EMPLOYMENT TRIBUNALS

Claimant: **Ms Seyi Omooba**

Respondents: **(1) Michael Garret Associates Ltd, trading as Global Artists**
(2) Leicester Theatre Trust Ltd

London Central Remote Hearing (CVP) **On: 1-5, 8 February 2021**

Before: **Employment Judge Goodman**
Ms. S. Went
Ms. L. Moreton

Representation
Claimant: Mr Pavel Stroilov, lay representative
Respondents: (1) Mr Christopher Milsom, counsel
(2) Mr Tom Coghlin, Q.C.

JUDGMENT

1. The claims of discrimination against both respondents do not succeed.
2. The claims of harassment by either respondent do not succeed.
3. The second respondent was not in breach of contract.

REASONS

1. The Claimant is an actress. She brings claims of discrimination and harassment by each of the two respondents, expressed to be because of, or related to, religious belief. There are also claims of breach of contract.

2. In January 2019 she was engaged by the Second Respondent (the theatre) to play the lead role of Celie in a joint production between the Curve Theatre Leicester and the Birmingham Hippodrome of The Color Purple, a stage musical based on Alice Walker's novel. The First Respondent was the claimant's agent, and an employment services provider pursuant to section 55 of the Equality Act 2019. The Second Respondent was the Claimant's employer.

3. The production was to open in Leicester in June 2019 for two weeks, before transferring to Birmingham for a further week. As soon as the cast was announced on 14 March 2019, another actor tweeted accusing the claimant of being a hypocrite, publicising a Facebook post made by the Claimant from some years

before saying homosexuality was sinful and Christians should stand up for their beliefs on this. There followed a storm of adverse comment about someone with her views taking the lead in a play about a same sex relationship between women.

4. The Second Respondent terminated her employment on 21 March 2019. The First Respondent terminated its agency contract with the Claimant on 24 March 2019. These proceedings began in August 2019.

5. The pleadings are detailed. The legal issues arising were condensed into a consolidated list which runs to 7 pages. It is appended to this decision. Nevertheless there were some amendments in the hearing to reflect developments in the Claimant's evidence. The reasons for these amendments are set out next.

Late Amendment of Response

6. On the first morning of hearing the tribunal heard an application by the second respondent to amend the response, which was opposed by the claimant. After hearing from all three parties the tribunal allowed the two amendments. They both arise from the claimant saying in her witness statement that had she known that the direction of the production was to portray the relationship as lesbian, she would have pulled out. The first was to argue that in light of this, the respondent's decision to terminate was not unwanted conduct, the second, that there was no breach of contract, as the claimant by her intention was in repudiatory breach of the contract to play the part as directed when she must have known that this was likely, and did not say to the respondent that there was a risk she would disrupt the production by pulling out.

7. The tribunal allowed the application for these reasons: (1) until exchange of witness statements the respondent could not have expected that this is what the claimant would say (2) it did not require the reintroduction of the expert report of the theatre critic Mr Evans, because his report was premised on the play being about a same-sex relationship; in any case there are a number of difficulties with his report as explained by Griffiths J in the EAT decision in the interlocutory appeal in this case (3) prejudice to the claimant could be mitigated by permitting her representative to ask supplementary questions to add briefly to what she knew or ought to have known about the play, before cross examination began (4) given that we already have the claimant's witness statement and opening submission about her not wanting to play the part if the direction was that it was about a same-sex relationship, it was better that the legal arguments about this were set out clearly at the start of the case, rather than try to make findings and reach conclusions without this framework (5) as to the late timing of the application, exchange of witness statements took place about three weeks ago, and opening submissions last week. Of necessity, a response has to respond to the claim. This part of the claim was not clear until then. There is still time for the claimant's representative, given the time allocation, and the claimant going first, to focus his cross-examination and closing submissions. Although a lay representative, he has studied law and is experienced in preparing cases.

Late Amendment of Claim

8. After the claimant had given evidence, her representative applied to amend the claim in the way it set out the nature of her belief. He did not seek to recall her. This was permitted on the basis that it did no more than formalise what she had already said in evidence, and would not prejudice the respondents. The tribunal would consider what findings to make in the light of the changes in the way her case had been put from time to time. (This was the background to the respondent's application to adduce an exert report the claimant had tried to adduce at an earlier stage in the case - see below).

Evidence

9. The tribunal heard evidence from:
    - Pastor **Ade Omooba**, the claimant's father
    - **Seyi Omooba**, the claimant
    - **Chris Stafford**, CEO, Leicester Theatre Trust Ltd (R2)
    - **Bobby Chatt**, the claimant's agent, employed by the agency, Global Artists (R1).
    - **Michael Garrett**, owner of Global Artists (R1).

10. There was a bundle of 1,577 pages, including the entire script of the production, and another 107 pages in a supplementary bundle. We were also provided with a cast list, a chronology, and written openings. After hearing the evidence we were provided with written submissions on the law, and heard oral submissions as well before reserving judgment. A further date, 18 March, was set o a contingent basis to determine recommendations if required and any other application arising from judgment.

Conduct of the Hearing

11. There were substantial numbers of observers, including members of the press, throughout the hearing. Public access to written case materials was provided by the claimant's representative's Christian Legal Centre hosting on its website electronic copies of the witness statements. Documents referred to in the statements were uploaded as each witness was called; at the tribunal's request, the pleadings, list of issues and opening arguments were posted from the beginning of the hearing, so that the public could understand the issues being argued. This was arranged prior to the hearing and with the consent of both respondents. The Christian Legal Centre also hosted for public access during the hearing a hard copy of the witness statements and documents bundle at their premises in Wimpole Street. This would usually have been done at the Employment Tribunal's premises at Victory House, which is currently closed, to both staff and public, because of inadequate ventilation.

12. One document had to be redacted after uploading when it was noted that it contained information that should not be made public. The material was visible at most for 10 minutes. Those in the hearing were directed not to report the redacted content, formally or informally.

13. At the conclusion of the hearing on 8 February an order was made that the claimant's team remove case materials from the website by 5 pm that day; any request for further access must be made to the tribunal.

14. The claimant objected at the start of the hearing to the inclusion in the bundle of a November 2020 email from the second respondent's artistic director, Nicolai Foster, with some notes on the script intended to demonstrate it was about same sex relationship. The tribunal decided the document should remain because it usefully excerpted parts of the script, but told the parties we would treat the document with great caution: it was prepared 18 months after the event, in response to an issue that had arisen after the dismissal complained of; Mr Foster would not be giving evidence; although an opinion, it is relevant to factual evidence Mr Stafford would be giving about the nature and direction of the production; Mr Stafford would be giving evidence about his contemporary discussion with Mr Foster about the decision to drop the claimant; finally, if it was to be suggested (and in the event it was not) that Mr Foster's note selectively quoted from the text in a way which skewed a true view of what the play was about, we had the whole script for comparison and could decide for ourselves.

15. On day 3 the respondents sought to introduce an expert report (on Christian Belief) by Dr Martin Parsons that had been obtained by the claimant, but not allowed by E.

J. Elliott at the case management stage (or by Griffiths J. on appeal from this decision to the EAT) to be admitted in evidence. The stated purpose of the application was to demonstrate that the claimant had changed her case on the nature of her belief. The report was not admitted, on the ground that the change the respondents had identified was apparent from comparing the pleadings and list of issues with her answers in cross examination, and it was not necessary to complicate the case and add to hearing time by introducing a report which had been held not to assist the tribunal in any other respect.

16. Having heard the evidence we make the following findings of fact.

Findings of Fact

17. The claimant grew up in London in a committed Christian family of Nigerian origin. Her paternal grandfather's parents converted from pagan belief to Christianity in the Church of Nigeria within the Anglican Communion. Her father moved to England and became a pastor. His ministry included community projects as part of the Christian Victory Group, and he has co-founded and is a director of Christian Concern and its sister group, the Christian Legal Centre. He explained that the Church of Nigeria had separated from the Church of England over divergence of interpretation of church teaching on abortion, sexual purity, the sanctity of marriage and homosexuality, not least because of its history of mission opposing pagan practice, such as polygamy. More recently, in England, some Nigerian (and other) Christians have been active in opposition to legislative change on same sex marriage. Pastor Omooba has been involved in a number of legal claims brought by Christians in difficulty because of their stance on homosexuality. The claimant is represented by the Christian Legal Centre.

The Claimant's Belief

18. The claimant herself attended church and church school. At the age of 17 she committed to Christ.

19. On 18 September 2014, when the claimant was a student who just turned 20, she posted the following on Facebook:

> "Some Christians have completely misconceived the issue of Homosexuality, they have begun to twist the word of God. it is clearly evident in 1 Corinthians 6:9 -11 what the bible says on this matter. I do not believe you can be born gay, and i do not believe homosexuality is right, though the law of this land has made it legal doesn't mean its right. I do believe that everyone sins and falls into temptation but its by the asking of forgiveness, repentance and the grace of God that we overcome and live how God ordained us too, which is that a man should leave his father and mother and be joined to his wife, and they shall become one flesh. Genesis 2:24. God loves everyone, just because he doesn't agree with your decisions doesn't mean he doesn't love you. Christians we need to step up and love but also tell the truth of God's word. I am tired of lukewarm Christianity, be inspired to stand up for what you believe and the truth # our God is three in one # God (Father) #Christ (son) #Holy Spirit".

20. Evidently the post is addressed to Christians, but it was public, not restricted to any

group of readers.

21. This being a case about discrimination because of religion, we must make a finding about what the claimant's religious belief was, or what other people reasonably perceived it to be. It is common ground that what is expressed in this Facebook post is the belief on which this claim is brought.

