge Eady QC found on the basis of the findings of fact made by the ET, the PTO and the EPML were not interdependent and did not facilitate each other, despite the fact that the Bishop referred to "inconsistency" in the 7 July Letter. The inconsistency would have arisen were a different view on "good standing" taken in relation to the grant of an EPML than had been taken when revoking the PTO, the underlying facts remaining the same. As Her Honour Judge Eady QC pointed out, the Bishop's position was consistent in relation to good standing and the ET had found that the PTO and the EPML were not interdependent.

42. It seems to me that the circumstances are different from those in the *Petty* case in which the referee's certificate was held to have facilitated the trade or profession as a judo coach whether or not that had been the purpose of the association when issuing the certificate. Had the grant of a PTO been necessary in order to obtain an EPML, or at the very least, whatever its intended purpose, had assisted the grant of an EPML, it is possible that there may have been some strength in Mr Jones' argument. However, on the basis of the ET's findings of fact, the PTO and the EPML were entirely separate, although the grant of both was based upon the same criterion.

43. I can also find no error of law in the EAT's treatment of the issue of whether the EPML is a "relevant qualification." It is clear that the EPML was a condition of the employment on offer. It was needed for, or, at the very least, would have facilitated the appointment and it is common ground that the position of Chaplaincy and Bereavement Manager amounted to a "vocation" for the purposes of section 212 of the 2010 Act. I am unable to accept Mr Linden's submission that the EPML was equivalent to a character reference and could not amount to a "relevant qualification". I agree with Mr Jones that it is quite clear from the job description that the person taking up the post was required to hold the appropriate licence and be "accredited" by his or her faith body. It was for that reason that they were to be employed. This is consistent with the way in which the Chaplaincy Manager described the situation in his letter to the Bishop. He pointed out that the person taking up the post was required to have "recognised or accredited status with their faith community."

44. I come to this conclusion despite the fact that the decision to grant an EPML is one for the individual bishop concerned based upon that individual's assessment of the particular applicant. That is an inevitable consequence of the structure of the Church of England and the authority of individual bishops. It is not suggested that a decision of this kind is made upon a whim. In fact, we were referred to the undisputed evidence of the Bishop in relation to the grant of licences to priests from different diocese. It entails obtaining a "Clergy Current Status Letter" from the "sending bishop" which contains specific paragraphs about prescribed matters. Those matters are also the subject of detailed Guidance Notes. It seems to me, therefore, that the decision in relation to the grant of a licence is subject to objective criteria even if different bishops may reach different conclusions.

45. The circumstances are not the same as those of the would-be political candidates in the *Ali* and *Ahsan* cases. Their selection would not have denoted any particular status at all and it is not clear that any objective criteria would be applied in the selection process. By contrast, the EPML amounts to an authorisation and a vouching to the public that the person in question is qualified and has a particular status within the Church of England which can be relied upon and which was arrived at by the application of particular criteria: *Watt v Ahsan* at [18]. That is the very reason it was required before the Canon could take up the post with the NHS Trust. As Her Honour Judge Eady QC pointed out at [108] of the EAT judgment, the Bishop on behalf of the Church of England was not simply applying a standard for his and its own purposes. Granting an EPML signifies to the NHS Trust in this case and through the Trust to the public that the individual meets a particular standard and has an appropriate status. The circumstances are analogous with those in the *Patterson v Legal Services Commission* case. In granting an EPML a bishop is vouching that a priest has the requisite status within the Church of England for the purpose of the outward facing role which the employment in question entails.

46. I would, therefore, dismiss the appeal in relation to the PTO, and the cross-appeal in relation to the EPML and the status of the Bishop as a "qualifications body."

Is the Bishop entitled to rely upon the exception in Schedule 9 paragraph 2 of the Equality Act 2010?

47. Schedule 9 where relevant is as follows:

> "2 (1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) 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).
>
> (2) …
>
> (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—
>
> (a) a requirement to be of a particular sex;
>
> (b) a requirement not to be a transsexual person;
>
> (c) a requirement not to be married or a civil partner;
>
> (ca) a requirement not to be married to a person of the same sex;
>
> (d) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
>
> (e) a requirement relating to circumstances in which a marriage or civil partnership came to an end;
>
> (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."

