

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/105844/2010 Held in Glasgow on 25, 26 and 31 October 2011 and 21
November 2011

Employment Judge: Shona MacLean
Members: Mr GD Piggott
Mr A Ross

Ms A McShane
20 Blantyre Street
Glasgow
G3 8AP

Claimant
Represented by:
Mr C Edward
Counsel

Glasgow City Council
City Chambers
George Square
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Respondent
Represented by:
Mr I Truscott
Queen's Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim of indirect
discrimination contrary to the Employment Equality (Religion or Belief) Regulations
2003 is dismissed.

REASONS

Introduction

1. The claimant claims indirect discrimination by the respondent in terms of
Regulation 3 of the Employment Equality (Religion or Belief) Regulations
2003 (the Regulations).
2. At a pre-hearing review (PHR) to determine if a tribunal had jurisdiction to
hear the claim and if so whether the claim had reasonable prospects of
success Mr Edwards, Counsel represented the claimant and Mr Farrell,
Solicitor represented the respondent. The Employment Judge heard
evidence from the claimant. For the respondent she heard evidence from
John Timmons, who was then Deputy Head Teacher of St Thomas Aquinas
School and Valerie Stevenson, Senior Human Resource Adviser to

E.T. Z4 (WR)

Glasgow City Council Educational Services. The parties lodged productions.

3. Following the PHR the judgment promulgated on 1 June 2011 was that the Employment Tribunal has jurisdiction to hear the claim and the respondent's application for strike out of the claim on the grounds that it had no reasonable prospects of success was refused.
4. A case management order was issued on 11 August 2011 ordering the claimant to provide additional information specifying (a) the religion or belief on which she was relying and (b) the basis upon which the claimant says that persons of the same religion or belief as her are at a particular disadvantage. The claimant responded on 1 September 2011 in the following terms:

"The Claimant was discriminated against on the ground of her lack of religion. Although baptised and brought up in the Catholic faith, she did not attend Mass.

In order to gain approval to teach at St Thomas Aquinas, she was required to obtain a reference from a priest who could confirm her attendance at Mass. Due to her non-attendance at Mass, she was unable to do this. For that reason, approval to teach was withheld by the Church.

Before approval is granted the Catholic Church requires all persons it considers Catholic to obtain a reference from a priest who can confirm their attendance at Mass. This applies to people, who like the Claimant do not attend Mass. Such persons cannot obtain a reference from a priest. They are therefore unable to gain approval to teach in a Catholic school.

The practice of the Respondent[s] is to act in accordance with the Church's decision (for example by removing the teacher from a school). This practice places persons with the aforementioned lack of religion at a particular disadvantage when compared to other persons."
5. On 18 October 2011 the respondent requested an order to provide the application for approval submitted by the claimant to the Scottish Catholic Education Service and/or the Roman Catholic Archdiocese of Glasgow (the Archdiocese) in January 2010 who were believed to be the holders of the application. The order was requested because it was relevant to the matters to be considered at the Hearing. Further at the PHR the claimant could not recall the detail of her approval application therefore the order was necessary. The order was granted and the document was provided by the Archdiocese on 21 October 2011.
6. At the Hearing the claimant was again represented by Mr Edwards. Mr Truscott, QC represented the respondent and was instructed by Mr Farrell. The Tribunal heard evidence from the claimant. Mr Andrew McSorley, Head Teacher of St Thomas Aquinas School, Valerie Stevenson, Senior Human Resource Adviser to Glasgow City Council Educational Services and John Timmons former Deputy Head Teacher of St Thomas Aquinas School (who retired in January 2011) gave evidence for the respondent. The respondent also lodged a set of productions.
7. The Tribunal found the following material facts to have been established or agreed.

Findings in Fact

- 5 8. The respondent is the education authority for Glasgow.
9. The respondent employed the claimant as a teacher. She was part of the respondent's pool of permanent supply teachers. The claimant did not hold a substantive post at a named school. She received her salary irrespective of whether she taught. The claimant taught in various teaching posts in the respondent's schools over a number of years. These have included denominational and non-denominational schools.
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10. The claimant was baptised and educated in the Roman Catholic faith. In relation to her religion or belief, the claimant describes herself as agnostic. She attends Mass every week to support her mother and to be part of the community. The claimant very occasionally takes communion although she could not recall celebrating Mass with her mother's parish priest, Father Gannon.
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11. The claimant sustained significant absences from work. Since 2009 Valerie Stevenson, Senior Human Resource Adviser was supporting the claimant during which time the claimant worked in posts in non-denominational schools. The respondent had concerns about her teaching competence, which was not accepted by the claimant. The claimant attributed her absence to bullying and harassment.
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12. St Thomas Aquinas Secondary School (St Thomas Aquinas) is a Roman Catholic denominational school held, maintained and managed by the respondent. The Senior Management Team (SMT) at St Thomas Aquinas is Roman Catholic. The teaching staff is Roman Catholic and non-Roman Catholic. It is estimated that around 50 per cent of the teachers are non-Roman-Catholic. The pupils are Roman Catholic, of other faiths and of no faith.
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13. In the 2009/2010 the SMT included Andrew McSorley, Head Teacher and John Timmons, Deputy Head Teacher. Mr Timmons' responsibility included staff and use of supply teachers in class cover. Geoff Nolan is the Head of the Performing Arts Faculty at St Thomas Aquinas, which incorporates the disciplines of music and drama. It is a high performing well-organised faculty. In addition to Mr Nolan the Performing Arts Faculty has a drama specialist and two full time music teachers.
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14. Around December 2009 there was no vacancy in the Performing Arts Faculty. However Mr McSorley was approached by Ronnie Mackie, Quality Improvement Officer about the claimant joining the Performing Art Faculty in January 2010 to support her professional development, which the respondent considered she needed. As the post was supernumerary the claimant's salary was to be met out of the central budget of the respondent's Education Services rather than the staffing budget of St Thomas Aquinas. Mr McSorley agreed to this.
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15. In December 2009 the claimant was in a supply teaching post in one of the respondent's non-denominational schools. The claimant was offered a supply teaching post at St Thomas Aquinas, which she accepted.
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16. There is a statutory requirement that a teacher appointed to any post in one of the respondent's denominational schools requires to obtain approval from the relevant church or religious body. It is the responsibility of the teacher to gain approval.
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17. The Roman Catholic Church grants approval to Roman Catholics and non-Roman Catholics in respect of the posts in Roman Catholic denominational schools operated by the respondent (the Approval).
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18. The teacher makes the application to the Archdiocese of the Roman Catholic Church (the Archdiocese) by completing a pro-forma application published by the Scottish Catholic Education Service for the Bishops' Conference of Scotland (production R9).
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19. The pro-forma includes guidance for teachers seeking the Approval (production R9, page 27). The guidance states *inter alia*:
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- "You must provide a statement to demonstrate how your personal "religious belief and character" will enable you to undertake your duties associated with the particular post in the Catholic school for which you have applied. As well as referring to these duties you are advised to consider the distinctive features of a Catholic school as outlined in *A Charter for Catholic Schools in Scotland*.
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- You must provide the name of a suitable referee who can testify to your personal "religious belief and character". (A second name is only necessary if the first referee fails to provide a reference.)
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- N.B. If you are Catholic you should provide the name of your parish priest who should be able to testify to your "religious belief and character".*
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20. The teacher completes the Teacher's Statement (Form A) (production R9, pages 28 to 29). On Form A the teacher names a suitable referee who can testify to the teacher's personal "religious belief and character". The teacher also has to provide statements to demonstrate how their personal "religious belief and character" will enable them to undertake their duties associated with the particular post in the Roman Catholic school for which they have applied.
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21. The teacher also completes part of the Referee's Statement (Form B) and gives this to their referee for completion. The completed application is then sent to the Archdiocese (production 9, page 30)
22. The process, the criteria applied and any decision in relation to the application is that of the Roman Catholic Church.
23. Before January 2010 the claimant was aware of the requirement to obtain the Approval in relation to the post at St Thomas Aquinas. The claimant had some years previously obtained the Approval in relation to a post at a

Roman Catholic denominational school operated by the respondent. On that occasion her mother's parish priest who had since left Scotland supported the claimant.