22. The list of issues states the belief in the terms pleaded in the particulars of claim:

(a) a belief in the truth of the Bible, in particular Genesis 2:24 and 1 Corinthians 6:9,
(b) a belief that although God loves all mankind, He does not love all mankind's acts, in particular, she believes that homosexual practice (as distinct from homosexual desires) is sinful/morally wrong;
(c) C does not assert a belief that homosexuality, as a matter of orientation or desire (as opposed to homosexual practice) is in itself sinful or wrong.

23. The Biblical texts to which the claimant refers in her post speak of men, but the claimant applied them to women too. They say:

> *Genesis 2:24*: That is why a man leaves his father and mother and is united to his wife, and they become one flesh. (NIV)
>
> *1 Corinthians 6:9:* Or do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral nor idolaters nor adulterers nor men who have sex with men nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. (NIV)

24. The claimant was questioned about that part of (c), that she did not assert that homosexual desire was in itself sinful or wrong. It became clear that the pleading was a misstatement. She said: "no, I do believe desires are sinful and wrong, that is not right… The desires… they happen, but they are wrong", and later, (of desire) "it happens, but it's sinful, it's not right".

25. Of the comment that she did not believe you could be born gay, she said in her witness statement that God did not make people homosexual, they made that choice themselves. She clarified in oral evidence that it was possible to "be a Christian and be struggling with homosexual desires and God can change it around… God can take it (desire) away.. You can be Christian – you may have desires – you are not less of a Christian – but God can change you".

26. Later she said that (homosexual) "sex is wrong (but) having these desires is not sinful". She denied that people should be forced to change their ways. Asked if it was not offensive to non- believers who were homosexual to be told it was not intrinsic to their nature, she said it was her belief. When giving evidence, and being asked questions about sexual orientation, the claimant twice asked for an explanation of the word "orientation", and it was explained this meant sexual attraction to a particular sex. This to our mind showed uncertainty about her belief as to homosexual desire, rather than acts.

27. This led to the proposed amendment on day 4 of the hearing, changing "she believes that homosexual practice (as distinct from homosexual desires) is sinful/morally wrong" to "she believes that Homosexual practice and sexual desires (as distinct from involuntary homosexual feelings) is sinful/morally wrong". The distinction between sexual desire and involuntary homosexual feelings was not explained; it was not clear to the tribunal how desire could be willed or what the distinction between sexual desire and involuntary feeling was.

28. Having considered the post, and heard her evidence, our finding is that she did not consider that sexual orientation was innate, or a given. It was something a human could will, control and alter, perhaps with God's help. They were to held responsible, as sinners, for their sexual attraction to members of the same sex. It seemed to us possible, from her confused expression, that she had not thought through the implications of her belief. Certainly she had not paid close attention to the claim documents filed on her behalf, including the county court claim form, which, unlike employment tribunal pleadings, she had to sign herself with a statement of truth.

The Claimant's Career

29. The claimant attended university and then Mount View drama school, specialising in musical theatre. She obtained her first job offer before graduating, and no fewer than 19 agents offered her work. She signed with Global Artists, (the first respondent) on 18 August 2016.

30. Her agent was Bobby Chatt. They had a good working relationship. The claimant performed parts in Hades Town at the National, and in Little Shop Of Horrors, Junkyard, Boxed, The Little Beasts, Voiceover, and did backing vocal work for Stormzy. In May 2017 she appeared in a concert production of the Color Purple at Cadogan Hall, and was noted in a review as "the delightful Seyi Omooba". She was very talented and had a remarkable voice. As a measure of her increasing success, in tax year 2016/17 she earned £7,368, in 2017/18 £8,377.25, and in 2018/19, £22,744.

31. She explained early on to Bobbie Chatt that as a Christian she would not want to play certain parts. She turned down an opportunity in Book of Mormon because of its satirical depiction of Christian belief. When accepted for a part in Junkyard, she became concerned that her part was bisexual, which she had not realised. Bobbie Chatt passed this on, there was a discussion with the production team, and she was reassured and continued. Sometimes she turned parts down for other reasons or for no reason. Her agent was content that her career should take the path she chose. Once the cast of Little Shop of Horrors took time out to prepare a video for Gay Pride. The claimant took no part in the video because she did not want to participate in something that would be used to celebrate homosexuality.

32. She accepted that many actors are gay. She had not experienced conflict with others in her career. Colleagues knew she was Christian (she would pray before performances) but there was no discussion of her views. When the media storm broke in March 2019 one of her former colleagues in Little Shop of Horrors commented on her not taking part in the Gay Pride video, and said that many of them 'felt uncomfortable'. This was written in retrospect; there is no other suggestion of difficulty in the workplace by reason of the claimant's belief.

The Color Purple

33. In November 2018 she was invited to audition for a part in the musical production of the Color Purple that is the subject of this claim. It is important for this case to analyse the themes of the work, how they are widely understood, and how they were understood by the claimant.

34. The Color Purple is an epistolary novel written by Alice Walker and published in 1983. It won the Pulitzer prize and has worldwide renown. It is often read as a school text. The central character is Celie, a woman growing up in the southern state of Georgia in brutal circumstances, raped by her father at the age of 14, bearing him two children who were taken away, and blamed by her mother who left the home. She was married to an older man to be his housekeeper and raise his

children. She never knew love and affection. Growing up she was close to her sister, Nettie, who left to work in Africa as a Christian missionary; Nettie's letters to her were hidden by Celie's husband, so she felt abandoned by all who cared for her. She formed an attachment with a woman jazz and blues singer, Shug Avery, who was her husband's mistress. Shug awakens Celie to sexual desire, the first time she has experienced it, and they have a physical relationship. Then Shug marries, and Celie goes to live with the couple. Later Celie suffers when Shug has an affair with a man, but she attains acceptance and serenity.

35. Steven Spielberg made a film of the book, released in 1985 and starring Whoopi Goldberg. None of the panel have seen the film (all of us had read the book), but we understood from evidence that the film played down the physical relationship between Celie and Shug, (as it did the rape), shown only with a respectful kiss on the cheek. Whoopi Goldberg said of the film that it was " Not really about feminism, or lesbianism, despite the fact that Celie finds out about love and tenderness from another woman… It has nothing to do lesbianism...it has to do with, her eyes are opened, now she understands".

36. The claimant had read the book at school, and had been impressed by the relationship Celie had with God, to whom she writes the letters that tell her story. Later, she watched the film, "many times".

37. The claimant's evidence was that Celie was not a lesbian, nor was the play about lesbianism. "You can see a woman's worth and beauty without being a lesbian and as far as I was concerned, that is what this particular aspect of the play is about". She saw Celie as "a woman struggling with racism, her father's rape, abuse by her husband, and that it was a woman who showed her she was beautiful and caused her to realise that she was beautiful". She did not really think about sexual orientation: "the men in her life …gave her a distorted view of what it was like to be a man". She agreed that Celie fell in love with Shug, but not that this was romantic or sexual love. In closing, her representative glossed that you could "fall in love with" a book, but we did not consider this figure of speech helpful. When people fall in love, there is the possibility, however remote, of it leading to a sexual relationship; no one would contemplate physical consummation of love for a book.

38. The play was the subject of a Broadway musical in 2005, with libretto and book by Marsha Norman. There was a further production at the Menier Chocolate Factory in London in 2013 which made a successful transfer to Broadway in 2015. The musical production carried more focus on the physical relationship between Celie and Shug for which a mass cinema audience had not been ready in 1985. The claimant had appeared in this version in 2017 at Cadogan Hall as Nettie.

39. The second respondent acquired the rights to perform this production, and arranged a co-production between the Curve Theatre, Leicester and Birmingham Hippodrome, with the hope of a tour after that if it was a success. With its themes of lesbianism and race oppression, it would give the theatre a good score on the Case for Creative Diversity criterion for public funding. It required considerable financial investment for the theatre, and was likely to make a loss, even with good ticket sales, unless there was a profitable tour to follow; this required prior sign off from trustees and funders.

40. This is the project for which the claimant auditioned. In November 2018 she was invited to audition for the role of Nettie, which she had previously performed, "for starters", meaning she might also be considered for other parts too. She was sent the meeting brief which said: "Script is attached, please make sure you have read it before you come in this time around". At a recall audition a week later, she was asked to sing from sight a song performed by Celie. She impressed, and was offered this lead part, on 3 December. After negotiation of terms by her agent, she

accepted the role on 10 January 2019. A note of the agreed terms was sent by the theatre to the agent on 6 March 2019. She was to attend a publicity Q and A with the press on 18 March, and rehearsals were to start on 28 May, with first performance on 28 June.

41. Until the exchange of witness statements in January 2020, the claimant's pleaded case was that she had understood there were several interpretations of the relationship between Celie and Shrug, and she would have interpreted the part in her own way. Her witness statement however said that when she had realised that the production focused on a lesbian relationship, she would have had to pull out, and would not in fact have performed it.

42. How then did the claimant come to accept a part in what the respondents described as an "iconic gay work"?

43. A preliminary question, given that the claimant had not accepted this, is whether it was a gay work. In our finding, the book is about a physical lesbian relationship, and, having been taken to several passages of the script in cross-examination, so was the musical production for which she was auditioning. Of course the work can be interpreted as Celie's awakening to a real and full life, which continues even after Shug turns her attention to a man, but it is the lesbian relationship that awakens her to it. When taken in cross examination to the relevant passages in the script, the claimant had to agree. It would have been difficult to interpret the role in the musical production in any other way.