The term "employment", which appears in sub-paragraphs (1) and (3) is defined at section 83 (2) of the Act as, leaving aside certain special cases, "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

48. Her Honour Judge Eady QC dealt with these matters in the following way:

> "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)."

49. Paragraph [202] of the ET decision is as follows:-

> "We then get the letter he wrote to Ms Toor on 5 July … [the 7 July letter]. So that is clear, is it not? 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 [sic] 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."

50. There are two central questions to be determined: was the EPML a qualification . . . for the purposes of employment . . . for the purposes of an organised religion (see Schedule 9 paragraph 2(3)(a)); and was the requirement not to contract a same-sex marriage applied in order to comply with the "doctrines of the religion" (see Schedule 9 paragraphs 2(3)(b) and (5))?

51. Mr Jones answers both questions in the negative. In summary, in relation to the first question he submits that the EPML would have qualified the Canon for the purposes of employment but that it was employment with the NHS Trust and not for the purpose of organised religion at all. He says that the question is for whose purpose is the employment and that the answer is the NHS Trust and not the Church of England. He submitted that it would be extraordinary if the Bishop or the Church had any control over the Canon's duties as a bereavement counsellor. Furthermore, he says that a distinction must be made between employment with a religious element such as the post which the Canon wished to take up and one for the purposes of an organised religion.

52. In relation to the construction of Schedule 9 paragraph 2(1)(a) Mr Jones referred us to *R (Amicus) v Secretary of State for Trade and Industry* [2007] ICR 1176 which concerned the validity of regulations 7(2) and (3) and 20(3) of the Employment Equality (Sexual

Orientation) Regulations 2003. The Regulations were made for the purpose of implementing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation so far as it related to discrimination on grounds of sexual orientation and contained, in regulation 7(3) amongst others, a derogation for the purposes of occupational requirements, including an exception in relation to employment "for the purposes of an organised religion". Richards J concluded that on its proper construction the exception was very narrow and accepted that "for the purposes of organised religion" was a narrower expression than "for the purpose of a religious organisation". He also accepted the example given that employment as a teacher in a faith school is likely to be "for the purposes of a religious organisation" but not "for the purposes of organised religion": see [115] and [116]. In relation to the phrase "so as to comply with the doctrines of the religion" in regulation 7(3)(b)(i), Richards J held at [117] that the condition:

> " . . . 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. That is very narrow in scope. . ."

53. Mr Jones also referred us briefly to *Fernandez Martinez v Spain* (2014) 37 BHRC 1, a case which was heard by the Grand Chamber of the European Court of Human Rights. In that case an ordained Roman Catholic priest married a woman in a civil ceremony. He was employed by the Spanish state as a teacher of Catholic religion and ethics in a secondary school. The renewal of his contract was subject to annual approval by the bishop. The teacher made his marital status public in an article about a movement for optional celibacy of priests. Thereafter, the Pope granted him a dispensation from celibacy. Nevertheless, the bishop decided not to propose the renewal of his employment as a teacher on the basis that he had made public his family situation and the fact that he was a member of the movement which challenged certain precepts of the Catholic Church together with the need to avoid scandal and to respect the sensitivity of parents as they might be offended if he continued to teach Catholic religion and ethics. His employment was terminated. It was held by majority that there had been no violation of Article 8 of the ECHR on the basis amongst others, that a fair balance had to be struck between the general interest in the effective respect for family life and the interest of the individual and that the State enjoyed a certain margin of appreciation. The court stated that:

> "art 9 of the convention does not enshrine a right of dissent within a religious community; in the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual's freedom of religion is exercised by the option of freely leaving the community.": [128]
>
> And
>
> " . . . but for very exceptional circumstances, 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 . . . 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 . . ": [129]

It also took into account the fact that the priest had knowingly placed himself in a position which was incompatible with the Church's precepts: [146.]

54. In relation to the second question, although Mr Jones accepts that the Church of England does not regard a same sex marriage as a "marriage" for its purposes, he says that it has no doctrine in relation to same-sex marriage at all and therefore, the requirement that the Canon did not enter into a same-sex marriage could not be necessary in order to comply with the "doctrines of the religion". The only relevant Canon of the Church of England refers to marriage between a man and a woman and if the Bishop were to succeed in this defence Mr Jones says that it would be necessary for him to be able to point to an express provision in the Canons, the Thirty-Nine Articles, the Book of Common Prayer or the Ordinals expressly prohibiting clergymen to enter into same-sex marriages. There is no such provision and therefore, the Bishop cannot avail himself of the defence in Schedule 9 because he cannot satisfy the compliance principle. He also says that the matter must be approached from an objective standpoint: *Amicus* at [117].