- 5 24. The Approval should be obtained before taking up the post. However often to ensure there is sufficient teaching cover the teacher takes up the post while the application is being processed which usually takes around 14 days.
- 10 25. The claimant commenced work in St Thomas Aquinas around 5 January 2010. Initially the claimant assisted with classes and did co-operative teaching. She was then timetabled for a limited number of drama classes and covered other classes for absent teachers.
- 15 26. The respondent's Education Services Department decided that the claimant should remain at St Thomas Aquinas until a decision on the claimant's application was received from the Roman Catholic Church. It was envisaged that it would be in place by 26 January 2010 (production 16, page 45).
- 20 27. Although Mr Timmons was in charge of teaching staff and was aware of the requirement to obtain the Approval he did get usually get involved in the process. His secretary Anne Murray dealt with administration and would inform him when the Approval was obtained.
- 25 28. Around 12 January 2010 the claimant and Mr McSorley had an unscheduled meeting at which they discussed the process of applying for the Approval (the First January Meeting).
- 30 29. During the discussion Mr McSorley did not ask the claimant's religion. He directed the claimant to the Scottish Catholic Education Service website. They discussed the requirement for all applicants to complete Form A and to have a referee complete Form B. Mr McSorley explained that for Roman Catholics the referee must be a priest and for non-Roman Catholics the referee should be a person of standing within the community. Mr McSorley also referred the claimant to the Charter for Catholic Schools in Scotland and the need to include reference to it in the application. The claimant became exercised as she anticipated difficulty in obtaining approval. She said that she had approached her parish priest who had declined to give her a reference, as he did not know her. Mr McSorley understood from the conversation that this was because the claimant did not attend Mass at that parish; she attended Mass at her mother's parish. Mr McSorley's impression from the claimant's comments was that she was a Roman Catholic. He suggested that the claimant seek a reference from her mother's parish priest. From the discussion Mr McSorley did not anticipate any difficulty in the claimant obtaining the Approval.
- 40 30. On 15 January 2010 the claimant applied for the Approval (production 10). In Form A (production 10, page 33) the claimant included in her statement of how her character will enable her to undertake the duties associated with the post for which she has applied the following:
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"I aim to promote these universal values in my daily life and in education in the schools and take my mother to Mass."

- 5 31. The claimant obtained a reference from a lawyer whom she had known for a number of years (production 10, page 34). In the box for religious belief the referee stated:
- "I believe the applicant is a Catholic and will support the Catholic ethos within the school."
- 10 32. The claimant saw the completed reference and submitted it with Form A to the Archdiocese. The respondent had no knowledge of the terms of the claimant's completed application.
- 15 33. Around 26 January 2010 the claimant had not received the Approval. The claimant expressed concern about the delay to Mr Timmons. At her request Mr Timmons telephoned the Archdiocese to enquire about the progress of her application.
- 20 34. Monsignor Peter Canon Smith, Chancellor of the Archdiocese returned Mr Timmons' telephone call sometime later. Monsignor Smith was reticent. He advised Mr Timmons that the claimant's application was likely to be declined; the claimant needed to clarify if she was a Roman Catholic and if so she should obtain a reference from her parish priest. The claimant was
- 25 to be informed of this in writing.
- 35 35. On 29 January 2010 Mr Timmons told the claimant that it was likely that her application would be declined.
- 30 36. The claimant subsequently spoke to Mr McSorley. Mr McSorley said that failure to obtain the Approval would mean that she would have to leave St Thomas Aquinas. He did not say that she had to leave that day.
- 35 37. Mr McSorley and Mr Timmons expected the claimant to return to St Thomas Aquinas the following week.
- 40 38. The claimant was devastated at learning that her application was likely to be declined. She considered that the implication was that she was deficient in some respect and she would suffer a loss of status among the community. At the end of the day on 29 January 2010 the claimant decided that she would not return to St Thomas Aquinas. She did not inform Mr McSorley or Mr Timmons of her decision.
- 45 39. On 1 February 2010 the claimant reported sick and then attended the headquarters of the Education Services to obtain a copy of the respondent's policy on approval from the Roman Catholic Church. The claimant remained absent from work due to ill health. She did not return to work.
- 50 40. Around a week later the claimant collected a letter dated 26 January 2010 from Monsignor Smith, regarding her application for approval to teach at St Thomas Aquinas (production R11). The letter stated:

"..if you are a Catholic, I require a reference from the parish priest who sees you at Mass.

I would be grateful if you would clarify this.

5 In the meantime your application will be held pending."

41. The claimant's application has the following handwritten comment which she did not write (production 10, page 32):

10 "Is this lady a Catholic – if so she needs a priest reference."

42. The claimant contacted the Archdiocese. The claimant told either Father White or Monsignor Smith that she was not a practising Roman Catholic but she attended Mass with her mother. She was told that there was no such thing as a non-practising Roman Catholic. She was informed that the problem was of her own making and the solution was in her own hands.

43. The claimant wrote to the Archdiocese on 11 February 2010 seeking a review of Monsignor Smith's decision.

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44. On 12 February 2010 Monsignor Smith spoke to Ms Stevenson on the telephone and advised her that the claimant's application for approval had been declined.

25 45. Later that day the claimant, accompanied by her mother, attended a meeting with Jim McTernan, Senior Human Resources Officer, who was accompanied by Valerie Stevenson. The meeting was a formal interview under the respondent's absence management policy as the claimant has been sick absent from 1 February 2010.

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46. The claimant was invited to explain why she felt stressed at work. The claimant referred to the advice given in relation to her application for approval and the uncertainty over the status of the application. She was advised that the respondent's Education Services had been contacted on 12 February 2010 to confirm that the claimant's application to work in denominational schools would be confirmed as declined and the claimant would receive a letter from the Archdiocese confirming the position.

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47. The claimant was advised that as she had not received the Approval the respondent could not continue to allow her to teach in the post at St Thomas Aquinas. The claimant was advised that a school could be identified almost immediately within the non-denominational sector. The claimant indicated that she had no intention of discussing this until she met with her General Practitioner in four weeks time.

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48. By letter dated 12 February 2010 from the Archdiocese the claimant was advised as follows (production R12):

50 "Thank you for your letter of 11 February in which you request that I look again at your application for approval. I have done as you asked.

The Catholic Church has a right to approve applicants for posts in a Catholic school in regards to "belief and practice". In addition to your statement of belief all Catholics are

required to demonstrate their practice, i.e. their attendance at Mass. I wrote to you on 26 January informing you that I required a reference from the priest who sees you at Mass.

As of yet you have failed to provide me with such a reference. In looking again at your application, I see no priest's reference I therefore find no evidence of your practice.

The decision of the Archdiocese of Glasgow is: approval is not granted.

You have the right of appeal against this decision and should you wish to exercise this right, you should address your written appeal, including the reasons for your appeal to Mr Michael McGrath, Director, Scottish Catholic Education Service, 75 Craigpark, Glasgow G31 2HD. Any appeal must be received within 14 days of today's date.

I have informed Glasgow City Council of this decision."

49. The claimant appealed to the Archdiocese on 1 March 2010 and was subsequently advised that the appeal was not competent.

50. The claimant raised a grievance with the respondent by letter dated 10 March 2010 (production R14). The closing paragraph of her grievance reflected her grounds of appeal to the Archdiocese:

"Firstly I am not satisfied that the established procedures were followed correctly. I am not satisfied that it was appropriate for me to be asked to seek approval to teach in a Catholic School. I have a Certificate in Religious Education from Moray House College, Edinburgh. Around five years ago I sought and obtained approval when I applied for drama post at Holyrood. I cannot therefore understand why it is necessary to have to undergo this procedure when I have a qualification in religious education and have already been approved.

I also consider there is an issue in relation to consistency. I appear to have been treated differently from the majority of other teachers on the basis that I am permanent supply teacher. As I have previously mentioned I previously sought and obtained approval. It is my understanding that a very significant number of teachers in Catholic schools are not required to provide approval on the basis that they are already in post. I also understand that a significant number of schools do not require all supply teachers to provide evidence of approval from the Roman Catholic Church. I would therefore suggest there is a considerable degree of inconsistency between supply teachers and teachers in non-supply posts and indeed between supply teachers in different schools. If my understanding of the situation is correct, there is a complete lack of consistency."

Witnesses and Conflict of Evidence

51. The Tribunal found that the claimant gave her evidence honestly based on her recollection and perception of events. The Tribunal felt that her responses were loquacious and at times failed to answer the question asked of her. The Tribunal considered that the claimant's evidence in relation to (a) her telephone discussion with Monsignor Smith or Father White following her receipt of the letter dated 26 January 2010 and (b) the contents of her letter to Monsignor Smith dated 11 February 2010 was vague and of doubtful reliability and noted that it was at odds with the statements in her ET1 claim form.

52. Mr McSorley was in the Tribunal's view a credible and reliable witness. The Tribunal did not doubt that he gave his evidence honestly based on his recollection of discussions. The Tribunal noted that he did not recall certain

events. However the Tribunal considered that this was because at the time the discussions were insignificant and Mr McSorley only became aware of the claimant's concerns after these proceedings were presented.