44. The answer to the main question is that the claimant had not read the script when she accepted the part. She had still not read it when the storm blew up which led to her being dropped from the production. She intended to read it before rehearsals began in May. In evidence she said that when at that point she realised that it was a portrayal of a lesbian relationship, she would have had to pull out.

45. As late as October 2019, when she gave an interview to BBC Radio 4's Today programme, she was saying that she did not think Celie was a lesbian character, and that she would interpret Color Purple in her own way. She did not in fact begin to read the script until shortly before this hearing. At that point, she said: "I started to question whether it was the interpretation I had thought". She now agreed (as stated in her January 2021 witness statement) that it was not the role for her.

46. How did she maintain this view when she had appeared in a concert production of the same work, with a 10 second kiss? At first she said she had been off stage in the big scene between Celie and Shug. Later she said she had been on stage with the other performers, but looking at the audience. She had only read Nettie's highlighted lines in preparing the script for the Cadogan Hall. It was a one-off performance.

47. We did not think she accepted the part in bad faith, or to set up a discrimination claim as part of a Christian campaign against homosexuality. We concluded that she had not done her homework or been paying attention, and that she still thought of the work in the frame of the Spielberg film. Thus she drifted into the storm that arose on 15 March 2019.

Events Leading to Termination

48. On 14 March 2019 the cast for the Leicester production was announced. On Friday 15 March, Aaron Lee Lambert, an actor in Hamilton, with no connection to either respondent, tweeted the claimant's 2014 Facebook post and added:

"@Seyiomooba Do you still stand by this post? Or are you happy to remain a

hypocrite? Seeing as you've now been announced to be playing an LGBTQ character, I think you owe your LGBTQ peers an explanation. Immediately"

49. The tweet gained rapid traction, and by early evening had come to the attention of Chris Stafford, the theatre's chief executive officer. There was already comment from the Stage, asking how the theatre could offer someone with these views a role playing a woman who has an explicit lesbian relationship. He agreed with Birmingham Hippodrome to take the lead in responding. He then spoke to Bobbie Chatt. His first concern was that this was a historic post, and that the claimant's views may have moved on since 2014. They discussed whether she could issue a retraction or apology on which they could base a joint statement to the media. He explained that the social media put the theatre in a difficult position. Meanwhile he instructed his staff to make no comment to anyone.

50. Miss Chatt then spoke to the claimant to ask whether she had re-evaluated her views since making the Facebook post. The claimant, who had not been on Twitter, and had only just seen the message, said her views were unchanged. She was asked to say nothing until it was established what was best to do. The claimant said that she would speak to a lawyer known to her family and contact her again after that. She consulted her family (she lives with her parents) and a lawyer from the Christian Legal Centre. Bobbie Chatt reported back to Chris Stafford, who asked for a written statement about her stance.

51. Next morning, Saturday 16 March, Miss Chatt messaged the claimant saying that the issue had gathered momentum overnight and she was being pressed for a statement that morning, adding:

> "I think, without it, they will have no choice but to rescind the role. If this is the case then, professionally speaking, I would advise you to step down rather than have that taken out of your hands. Would definitely rather talk than text, so call me".

The claimant understood that the theatre had told Ms Chatt they proposed to drop her from the production if she did not change her view. In our finding, the theatre had not issued any threat - although it may well have been said that if the view was unchanged it would be difficult - and Ms Chatt was explaining to her the context of the Facebook post now being made public from the point of view of the theatre, and what was likely to happen if she said the post remained her view. She also explained by phone that the backlash from social media meant she was worried for her personal safety. The claimant said she was drafting something.

52. At 12:04 the claimant emailed Bobbie Chatt with the first version of a statement:

> "I sincerely apologise if what I wrote 5 years ago caused offence. My intention was to describe my views as a Christian, believing in God and in the bible. I am unable to retract my Facebook post as to do so would be to deny my faith. The law protects my freedom of expression as well as freedom of thought, conscience and religion. With regard to the role of Celie, I will not disregard that Celie falls in love with Shug or that Celie believes in God and is black. There is so much to Celie. The role of an actor is to play characters different from myself. As for my personal faith I will stand firm".

53. At 12:08 she sent version 2, trimmed of the apology to read as follows:

> "The law protects my freedom of expression as well as freedom of thought, conscience and religion. With regard to the role of Celie, I will not disregard that Celie falls in love with Shug or that Celie believes in God and is black. There is so much to Celie. The role of an actor is to play characters different from myself".

54. At 12:12 she sent a third statement, prefaced by the words:

"we feel like using the word apology could be misconstrued. Here's another alternative to the first statement I sent:

> "My intention of what I wrote 5 years ago was not to cause offence. It was to describe my views as a Christian, believing in God and in the bible. I am unable to retract my Facebook post as to do so would be to deny my faith. The law protects my freedom of expression as well as freedom of thought, conscience and religion. With regard to the role of Celie, I will not disregard that Celie falls in love with Shug or that Celie believes in God and is black. There is so much to Celie. The role of an actor is to play characters different from myself. As for my personal faith I will stand firm".

55. Then at 12:35, headed "last statement", (in effect version 2 with an added statement of commitment) she emailed:

> "The law protects my freedom of expression as well as freedom of thought, conscience and religion. With regard to the role of Celie, I will not disregard that Celie falls in love with Shug or that Celie believes in God and is black. There is so much to Celie. The role of an actor is to play characters different from myself. As for the personal faith I will stand firm."

56. Giving evidence, the claimant said that every version of the statement she sent had been rejected by the theatre. Having heard the relevant witnesses we concluded that none of the statements was shown to theatre before the last one arrived; there was in any case no time for the first three to have been discussed with anyone.

57. In the afternoon Bobbie Chatt relayed the last statement to Chris Stafford, who asked her to tell the claimant not to release it until they could take advice. Meanwhile she was not to travel to Leicester on Monday for the press Q and A. Chris Stafford made a note that Bobbie Chatt told him that if the claimant was removed from the show (and she would not step down) she would take action on grounds of discrimination. This is disputed by the claimant. On the evidence, we concluded that the claimant had said she was consulting a lawyer, and her statements do refer to the protection of the law. The most likely explanation is that Bobbie Chatt passed this on to Chris Stafford and probably suggested that if she was removed a discrimination claim was likely to follow. She was passing on her reading of the claimant's likely course of action, just as she had passed on to the claimant her reading of the theatre's likely course of action.

58. Next day, Sunday 17 March, at 1 p.m. the claimant was told by Bobbie Chatt that Chris Stafford wanted confirmation that the last statement "remains your final position on the matter" – so she had a chance to rethink. That evening, the claimant confirmed that it was.

59. While waiting to clarify the claimant's position, Chris Stafford was consulting with others, including lawyers, on what was to be done. The theatre's artistic director, Nikolai Foster, said on the Saturday:

> "the fact is the audience have to love this character and passionately care about her through the play. Judging by the reaction so far, she would be booed off stage and her beliefs make it impossible to rehearse this material with her. I've spoken to Tinuke (Tinuke Craig, the play's director), who is remarkably gracious and calm, but says she couldn't work with Seyi now all of this has come to light" .

He had also heard that Joanna Francis, playing the part of Shug, was "unsure about her position within the company".

60. On Sunday evening Tinuke Craig set down her views, to the effect that the show explored issues of gender and sexuality. She had : "no intention of shying away from the lesbian relationship at the heart of the story, and in order to portray truthfully it is necessary to have a safe, non-judgemental, open working environment. In light of recent events, I feel it would not be possible to create such an environment with Seyi Omooba in the role". She spoke too of requiring "a relaxed safe and inclusive environment" in the rehearsal room, "where everyone feels comfortable and respected." She reported the deputy stage manager was "deeply uncomfortable" about working with her, and she suspected "there will be many more members of the company, LGBTQ+ otherwise, who feel the same".

61. By Monday morning 18 March, , Nikolai Foster, who is gay, (as is Chris Stafford), said he was disappointed that the claimant stood by her "offensive and upsetting original 2014 statement". He pointed out that the very public expression of disapproval of the claimant participating in the performance would make it "impossible for an audience to connect to Seyi". He also doubted whether the claimant could cope with the character's sexuality, or how the other character would feel "in the intimate sex scenes that the play requires". Presciently he added: "given her beliefs, I'm not convinced Seyi had fully engaged with the demands of this role before accepting it". He ended saying "it is painfully clear that when beliefs like this are brought into the public arena, they invariably lead to hate crime".

62. Musical director, Alex Parker, also gay, commented that the claimant's views: "go against not only my way of life, but they completely contradict and condemn who I am". Given the subject matter of the musical, he did not want to work with the claimant on this production. He spoke of the theatre being a "safe space" for those who work in it, and the claimant being "someone who disbelieves something that I know it's part of my genetic make-up".

63. Ian Squires, chairman of the board of trustees of the theatre, said he did not believe the claimant should be penalised for her views, but when it caused offence and was likely to create a disturbance they had to be careful. He worried that she was a religious fundamentalist and that "irrationality will reign". Her views "are rebarbative and it has to be up to us if we accept in our midst.. She simply sounds like trouble".

64. In our finding, Chris Stafford had recognised early on that if the claimant's 2014 views had not changed it would be hard to keep her on, and consultation had only confirmed what he thought was the case. His thinking about a decision to dismiss hardened when by Sunday evening he knew the claimant had nothing further to say. As well as internal dissension with cast and crew, he feared boycotts, audience booing, and demands for ticket refunds. The publicity would not sell tickets when a large section of the target audience was so hostile; it was not a family show.