55. Furthermore, Mr Jones says that the statement of Pastoral Guidance from the House of Bishops cannot be relied upon because it has not been approved by the General Synod and is not part of the doctrine of the Church of England. He also points to the fact that even at paragraph 27, the Guidance does not state the consequences if a priest enters into a same sex marriage. He says that the matter is left open to enable different bishops to exercise their discretion, that this is illustrated by the differing treatment that the Canon received from the Bishop and the Bishop of Lincoln, and that as a result, it is obvious that the "application of the requirement" by the Bishop in this case was not necessary to be compatible with the doctrines of the religion and was not imposed with reference to an objective test.

56. In this regard, Mr Gau on behalf of the Canon also took us to a report dated 6 August 2014 by the Diocesan Registrar of the Diocese of London in relation to a complaint made under the Clergy Discipline Measure 2003 against Reverend Andrew Foreshew-Cain. The Reverend Cain was an incumbent whom it was alleged had acted in a manner "unbecoming the office and work of a Clerk in Holy Orders" by entering into a same sex marriage. We were informed that he remained in post. The Registrar concluded that the complainant did not have a "proper interest" to bring the complaint. However, he also noted that: some had stated that the matter pertained to doctrine which did not fall within the Clergy Discipline Measure; that doctrine on a literal interpretation included all the teachings of the Church of England; that it is presumably for the House of Bishops to give a lead as to what should and should not be regarded as doctrine; that the Bishops had said in clear terms that in their view, entering into a same sex marriage would be inappropriate conduct for a member of the clergy; and that what was being alleged was essentially such conduct. However, Mr Gau submitted that the Report evidenced the fact that the Church of England did not consider the matter to be one of doctrine because otherwise a different route other than one of discipline would have been adopted.

57. Furthermore, Mr Jones submits that the Declaration of Assent contained in Canon C15 is not an undertaking never to differ or a bar to dissent and that marriage does not fall

neatly within Canon C26. In this regard, Mr Gau referred us to [32] in the judgment of Arden LJ in *Sharpe v Worcester Diocesan Board of Finance Ltd* at which she recorded the evidence of a Professor McClean to the effect that the oath of canonical obedience was "largely symbolic" and that there was no sanction for disobeying a bishop or the oath of canonical obedience. He says therefore, that the ET was wrong to treat canonical obedience as if it were doctrine itself as he says it did at [202] of the ET decision.

58. He also criticises the reasoning in the EAT judgment at [112] and [113]. He says that simply because a same sex marriage is not within the Canons of the Church of England does not make it incompatible with them and that there is no reasoning as to incompatibility.

59. Mr Linden referred us to the Explanatory Notes both in relation to paragraph 2 itself and to the Marriage (Same Sex Couples) Act 2013 by which Schedule 9 paragraph 2(4) of the 2010 Act was amended to include sub-sub-paragraph (ca). However, it seems to me that they do not carry the matter any further forward. He also reminded us that section 13 Human Rights Act 1998 provides that:

> "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

60. He drew attention to the European Court of Human Rights decision in *Hasan and Chaush v Bulgaria* [2000] ECHR 30985/96 which was concerned with the choice of the Chief Mufti in Bulgaria. The court noted at [62] that:

> "The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion protected by Article 9 of the Convention."

He also relied upon the *Fernandez* case and submitted that the position was stronger here because the EPML would have allowed the Canon to officiate as a priest.