- 5 53. The Tribunal considered that Ms Stevenson gave her evidence honestly and she was a credible and reliable witness. The Tribunal felt that Ms Stevenson was genuinely endeavouring to support the claimant and any negative feelings that the claimant had towards her were not reciprocated.
- 10 54. Mr Timmons was also a credible and reliable witness. The Tribunal felt that he was candid about his dealings with the claimant and his comments were understandable when viewed in the context of his overall management responsibility at the time.
- 15 55. In the judgment following the PHR the Employment Judge made a number of findings in fact. However Mr McSorley did not give evidence at the PHR. Also additional documentation relating to the claimant's application for approval was produced at the Hearing, which was not produced at the PHR. Accordingly in this judgment when making findings in fact the Tribunal took
20 into account the evidence of all the witnesses and productions. Where there was a conflict of evidence between the witnesses on a material issue or the original findings in fact and the findings in fact in this judgment in the Tribunal has explained below which evidence it preferred and why.
- 25 56. The claimant did not accept that the respondent had concerns about her teaching competence. While she was willing to go to St Thomas Aquinas she unaware that her placement there was supernumerary and professional support. Mr McSorley said that there was no vacancy for a supply teacher in the Performing Arts Faculty and the claimant was supernumerary. Mr
30 Timmons said the cost of the claimant's salary was met out of the respondent's Education Services rather than the budget of St Thomas Aquinas. Ms Stevenson confirmed that the placement was for professional support and the timetable was collapsible so that if the claimant were absent the impact would be minimal. Given that the claimant was initially
35 assisting and participating in co-operative teaching the Tribunal considered that the evidence of the respondent's witnesses was more convincing on this issue.
- 40 57. Turning to the First January Meeting the evidence of the claimant and Mr McSorley was consistent in a number of aspects. They agreed that Mr McSorley did not ask the claimant's religion. He directed the claimant to the Scottish Catholic Education Service website. They discussed the requirement for all applicants to complete Form A and to have a referee complete Form B. Mr McSorley explained that for Roman Catholics the referee must be a priest and for non-Roman Catholics the referee should be
45 a person of standing within the community. They discussed the Charter for Catholic Schools in Scotland and the need to include reference to it in the application. The claimant informed Mr McSorley that she might have difficulty in obtaining approval.
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58. Where there was a conflict of evidence was that the claimant said that Mr McSorley thought that she was a Roman Catholic, as he knew members of her family were Roman Catholic. She said that she told him that she had approached her mother's parish priest (Father Gannon) who declined to support her application for approval, as he did not know her. The claimant also said that Mr McSorley commented that Father Gannon was wrong to refuse her and that all that the claimant needed was a priest who saw her face at Mass. Further that the basis upon which the claimant applied was a matter for her own conscience and that she should ask her solicitor to be her referee.
59. Mr McSorley's evidence was that he did not know or ask if the claimant was a Roman Catholic. However as she referred to attending Mass and her parish priest he assumed that she was a Roman Catholic. Mr McSorley said that the claimant told him that she had approached her parish priest who had declined to support her application, as he did not know her. He understood that this was because she attended Mass at her mother's parish. Mr McSorley suggested that the claimant seek a reference from the priest at her mother's parish. From the discussion Mr McSorley did not anticipate there being a problem.
60. As a head teacher of a Roman Catholic denominational school Mr McSorley is familiar with the process of obtaining the Approval. The Tribunal accepted that he knew the Approval to be a matter for the Roman Catholic Church and from the discussion Mr McSorley assumed that the claimant was Roman Catholic and was seeking a reference from a parish priest. The Tribunal also accepted that at that from the discussion Mr McSorley did not anticipate there being a problem. Given his position and more significantly his own religious beliefs the Tribunal considered it highly unlikely that Mr McSorley would be critical of a parish priest declining to give the claimant a reference or that he would suggest that the claimant only had to show her face at Mass. The Tribunal was mindful that the First January Meeting was unscheduled, relatively short and only one of many matters that Mr McSorley would have dealt with that day. Although at the time the discussion would have had more significance to the claimant the Tribunal was not convinced that meant her recollection was more reliable than that of Mr McSorley. His recollection was given objectively and was based on his understanding and impression of a routine conversation. The claimant undoubtedly now believed her recollection to be accurate but with the passage of time her recollection was not in the Tribunal's view what she was actually conveyed to Mr McSorley at the time. The Tribunal therefore preferred Mr McSorley's evidence in far as there was any conflict of evidence in relation to the First January Meeting.
61. In relation to the respondent's witnesses there was some conflicting evidence about who informed whom of what and when. The Tribunal noted that while Mr Timmons had responsibility for supply teachers at St Thomas Aquinas, he left his secretary Ms Murray to keep note of when the Approval was obtained. Ms Stevenson's assistant, Collette Bone kept a spreadsheet of all teachers working in denominational schools who required the Approval and when that had been confirmed. Mr McSorley and Mr Timmons liaised

throughout the day on various matters. In addition the claimant spoke to the respondent's witnesses about her application for approval.

- 5 62. The Tribunal considered that it was highly likely that information regarding the claimant's application for approval was communicated indirectly between Mr McSorley, Mr Timmons and Ms Stevenson. This explained why they were aware of certain developments although they did not necessarily recall speaking directly to each other.
- 10 63. The Tribunal turned to what was said about the claimant's application during the telephone conversation between Mr Timmons and Monsignor Smith and what Mr Timmons subsequently communicated to the claimant.
- 15 64. Dealing first with the telephone conversation the Tribunal noted that it was unusual for Mr Timmons to make such enquiries and only did so reluctantly at the claimant's request. The Tribunal therefore considered that it was highly likely that Monsignor Smith would be reticent about divulging information to Mr Timmons. For that reason the Tribunal considered that the information provided during their conversation would be limited.
- 20 65. The Tribunal noted that the letter dated 26 January 2010 from Monsignor Smith to the claimant stated that if she was a Roman Catholic a reference was require from the parish priest who see her at Mass. The claimant was asked to clarify this. Meantime her application was pending. The claimant had not received this letter at 29 January 2010. Accordingly this clarification was still awaited when Monsignor Smith spoke to Mr Timmons. The Tribunal also noted that at the top of the claimant's application is a handwritten note querying whether the claimant is a Roman Catholic and if so a priest reference was required. Mr Timmons timetabled the claimant to cover classes and teach at St Thomas Aquinas during the week commencing 1 February 2010. The Archdioceses did not reach a decision about the claimant's application until on or around 12 February 2010: almost a fortnight after the telephone conversation took place. Against this background the Tribunal considered it highly probable that Monsignor Smith told Mr Timmons that the application was likely to be declined.
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- 40 66. As regards the subsequent discussion between the claimant and Mr Timmons, the claimant said that Mr Timmons told her on 29 January 2010 that her application had been turned down. Mr Timmons denied saying this. His position was that he told the claimant her that the application was likely to be declined and she would be informed in writing. Mr Timmons said that he was noncommittal.
- 45 67. The Tribunal considered that Mr Timmons did not of his own volition raise the issue of Approval with the claimant. Had the claimant not asked Mr Timmons to contact the Archdiocese he would not have done so himself. From Mr Timmons' perspective until he was notified that the claimant's approval had not been granted he was at liberty to use the claimant as a supernumerary supply teacher at no cost to St Thomas Aquinas. The Tribunal therefore felt that that Mr Timmons' evidence was more plausible.
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- 5 68. The Tribunal moved onto consider if Mr Timmons was aware of the reason why the claimant's application for approval had not been granted at 29 January 2010. The Tribunal considered that at 29 January 2010 the claimant's application was pending; it was not declined until 12 February 2010. The Tribunal considered that the claimant's Approval was of little consequence to Mr Timmons and given Monsignor Smith's reticence the Tribunal considered that it was unlikely that Mr Timmons would have asked why Approval had not yet been granted. In view of the delay in reaching a decision the Tribunal thought it was probable that Monsignor Smith would have given some explanation for this. However the Tribunal considered that the most he would have told Mr Timmons was that the claimant had been asked to clarify if she was a Roman Catholic and if so she should obtain a reference from her parish priest.
- 15 69. There was a conflict of evidence in relation to a meeting between the claimant and Mr McSorley on 29 January 2010 (the Second January Meeting). The claimant evidence was that she went to speak to Mr McSorley after her conversation with Mr Timmons. The claimant said that Mr McSorley confirmed that the Approval was turned down. Mr McSorley said that he did not specifically recall any further conversation with the claimant after the First January Meeting. In particular he had no recollection of a conversation with the claimant in which he advised, or confirmed that her Approval had been declined. Mr Timmons may have given him an update at some point that day. Mr McSorley denied that he knew the reason for the delay in the application and had no recollection of speaking to Ms Stevenson or Mr Mackie at that stage.
- 30 70. While the Tribunal considered that it was likely that the claimant would have approached Mr McSorley on 29 January 2010 it was not surprised that he had no particular recollection as from his perspective there was no change in the situation; the claimant's application was pending and if it was subsequently declined she could not teach at St Thomas Aquinas. The Tribunal considered that it was highly unlikely that Mr McSorley would have told the claimant that her application had been turned down. There was in the Tribunal's view no reason for him to have done so. The Tribunal thought it was probable that he would reassure the claimant that if her application was declined she could no longer teach at St Thomas Aquinas and that an alternative post would be found for her.
- 40 71. At 29 January 2010 a decision had not been taken by the Archdiocese in relation to the claimant's application. Accordingly at that stage the respondent did not know that the application was refused or the reason for it. Certainly by the week commencing 1 February 2010 Mr Timmons, Mr McSorley and Ms Stevenson were aware that the application was pending and was likely to be declined. Monsignor Smith advised Ms Stevenson on 45 12 February 2010 that the claimant's application was refused. There was no evidence that Monsignor Smith told Ms Stevenson (or indeed Mr Timmons or Mr McSorley) the reason for decision to refuse the application on 12 February 2010. The letter from the Archdiocese to the claimant dated 50 12 February 2010 was not copied to the respondent.