65. On Monday, having established that the claimant's position was not going to change, he spoke to the rights holder, Steve Spieler of TRW in New York, who represented the authors of the musical and consulted them about what was happening. Chris Stafford's concern was with the production's "brand". If the claimant played the part as *not* a lesbian relationship, and it was hard to see how else this could be done, there might be legal action arising from the copyright compliance term of the December 2016 licence agreement forbidding, without prior approval, "changes in the characters...including…any change in the gender or characterizations of any character in the play". Mr Spieler said in his reply: "at times, an actor's skill set may call for the playing of a part which may not be in alignment with personal beliefs. However, the supportive environment of theatre cannot embrace a position, especially from the actor in the leading role of Celie, that creates a hostile atmosphere for the cast members and audiences alike." The answer did not indicate that changes would be approved, but supported a decision to drop the claimant.

66. On Tuesday 19 March Chris Stafford spoke to the Arts Council, which funds the theatre jointly with Leicester City Council, about the position.

67. The theatre was now under pressure from constant messages on social media to the theatre, to other actors, to the funders, and generally. A statement about dropping the claimant from the production went through many redrafts. On Wednesday 20 March he told Bobbie Chatt that a statement would be sent the claimant the following day, and made a number of other calls to confirm his decision. The final version of the statement was bland: it said the reposting of the 2014 comments had caused

> "significant and widely expressed concerns both on social media and in the wider press. Following careful reflection it has been decided that Seyi will no longer be involved with the production. This decision was supported by the authors and Theatrical Rights Worldwide".

It concluded by saying (as an answer to criticism of how they had cast her in the first place) that they did not screen social media when casting actors.

Termination by the Second Respondent

68. On Thursday 21 March Chris Stafford sent Bobbie Chatt a letter for the claimant from the theatre terminating her engagement, and a copy of the public statement the theatre was going to release later. The claimant was asked to comment if she wished; in the hour and a quarter before it went out she did not reply.

69. The letter informed the claimant that it had been decided to terminate her engagement in the role of Celie with immediate effect. It states that the production explores issues of sexuality, with the lesbian relationship which Celie has being an important part of the story. Intrinsic to the production are intimate scenes involving Celie and the actress playing opposite her. The play and production are: "seeking to promote freedom and independence and to challenge views, including the view that homosexuality is a sin". It goes on to refer to the 2014 post that she did not believe you could be born gay, or that homosexuality is right. That was in the public eye, and she had made clear she would not distance herself from it. There was adverse negative publicity of her involvement in the production, which was expected to grow as time went on, and there was some evidence of potential boycott by LGBT groups. He went on: "I regret to say that I consider your continued engagement simply untenable in the circumstances and I that I cannot see that it is practicable for you to undertake the role of Celie". Her continued engagement would affect the harmony and cohesion of the cast, the audience's reception, the reputation of the producers and "the good standing and commercial success" of the production.

70. She was told that she would be paid in full the contract sum of £4,309.

71. The claimant has never been paid this sum. This is because the agency, which usually invoiced for her, told her to send invoice direct to the theatre, and she has not done so, despite reminders. She has been reminded since proceedings began that the payment is still available, but has not replied.

72. Chris Stafford was asked about the claimant's evidence to the tribunal that if she had pulled out at rehearsal stage, when she read the script, the production could still have gone ahead, as a cover or understudy could take over. He rejected this out of hand. It would have been necessary to cancel the production if the lead actor pulled out just as rehearsals began. As it was, they were able to cast a substitute in time.

73. The claimant has described her feelings from 16 March to being dismissed. She did not understand why the theatre was siding with a social media campaign labelling her as homophobic "simply because I expressed my religious beliefs". She cannot

hate homosexual people because as a Christian she loves the sinner while hating the sin. Further, she felt betrayed, in that despite a policy of diversity, the theatre would not say that they supported and respected people of all religious beliefs as well as LGBT. She felt they condemned her without meeting her.

Termination by the First Respondent

74. Meanwhile Bobbie Chatt was keeping Michael Garrett, the first respondent's, abreast of the situation. He thought that the position was "unsustainable", that the Facebook post compromised the agency's overall standing with the public, with its staff, and with other clients, as it was "offensive to the LGBTQ+ community and beyond". He explained in evidence that he had built up the agency from nothing over the course of 20 years, five of his twelve staff were gay, that against the social media publicity two of his seven agents who were gay were talking of leaving, and agents took years to train and were hard to replace, he had 334 other clients to represent , and in the past he had seen an agency collapse when one by one its clients quietly left following a social media storm, and could see this happening too when actors did want to be associated with what was now widely seen as bigotry. He feared for his financial viability. Quite apart from that, an ongoing relationship with the claimant would be "uncommercial", as they would struggle to place her in roles after the outcry.

75. He had made no final decision, even after she had been dropped by the theatre, by 24 March. He was then shown a Twitter article by Bernard Dayo of Y Naija, a newspaper aimed at young Nigerians with around 200,000 followers on Twitter. Bernard Dayo had blue tick status, meaning he was authenticated on Twitter as a professional journalist. The article said that the claimant's publicist had released a statement saying that she believed: "homophobia is a natural reaction to homosexuality which is an aberration". Mr Garrett was concerned that the claimant had not discussed any comment to the press with the agency, while the agency itself had firmly maintained a rule of silence in the face of enquiries, and that this report could only aggravate what was already a difficult position. The article "expedited" his decision to terminate her contract with the agency. On 24 March he emailed the claimant telling her that the agreement for representation had been terminated, "effective from today 24 March 2019". She should invoice the theatre direct for payment; there would be no agency commission payable. Her details were removed from the agency website.

76. The claimant fervently denied to Bobbie Chatt that she had given any statement to Bernard Dayo. She said the piece was satirical; 24 hours later comment to that effect was added to the post. Gearing this from Bobbie Chatt, Mr Garrett said that even if the item was a misunderstanding, the contract should be terminated anyway. The claimant then emailed Mr Garrett asking him to reconsider. Nevertheless Mr Garrett did not change his mind. On 18 April he replied by email saying that the relationship was "beyond repair" because she had not retracted the original Facebook post, she was now unmarketable, and her continued association damaged the agency's commercial viability.

77. The claimant's feelings on termination of the agency agreement were even stronger than when terminated by the theatre. She could not see any "logical reasoning" for terminating the contract. She had a good relationship with Bobbie Chatt, yet Mr Garrett had terminated the contract in a brutal and unfair way "pretending to believe a ridiculous allegation that he then admitted to be false". He just wanted to distance himself and the agency because of the controversy.

78. A few weeks later Mr Garrett noticed that the agency was no longer linked to the claimant's details on Spotlight, an online directory where actors upload their details and theatres advertise roles. Only an actor, or Spotlight, can remove details. The agency could only email Spotlight to ask for details of their association with a particular actor to be deleted. The claimant denies removing her details, and

suggests the agency cut her off. We do not accept that it was done at Mr Garrett's behest, and it remains unknown how the details came to be deleted.

79. The claimant told us she found another agency, but the relationship did not last long and she has not had any further acting work. Had she continued in the theatre, the pandemic restrictions that began in March 2020 would have interrupted her employment as they have with all in the theatre.

Relevant Law and Discussion

Is the Claimant's Belief Protected?

80. Section 10 of the Equality Act 2010 defines the protected characteristic of religion and Belief:

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

85. Courts and Tribunals must so far as possible read and give effect to UK law in a way which is compatible with the European Convention on Human Rights. Article 9 provides:

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

81. The nature of the claimant's belief was set out in the list of issues. The respondents agree that Christian religion, and a belief in the truth of the Bible, and a belief that homosexual acts are sinful and morally wrong are all protected. They have always disputed that a belief that you cannot be born gay, and a belief that not speaking out in defence of beliefs, are protected beliefs. In view of the change in the claimant's stance on homosexual *desire,* they also dispute that this is protected.

82. In **Grainger v Nicholson (2010) ICR 360**, drawing on earlier decisions in order to decide whether a belief in climate change was protected, five features were identified as characteristic of belief for a belief, religious or philosophical, to qualify for protection:

> (a) the belief must be genuinely held
> (b) it must be a belief, and not simply an opinion based upon the present state of information.
> (c) it must concern a weighty and substantial aspect of human life and endeavour
> (d) it must attain a level of cogency, seriousness, cohesion and importance
> (e) it must be worthy of respect in a democratic society and was not in conflict with the fundamental rights of others.

83. The respondents challenge whether the claimant's belief can meet the second and fifth of these criteria.

84. The second criterion comes from **McClintock v Department of Constitutional Affairs (2008) IRLR 29**, which concerned a magistrate who did not wish to adjudicate in cases on same-sex partners adopting children, not because of a religious belief, but because he had concluded that on the current evidence that it was in the child's best interests to have one parent of each sex, and that if there was more or different evidence, his view might change. That was an opinion, not a belief.

85. In **R (Williamson) the Secretary of State for Education and Employment (2005) 2 AC 246,** a case about Christian belief requiring corporal punishment of children (as in "spare the rod and spoil the child"), the House of Lords observed of religious belief:

> The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention

86. That case also reminds courts and tribunals that freedom of religion is unfettered, but that manifesting belief is subject to limitation, including "for the protection of the rights and freedoms of others".

87. We start with the claimant's belief that it is sinful not to speak out in defence of belief. This was not much elaborated. She said it in the context of Christians not speaking of a belief in the sinfulness of homosexual practice. We understood her to be stating a Christian belief in a duty of Christians to bear witness to the faith they hold, not to keep it secret. By itself, the duty to speak out is uncontroversial, as the protection of an unspoken belief is worth little, though when and where it is spoken of may alter cases in a work context. Insofar as speaking up is a manifestation of belief, it is subject to the limitations of article 9(2).