Conclusions:

61. In relation to both questions I agree with Mr Linden and can find no error of law in the reasoning of Her Honour Judge Eady QC. In relation to the first question, it seems to me that although the EPML was a condition of employment with the NHS Trust, it is clear from the job description that although there were some duties which were of a general nature, the NHS Trust intended to employ a properly accredited minister of religion to carry out all aspects of the post, including conducting Church of England services if

required. It required a clergyman properly licensed and approved by his bishop to carry them out. That person was to be based at the Faith Centre at the hospital. To put the matter another way, the focus or the purposes of the employment was that of organised religion. The appointee was not to be employed for some other purpose such as accounting, cleaning or the provision of medical services. Inevitably, the principal purpose of the NHS Trust was to provide medical services. However, in the circumstances, that does not prevent the EPML being for the purposes of employment with the NHS Trust for the purposes of organised religion. If Mr Jones were correct, the exception would have no purpose at all. All employment other than with a Church itself would fail to be "for the purposes of an organised religion." The circumstances of this case are different from those under consideration in the *Fernandez* case and considered by Richards J in the *Amicus* decision. In *Fernandez* the priest was employed as a teacher. The approval by the bishop was for the purposes of employment as a teacher, a role in which he was not required to carry out any duties relating directly to organised religion. He was not required to officiate as a priest. Here, it was intended to employ the Canon specifically because of his status as a minister of religion and in part to conduct religious services. The position is not even analogous to that of a teacher in a faith school, considered by Richards J in the *Amicus* case. In this case, the employment itself was in part, "for the purposes of an organised religion".

62. In relation to the second question, it seems to me that Her Honour Judge Eady QC was correct to conclude that "doctrines" for the purposes of paragraph 2(5) of Schedule 9 must be read more widely than what is considered strictly by a particular church or religious organisation to be "doctrine" by that organisation. As Mr Linden points out paragraph 2(5) uses the term "doctrines" and not "doctrine" and is intended to apply in relation to all religions. It seems to me that if one reads the sub-paragraph as a whole, in the context of the exception in paragraph 2 as a whole, it should be construed to mean the teachings and beliefs of the particular religious organisation which may be wider than what it itself labels "doctrine." Even if that were not the case, in this case, Canon A5 itself refers to the "doctrine of the Church of England" in wide terms and states merely that such doctrine is to be found "in particular" in the specific documents referred to. Accordingly, it seems to me that Her Honour Judge Eady QC was correct to conclude that the ET was entitled to find that the doctrines, as in teachings and beliefs of the Church of England, were as stated in Canon B30 with specific regard in relation to same sex marriages to the statement of Pastoral Guidance from the House of Bishops. She was quite right to note that the Court cannot be expected to enter into a theological debate in order to determine the doctrines itself: see [112]. Indeed, the Court ought not to do so. She was also right to find that the ET was entitled to find that the doctrines in relation to marriage were clear.

63. It was not necessary, as Mr Jones suggested, that there should be an express provision prohibiting a priest from entering into a same sex marriage and spelling out the consequences if he did. The teaching and in fact, the doctrine of the Church of England (in the sense in which the Church uses the term) is quite clearly spelt out in Canon B30. Paragraph 1 of that Canon makes clear that the Church of England considers marriage to be between one man and one woman. By its very terms it delimits the concept of marriage in accordance with the teachings and doctrine of the Church in a way which excludes same sex marriage. Furthermore, it is made clear in paragraph 3 that a priest is expected to uphold what is described expressly as "the Church's doctrine of marriage." As Mr Linden pointed out, Canon B30 does not state expressly that the Church of

England's doctrine of marriage does not include polygamy but it is quite clear that it does so.

64. Although the Marriage (Same Sex Couples) Act 2013 has extended the meaning of marriage, the position of the Church of England is carefully preserved in sections 1(3), (4) and 11. Mr Jones conceded that the Church of England does not accept same sex marriage as "marriage" for its purposes at all. As the statement of Pastoral Guidance from the House of Bishops made clear at paragraph 9, since the 2013 Act, there has been a divergence between the general understanding and definition of marriage in law and the "doctrine of marriage held by the Church of England and reflected in the Canons and the Book of Common Prayer." A clear statement on marriage and same sex marriage is contained at paragraphs 9, 11, 12, 26, 27 and 28 of that document, including the need to obey the Church on these issues. Paragraph 26 states expressly that marrying someone of the same sex would be at variance with the teachings of the Church of England. Paragraphs 27 and 28 leave little to the imagination in relation to the effect upon a clergyman's 'good standing' of entering into a same sex marriage. This is all the more so when coupled with the form of the Preface to the Declaration of Assent and the Declaration itself contained at C15 of the Canons and the requirement to exemplify the teachings of the Church contained at C26, to which reference is also made in paragraphs 23 and 26 of the statement of Pastoral Guidance.