- 5 72. In paragraph 28, page 5 of the judgment following the PHR the Employment Judge made a finding that, "The respondent had a general understanding why the application had been declined." She went on to explain in paragraph 37, page 6 that the evidence before her regarding the information provided to the respondent about the reason for the refusal was unclear but she was satisfied from the evidence of Mr Timmons and Ms Stevenson that, "the claimant's application was refused because the claimant was a non-practising Roman Catholic who could not provide a reference from a priest to demonstrate that she attended Mass."
- 10 73. The Tribunal considered that Mr Timmons' was probably aware from Monsignor Smith that the claimant needed to clarify if she was a Roman Catholic and if so she should obtain a reference from her parish priest. At the Hearing Mr Timmons said that he assumed that when the application was refused it was because a parish priest did not say that the claimant was attending Mass. Ms Stevenson said that she would not ask the reason for refusal, as there was no reason to do so as it had no bearing on the respondent's obligation to offer work to the claimant. It was a matter between the claimant and the Archdiocese.
- 20 74. The grievance raised by the claimant dated 10 March 2010 (which none of the respondent's witnesses had seen before the Hearing) makes no reference as to the basis of her application for Approval or the reason for it being declined. On 15 May 2010 the claimant presented her claim to the Employment Tribunal. In the ET1 she states that she applied for approval as a non-Catholic with a reference from a family lawyer. However "*Father White, who was one of the priests dealing with the application informed her that if she was baptised as a Catholic then she would require a reference from her parish priest before approval could be granted.*"
- 25 75. The Tribunal noted that the respondent only had sight of the claimant's application for approval shortly before the Hearing. Any information that the respondent's witnesses had regarding the basis of claimant's application for Approval and the reason for its refusal was based on assumption of information provided by the claimant during the Employment Tribunal proceedings. The Tribunal did not consider that in view of the evidence before it at the Hearing it could find that the respondent knew the reason for the claimant's application being declined.

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Submissions

- 45 76. The representatives helpfully prepared written submissions of which the following is a summary.

Submissions for the Claimant

- 50 77. The claimant claims indirect discrimination by the respondent in terms of Regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations).

- 5 78. The respondent employed the claimant as a permanent supply teacher. She was placed at St Thomas Aquinas and she required to be approved for the post by the Roman Catholic Church in terms of Section 21(2A) of the Education (Scotland) Act 1980 (the ESA).
- 10 79. The Roman Catholic Church regularly approves both Roman Catholic and non-Roman Catholic teachers for posts in Roman Catholic denominational schools. The Roman Catholic Church treated the claimant as being Roman Catholic. The Approval was refused on the grounds that she did not attend Mass.
- 15 80. The decision to refuse the claimant's approval was an interference with her right to freedom of religion or belief under Article 9 of the European Convention on Human Rights. Any interference is only lawful where it is necessary. Other teachers at the St Thomas Aquinas were approved despite not attending Mass. It is not necessary for a teacher to attend Mass in order to teach at a Roman Catholic denominational school. The refusal was clearly therefore not a necessary limitation in terms of Article 9.2. It not being necessary the refusal was an unlawful interference with the claimant's Article 9 rights.
- 20 81. The respondent operated a practice with regard to decisions of the Roman Catholic Church regarding the approval of teachers to posts in Roman Catholic denominational schools. That practice was to accept and act upon the decision of the Roman Catholic Church without question.
- 25 82. The respondent accepted the decision of the Roman Catholic Church. It acted upon it by informing the claimant that she could no longer teach at St Thomas Aquinas. The respondent informed the claimant that she could no longer teach at any Roman Catholic denominational school in Glasgow.
- 30 83. The respondent's practice was applied equally to persons not of the same religion or belief as the claimant. However the practice puts persons of the same religion or belief as the claimant at a particular disadvantage when compared with those other persons. It also put the claimant at a disadvantage.
- 35 84. The claimant is agnostic. She does not attend Mass. Her non-attendance at Mass can be characterised as a lack of religion.
- 40 85. It is the practice of the respondent always to accept the decision of the Roman Catholic Church even if the decision is plainly unreasonable. That is the case even if the decision constitutes a breach of Article 9 rights and that breach is plainly not necessary.
- 45 86. The appropriate pool for comparison comprises all teachers who seek approval. This comprises teachers who, like the claimant, are treated as being Roman Catholics by the Roman Catholic Church but who do not attend Mass (the disadvantaged group). These teachers share the claimant's lack of religion. The pool also comprises Roman Catholic
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teachers who do attend Mass together with non-Roman Catholic teachers (the non-disadvantaged group).

- 5 87. It is a matter of general knowledge that not all Roman Catholics attend Mass therefore it is within judicial knowledge that there are Roman Catholics who do not attend Mass. It is also within judicial knowledge that not all Roman Catholic teachers attend Mass. The alternative would be to presume that all Roman Catholic teachers attend Mass, which is a presumption that is unlikely to be correct.
- 10 88. The respondent's practice is applied to all teachers in the pool. However that places teachers in the disadvantage group at a particular disadvantage from those in the non-disadvantaged group.
- 15 89. It is not necessary for the claimant to prove that the respondent's practice has actually placed other people in the disadvantaged group at a disadvantage. It is sufficient to show that it would do so. This is so. The respondent's practice is to accept any decision the Roman Catholic Church makes. Had the Roman Catholic Church on the same grounds refused
20 another member of the disadvantaged group the respondent would have behaved in the same or similar way to how it behaved towards the claimant. Its practice would be the same.
- 25 90. The respondent's practice of accepting the refusal and acting upon it placed the claimant at a particular disadvantage compared to persons in the non-disadvantaged group.
- 30 91. The claimant was told that she would have to leave St Thomas Aquinas when another post was found for her in a non-denominational school. She was told that she could no longer teach in any Roman Catholic denominational school. She described the feeling that she would be stigmatised and that her reputation would be shattered. She felt that people would wonder why she had been turned down. She would suffer a loss of status amongst the community. She described anticipating the loss of
35 credibility in school. The claimant suffered injury to her feelings caused by the respondent's practice.
- 40 92. Section 21(2A) of the Education (Scotland) Act 1980 (ESA) requires an applicant for a teaching post in a denominational school to be approved as to their religious belief or character by the appropriate religious organisation. The Regulations apply without prejudice to Section 21 of the ESA.
- 45 93. The claimant's position is that in denying her approval to teach for the reason stated, the Roman Catholic Church breached her rights at Article 9 of the European Convention on Human Rights (ECHR) which guarantees freedom of religion and thought and freedom to manifest one religion or thought. Section 21 of the ESA must be read and given effect to, if possible in a manner, which is compatible with the ECHR. The claimant's position is that this is possible by reading in words to the effect that approval shall not
50 be denied unreasonably. The respondent failed to read the provision in that manner.

- 5 94. The duty to read in words is obligatory on all not just courts or tribunals. It is a duty of the respondent to read Section 21 of the ESA in a way, which was convention compliant if possible. The duty is not restricted to situations where the words of a provision are ambiguous or unfair.
- 10 95. The duty exists where it is both possible to read the provision as convention compliant and doing so will not undermine the fundamental function of the provision. The fundamental function of the provision is to allow the Roman Catholic Church to ensure that those teaching in Roman Catholic denominational schools are not in conflict with the ethos and values of the Roman Catholic Church. That those teaching in Roman Catholic denominational schools are in agreement with the charter. By reading the words to seek approval must not be unreasonably withheld the fundamental function of the provision is not undermined.
- 15 96. The respondent has a duty to read Section 21 of the ESA in this way. It is not a defence to say that it was forced by Section 21 of the ESA to adopt the practice, which it did. It did not need to act on the decision of the Roman Catholic Church where that decision appeared to be an unlawful interference with the claimant's Article 9 rights. The respondent could have allowed the claimant to remain in post if it felt that the decision had been reached unlawfully. It was common for teachers to be placed in the school pending approval as indeed the claimant had been. The respondent could have operated a practice where a teacher remained in place pending review of an unlawful decision.
- 20 25 97. The respondent was aware of the reason for the refusal by the Roman Catholic Church. The respondent knew the problems the claimant was having because she did not attend Mass. Mr Timmins stated that it was "probably true" that Monsignor Smith had informed him of the reason. He said that when an approval was refused he assumed it was because the parish priest would not say that the applicant is attending Mass. The respondent was aware of the reasons for the refusal by the Roman Catholic Church. The respondent must therefore take into account the reason for the decision of the Roman Catholic Church. The claimant's position is not that the respondent must necessarily do so in every case. The claimant is not saying that the respondent must investigate the decision of the Roman Catholic Church in each occasion. But in this case the respondent knew the reasons for refusal. It was clear that the policy of the Roman Catholic Church was unreasonable.
- 30 35 40 98. It cannot be the intention of Parliament to allow an unfettered discretion by the Roman Catholic Church under Section 21 of the ESA nor to allow the Roman Catholic Church to exercise an arbitrary use of power. It cannot have been the intention of Parliament to allow an unlawful interference with a person's right to freedom of religion or thought.
- 45 50 99. The decision of the Roman Catholic Church was plainly unlawful. Had the respondent not adopted the practice of accepting unquestionably the

decision of the Roman Catholic Church the resultant injury to feeling of the claimant would not have occurred.