88. We move on to the core of this case, the belief that you cannot be born gay. Believing that homosexual desire, as well as practice, is sinful makes some sense in the context of this belief, because if gay people are not born that way, they can presumably control what they do. Taking the **Grainger** tests one by one, we did not doubt that the belief was genuinely held. As to whether it was a belief and not an opinion based on present state of information, while the issue of the origin of sexual preference might be the subject of investigation by scientists, psychologists and sociologists, as far as the claimant is concerned its source is not an assessment of evidence but a belief derived from religious teaching. There are groups of Christians who may disagree, and hold that homosexual desire is innate, but the disagreement can involve theology on freewill, or the inherent sinfulness of mankind, in which courts and tribunals should not be involved. The respondents detach the beliefs that you cannot be born gay, and that homosexual desire is wrong, from belief that homosexual practice is wrong. We have had little or no evidence in this case about what distinctions other Christians make on this, or whether the claimant is unique in her belief, but we were invited to read **R(Eunice Johns and Owen Johns v Derby City Council (2011) EWHC 375,** where the facts are sparse but included a note that one of the would be foster carers, members of a Pentecostalist church, opposed to homosexual practice, had told a social worker that a child "could be turned", which suggests that other Christians may also hold that homosexuality is not innate. That judgment held generally that Pentecostalist religious belief was "clearly worthy of respect", while going on to explain nevertheless why the state could lawfully decline to accept that children should be fostered by people with those beliefs.

89. It is also a belief as to a weighty and substantial aspect of human life and endeavour,

and passes the test of cogency seriousness cohesion and importance, having regard to what is said in **Williamson** as to cohesion and precision in the expression of religious belief, even in the light of the changes in the way the claimant stated her case on homosexual desire.

90. The final step is the difficult one in this case, namely whether it is worthy of respect in a democratic society. The origin of the statement of this criterion is in the discussion of Convention rights in **Williamson** and in **Campbell and Cosans v United Kingdom 1982 4EHHF 293**. Both cases concerned corporal punishment of children derived from Christian belief. In **Campbell**, the use of the tawse in Scottish schools was held not to be a breach of article 3 prohibiting inhuman or degrading treatment or punishment. However, the fact that the children's parents had had to keep them out of school because they believed corporal punishment was wrong, involved respect for their beliefs; those beliefs must be worthy of respect in a democratic society, not incompatible with human dignity, and not in conflict with the fundamental right of the child to an education. In **Williamson,** many years later, the complaint was now made by parents who believed that not to punish was contrary to their beliefs in the context of a state ban on corporal punishment in schools. Discussing this, Lady Hale said: "both (beliefs in punishing and not punishing) are essentially moral beliefs, although they may be underpinned with other beliefs about what works best in bringing up children. Both are entitled to respect. A free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable. The real question is whether any limits set by the state can be justified under article 9.2. … Those limits must fulfil the three well-known criteria: (1) they must be prescribed by law, as this undoubtedly is; (2) they must pursue a legitimate aim; and (3) they must be necessary in a democratic society: the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued": see, for example, *Pretty v United Kingdom*."

91. The respondents argue that the claimant's belief was not compatible with the rights of others, namely those of same sex orientation, as its expression was inherently offensive. In this context, we note that although the claimant's representative referred to the hostile social media being a campaign by LGBT people, there is no evidence that it was coordinated, and every reason to think that these were individual responses. All members of the panel agree that the belief is offensive, denying as it does the foundation of another person's integrity and identity. The question is whether it is necessary to set a limit to its manifestation in accordance with article 9 (2). The difficulties of limiting what people can say, rather than what they do, were summarised in **R(Miller) v College of Policing and another (2020) EWHC 225**, in a discussion of whether posts about transgender should be recorded as hate crime. Freedom of expression (Article 8) involves "the right to tell people what they do not want to hear" (George Orwell, a supporter of democratic pluralism). Freedom "restricted to what judges think to be responsible in the public interest is no freedom… there is a right to say things which right-thinking people regard as dangerous or irresponsible" – **R v Central ITV plc**. In the words of Sedley L J in **Redmond-Bate v DPP (1999) EWHC Admin 733** , "free speech includes not only the inoffensive but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having". **Handyside v UK, ECHR 5493/72**, (on The Little Red Schoolbook) noted that the freedom also applied to ideas that offend shock or disturb the state or any sector of public opinion. Therefore restrictions on a manifestation of religious belief must be proportionate to the article 9(2) factors. We also note what was said in **McFarlane v Relate Avon Ltd (2010) EWCA Civ 880** in the Court of Appeal, on a statement by former Archbishop Lord Carey that Christian belief should be upheld as part of the national fabric: "Judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds as homophobia", stating that the courts safeguard the right to hold and express religious

beliefs …(and) equally firmly eschew protection of its content in the name only of its religious credentials." We should take care on whether expressing a belief in public, not at work, forfeits protection because it causes real offence to a section of the community.

92. In **R (Ngole) v University of Sheffield (2019) EWCA Civ 1127**, concerning a social work student excluded from a course of professional training because on his social media posts he had disapproved of homosexual acts as "wicked" and an "abomination" could be seen as offensive, it was held that expression of a view "does not necessarily connote that the person expressing such views will discriminate on such grounds". There was no evidence that he had or would discriminate. In **Smith v Trafford Housing Trust EWHC 3221**, it was held that it was not misconduct, or an activity that might bring the employer into disrepute, for an employee to express a view (questioning why gay people wanted to be married in church) of "moderate expression" on a "personal Facebook wall at a weekend out of hours".

93. Having regard to this we consider whether stating this belief interfered with the rights and freedoms of others. While wholly understanding why the statement of the claimant's beliefs was deeply offensive to people of same sex orientation, as well as to those of other orientations and none, we could not go so far as to say that merely stating the belief was not worthy of respect in a democratic society. It does not advocate harassment, although the belief may from time to time be expressed in ways that do amount to intimidation, nor that gays should not be employed, run businesses, be punished or shunned. She did not suggest conversion therapy, though that is underpinned by the belief that you are not born gay. A pluralist society must respect belief, however unacceptable to many people. There may be limits, for example to incitement to violent action, or setting restrictions on other people leading their lives, but as expressed by the claimant, she was not advocating any more than that other Christians must express their beliefs. We were asked to consider the position of homosexuals who are Christians, being told that they are sinful. We observe that there has always been dispute between Christians about matters of belief, asserting that some beliefs incur damnation, spilling much ink and sometimes blood; the insistence on respect for belief has an origin in such disputes.

94. After anxious and careful consideration we concluded that the Claimant's beliefs as manifested in the Facebook post, did scrape over the threshold for protection, having regard to section 9(2), and move on to consider whether either respondent discriminated against the claimant because of her belief.

Direct Discrimination

95. Section 13(1) of the Equality Act defines direct discrimination**:**

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

96. Deciding what is less favourable involves a comparison, and by section 23 (1):

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

97. In this case the tribunal was invited to compare the claimant's treatment with the treatment of someone who was like her in all respects but had not posted her belief on Facebook and not retracted it. There is no actual comparator. In such circumstances, tribunals must focus on the reason why the claimant was treated as she was, recognising that construction of a hypothetical comparator is an aid to identifying the reason for the treatment -**Shamoon v Royal Ulster Constabulary (2003) ICR 337.** Tribunals must be careful not to confuse "but for" causation with an examination of the "reason why" treatment occurred (as illustrated in **Seide v Gillette Industries Ltd (1980)** **IRLR 427** – a man was moved out of his section at work

because of anti-Semitic treatment by his colleagues; later his new role became redundant and he lost his job; anti-Semitism was not the reason why he was made redundant, even though but for the move to a new section he would not have been redundant). However, if the prohibited reason (here, belief) is one of the reasons why the discriminator treated a claimant less favourably, it matters not that it is not the main reason **– Nagarajan v London Regional Transport (1999) ICR 877**.

98. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

How this is to operate is discussed in **Igen v Wong (2005) ICR 931.** The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts proved by a claimant. If inferences tending to show discrimination can be drawn from those facts, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.

99. The second respondent argues that the claimant was dropped from the production not because she had declared a belief as to the sinful nature of homosexuality, but because in the particular circumstances of this case her role in the production was "untenable". The tribunal was asked to distinguish the expression of belief as a cause of what happened from the reason why she was dropped.

100. In **Wasteney v East London NHS Foundation Trust (2016) ICR 643**, a social work supervisor was given a warning for overstepping professional boundaries when discussing conversion to Christianity and praying at work with a Muslim junior. Her treatment was not discrimination because of religious belief, but because her conduct in a work relationship was out of place. In **McFarlane v Relate Avon Ltd (2010) IRLR 196,** where a marriage guidance counsellor expressed reluctance to counsel same sex couples on physical relationships, and was dismissed, it was held that while in some cases there was no distinction between having a belief and manifesting it, in other cases there could be context showing a genuine basis for differentiating between the belief itself, and the employer's reason for acting as he did, such as a general rule as to the nature of the work for which he was employed, or a dress code that applied to all. In **Ladele v LB Islington (2009) ICR 387**, a registrar of births marriage and death brought proceedings because the employer would not accommodate her refusal to register civil partnerships because of her religious belief that same-sex relationships were wrong. It was held the employer was not discriminating. The religious belief was not their reason for acting as they did, it was her reason for refusing to undertake some of her duties. In **Page v NHS Trust Development Authority UKEAT 0183/18**, an employee who spoke to the media about disciplinary action against him as a magistrate because of his faith-based belief that it was not normal for a child to be adopted by a single parent or same-sex couple, was not dismissed by his employer because of his belief, but because he had spoken to the media without informing them, and had done so knowing that his conduct was likely to have an adverse effect on the Trusts ability to engage with sections of the community it served. The tribunal was also referred to **Fecitt v NHS Manchester (2011) EWCA Civ 1190**, where whistleblowers (about whether other staff were in fact qualified) were moved out of the walk-in centre where they worked because of deterioration of relations among staff who resented what the whistleblowers had said. It was held that the employer was not liable for the actions of the other staff who would not work harmoniously with the whistleblowers, and on the facts the employer's

reason for moving the whistleblowers was not that they had made a protected disclosure, but because it was the only feasible way of resolving a dysfunctional situation at the walk-in centre. It was important to be clear that the protected reason (here whistleblowing, but in other cases, protected characteristics such as belief) should not have a material influence on the decision, material meaning more than trivial.