65. In my view, the facts that the Bishop of Lincoln, in different circumstances, imposed a different sanction upon the Canon and that the Reverend Mr Cain (who was an incumbent at the time) was dealt with in another way are neither here nor there. Furthermore, although I do not consider that it has any particular weight at all, it seems to me that the Registrar's report to the Bishop of London in relation to Mr Cain points not only to "doctrines" but also to 'doctrine' as including all the teachings of the Church of England. In addition, I consider the question of whether the oath of obedience is enforceable to be irrelevant. As Her Honour Judge Eady QC pointed out, the ET was entitled to take into account all of the matters she referred to at [113].

66. It follows that I also consider that Her Honour Judge Eady QC did not err in law in deciding at [113] of the EAT Determination that the ET was entitled to find that the requirement had been applied so as to *comply* (emphasis added) with the doctrines as found. Accordingly, I would dismiss the appeal in relation to schedule 9 paragraph 2.

Did the EAT and the ET before it err in law in deciding that the revocation of the PTO and the refusal to grant an EPML were not, without more, sufficient to amount to harassment?

67. Section 26 of the 2010 Act is concerned with harassment. Where relevant, it provides as follows:

> " (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and

> (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> . . .
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation."

Further, Section 53(3) is as follows:

> (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."

68. It is accepted that initially, the harassment claim was put purely upon the basis that the unwanted conduct for the purposes of section 26 was the revocation of the PTO and the refusal to grant the EPML. The claim was later broadened to include both the decision and the manner of communication whether taken separately or in aggregate.

69. The ET found at [242] that the revocation of the PTO and the refusal to grant the EPML were "unwanted conduct" for the purposes of section 26 and that the Canon would not have been subject to that conduct had he not exercised his rights under the Marriage (Same Sex Couples) Act 2013. The ET also found that the revocation of the PTO and the refusal to grant the EPML caused the Canon distress and that it was humiliating and degrading: [244]. In addition, the ET found that the decision "struck at the [Canon's] self belief in a fundamental way": [258]. However, the ET did not agree with Mr Jones that there was anything aggravating about the way in which the matter had been handled: [251] – [263]. It concluded at [270], as follows:

> "270. Stopping there, we accept as already stated that the Claimant was clearly distressed and felt humiliated and degraded by what had occurred. As to whether his dignity was violated, we are with Mr Linden. Despite the valiant efforts of Mr Jones, 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."

70. Her Honour Judge Eady QC dealt with harassment at [116] – [126] of her judgment. At [116] she noted the ET's reasoning that the conduct in issue was unwanted and that objectively it created an adverse environment for the Canon but that "the [Canon] would never have been in this position had he not defied the doctrine of the Church" and that it would be "an affront to justice' for the Bishop's actions to amount to harassment when otherwise exempt from liability by reason of the Schedule 9 defence. She went on to consider the difficulties with that reasoning and to note that the focus of the appeal was in relation to the ET's focus on the Canon's conduct and its conclusion that it would be an "affront to justice" if a decision which was exempt under Schedule 9 could nevertheless constitute harassment. At [124] she concluded that the ET's reasoning disclosed no error of law. She went on to note that the Bishop's decision was not unexpected, that the Canon was aware that his marriage would be seen as in conflict with the teachings of the Church and he would be thus viewed as not in good standing. She went on:

> " . . . 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."

71. It is accepted that the Schedule 9 defence does not apply to harassment. Mr Jones submits, however, that the way in which the matter was approached both by the ET and the EAT in requiring an additional "aggravating factor" over and above those otherwise required to establish a claim in harassment where the Schedule 9 defence is available amounts to writing the Schedule 9 defence into the harassment provisions in a way which is impermissible. He says that both the ET and the EAT fell into this error and that in addition, the EAT erred in finding that the Canon knew that the loss of good standing was an inevitable consequence of his marriage: EAT judgment at [34].