Submissions for the Respondent

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100. This is a claim of discrimination contrary to the Regulations. It is unusual because the principal act that has aggrieved the claimant was not the act of the employer but the act of a third party.
- 10 101. On 12 February 2010 the Archdiocese decided to refuse the claimant's application for approval to teach at St Thomas Aquinas. It was this decision that left the claimant "gutted": she felt a stigma at being turned down.
- 15 102. The respondent had no involvement in the decision not to grant approval. Nonetheless it is against the respondent that the claim is made. The claim is that the actions of the respondent in consequence of the decision of the Archdiocese indirectly discriminated against the claimant by virtue of her being a member of the Roman Catholic Church but a member who did not practise.
- 20 103. The respondent set out the factual background and invited the Tribunal to prefer the evidence of the respondent's witnesses to that of the claimant.
- 25 104. The Tribunal was referred to the applicable law and authorities.
- 30 105. Regulation 39(1) of the Regulations provides that the Regulations are without prejudice to Section 21 of the ESA. In a denominational school, an education authority's power to appoint teaching staff is expressly fettered by two external requirements: the satisfaction of the Secretary of State as to qualification; and the approval of the Roman Catholic Church or other denominational body as regards religious belief and character. Section 21(2)(A) of the ESA does not afford the education authority any locus in either matter nor any discretion in relation to these requirements (see *Glasgow City Council v McNab [2007] IRLR 476 EAT*).
- 35 106. The claimant not having gained the Approval the respondent could not allow her to teach in St Thomas Aquinas without breaching Section 21(2)(A) of the ESA.
- 40 107. In following the provisions of Section 21(2)(A) of the ESA the respondent is not liable to a finding of discrimination under Regulations by virtue of Regulation 39 of the Regulations. The respondent is a statutory body, which only had power to do what was authorised by statute and had no power to do what was inhibited by statute (*Renfrewshire Council v Martin [2010] UKEATS/0031/07/MT dated 30 April 2008*). This should be the end of the matter.
- 45 108. If however the Tribunal wishes to go on to consider the claim under the Regulations two issues arise:
- 50 a. What is the religion relied upon by the claimant?

b. How is she indirectly discriminated against?

- 5 109. The claim form presented to the Tribunal has no reference to the claimant's religion nor is there mention of it in the first amendment to the claim. In the second amendment the claimant describes herself as "a non-practising member of the Catholic Church". In the response to orders the claimant states that, "she does not attend Mass". Together these documents make up the claim before the Tribunal.
- 10 110. Yet in her oral evidence the claimant stated that she is agnostic and was agnostic at the time that she applied for the Approval (this mirrors her evidence at the Pre-Hearing Review). The claimant attends Mass every week both to support her mother and to be part of something bigger. The claimant very occasionally takes communion. She has contradicted the very basis upon which she has chosen to advance her claim.
- 15 111. Regulation 2(1)(a) of the Regulations provides that religion means any religion. The issue in this case is whether having described herself as a lapsed Roman Catholic and claiming discrimination on that basis she can persist in the claim she now claims that she was discriminated because she is an agnostic. The latter may be a religion for the purposes of the Regulations; the former is not.
- 20 112. The claim is one of indirect discrimination however there is no provision, criteria or practice (PCP) identified; it is not clear what the protective characteristics to which the PCP is applied. Adverse impact on those who share the protected characteristic has not been established neither has disadvantage to the claimant.
- 25 113. Lady Hale in R (on the application of *E v Governing Body of JFS and Others* [2010] IRLR 136SC) said at paragraphs 56 to 57:
- 30 "The basic difference between direct and indirect discrimination is plain: see Mummery LJ in R (Elias) the Secretary of State for Defence [2006] EWCA 1293 [2006] 1WLR 3213 paragraph 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria, which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.
- 35 Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias, at paragraph 117 "The conditions of liability, the available defences to liability and the available defences to remedy differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."
- 40 45 114. Regulation 3(1)(b) of the Regulations provides that a person indirectly discriminates if he applies a PCP to all, but it puts persons who have a particular characteristic at a particular disadvantage, and he cannot show that the PCP is a proportionate means of achieving a legitimate aim. In considering a claim for indirect discrimination the formulation requires an examination of the following issues:
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- Whether there is a PCP;
 - Which is applied equally to those who do not have the protected characteristic in question in this case, religion;
 - 5 - Which puts or would put, persons who share the protected characteristic of the complainant at a particular disadvantage when compared to those who do not share the particular protected characteristic;
 - Which puts or would put the complainant at that disadvantage; and
 - 10 - Which cannot be shown to be a proportionate means of achieving a legitimate aim.
115. If there was a PCP applied by the employer in this case, the respondent is required to comply with the statutory provision so it is obliged to retain the claimant in employment at St Thomas Aquinas only if she has Approval. It is not an employer's requirement. This position is similar to that in *Hacking and Paterson v Wilson (UKEATS/0054/09)* in which Lady Smith held that when a female employee wanted to return to work after maternity leave on a part time or flexible basis, this was not a case in which there was to be an imposition of an obligation (to work full time) as the employer was not seeking to impose any new obligation on her. Rather the employee was asking for a variation of her contract so as to afford her a new benefit, which was then refused.
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- 25 116. This definition of indirect discrimination asks whether the PCP "puts or would put" those with the protected characteristics at a particular disadvantage when compared to those who do not have that protected characteristic. This formula does not require statistical proof (although this may be used, where available) and instead other types of evidence (for example expert testimony) may be used to establish the necessary effect. While therefore a claimant is not required to use pools to show a particular disadvantage, such an approach is not prohibited. To this extent the pre-existing case law on selection pools and statistics demonstrating disparate impact remains of such interest.
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117. As regards the choice of pool, the Tribunal was referred to best recent discussion of choice is contained in *Hacking and Paterson and Another v Wilson* (above). Lady Smith addresses this issue at paragraphs 9 to 18.
- 40 118. Turning to the proportions within the pool, the main focus should be on the relative proportions within the advantage groups (see *Rutherford and Another v Secretary of State for Industry (No 2) [2005] ICR 19 CA*).
- 45 119. As regards evidence of disadvantage, the employees of the respondent who had their applications for approval granted would be able to continue with their employment in the denominational school. Those who did not gain approval would be employed in a non-denominational school. It was not accepted that not gaining approval is a disadvantage. Either way, they remain employed and are not disadvantaged by anything done by the
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120. Turning to putting the claimant at that disadvantage, the PCP that puts members of a protected group at a "particular disadvantage" must also put (or would put) the claimant at that disadvantage; it is not enough for the claimant merely to establish membership of the protected group.
121. Here the claimant was in the group who had to be deployed to the non-denominational sector. It was not accepted that this disadvantages her.
122. In relation to justification the Tribunal was referred to the leading case of the European Court of Justice, *Bilka-Kaufhaus JMBH v Weber Von Hartz 170/84 [1987] ICR 110 ECJ*.
123. The test of justification set out in the Race Directive And Equal Treatment Framework Directive requires the employer to establish that the PCP is "objectively justified by a legitimate aim and the means of achieving that aim is appropriate and necessary". This is in effect a codification of the *Bilka* test. UK law has shortened this to "a proportionate means of achieving a legitimate aim". Replacing "appropriate and necessary" with "proportionate" is not intended to override the directive or the *Bilka* test but to incorporate the idea that the "reasonably necessary" is equivalent to the proportionality test set out by the ECJ in *Enderby*.
124. In relation to "legitimate aim" and "proportionate means" it is important to note that there must be full consideration of two separate issues and the questions must not be inflated. This was emphasised in *MacCulloch v ICI Plc [2008] ICR 1334 EAT*.
125. Neither domestic nor European legislation defines what can be a "legitimate aim" for the purposes of seeking to justify what would otherwise be indirect discrimination, rather as a matter of fact for the Tribunal (see *Ladele v London Borough of Islington [2010] IRLR 211CA*). The Equal Treatment Framework Directive in Article 6, dealing with circumstances in which direct age discrimination may be justified, says that the legitimate aims may include "legitimate employment policy, labour market and vocational of vocational training objectives". What can amount to a legitimate aim is however far wider than the considerations listed that the list is sufficient for this case.
126. The principal of proportionality requires the objective balance to be struck between the discriminatory effect of the measures and the reasonable needs of the undertaking. Whether domestic legislation uses the word "proportionate" in preference to the phrase "appropriate and necessary" it is considered that the European Court of Justice has used the two terms interchangeably. Guidance in the way which this balance of exercise should be carried out was provided by the Court of Appeal in *Hardy & Hansons Plc v Lax [2005] ICR 1565* in which the Court of Appeal held that it was for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measures to make its own assessment of whether the former outweighed the latter. The court emphasises that there is no room to introduce a test of objective

justification the “range of reasonable responses” which is available to the employer in cases of unfair dismissal.