Direct Discrimination by the Second Respondent

101. The claimant's case, put simply, is that her religious belief was clearly at the forefront of Mr Stafford's mind when he decided to dismiss her. His concern to check whether she still stood by that belief demonstrates this. When she did not retract, apologise or explain, he decided she had to go. The claimant accepts that Mr Stafford was a thoughtful and truthful witness, but argues that whatever the other factors in his mind, her belief was central and crucial.

102. An unusual feature of this case is that, unknown to either side at the time, the claimant would not have performed the role, so arguably the only detrimental treatment experienced was that she was dropped some weeks before she would have decided to pull out. Nevertheless, she will have experienced some hurt at being dropped for, as she saw it, expressing a deeply held religious belief, and that can be reflected when assessing remedy, so for now we turn to examining the reasons for the theatre's decision.

103. The essential context of Mr Stafford's decision was the speed and savagery of the social media storm on the back of the Lambert tweet on 15 March. It was not the 2014 Facebook post by itself. The social media storm was not about gay actors having to work with an actor whom they knew believed them to be sinful, but about someone who had publicly declared that homosexuality was sinful taking the lead role in a production centred on a sympathetic depiction of a redemptive lesbian relationship (the 'iconic gay role').

104. The tribunal accepts, as did the claimant, that actors can play murderers, prostitutes or politicians, and still hold that murder, prostitution or a particular brand of politics are wrong. She would have played such roles. The claimant's unknown red line was that she would *not* play a lesbian, despite what she said in her 16 March statements about being an actor, and not denying that Celie falls in love with Shug, with its implied message that she need not be lesbian (though she did not use the word), or sympathetic to lesbians, to play the part. It is probably significant that she did not use the word, restricting herself to "in love with". Nicolai Foster and others foresaw this difficulty, even if she did not. Such realism may have informed the decision, but it not an explicit part of Mr Stafford's thinking. He made his decision on the basis that she would play the part, as she said she would.

105. He contacted the claimant through Ms Chatt in case some emollient elaboration of her view could form the basis of a statement that would damp down the storm. When that did not happen, he had to consider if the production could go despite the adverse publicity.

106. Many of his staff were very upset at her public condemnation of homosexuality; this is also mentioned by Steve Spiegel of TRW. Had that been Mr Stafford's only concern we would have wanted to examine whether there was a way through, perhaps by discussion and mediation, given the Diversity policy. It would be difficult to hold that someone prepared to act a role in any production should be dropped just because others resented her beliefs - actors of her religious views might never find employment. It was not just that however. One result of the Twitter storm was that the play's director was concerned that the central relationship could not adequately be performed as a sexual one because of claimant's belief impeding a convincing depiction. That may have been overcome if the claimant could commit to playing the

part as directed (though now we know she would not). The controversy would also intrude on audience connection with the performance – their knowledge of the controversy because of the actress's views, which would surely have stayed in the forefront of publicity, would interfere with their suspension of disbelief essential for performance. Some members of the audience might disrupt the performance. Or there would be a boycott, or objectors demonstrate outside, and tickets would be returned or remain unsold . These were not fanciful possibilities. Some were already being mentioned in social media. Others have happened in other controversial productions. Its theme was not likely to appeal to a mass audience, despite being a musical and despite being a school text. If she had stayed in, there was a real possibility that the production would have had to be cancelled in the face of a building storm of protest. There was no way to stem the tide unless she could make a convincing statement to allay the vocal objections, and she could not. The decision had to be made quickly, before the theatre's hesitation led to accusations that it too was homophobic did more damage. What had been budgeted as a small loss, unless there were a tour, would become a very substantial loss. If the claimant had not been dropped there is no reason to hold that the production would have succeeded. The dismissal letter made clear that it was then effect of the publicity of her views in this particular production - the fact that her belief was "in the public eye", in a work centred on homosexuality not being sinful - that meant the production was "untenable" and her participation "not practicable". Mr Stafford, gay himself, may not have liked or agreed with the claimant's religious view on homosexuality, but we do not find that his personal view informed the decision. There is nothing to suggest that he would have made a similar decision if the production had not been centred on a lesbian relationship. He made a commercial decision as the theatre's chief executive.

107. We concluded that while the situation would not have arisen but for the expression of her belief, it was the effect of the adverse publicity from its retweet, without modification or explanation, on the cohesion of the cast, the audience's reception, the reputation of the producers and "the good standing and commercial success" of the production, that were the reasons why she was dismissed. The centrality of authentic depiction of a lesbian role was a key part of the factual matrix. It was not necessary that she should be a lesbian, but it was important that she was not perceived by audience and company as hostile to lesbians. The decision to terminate was made to deal with the dysfunctional situation that arose from the context and circumstances of the public retweeting. The religious belief itself was not the reason why the theatre decided this. It was the commercial and artistic reality of the cluster of factors that it would not succeed.

108. Having reached that conclusion it is not necessary to consider the theatre's argument that there was a genuine occupational requirement for the ri=ole to be played by someone of a particular sexual orientation.

109. We can understand why the claimant was shocked. The situation moved fast. Not reading Twitter, she did not have as good a grasp of the implications as Mr Stafford and Bobbie Chatt did. Even the limited concession she made in her first statement to other people's feelings about her view was withdrawn, showing she had no insight into the difficulty caused. With publicity building, there was no time for extended reflection. She even told the tribunal she did not read the reasons set out in the dismissal letter, so of course she experienced this as termination for holding a particular belief.

Direct Discrimination by the First Respondent

110. Next we considered what part the belief played in the agency's decision to end the representation contract. The claimant argues that the agency had a contractual duty to promote her, and that far from terminating her contract, they should have continued to put her forward for parts, even if others left. This led to argument by the parties about "forced speech"- whether a person can be required to speak in favour of views

with which he does not agree. Mr Garret was less sympathetic and thoughtful a witness than MrStafford. We were unimpressed by his attempts to suggest that she was given some notice of termination. However we did accept that what operated on his mind was not the fact of her belief, but the commercial risk to his business if clients and agents walked. The contract explicitly required the claimant to acknowledge that the agency represented other clients too. The agency had to consider the extent to which other clients would dislike the association with the claimant and whether they would be damaged by association. The claimant had made her view public and had not stood by it when it attracted adverse comment. She continued to give interviews (after termination) defending her position. It is hard to see how in the polarised situation that had come about the first respondent could dissociate itself from the claimant's public views without picking a side and voicing support not just for her but for the views she expressed, as that was now what she was known for. As for his fear of disintegration of the business, we cannot assess the extent to which his fears were justified, but we accept that they were real, and that they were based on experience and evidence, so not fanciful. That it was the Y Naija story that was the last straw for him confirms this. While initially he believed it was truthful, and that she was fanning the fire when she had been asked to be silent, he did not change his mind with her denial, and it probably matters not whether he believed her. The damage was done, the story had increased the commercial risk. He later said he could not trust her, meaning his belief that she was deliberately stoking the fire. The contract does not have an implied term of mutual confidence and trust as it is not a contract of employment, but did have an implied duty of good faith as it contemplated long-term collaboration and was relational - – **Bates v Post Office Ltd (number 3: common issues) 2019 EWHC 606 QB).** He terminated in the belief she was in breach of this by going to Y Naija. The continuation of hostile posts (with an especially unpleasant one on 22 March) suggested the storm was increasing, and whether she did or did not encourage the story, he did not change his view because taking her back in would only renew the threat to the business from consequent loss of agents and clients. The business model included not only the claimant but other artists, and the contract stipulated that she acknowledge that the agency represented and continued to represent other clients. He had also to consider the effect of representing her on the agency's reputation and the effect on that on supply of work.

111. There is no evidence that she would have been offered other parts had the contract continued, and in the circumstances prevailing it seems unlikely. She was unable to obtain work with any other agent, and that was not because Global Artist no longer represented her, but because of the adverse social media publicity.

112. On the evidence he terminated the contract because he thought a continued association would damage the business. The contract was not terminated because of her religious belief, but because in his mind the publicity storm about her part in The Color Purple threatened the agency's survival.

113. The other treatment alleged as discriminatory duplicates the claim for harassment. It is that they took steps to publicise their decision to terminate the contract, that they refused to reconsider the decision to terminate the contract, and that they suggested that her conduct had undermined their confidence in her. Publicising the decision to terminate the contract is about the agency's details being removed from the Spotlight, and about her details being removed from the agency's website. The claimant believed that a journalist had been tipped off that her details had been removed from the agency website, leading to a story being published about it. In our view it was far more plausible, given Mr Garrett's insistence on silence on the part of the agency and its staff in the face of many media enquiries, that the journalist went to the website to get some background information about Ms Omooba for a story, and found her missing. As for Spotlight, the agency denies removing its details, as it was not something they could do, and they did not ask Spotlight to do it for them, the claimant

denies removing her details, and we are unable to make a finding as to who did. It is common ground that the agency did nothing else that might publicise the decision not to represent her. As for refusing to reconsider, strictly Mr Garret did reconsider, and decided not to change his initial decision and taken her back on. He had evidence from Bobbie Chatt about whether the claimant had a part in this. He decided nonetheless not to take her back because of all the reasons concerning commercial viability, which had not changed as the media storm continued. He did express lack of confidence in the claimant, implying he did not believe she had nothing to do with the story, but that does not make her belief the reason for not believing her.