72. Mr Linden submits that the EAT and the ET's reasoning is unimpeachable. He says that it is not reasonable to react in a way which fulfils section 26 and section 53(3) in relation to conduct in respect of which Parliament has provided a defence, where that defence is made good. Furthermore, he submits that Parliament cannot have intended that decisions which are authorised under Schedule 9 could then be rendered unlawful by being re-

classified as harassment. He points out that section 26(4) requires the Tribunal when determining whether conduct falls within Section 26(1)(b) to consider amongst other things, the circumstances of the case and whether it is reasonable for the conduct to have the effect referred to in section 26(1)(b).

73. The elements necessary for liability under a very similar provision in section 3A Race Relations Act 1976 were analysed by Underhill J (as he then was) in his capacity as President of the EAT in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724. Both Mr Jones and Mr Linden relied upon the analysis. It was that the respondent must have engaged in unwanted conduct; that conduct must have had the purpose or the effect of either violating the claimant's dignity or creating an adverse environment for her; and the conduct must have been on the grounds of the claimant's race. The President went on to consider section 3A(2) which provided that the conduct should "only be regarded as having the [proscribed] effect if having regard to all the circumstances . . . it should reasonably be considered as having that effect" as follows:

> "15. Thirdly, 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. . . 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 . . . "

74. Mr Linden says that: the provisions should not be construed in a way which renders the conduct for which Parliament has provided a defence, nevertheless capable of being re-packaged as harassment; and in any event, in all the circumstances of this case, it was not reasonable for the Canon to have reacted as he did.

Conclusions:

75. It seems to me that this is quite a narrow question of construction. I agree with Mr Jones that it would be impermissible to read in the defence in Schedule 9 paragraph 2 in relation to harassment which is not there. However, when deciding whether conduct has the effect referred to in section 26(1)(b), one is required to take into account the circumstances of the case and whether it is reasonable for the conduct to have had that effect: section 26(4)(b) and (c). It seems to me that in the context of this case, unless there are "aggravating features", it cannot be reasonable for unwanted conduct which otherwise falls within the defences in Schedule 9 paragraph 2, to have had the effect proscribed in section 26(1)(b). To conclude otherwise would make a nonsense of providing the defence in Schedule 9 in the first place.

76. In any event, in this case, the ET found that there had been lengthy discussions with the Bishop and others in relation to the Canon's intention to marry his same sex partner and their opposing positions were clear. Therefore, the consequences in relation to his standing cannot have been much of a surprise, despite the different approach adopted by the Bishop of Lincoln. In the circumstances, therefore, whether as a result of the statutory defence in relation to the same facts which amount to the unwanted conduct, or on the facts of this case, I agree with Mr Linden that it was not reasonable for the Canon to have reacted as the ET found that he did. Accordingly, I can find no error in Her Honour Judge Eady QC's conclusion at [124] of her judgment and I would dismiss the appeal on this ground also.

Underhill LJ:

INTRODUCTION

77. I agree that both the appeal and the cross-appeal should be dismissed. I essentially agree with the reasoning and conclusions of Asplin LJ in her comprehensive judgment, but there are some aspects on which I would like to say something of my own.

THE DIRECT DISCRIMINATION CLAIM

78. As regards the question of whether the PTO and the EPML constituted "relevant qualifications" for the purpose of section 53 of the Act, I have nothing to add to the reasoning at paras. 40-42 of Asplin LJ's judgment. For the reasons which she gives, I would hold that the PTO did not constitute such a qualification but that the EPML did. I would also, like her, reserve my position on whether it is in all cases necessary that an activity should be remunerated for it to be part of the carrying on of a profession (which includes a "vocation or occupation"): in *Petty* that was assumed to be the case as regards voluntary judo referees but the position as regards other kinds of putative profession may not be the same.

79. As regards the availability of the defence under Schedule 9 of the Act, I did not find the route through the statutory provisions entirely straightforward, and I would like to give my reasons in my own words, though I do not believe that they substantially differ from Asplin LJ's.