- 5 127. In seeking to show that its actions were proportionate an employer does not need to show that there was no alternative course of action but must demonstrate that the measures taken were “reasonably necessary” (see *Barry v Midland Bank Plc [1999] ICR 859 HL*). The actions will not be considered reasonably necessary if the employer could have used less discriminatory means to achieve the objective (*Kutz-Bauer v Freie Und*
10 *Hansestadt Hamburg [2003] IRLR 368 ECJ*).
128. The Tribunal must carry out a “balancing exercise” to evaluate whether the business leads relied on by the employer was sufficient to outweigh the impact of the measures in question on the protected group generally and on the claimant in particular (*Allonby v Accrington and Rosendale College and Others [2001] IRLR 34 CA Paragraph 29*).
129. The action taken by the respondent in the present case was the only course open to them in light of the claimant’s failure to gain approval.
- 20 130. On the foregoing analysis of the law the claimant would not be entitled to a remedy from the Employment Tribunal. The Tribunal was however referred to Regulation 30 of the 2003 Regulations.
- 25 131. On the question of what “intention” really implies in this context the Tribunal was referred to the decision of the EAT in *J H Walker Ltd v Hussein [1986] IRLR 11 EAT* where the intention was satisfied where an employer knew that certain consequences would follow from his acts and he wanted those consequences to follow. In this case the employer’s motive (which was to promote business efficiency) did not mean that he had not intended to treat the claimants unfavourably on the protected grounds.
- 30 132. Tribunals have the power, where they think it would be not be just and equitable to decline to do so, to award compensation even where the respondent did not intend to treat the claimant unfavourably on the grounds of their sex and marital status.
- 35 133. The claimant says she is entitled to an award on the lower band of *Vento* as adjusted. On the evidence, it was the actions of the Archdiocese that occasioned any hurt feelings to the claimant. The claimant was gutted at learning that her application would likely to be refused. The stigma she felt was stigma at being denied Approval and the implication that she was deficient in some respect. She became absent and was certified as unfit by reason of stress at the likely decision of the Archdiocese. All of these actions (and reactions) pre-date 12 February 2010 the date upon which the respondent told the claimant that she could no longer teach at St Thomas Aquinas. Even if the claimant is successful, the claim does not entitle her to any award of compensation.
- 40 45 134. The Tribunal was referred to Article 9 of the Human Rights Act 1998 (the HRA). The claimant’s case under the HRA is based on the proposition that
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- the claimant's failure to gain approval from the Roman Catholic Church was an infringement of Article 9 Convention Rights. However the failure of the claimant to gain approval from the Roman Catholic Church does not in itself constitute an infringement of her rights under Article 9. The Tribunal was referred to the comparable situation in *R (an application of the Begum) v Head Teacher and Governors of Denbigh High School* [2007] 1AC 100HL.
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135. Further it is based on the proposition that the respondent had knowledge that the circumstances surrounding her failure to gain approval amounted to her infringement of Article 9 rights. This knowledge is necessary to trigger any duty that the respondent may have had under Sections 3 or 6 of the ERA. The respondent had no such knowledge.
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136. If the submission in relation to Article 9 was not accepted in Section 6 of the HRA is relevant. Where the act of the public authority is incompatible with a Convention right the effect of Section 6(2)(A) is to immunise that public authority where the authority was bound to show to act by primary legislation. The HRA emphasises that parliamentary sovereignty takes precedent over Convention rights. Section 6 cannot be used to undermine a clear statutory scheme and subvert the intention of Parliament: see *R (on the application of Hooper and Others) v Secretary of State for Works and Pensions* [2005] 1 WLR 1681HL.
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137. The respondent has not acted incompatibly with the claimant's Article 9 Convention right. The respondent's act is unrelated to the claimant's religion or belief. Therefore Section 6(1) is not triggered. The respondent immediately offered an equivalent post in a non-denominational school. This is not incompatible with the claimant's Convention rights.
- 25
138. The act that the claimant is complaining is incompatible with her Article 9 Convention right is that of the Roman Catholic Church. If there is a remedy, it is one of judicial review of the decision of the Roman Catholic Church not a complaint against the employer in the Employment Tribunal.
- 30
139. Even if the respondent acted in a way that it was incompatible with the claimant's Convention rights, under the statutory scheme set up by the ESA, the respondent could not have acted differently. This act is not unlawful by virtue of Section 6(2)(A).
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140. The Tribunal was referred to Section 3 of the HRA, which applies where the ordinary meaning of legislation may be incompatible with the Convention rights. In such circumstances there is an obligation to interpret the legislation compatibly with the Convention rights. It is a powerful obligation but it is limited. The interpretation may not go so far as to depart substantially from a fundamental feature of legislation (see *Re S; Re W (children; care plan)* [2002] 2AC 291 HL and *Ghaidan v Mendoza* [2004] 2EC 557 HL.
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141. There was no breach of the claimant's Article 9 Convention rights. The ordinary meaning of the scheme contained in Section 21 of the ESA is not incompatible with the claimant's Convention rights. In any event the
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interpretation advanced for the claimant does nothing to eliminate any incompatibility in the legislation. Any stronger interpretation where the respondent had a supervisory jurisdiction over the actions of the Roman Catholic Church would exceed the limits of Section 3 of the HRA.

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142. The claim falls to be dismissed because none of the essentials of indirect religious discrimination has been established.

10 The Law

143. The Tribunal referred to the Employment Equality (Religion or Belief) Regulations 2003 and in particular the following Regulations:

15 "2. Interpretation

(1) In these Regulations –

- 20 (a) "religion" means any religion
(b) "belief" means any religious or philosophical belief
(c) a reference to religion includes a reference to lack of religion, and
(d) a reference to belief includes a reference to lack of belief.

3. Discrimination on the grounds of religion or belief

(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if

- 25 (a)
(b) A applies to B a provision criterion or practice which he would apply equally to persons apply equally to persons not of the same religion or belief as B, but
30 (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
(ii) which puts B at that disadvantage, and
(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

35 39. Savings of, and amendments to, legislation

(1) These Regulations are without prejudice to

- 40 (a).....
(b) section 21 of the Education (Scotland) Act 1980 (management of denominational schools

144. The Tribunal then referred to Section 21 of the Education (Scotland) Act 1980 which provides:

45 "21. Management of denominational schools

(1) Any school transferred to an education authority under section 16(1) of this Act shall be held, maintained and managed by the education authority as a public school.

(2) Subject to subsections (2A) and (2C) below, in any such school the education authority shall have the sole power of regulating the curriculum and of appointing teachers:

50 (2A) A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted;

55 (2B) Where the said representatives of a church or denominational body refuse to give the approval mentioned in subsection (2A) above they shall state their reasons for such refusal in writing.

- (2C) subject to the provisions of section 9 of this Act, the time set apart for religious instruction or observance in any such school shall not be less than that so set apart according to the use and wont of the former management of the school.
- 5 (3) For each such school the education authority shall appoint as supervisor of religious instruction, without remuneration, a person approved as regards religious belief and character as aforesaid, and the supervisor so appointed shall report to the education authority as to the efficiency of the religious instruction given in such school, and shall be entitled to enter the school at all times set apart for religious instruction or observance.
- 10 (4) In every such school the education authority shall give facilities for the holding of religious examinations.
- (5) Subsections (1) to (4) above, so far as applicable, shall have effect in relation to any school provided by an education authority under section 17(2) of this Act as they have effect in relation to schools transferred to an education authority as mentioned in subsection (1) above, subject to the modification that the time set apart for religious instruction in any school so provided shall be not less than that so set apart in schools in the same education area which have been transferred as mentioned in subsection (1) above.
- 15 (6) Any question which may arise as to the due fulfilment or observance of any provision or requirement of the foregoing provisions of this section shall be determined by the Secretary of State.
- 20 (7) In this section, the reference to section 16(1) or 17(2) of this Act shall include a reference to the corresponding provision of the Act of 1918, the Act of 1946 and the Act of 1962."
- 25 145. The Tribunal then referred to Article 9 of the European Convention on Human Rights which states:
- 30 "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."
- 35 146. The Tribunal also referred to the Human Rights Act 1998 and in particular the following sections:
- 40 "3. Interpretation of Legislation
- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- (2) This section
- 45 (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
- 50 6. Acts of Public Authorities
- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right
- 55 (2) Subsection (1) does not apply to an act if
- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the

Convention rights, the authority was acting so as to give effect to or enforce those provisions.