114. The direct discrimination claim is not made out against either respondent.

Indirect Discrimination

115. Indirect discrimination is when a neutral provision is applied which has the effect of disadvantaging a group and person because of the protected characteristic they share. It is discriminatory if there is no justification for it. As defined by section 19 of the Equality Act:

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

116. The provision, criterion or practice (PCP) alleged against the agency is:

> "it is unwilling to provide its services to a performer who is subjected to public criticism for a social media post which condemns homosexuality on religious grounds; and
> "it regards such public criticism as sufficient grounds to terminate the contract without notice".

(This is the amended PCP, changing the originally pleaded "homosexual practices" to "homosexuality".)

117. We cannot understand this as a criterion applied to all which would disadvantage a group professing a religious belief that homosexuality is sinful. No one is disadvantaged by it except those who condemn homosexuality on religious grounds. It is a restatement of the case in direct discrimination. **Taiwo v Olaigbe (2016) 1WLR 2653** illustrates the point. It might be possible to edit the PCP, limiting it to public criticism for a social media post regardless of the grounds for condemning homosexuality, and then considering group disadvantage, but the tribunal must judge the case put by the claimant, not the case as the tribunal might have drafted it.

118. The PCP alleged against the theatre was:

> "Did R2 apply to C a PCP that an actor who is known to hold, and/or to have expressed
> (a) the Biblical teaching on sexual ethics (including on the issue of homosexual practices *or desires*). (Words in italics added by amendment after the claimant had given evidence.)
> (b) and/or (b) a view that homosexual practice is sinful or "not right", is considered unsuitable (i) to be engaged by the Theatre in a performance, and/or (ii) to be

engaged by the Theatre for a major part in a performance, and/or (iii) to be engaged for a part of a homosexual character".

119. In our finding this meets the same difficulty. It is a restatement of the direct discrimination claim. The only group matching the PCP are those who profess the claimant's religious belief.

120. In closing, the claimant's representative argued that both Mr Stafford and Mr Garrett has agreed they would treated the same anyone who argued that homosexuality was wrong, but in both cases the question put to the witness was based on religion or the Bible as the basis for belief. The claim for indirect discrimination falls at the first hurdle.

121. In any case, had individual and group disadvantage been shown, we would have had to consider justification. The claimant does not dispute that the aims of both theatre and agency are legitimate. We would have judged that the response was proportionate. It is hard to see what other action could have saved the production had she been retained when she was unable to make any statement that would engage with publicly expressed concern about the particular nature of this production is portraying a lesbian relationship, or why LGBT people found it offensive. As for the agency, the same lack of engagement (quote apart from the alleged fanning of the flames) meant there was no other way to remove the risk of attrition of agents and clients by continued association with her.

Harassment

122. Harassment is defined in section 26(1) as

> 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.

Harassment by Second Respondent

123. The conduct alleged against the theatre is the termination of the contract. In the view of the tribunal Mr Stafford did not have the *purpose* of violating the claimant's dignity or creating an intimidating or humiliating environment for her. His purpose was to save the production. We must go on to consider whether it had that *effect*, whatever his purpose. Section 26(4) requires us to take account of the perception of the claimant (the subjective element), the other circumstances of the case, and whether it was reasonable for the conduct to have that effect (an objective element). We accept the claimant's evidence that she experienced the decision as hostile. Most people who are suddenly and unexpectedly dismissed without understanding the reasons experience this as hostile and humiliating. We do not accept that it was reasonable for the theatre's conduct to have that effect. Ms. Chatt had attempted to explain the seriousness of the situation from the theatre's point of view. The claimant had been offered extra time to consider whether she could meet them by changing the expression of her view. She had the opportunity to talk it over with Ms. Chatt again, or even to ask talk direct to the theatre, including to the director if she wanted clarification of it being a gay production, but she made no approach. She was given an opportunity to comment on the theatre's brief public statement. The statement said that she was 'no longer involved' with the production, rather than that she had been sacked, dropped or dismissed. The letter she received was careful and neutral and fully explained the reasons, and if she had read it, the effect of the decision may have been less hostile than she experienced it. Finally, it goes without saying that

the hostility of social media towards the claimant (although in her evidence she was not reading much of it) -most of it was hostile, some of it was very nasty- whether before or after the termination, was not because of any action on the part of the second respondent. It was because of Aaron Lee Lambert's tweet.

124. The harassment claim against the second respondent does not succeed. We reach this finding without considering the additional argument that the conduct was not unwanted because the claimant would soon have realised that she did not want to play the part anyway.

Harassment by First Respondent

125. Against the agency, there is, as found, no evidence the first respondent engaged in what is alleged as the first of three episodes of unwanted conduct, namely publicising the termination, refusing to reconsider the decision to terminate, and expressing inability to trust her.

126. Of refusal to reconsider the decision to terminate the contract, and the lack of confidence in her, the claimant wrote asking the respondent to reconsider, and after an interval, Mr Garrett replied refusing to do so. He did so in polite terms, saying that having had a period to reflect on "the circumstances surrounding these unfortunate events, it is regretful we feel that the confidence has been irretrievably eroded". There was an offer of handover to her new representative and good wishes for the future. She was no doubt hurt by his lack of trust, and not being believed, as it suggested that she *had* instructed a publicist to speak to Bernard Dayo, but we could not conclude that his purpose was to harass her, nor that it was reasonable for this to have that effect in circumstances where Mr Dayo had a blue tick on Twitter, there was no reason to think he was not reputable or had made it up, or that the story was satirical, or that someone connected with the claimant had not had an involvement, or that she had not engaged a publicist, when it was known she was taking legal advice. He had got Ms. Chatt to speak to her and noted her reported denial, but he still suspected she may have had a hand in it. Apart from that, he was speaking of the confidence of the industry in her, or his confidence that they could get her any work in the circumstances. In addition, her email was in effect an appeal, and he had considered the appeal, but maintained the earlier decision. He did so in polite terms. Viewed objectively, it did not add up to a violation of her dignity, or the intimidating (etcetera) environment required to establish that this was harassment.. We concluded harassment was not the reasonable effect of this conduct.

127. Against both respondents we should clarify that harassment and discrimination as defined by the Equality Act are mutually exclusive. The claimant has argued that *any* breach of the requirement of article 14 of the ECHR (about discrimination) will amount to violation of her Convention right, so is a violation of her dignity (harassment). If there was discrimination because of religious belief (we have of course found there was not) that would not mean that any violation would be substantial enough to amount to violation of dignity.

Breach of contract- second respondent

128. It is the claimant's case that the theatre, is liable to her in breach of contract. She was ready to perform her part. Initially she claimed the wages she would have earned, but at the conclusion of the evidence she filed a revised schedule of loss in which this claim did not appear, recognising that she would not have played the part when she had read the script. There remains a claim for damages for loss of opportunity to add to her reputation as an actress – this is an additional award available to performers- **Herbert Clayton and Jack Waller the Oliver (1930) AC 209.**

129. In the light of the claimant's revelation that she would not have played the part

once she recognised it required her to play a lesbian relationship, the second respondent defends the claim on the basis that the claimant was in prior repudiatory breach herself, even though the respondent was unaware of it at the time of dismissal, relying on **Boston Deep Sea Fishing v Ansell (1888) 39 Ch 33.** In that case a manager was dismissed for other reasons; after he left it was discovered he had been taking secret commission payments from other companies to whom he gave work which should have been paid to his employer; he could not claim of breach of contract when he was already himself in breach of contract, regardless whether the employer knew it at the time. The theatre relies on an implied term of the contract of mutual confidence and trust, that she would not without reasonable and proper cause conduct herself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. They rely also on express terms (the written contract setting these out was not sent to her before dismissal, but these were presented as standard industry terms and she did not dispute that they were requirements) that she conduct herself in a professional manner, fulfil all the duties normally expected of a performer in a first class theatrical productions, and actively cooperate in publicising the production. The breaches they identify are that she did not read the script although instructed to do so several weeks before she accepted the role. Arguably there was no breach before the contract began, but she still had several more weeks to read the script and find out that the part crossed her own red lines before the storm broke. The respondent did not know about her red lines and had no reason to think she was unaware of the lesbian relationship when she had appeared in a concert performance of the same play. In any case, she ought to have known, if she did not actually know, that this production is about a lesbian relationship. In her statement she did not deny that Celie falls in love with Shug; she agreed she was aware that at least one interpretation of Celie was that she was a lesbian, so it was all the more incumbent on her to read the script, or speak to the director about the interpretation, or discuss the restrictions she wanted to place, and to do so well before rehearsals, when it would be too late to repair the damage.

130. The claimant argues that although she was to blame for not reading the script, this is not repudiatory breach because she knew the production reasonably well, it was not reasonable to think that it must be a lesbian relationship, Ms. Chatt knew her red lines and did not suggest this was a potential difficulty, and the conduct fell short of repudiatory breach.

131. In the tribunal's finding there is no breach of contract because the claimant was in prior repudiatory breach. Her conduct was not as obviously wicked as that in **Ansell,** but the contract was empty because the claimant would not have played the part, and her conduct, pulling out at a late stage, had she not been dropped when she was, would have wrecked the production. She taken part in a similar production, she had the script, and knowing that a lesbian relationship was at least one interpretation, she should have considered much earlier whether a red line was to be crossed.