80. We are here concerned with paragraph 2 of Schedule 9, which is headed "Religious requirements relating to sex, marriage etc, sexual orientation". Its relevant terms are set out at para. 47 of Asplin LJ's judgment. It is worth noting that it is not the only exception concerned with religion: paragraph 3 is headed "Other requirements relating to religion or belief". The specific provision relied on by the Bishop in the present case

is sub-paragraph (3), but it requires cross-reference to other sub-paragraphs. Specifically, sub-sub-paragraph (a) cross-refers to sub-paragraph (1) (a)[1]; and sub-sub-paragraph (b) requires reference both to sub-paragraph (4), which identifies the various types of "requirement" potentially exempted, and to sub-paragraph (5), which defines "the compliance principle". Thus in order to rely on the defence under paragraph 2 (3), bringing in the various cross-references, the Bishop must show:

(a) that the EPML (being the qualification in question) is "for the purposes of employment for the purposes of an organised religion"; and

(b) that the requirement not to be married to a person of the same sex (see sub-paragraph (4) (ca)) is applied "so as to comply with the doctrines of the religion".

I take those two elements in turn.

81. As to (a), the composite drafting is clumsy, because it uses the phrase "for the purposes of" twice. It is also to be noted that the provision is concerned only with qualifications for "employment" (see the definition at para. 47 in Asplin LJ's judgment), whereas section 53 is concerned with qualification for engagement in any trade or profession, which need not take the form of employment. However, we are in the present case concerned with a qualification which was needed in order to enable Canon Pemberton to be employed as Chaplaincy and Bereavement Manager, so any potential mismatch between the scope of section 53 and paragraph 2 (3) does not arise. I agree with Asplin LJ (and indeed with the ET and the EAT) that that employment was "for the purposes of an organised religion". In this context the phrase "for the purposes of" must connote the nature of the work required by the employment. It is beyond question that a central and necessary part of the chaplaincy role was to act as a minister of the Church of England: indeed it was because the withholding of the EPML meant that Canon Pemberton could not do so – formally, that he could not perform any "offices and services" as such a minister (see the words of the 1967 Measure quoted at para. 13 above) – that the Trust felt unable to employ him. I will not repeat the points that Asplin LJ makes at para. 61 of her judgment, which are compelling. It cannot make any difference that acting as a minister of the Church of England was not the totality of the role: if the employment was for the purpose of so acting it is irrelevant that there were other purposes as well. It follows that the EPML was "for the purposes" of employment of the specified kind. It is true that an EPML may be granted in order to enable a minister to officiate in circumstances which do not amount to or involve employment. But in this context the question must be what was the purpose of the specific withheld EPML.

82. As to (b), I agree with Asplin LJ's reasoning at paras. 62-66 of her judgment. In particular, I agree with her that what constitutes a "doctrine" for the purpose of the Act must refer to the teachings and beliefs of the religion in question and that what those teachings and beliefs are must in principle be decided by the Court itself on the basis of the evidence adduced to it. Of course in many cases it will be sufficient to refer to official statements of doctrine published by the recognised central authority of the religion in question; but not all religions will have such an authority, or there may be cases where it is clear that it uses the term "doctrine" in a specific sense which is narrower than that intended by the Act.

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[1] Sub-paragraph (1) is not otherwise relevant, because section 53 is not one of the provisions identified in sub-paragraph (2).

83. It is clear that the Canons of the Church of England must be a source of its "doctrines" in the statutory sense. Even if the effect of Canon A5 were that, from the Church of England's own point of view, its doctrine consists only of things stated explicitly in the Thirty Nine Articles, the Book of Common Prayer or the Ordinals, this would be a case of the kind mentioned above where the religion in question uses the term "doctrine" in a narrower sense than the Act. But I do not in fact think that that is its effect. It is not simply the use of the term "in particular" noted by Asplin LJ: as I read it, although Canon A5 identifies the fundamental sources from which the doctrine of the Church derives, part of the purpose of the Canons as a whole is to state such doctrines more clearly or succinctly than may appear in those sources – Canon B30 being a case in point.

84. Once that point is reached, I think it is sufficiently clear that the Bishop withheld an EPML from Canon Pemberton "so as to comply" with the doctrine expressed in Canon B30 that "marriage is *in its nature* a union … of one man with one woman". I have italicised the words "in its nature" because of Mr Jones's submission that the doctrine there stated is only concerned with marriage as recognised by the Church of England, and that the Church takes no position on the different concept of marriage now introduced by the secular law. It seems to me that those words are inconsistent with any such distinction and that they state the Church's position about the nature of marriage generally. If, however, there is room for doubt about that, it is clearly resolved by the Statement of Pastoral Guidance from the House of Bishops: see para. 19 of Asplin LJ's judgment. Paragraph 26 says in terms that "getting married to someone of the same sex would … be clearly at variance with the teachings of the Church of England"; and paragraph 27 spells out that it would in consequence not be appropriate conduct for a person in holy orders to enter into such a marriage. It is immaterial that that Statement had not been adopted by the General Synod: it is plainly powerful evidence, which the ET was entitled to accept, as to the meaning and effect of Canon B30 and thus as to what the doctrine of the Church of England is on this subject.