- (3) In this section "public authority" includes:
- (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- (4)
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
- (6) "An act" includes a failure to act but does not include a failure to:
- (a) introduce in, or lay before, Parliament a proposal for legislation; or
 - (b) make any primary legislation or remedial order."

Deliberations

147. The claimant alleges that the respondent applied to her a practice which it applies equally to persons not of the same religion or belief as the claimant but which puts people of the same religion or belief as the claimant at a particular disadvantage and put the claimant at that disadvantage and the respondent can not show that to be a proportionate means of achieving a legitimate aim (Regulation 3(1)(b)).
148. The Tribunal found that the respondent, an education authority employed the claimant as a permanent supply teacher. In December 2009 the respondent appointed the claimant to the post of a supply teacher from 5 January 2010 in St Thomas Aquinas a Roman Catholic denominational school.
149. The Tribunal noted that under Section 21(2A) of ESA the respondent's power to appoint the claimant to the post was fettered by the requirement that the Secretary of State is satisfied as to qualification and the approval of the Roman Catholic Church as regards religious belief and character (the Approval).
150. The claimant failed to obtain the Approval on 12 February 2010. Under Section 21 of the ESA the Tribunal considered that respondent has no locus or discretion in either satisfying the Secretary of State as to qualification or in gaining the Approval of the Roman Catholic Church. The Tribunal was satisfied that the respondent would have breached Section 21(2)A of the ESA if it allowed the claimant to continue teaching in St Thomas Aquinas after 12 February 2010.
151. Regulation 39 provides that the Regulations apply without prejudice to Section 21 of the ESA. It was not advanced that the respondent's actions were for any reason other than to comply with the statutory requirement. In particular the claimant's religion was not the reason for the respondent's action. The reason for the respondent's action was the decision of the Roman Catholic Church not to grant the claimant application for Approval. However the claimant argued that Section 21 of the ESA must be read and given effect to in a manner that is compatible with the claimant's Convention rights.

- 5 152. The Tribunal therefore decided to go onto consider the claim under the Regulations. It started by referring to the interpretation of "religion" under Regulation 2(1). The Tribunal noted that "religion" means any religion (Regulation 2(1)(a)) and reference to a religion includes reference to a lack of religion (Regulation 2(1)(c)). The Tribunal then asked, what was the claimant religion?
- 10 153. The Tribunal referred to ET1 claim form (production 1, page 9); the ET1 claim form as amended (production 1, page 10) and the further statement by the claimant (production 3, page 12). The ET1 claim form and the ET1 claim form as amended do not specify the claimant's religion or lack of religion. In the further statement the claimant is described as "*a non-practising member of the Catholic Church*".
- 15 154. The response to the order requiring the claimant to specify her religious belief issued after the PHR states (production 7, page 25), "*The claimant was discriminated against on the grounds of her lack of religion. Although baptised and brought up in the Catholic faith, she did not attend Mass*".
- 20 155. The Tribunal noted that in the response the claimant did not state that she is agnostic (which was her evidence at the PHR) nor was that a term that she used in her application for Approval or in any communication with the Archdiocese or indeed the respondent during the approval process.
- 25 156. From the claimant's evidence at the Hearing the Tribunal found that in relation to her religion or belief, the claimant was baptised and educated in the Roman Catholic faith. The claimant describes herself as agnostic. She attends Mass every week to support her mother and to be part of the community. The claimant very occasionally takes communion although she could not recall celebrating Mass with her mother's parish priest.
- 30 157. The Tribunal's understanding is that in Roman Catholicism the Eucharist is called the Mass, which Roman Catholics usually celebrate weekly. Although the claimant took her mother to Mass the claimant did not celebrate Mass on a weekly basis. Indeed she only very occasionally takes communion.
- 35 158. At the PHR there was reference to the claimant being a "non-practising Catholic". At the Hearing the claimant said that sometime after 29 January 2010 when she received the letter of 26 January 2010, she telephoned the Archdiocese and told either Father White or Monsignor Smith (she could not recall which) that she was "*not a practising [Roman] Catholic*". Mr McSorley said in his evidence that the word was an oxymoron. He said that being a Roman Catholic involved practising the faith which included attending Mass. Accordingly a non-Roman Catholic was a person who for whatever reason did not follow the practice of the Roman Catholic Church. He had heard the terminology "*lapsed Catholic*". However the claimant did not describe herself as a lapsed Catholic. Neither party referred to the claimant being a non-practising Roman Catholic in their submissions.
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159. The Tribunal concluded that the claimant's religion (which included lack of religion) was that she was baptised and educated in the Roman Catholic faith and did not attend Mass.
- 5 160. The Tribunal then turned to consider whether there is a PCP. The PCP on which the claimant relied is the respondent's practice of always removing an employee from a Roman Catholic denominational school if the Roman Catholic Church refuses to grant approval for that employee to teach there. The Tribunal accepted that the requirement for Approval was a statutory provision and not the respondent's requirement. However the Tribunal considered that the respondent's practice is to appoint an employee to a Roman Catholic denominational school before or during the approval process and then remove the employee when the Roman Catholic Church refuses to grant approval for that employee to teach there. The Tribunal concluded that the removal of an employee from a Roman Catholic denominational school if the Roman Catholic Church refuses to grant approval for that employee to teach there was a PCP.
- 10 161. The Tribunal was satisfied that the respondent's practice is applied equally to all employees appointed to denominational schools regardless of their religion or belief or lack of it.
- 15 162. In deciding on the appropriate pool for comparison in an indirect discrimination case, the Tribunal noted that people who have no interest in the advantage or disadvantage created by the PCP in question should not be included and the pool must be one which suitably tests, and is potentially capable of illustrating, the particular discrimination complained of.
- 20 163. The Tribunal agreed with the parties that the pool for comparison comprised all teachers who seek Approval.
- 25 164. As regards the proportions within the pool, the claimant submitted that the Tribunal had to look at the basis of the disadvantage of the disadvantaged group: the disadvantaged group were those who were treated as being Roman Catholic by the Roman Catholic Church but who do not attend Mass. The advantaged group included Roman Catholic teachers who attend Mass and non-Roman Catholic teachers.
- 30 165. The respondent's position was that the relative proportions within the pool were those who gained approval (the advantaged group) and those who were disadvantaged were those who did not (the disadvantaged group).
- 35 166. The claimant's position was that the Roman Catholic Church treated her as a Roman Catholic and refused approval because she did not attend Mass. She maintained that other teachers who were treated as by the Roman Catholic Church as being Roman Catholics would also be refused if they did not attend Mass.
- 40 167. The Tribunal did not accept the claimant's submission that it is a matter of general knowledge that not all Roman Catholic people attend Mass. The Tribunal's understanding was that being a Roman Catholic involves
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practising the Roman Catholic faith which includes attending Mass. For the same reason it did not accept that it was within judicial knowledge that not all Roman Catholic teachers attended Mass.

- 5 168. The Tribunal considered that it is a matter of general knowledge that not all people baptised and educated in the Roman Catholic faith attend Mass. In the Tribunal's view the fact that a person was baptised and educated in a particular faith did not mean that they kept that faith as an adult.
- 10 169. The Tribunal then considered whom the Roman Catholic Church would treat as Roman Catholic. The Tribunal was mindful that it was the teachers seeking Approval who initiated the process and required to demonstrate their religious belief and character and provided a suitable reference to testify to that religious belief and character.
- 15 170. In the Tribunal's view the Roman Catholic Church would treat all applicants who stated that they were Roman Catholic as Roman Catholics and would require a reference from a priest as to their practice as a Roman Catholic.
- 20 171. The Tribunal was not satisfied on the evidence before it that the Roman Catholic Church would treat all applicants baptised and educated in the Roman Catholic faith as Roman Catholic.
- 25 172. The Tribunal considered that those applicants who were baptised, educated in the Roman Catholic faith and attended Mass would apply as Roman Catholics and be treated as such by the Roman Catholic Church and would require a reference from a priest as to their practice as Roman Catholics.
- 30 173. Applicants who were baptised and educated in the Roman Catholic faith but did not attend Mass would not be able to provide evidence of their practice as a Roman Catholic. Accordingly the Tribunal considered it likely that they would apply as non-Roman Catholics stating their religious belief (which would not be Roman Catholic) and would require a reference from a suitable person testify as to the applicants' religious belief (which would not be Roman Catholic) and their character at the time of the application. The Tribunal considered that the Roman Catholic Church would not treat these applicants as Roman Catholic.
- 35 174. Against this background the Tribunal turned to consider why the claimant who was baptised and educated in the Roman Catholic faith but did not attend Mass was treated by the Roman Catholic Church as a Roman Catholic.
- 40 175. Monsignor Smith did not give evidence at the Hearing. The Tribunal referred to the claimant's application for approval which comprised the Teacher's Statement and the Referee's Statement.
- 45 176. In the Teacher's Statement under religious belief the claimant made no mention of being agnostic, being baptised or brought up in the Roman Catholic faith and not attending Mass. In the section relating to character the claimant stated that she took her mother to Mass. The Tribunal did not
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consider that this implied that the claimant was baptised or brought up in the Roman Catholic faith as many people, particularly when adult do not have the same religion as either or both parents.