132. In any case, if there were a breach, there are no damages. There is no financial loss because she would not have played the part. There is no loss of opportunity to enhance her reputation by performing, because she would not have played the part. If there is damage to her reputation, it was not caused by being dropped from the production but by an unconnected person's tweeting in March 2016 of her Facebook post and the outcry resulting from that.

Breach of contract – first respondent

133. The claimant has not brought a breach of contract claim against the first respondent, but alleges a breach in connection with whether any limitation on her freedom of thought conscience and religion was prescribed by law. The contract with the agency had an express term requiring her to "carry out and perform all

engagements conscientiously, to the best of your ability and in accordance with the terms of the applicable engagement and the directions of the applicable hirer". Although not an employment contract, with the implied term of mutual confidence, there was also an implied duty of good faith as it involved relations. The claimant argues that Bobbie Chatt knew her red lines and had not raised it with her, so it was reasonable to believe Celie's love of Shug would not involve a lesbian relationship.

134. The tribunal finds there was breach of these terms too: the claimant knew that Celie falls in love with Shug, that there was at the very least a possibility of a lesbian relationship, she had appeared in the same production, and she had not read the script or clarified the direction, nor queried it with her agent. Bobbie Chatt knew that she had previously appeared in this play, and it is not reasonable to hold her responsible for not questioning the claimant whether she was prepared to play Celie.

135. indicated in the standard terms. It was suggested in evidence that this was in fact given in practice if not explicitly stated, and that it was assumed she would sign up another agent. The fact that the email of 24 March said that the termination was effective that day, that they did not continue to perform the service by invoicing for the fee offered by the theatre (which they could have done even if they were not going to deduct commission from it), and that they took her details off their website are inconsistent with the contract not ending until two weeks later. That said the measure of damages is nil.

136. In conclusion , it is very sad that the claimant's promising career has been brought to an end. An email from a potential agent sent to the claimant in August 2019, explaining why she could not represent her until she had changed her view of homosexuality, began: "my lovely, bright, misguided and talented girl", and so perhaps she was. But for the reasons set out we do not find that she was discriminated or harassed because of or related to her religious belief.

_____

Employment Judge Goodman

Date: 15 February 2021

JUDGMENT and REASONS SENT to the PARTIES ON

16 February 2021

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FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

(Before Amendments at Hearing)

A. Jurisdiction

1. It is agreed that:

a. R1 was an employment services provider pursuant to s, 55 EqA 2010; and

b. R2 was C's employer until it terminated her employment on 21 March 2019.

B. Religion and Religious Belief

2. It is agreed that:

a. C's Christian religion is a protected characteristic for the purposes of section 10(1) of the Equality Act 2010 ("EqA 2010");

c. C does not assert a belief that homosexuality, as a matter of orientation or desire (as opposed to homosexual practice), is in itself sinful or wrong.

3. Is C's assertion in her Facebook post that "I do not believe you can be born gay" a religious belief caught by section 10(2) EqA 2010?

4. As to the belief set out in paragraph 3.c of the particulars of claim, namely "that not to speak out in defence of [the beliefs set out in paragraph 3.a and 3.b of the particulars of claim] would be sinful/contrary to her beliefs":

a. Did C hold such belief?

b. Was this a belief qualifying for protection under the Equality Act 2010?

C. Religious harassment (s26 EqA 2010)

5. Did RI subject C to unwanted conduct by:

a. taking steps to publicise RI's decision to terminate the contract;

b. refusing to reconsider the decision to terminate the Contract as communicated by Mr Garrett's email of 28 April 2019; and

c. Mr Garrett suggesting in an email of 18 April 2019 that C's conduct had

undermined RI's confidence in her?

6. It is agreed that:-

a. R l's termination of the Claimant's contract on 24 March 2019; and

b. R2's termination of C's contract on 21 March 2019

amounted to "unwanted conduct" within the meaning of section 26(1)(a) EqA 2010

7. Was the following conduct "related to" C's religious belief as set out at 2.b above (and/or those set out at 3 and 4 above if the same amount to religious beliefs) within the meaning of section 26(1)(a) EqA 2010:

a. Rl's alleged acts as set out at 5.a to 5.c and 6.a above;

b. R2's termination of C's contract on 21 March 2019?

8. Did the conduct of R1 and/or R2 have the effect of:

a. violating C's dignity; or

h. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

D. Direct religious discrimination (s13 EqA 2010)

9. Did R1 act as set out at 5.a to 5.c and 6.a above?

10. If so did R1 thereby subject C to a detriment?

11. If so was such conduct done because of C's religion or religious beliefs as set out at 2.b above (and/or those set out at 3 and 4 above if the same amount to religious beliefs)?

12. Did R2 dismiss C because of her religious beliefs as set out at 2.b above?

13. In each case did the respondent treat C less favourably than it treats or would have treated a hypothetical comparator in comparable circumstances?

14. Does less favourable treatment on the grounds of an expression or manifestation of a

protected belief constitute direct discrimination? If so, did the respondent in each case treat C less favourably on the grounds of any proven expression or manifestation of a protected belief?

15. In each case did the respondent apply a genuine occupational requirement compliant with Schedule 9 to EqA 2010?

E. Indirect discrimination (s19 EqA 2010)

16. Did R1 apply to C a provision, criteria or practice (PCP) that:

above (and/or those set out at 3 and 4 above if the same amount to religious beliefs)?

E. Indirect discrimination (s19 EgA 2010)

16. Did R1 apply to C a provision, criteria or practice (PCP) that:

a. it is unwilling to provide its services to a performer who is subjected to public criticism for a social media post which condemns homosexual practices on religious grounds; and
b. it regards such public criticism as sufficient grounds to terminate the contract without notice?

17. Did R2 apply to C a PCP that an actor who is known to hold, and/or to have expressed (a) the Biblical teaching on sexual ethics (including on the issue of homosexual practices), and/or (b) a view that homosexual practice is sinful or "not right", is considered unsuitable (i) to be engaged by the Theatre in a performance, and/or (ii) to be engaged by the Theatre for a major part in a performance, and/or (iii) to be engaged for a part of a homosexual character?

18. If so, did the respondent in question apply, or would it have applied, the same PCP to others who are not Christian or who did not hold the religious beliefs relied on by C?

19. If so, did the PCP put, or would it put, others who are Christian or who hold the religious beliefs relied on by C at a particular disadvantage when compared with others who do not have that religion or who do not hold those religious beliefs, namely that

a. (in the case of R1) their ability to benefit from Rl's services is or would be diminished?

b. (in the case of R2) their ability to perform in plays produced or co-produced by R2 is or would be diminished?

20. If so, did the PCP put C at that disadvantage?

21. If so, was the respondent's decision to terminate its contract with C a proportionate means of achieving a legitimate aim?

a. R1 relies on the following aims singly or together:

i. ensuring trust and confidence is retained with all Clients;

ii. maintaining and/or promote a positive reputation within the theatre and creative arts industries (including the need to avoid adverse publicity);

iii. maintaining and/or promoting positive working relationships with key stakeholders including theatre companies;

iv. fulfilling duties owed to other Clients;

v. ensuring and promoting the viability of the agency which could not require it to promote a Client which would be unable to obtain work;

vi. maintaining cohesion and morale within R l's workforce;

vii. safeguarding C's own welfare which would be undermined were the respondent to continue promoting her and her activities 'throughout the world, in every branch, medium and form of the entertainment industry' as required by the Agreement.

b. R2 relies on the following aims singly or together:

i. securing the commercial success and viability of the Production;

ii. securing the artistic integrity and success of the Production, including ensuring that audiences could connect to the greatest possible degree, and without negativity or distraction, with Celie and with the

Production as a whole;

iii. minimising adverse publicity and its effect on members of the cast and production team;

iv. maintaining the reputation of the respondent, the cast and the production team, and of the Birmingham Hippodrome;

v. ensuring the harmony, cohesiveness and effectiveness of the cast and production team and a positive working environment for them;

vi. ensuring the continued participation of other cast and production team members;

vii. maintaining the standing of The Color Purple as an important LGBTQ work of art;

viii. ensuring the overall viability of the Production.

F. Discrimination: remedy

22. Should the tribunal make a declaration and if so in what terms?

23. Should the tribunal make a recommendation and if so in what terms?

24. What if any loss has C suffered as a result of the unlawful act of the respondent in question, and to what extent should any compensation be adjusted having regard to other causative factors?

25. As to mitigation:

a. What sums if any has C received by way of mitigation of loss?

b. Has C taken all reasonable steps to mitigate her loss?

c. Has C failed to mitigate her loss, or caused loss herself, or done an intervening act breaking the chain of causation, by courting publicity in connection with this litigation?

26. If C has suffered any loss as a result of discrimination by either respondent, would part or all of that loss have been suffered anyway if there had been no discrimination?

27. In relation to indirect discrimination:

a. Was the PCP applied with the intention of discriminating against C?

b. If not, is it appropriate to make any award of compensation having regard to the availability of relief by way of declaration or recommendation?'

G. Breach of contract (R2 only)

28. It is agreed:

c. that R2 was contractually obliged to give a reasonable period of notice before terminating C's contract;

d. that R2 terminated C's contract without notice on 21 March 2019.

29. What was a reasonable period of notice?

30. To what damages (if any) is C entitled for breach of contract?

31. Is the claim vexatious or an abuse of process in whole or in part because R2 has at all times made clear its readiness to pay C the sum of £4,309 for which C has failed to submit an invoice?