HARASSMENT

85. Although I agree with Asplin LJ that the appeal on the harassment claim also should be dismissed, I should like to give my reasons in my own words, not least because of the reference made by both parties to my judgment, sitting in the EAT, in *Dhaliwal*.

86. I should start by noting that section 26 of the 2010 Act, which is set out at para. 67 of Asplin LJ's judgment, is not in identical terms to section 3A of the Race Relations Act 1976, with which I was concerned in *Dhaliwal*. Section 3A read:

> "(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1 (1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of –
>
> (a) violating that other person's dignity, or
>
> (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
>
> (2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the

> circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."

87. One difference between the two sections is that in section 3A the conduct must be "on grounds of [the protected characteristic]" whereas in section 26 it need only be "related to" that characteristic. That may be a significant difference in some cases, and it means that element (3) in the analysis at para. 10 of my judgment in *Dhaliwal*, with the associated comments at para. 15, is redundant; but it is immaterial for our purposes, since it was accepted in the present case that the conduct complained of related to Canon Pemberton's sexual orientation.

88. The other difference is that, although section 26 (2) has the same three elements as section 3A (2) (in short: B's perception; the "circumstances"; and reasonableness), they are specified as matters to be taken into account in deciding whether the effect has occurred, whereas in section 3A (2) it was expressed to be a requirement of liability that it was reasonable that the conduct should have the effect in question. However, it was not suggested to us that that difference in the structure of the successor provision was intended to make any substantive difference, and I do not believe it does[2]. Nevertheless it means that the precise language of the guidance at para. 13 of my judgment in *Dhaliwal* needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as[3] having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment[4] created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

89. Applying that approach to the facts of the present case, it seems to me plain that the ET was entitled to find that the withdrawal of the PTO and the withholding of the EPML did not amount to harassment. I have no difficulty understanding how profoundly upsetting Canon Pemberton must find the Church of England's official stance on same-sex marriage and its impact on him. But it does not follow that it was reasonable for

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2 Perhaps the change was a response to the complaint at para. 13 of my judgment in *Dhaliwal* that this part of section 3A was "clumsily expressed", but I suspect that it is simply a matter of the 2010 Act having its own drafting style.

3 The insertion of the words "to be regarded as" is a slight expansion of the statutory language, but it only spells out what is necessarily implicit in it.

4 This is the shorthand adopted in *Dhaliwal* for the cornucopia of epithets deployed in the statute. Although it is a convenient shorthand, it is important not to lose sight of the force of the particular adjectives used: see *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390, *per* Elias LJ at para. 47.

him to regard his dignity as violated, or an "intimidating, hostile, degrading, humiliating or offensive" environment as having been created for him, by the Church applying its own sincerely-held beliefs in his case, in a way expressly permitted by Schedule 9 of the Act. If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive.[5] It would be different if the Bishop had acted in some way which impacted on Canon Pemberton's dignity, or created an adverse environment for him, beyond what was involved in communicating his decisions; but that was found by the ET not to be the case.

90. The same conclusion could be achieved by treating the matters relied on above as part of the relevant circumstances under section 26 (4) (b), but I think that the focus on reasonableness in section 26 (4) (c) engages more directly with the reason why the claim ought not to succeed.

91. Although I have expressed myself slightly differently, I understand my reasoning to correspond in substance to that of Asplin LJ at paras. 75-76 of her judgment.

Lady Justice Gloster

92. I agree.

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[5] There is perhaps a parallel, though I do not suggest the situations are identical, with the reasoning of the House of Lords in *Derbyshire v. St. Helens Metropolitan Borough Council* [2007] UKHL 16, [2007] ICR 841, where it was held that an act done reasonably by an opponent in the course of litigation could not constitute a "detriment" for the purpose of the discrimination legislation, even if it caused distress: see per Lord Neuberger at para. 68 (p. 867 C-E).