- 5 177. The Referee's Statement requires the referee to testify to the applicant's personal religious belief and character. The claimant's referee stated in the box related to religious belief that he believed that the claimant *'is a Catholic'*.
- 10 178. The Tribunal could understand why the Roman Catholic Church sought clarification from the claimant if she was Roman Catholic particularly as she saw the Referee's Statement before the application was presented. If she was Roman Catholic as her referee testified then she required a reference from a priest. If she was agnostic (as she stated at the Hearing) then the Tribunal considered that her referee was inappropriate as he was unable to testify that she was agnostic as he believed that she was a Roman Catholic.
- 15 179. The claimant's evidence in relation to her telephone discussion with the Archdiocese in February 2010 was vague not only in relation to whom she spoke but also in relation to what was said. The Tribunal was satisfied that the claimant did not say that she is agnostic or indeed that although she was baptised and educated in the Roman Catholic faith she did not attend Mass. The claimant did not comment on the content or veracity of the Referee's Statement. She said that she referred to not being a practising [Roman] Catholic albeit that she attended Mass weekly with her mother. The productions did not include a copy of the claimant's letter to the Archdiocese dated 11 February 2010. There was no evidence as to the content of that letter.
- 20 180. The Tribunal referred to the letter of 12 February 2010 from Monsignor Smith that followed the claimant's telephone conversation and his receipt of the claimant's letter of 11 February 2010.
- 25 181. The letter of 12 February 2010 suggests that having reviewed the application Monsignor Smith understood that the claimant was a Roman Catholic and therefore she required to demonstrate her practice: her attendance at Mass. There was no reference from a priest. Accordingly Monsignor Smith had no evidence of the claimant's practice as a Roman Catholic.
- 30 182. There was no mention of the claimant being baptised or educated in the Roman Catholic faith in her application or during her telephone conversation. The Tribunal was not satisfied that the Roman Catholic Church treated the claimant as a Roman Catholic because she was baptised and educated in the Roman Catholic faith. The Tribunal considered that the Roman Catholic Church treated the claimant as a Roman Catholic Church because her referee who was testifying to her religious belief believed her to be Roman Catholic and when asked to clarify her position the claimant failed to do so. She did not say that she was agnostic. She did not say that she was not a Roman Catholic. Although
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she alluded to "not practising" she referred to attending Mass with her mother.

- 5 183. The Tribunal then considered of those teachers who applied for approval which group was advantaged by the respondent's practice of removal of an employee from a Roman Catholic denominational school if the Roman Catholic Church refuses to grant approval for that employee to teach. In the Tribunal's view the advantaged group were those teachers who were approved which would include Roman Catholics and non-Roman Catholics: other Christians, other faiths, agnostics and atheists.
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184. The disadvantage group would include those teachers who were not approved. The Tribunal considered that there was a myriad of reasons why approval might not be granted therefore the disadvantaged group would include Roman Catholics and non-Roman Catholics: other Christians, other faiths, agnostics and atheists.
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185. The disadvantage was that they could not teach in the denominational school to which the application for approval related. They were removed and transferred to a non-denominational school. They were not precluded from apply for Approval in respect of another post in a denominational school.
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186. The Tribunal was satisfied that the respondent's practice applies equally to persons not of the same religion or belief as the claimant. It was not however satisfied that it put persons of the same religion and belief as the claimant (those baptised and educated in the Roman Catholic faith and do not attend Mass) at a particular disadvantage when compared with those other persons. The Tribunal did not consider that it was impossible for the claimant or those with the same religion or belief as her to obtain the Approval.
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187. Further while the claimant was part of the disadvantaged group the Tribunal was not satisfied that the respondent's practice of removing an employee from a Roman Catholic denominational school if the Roman Catholic Church refuses to grant approval for that employee to teach put her at a disadvantage. The claimant decided unilaterally to leave and not return to St Thomas Aquinas on 29 January 2010. The claimant went on sick leave. The Roman Catholic Church made its decision to decline the claimant's application approval around 12 February 2010 when the claimant and the respondent were informed of the decision. At that stage the claimant was not working and remained on sick leave. The respondent accepted the decision of the Roman Catholic Church and offered the claimant employment at a non-denomination school as soon as she was able to return to work. While the Tribunal accepted that the claimant was devastated on leaning that her application for Approval was likely to be refused any injury to feelings that the claimant felt was caused by the action of the Roman Catholic Church.
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- 50 188. The Tribunal then considered whether the respondent's practice of removing an employee from a Roman Catholic denominational school if the

Roman Catholic Church refuses to grant approval for that employee to teach as there was a proportionate means of achieving a legitimate aim.

- 5 189. Section 21(2A) of the ESA requires an applicant for a teaching post in a denominational school to be approved as to their religious belief and character by the appropriate religious organisation. The Regulations apply without prejudice to the Section 21 of the ESA
- 10 190. The claimant's position is that the Roman Catholic Church refused to approve her for the teaching post at St Thomas Aquinas School because she does not attend Mass. This requirement is only made of Roman Catholic teachers. Had she been a non-Roman Catholic teacher she would not have been refused approval for not attending Mass. Had she been a Roman Catholic who attended Mass approval would have been granted. Accordingly it is impossible for her to attain approval. The claimant argues that this approach is unreasonable. Further it is a limitation on her right to manifest her religion or belief and is not necessary, as other teachers who do not attend Mass do not have this limitation put on them. The respondent is aware of the approach of the Roman Catholic Church and accepts that decision even if it breaches the claimant's Convention rights and is not proportionate.
- 15 20 191. The respondent's position was that the failure to gain approval of the Roman Catholic Church was not an infringement of the claimant's Article 9 rights therefore the claimant's argument under the HRA must fail.
- 25 192. The Tribunal referred to Article 9 of the Convention. It noted that the right guarantees freedom of religion and thought and freedom to manifest one's religion or thought. However the right is qualified and what constitutes interference depends on all the circumstances of the case including the extent to which in the circumstances an individual could reasonably be expected to be at liberty to manifest her belief in practice.
- 30 193. The claimant was baptised and educated in the Roman Catholic faith. The claimant describes herself as agnostic. She did not attend Mass. The claimant was offered and accepted the post at St Thomas Aquinas in December 2009 knowing that Approval was required. She started at St Thomas Aquinas on 5 January 2010. The claimant applied for Approval 15 January 2010. She knew that if she applied as a Roman Catholic she required a reference from a priest confirming her attendance at Mass. If she applied as a non-Roman Catholic she required a reference from a suitable person who could testify to her religious belief and character. It was a matter for the claimant to decide how she applied for Approval.
- 35 40 194. Despite describing herself as an agnostic the claimant initially sought a reference from her mother's parish priest. He declined to provide one. The claimant's referee testified that he believed that the claimant was a Roman Catholic. The claimant was aware of this. She did not seek a reference from another referee who could testify to her religious belief. The Tribunal considered that the claimant's application was unclear. She was provided an opportunity to clarify her position. Rather than provide clarity the
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claimant compounded the confusion by describing herself as not a practising Roman Catholic albeit she attended Mass weekly with her mother.

- 5 195. The Tribunal noted that the claimant appealed against the decision of the Roman Catholic Church. The grounds of appeal were not produced. However the claimant said that her grounds of appeal were reflected in the closing paragraphs of her grievance dated 10 March 2010. None of these
10 grounds is that she is an agnostic, a non-practising Roman Catholic or that the requirement for a priest reference was wrong because she was a non-Roman Catholic.
- 15 196. The claimant could apply for Approval in respect of another post in a denominational school. Although her circumstances remained unchanged the Tribunal considered that the claimant was not precluded from being offered another post in a denominational school and applying for as a non-Roman Catholic with a reference from a referee who could testify to her religious belief and character. The Tribunal could not say that the application would be granted. However it also could not say that it would be
20 impossible for the claimant to obtain approval if she submitted the appropriate application form. The claimant could also manifest her belief by teaching at a non-denominational school.
- 25 197. While Mr Timmons, Mr McSorley and Ms Stevenson knew after 12 February 2010 that the claimant's application for approval was refused they did not know its contents. Any understanding as to the reason for the application being refused was speculation and assumption on their part. The respondent had no knowledge of the circumstances surrounding the
30 claimant's failure to obtain Approval.
- 35 198. The Tribunal was satisfied that the claimant's Article 9 rights had not been infringed. In the circumstances it was not necessary to consider any duty that the respondent may have under Sections 3 and 6 of the HRA.
- 40 199. The Tribunal concluded that the essentials of indirect discrimination had not been established. Further and in any event the respondent is not liable to a finding of discrimination under the Regulations by virtue of Section 39 of the Regulations. Accordingly the application of indirect discrimination falls to be dismissed.

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Entered in register
and copied to parties

S. Maclean

Employment Judge

4 APR 2012

Date of Judgment

05 APR 2012